HARVARD JOURNAL
on
LEGISLATION

VOLUME 10 DECEMBER 1972 NUMBER 1

ARTICLE

STATUTORY COMMENT AND AMENDMENTS

NOTES

BOOK REVIEW

Published four times during the academic year (December, February, April, and June) by the Harvard Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Mass. 02138.

Subscriptions per year: United States, $7.50 (single copy, $2.50); foreign, $9.00 (single copy, $3.00). Subscriptions are automatically renewed unless a request for discontinuance is received.

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FEDERAL INCOME TAX TREATMENT OF CHILD CARE EXPENSES

JOHN B. KEANE*

Introduction

The problem of child care has had a significant impact in recent years as an issue of political, economic, and social importance. The origins of the growing concern are many and varied. An increased number of mothers now choose to work,[1] necessitating alternative arrangements for the care of their children. Widespread dissatisfaction with the welfare system has led to demands that welfare recipients, many of whom have small children, undertake gainful employment.[2] Some authorities view the increased provision of child care services as a source of employment for many of the new members of the work force.[3] A massive overstock of teachers trained in primary education has developed in many parts of the country,[4] creating a pressure group with a vocational interest in

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1 "One third of mothers with childen under the age of 6 — a total of over 4½ million women — are working today." S. REP. No. 331, 92d Cong., 1st Sess. 42 (1971).

In Massachusetts, a recently reported study estimates that 24 percent of mothers with children six years old and under work outside the home. Boston Globe, Mar. 9, 1972, at 3, col. 1 (reporting a study directed by Richard R. Rowe, under the sponsorship of the Massachusetts Advisory Council on Education; at the time of this writing, the report is not yet ready for general distribution).

2 For a variety of attitudes, see *Hearings on H.R. 1 Before the Senate Finance Comm.* 92d Cong., 1st Sess. (1971).

3 117 CONG. REC. S18551 (daily ed. Nov. 15, 1971) (colloquy between Senators Tunney and Long during debate on amendments to H.R. 10947); *Hearings on S. 2003, Child Care Provisions of H.R. 1, and Title VI of Printed Amendment 318 to H.R. 1 Before the Senate Comm. on Finance*, 92d Cong., 1st Sess. 241-43 (1971) (testimony of Mary P. Rowe, Economic Consultant) [hereinafter cited as *Child Care Hearings*].

WELFARE REFORM — A MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 146, 91st Cong., 1st Sess. (1969) [hereinafter cited as WELFARE REFORM]: "The expanded child care program would bring new opportunities along several lines: opportunities for the further involvement of private enterprise in providing high quality child care service; opportunities for volunteers; and opportunities for *training* and *employment in child care centers of many of the welfare mothers themselves.*"

4 "40,000 individuals, skilled and trained in education, are graduating from

expanding the availability of day care facilities. Social scientists and anti-poverty workers have championed institutional day care as a vehicle for introducing compensatory enrichment experience into the lives of economically disadvantaged children to combat environmentally transmitted poverty.[5]

In this highly charged political atmosphere and against a background of heated debate over welfare legislation, Congress recently passed as part of the Revenue Act of 1971 an amendment to § 214 of the Internal Revenue Code providing for an expanded income tax deduction for certain child care and household expenses.[6] This article begins by looking at the history of the child care deduction and the debate in Congress that produced this legislation. After closely examining the provisions of the revised section, it delves into the goals of this sort of child care deduction and analyzes alternative ways of financing child care through the Internal Revenue Code.

I. The History of the Child Care Deduction

Until the 1954 recodification of the federal income tax laws, there had been no provision which expressly either allowed or denied the deduction of dependent care expenses incurred by a taxpayer to enable him to work. Absent any such express authority, a taxpayer would be guided by two tenets of federal tax law. The first, found now in § 162(a) and § 212(1) of the Code, is that deduction of business expenses from gross income is to be allowed in order to measure a taxpayer's ability to pay:

> Section 162. TRADE OR BUSINESS EXPENSES.
> (a) In General. — There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . .
>
> Section 212. EXPENSES FOR PRODUCTION OF INCOME.
> In the case of an individual, there shall be allowed as a deduc-

college each year with education degrees but are unable to find employment in education. . . ." S. Rep. No. 331, 92d Cong., 1st Sess. 50 (1971).

5 *See, id.* at 41-42.

6 Act of Dec. 10, 1971, Pub. L. No. 92-178, § 210, 85 Stat. 497. Unless otherwise indicated, all sections in this article are of the Internal Revenue Code of 1954.

> tion all the ordinary and necessary expenses paid or incurred during the taxable year—
> (1) for the production or collection of income. . . .

The second principle is expressed in § 262: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." Where, as in the case of child care expenses, an item exhibits both business and non-business characteristics, the problem is one of characterization.

In the 1939 case of *Henry C. Smith*,[7] the Board of Tax Appeals undertook to resolve this problem. A husband and wife had deducted as a business expense amounts paid to nursemaids to care for their child while both parents were employed. The Commissioner disallowed the deduction, and the Board agreed, finding the expenses to be personal and therefore non-deductible under the predecessor of § 262. They reasoned that child care provided by the wife herself arose from a personal relationship and that the fact that the wife hired help to discharge the parental obligation of care did not change its character:

> The wife's services as custodian of the home and protector of its children are ordinarily rendered without monetary compensation. There results no taxable income from the performance of this service and the correlative expenditure is personal and not susceptible of deduction. *Rosa E. Burkhart*, 11 B.T.A. 275.[8]

The Board's decision in *Smith* has been repeatedly followed by other courts and by the Internal Revenue Service in holding that child care expenses do not qualify as deductible business expenses.[9]

In the revisions that became the Internal Revenue Code of 1954, Congress rolled back the *Smith* decision in part by enacting § 214, which allowed a severely restricted deduction in certain circumstances. Section 214 did not provide that the expenses were to be accorded business expense treatment, and it is hard to make a very strong argument from the legislative history of § 214 that there was any congressional intent to make the deduction a business ex-

7 40 B.T.A. 1038 (1939), *aff'd without opinion*, 113 F.2d 114 (2d Cir. 1940).
8 *Id.* at 1039.
9 See cases collected in Comment, *The Child Care Deduction: Issues Raised by Michael and Elizabeth Nammack and the Pending Amendment to Section 214*, 12 B.C. IND. & COMM. L. REV. 270, 274 n.4 (1971).

pense. The only textual support in the committee reports is a statement that "a widow or widower with young children must incur these expenses in order to earn a livelihood and . . . they, therefore, are comparable to an employee's business expenses."[10] A recent commentator was correct in concluding that the draftsmen of the committee intended only to soften the blow for many taxpayers without intending Congress to make the expense a business deduction:

> When the deduction was first granted in 1954, it was placed in Part VII of the Code as part of a series of apparently personal expenses made deductible as express exceptions to the prohibition of Section 262. As exceptions to the rule, they represented "a policy judgment as to a particular class of expenditures otherwise nondeductible, like extraordinary medical expenses, . . . [but they did] not cast any doubt on the basic tax structure set up by Congress — that is, on such essential policies as the business/personal distinction.[11]

The House hearings on the proposed child care deductions also support the conclusion that Congress was primarily concerned with alleviating hardship cases;[12] witnesses frequently referred to those women who had been widowed by World War II and the Korean War and who were compelled to make day care arrangements for their children in order to work.[13] The limitation in the original § 214(a) of eligible taxpayers to "a woman or widower," indicates that no broad new rule of deductibility was envisioned, but only a measure of relief for specified situations.

Prior to the broad revisions in 1971, § 214 was amended to extend coverage to additional classes of individuals,[14] and to increase

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10 S. REP. No. 1622, 83d Cong., 2d Sess. 36 (1954).

11 Comment, *supra* note 9, at 278 (footnote omitted).

12 *See* White, *Proper Income Tax Treatments of Deductions for Personal Expenses*, in 1 TAX REVISION COMPENDIUM 365, 371-72 (1959); Pechman, *Individual Income Tax Provisions of the 1954 Code*, 8 NAT'L TAX J. 114, 121 (1955).

13 *See Hearings on Forty Topics Pertaining to the General Revision of the Internal Revenue Code Before the House Comm. on Ways and Means*, 83d Cong., 1st Sess. 26-72 *passim* (especially at 30, 38, 64, 72) (1953).

14 Act of Apr. 2, 1963, Pub. L. No. 88-4, § 1, 77 Stat. 4, extended coverage to the "abandoned wife." Act of Feb. 26, 1964, Pub. L. No. 88-272, § 212(a), 78 Stat. 49, granted the deduction to husbands with incapacitated or institutionalized wives. The result was to exclude from eligibility only the never-married male taxpayer. Charles E. Moritz, 55 T.C. 113 (1970). In the 1971 revisions, Congress took the final step and included any "individual" who qualified under the other conditions of § 214.

the income ceiling.[15] There was little movement in Congress, however, to totally revamp the provision.

In 1969, President Nixon sent his Welfare Message to Congress, in which he expressed his support both for the goal of providing work incentives by means of child care subsidization and for the goal of equalizing a child's opportunities:

> The child care I propose is more than custodial. This administration is committed to a new emphasis on child development in the first five years of life. The day care that would be part of this plan would be of a quality that will help in the development of the child and provide for its health and safety, and would break the poverty cycle for the new generation.[16]

The Administration subsequently filed H.R. 1,[17] which included a substantial child care component. H.R. 1 was reported out of the House Ways and Means Committee and passed by the House on June 22, 1971, but was then dismembered and largely destroyed in the Senate Finance Committee.

On March 25, 1971, a bill rivaling the child care provisions of H.R. 1 was filed in the House by Representative John Brademas of Indiana.[18] Two weeks later, a more refined variant of the same basic program was submitted to the Senate by Senator Walter Mondale of Minnesota as S. 1512, the Comprehensive Child Development Act of 1971.[19] The Senate bill was grafted to S. 2007,

15 Act of Feb. 26, 1964, Pub. L. No. 88-272, § 212(a), 78 Stat. 48, raised it from $4,500 to $6,000.

16 WELFARE REFORM, *supra* note 3, at 23145.

17 H.R. 1 would authorize $700 million in federal funds for the first year. Families would pay part or all of the cost of child care, depending on ability to pay. As initially proposed, the limited federal income tax deduction for child care expenses was to be expanded to increase amounts deductible and to remove restrictions on eligibility.

18 H.R. 6748, 92d Cong., 1st Sess. (1971).

19 In contrast with the Administration's H.R. 1 work incentive emphasis, the Child Development Act stressed equalization of opportunities for "economically disadvantaged children." Funding significantly exceeded H.R. 1: $100 million was to be authorized for start-up costs the first year, to rise to $2 million in program costs for fiscal 1973. Citizen participation in the planning, staffing, and operation of day care facilities was built in. The draftsmen earmarked authorizations for Headstart programs, as well as for aid to migrant, Indian, handicapped, and low income children. A fee schedule based on a family's ability to pay was included. The Child Development Act omitted a tax component. The bill was also introduced in the House as H.R. 6719.

A third proposed expenditure program for day care is found in S. 2003, sponsored by Senator Long. S. 2003 is distinguished from H.R. 1 and S. 2007 chiefly by a greater concern with child care for low income families who are not on welfare and

which contained the Economic Opportunity Act Amendments of 1971.

S. 2007 passed the Senate on September 9, 1971. On October 1, the House also passed it, but with amendments. After nearly two months in conference the bill emerged on November 29 and by December 8 was agreed to by both Houses. It was then vetoed by President Nixon. The President reiterated his sympathy for the goal of enriching children's early opportunities, but he found this "laudable . . . intent . . . overshadowed by the fiscal irresponsibility, administrative unworkability, and family-weakening implications of the system it envisions."[20] President Nixon pointed instead to his own child care program in H.R. 1 and to the bolstered tax deduction which he was signing that day, which he characterized as "offering parents free choice of the child care arrangements they deem best for their own families."[21] An effort to override the presidential veto was easily turned back.

While it had been considering these expenditure programs, Congress also had before it bills to provide child care relief through the tax laws. H.R. 1 and S. 2003 both included modest expansions of the availability and amount of the existing tax deduction for dependent care expenses. More than a dozen other bills had also taken the same approach.[22] Another bill, H.R. 9565, sponsored by Representative Bella Abzug of New York, took a different approach by proposing the repeal of existing law and making reasonable child care costs deductible as business expenses under § 162 of the Code.

In late September of 1971 tax legislation was submitted to the House to effectuate the Nixon Administration's economic program by providing tax incentives for business and accelerating the timetable for increasing the standard deduction.[23] After hearings, in which no testimony on child care was taken, the Senate Finance Committee added a section amending § 214 to the Administration's

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by the creation of a Federal Child Care Corporation to replace HEW as the government's overseer. S. 2003, like H.R. 1 and unlike S. 2007, also had provisions to amend § 214.

20 VETO MESSAGE — ECONOMIC OPPORTUNITY AMENDMENTS OF 1971, S. DOC. No. 48, 92d Cong., 1st Sess. 3 (1971).

21 *Id.*

22 For a compilation of some of the bills, see Comment, *supra* note 9, at 272.

23 117 CONG. REC. H 8857 (daily ed. Sept. 29, 1971).

revenue bill, H.R. 10947.[24] On the Senate floor, Senator John Tunney of California presented an amendment that would have allowed deduction of § 214 expenses from gross income in determining a taxpayer's adjusted gross income.[25] This proposal was adopted by a 74 to 1 vote.[26] In conference, representatives from the House caused the bill to be pared back by recharacterizing the deduction as an itemized deduction rather than treating it as if it were a business expense.[27] So structured, the deduction for household and dependent care services passed the Congress as part of the Revenue Act of 1971 and was signed by President Nixon on December 10, 1971, the same day the Child Development Act was vetoed.

II. Technical Analysis of Revised Section 214

The Revenue Act of 1971 expanded § 214 substantially. Subsection (a) of the revised section sets forth the general rule allowing a deduction. The next five subsections, (b) through (f), serve to define, qualify, and condition the allowance granted in § 214(a).[28] Subsection (a) reads as follows:

> (a) Allowance of Deduction. — In the case of any individual who maintains a household which includes as a member one or more qualifying individuals (as defined in subsection (b)(1)), there shall be allowed as a deduction the employment-related expenses (as defined in subsection (b)(2)) paid by him during the taxable year.

A. *Eligible Taxpayers*

1. Income Limitations

Subsection (d) qualifies subsection (a) by denying the deduction when the income of the taxpayer exceeds specified amounts:

> (d) Income Limitation. — If the adjusted gross income of the taxpayer exceeds $18,000 for the taxable year during

24 S. Rep. No. 437, 92d Cong., 1st Sess. (1971) [hereinafter cited as Committee Report).

25 117 Cong. Rec. S18396 (daily ed. Nov. 12, 1971).

26 *Id.* at S18348.

27 S. Rep. No. 553, 92d Cong., 1st Sess. 42 (1971) (hereinafter cited as Conference Report).

28 The full text of § 214 is set out in the Appendix, *infra*.

> which the expenses are incurred, the amount of the employment-related expenses incurred during any month of such year which may be taken into account under this section shall (after the application of subsections (e)(5) and (c)) be further reduced by that portion of one-half of the excess of adjusted gross income over $18,000 which is properly allocable to such month. For purposes of the preceding sentence, if the taxpayer is married during any period of the taxable year, there shall be taken into account the combined gross income of the taxpayer and his spouse for such period.

This sort of limitation raises several fundamental questions.

a. Adjusted Gross Income as a Measure of Inter-Taxpayer Equity. The first problem is that adjusted gross income is clearly not a satisfactory measure of a taxpayer's discretionary income. The computation of AGI as described in § 62 includes adjustments for expenses which are more than mere offsets for the cost of producing income (such as those for accelerated depreciation,[29] percentage depletion,[30] and long term capital gains[31]). In addition, funds from certain sources are not included in income at all.[32] In terms of the net discretionary income available to a taxpayer, the AGI provision thus does not achieve equity between those taxpayers who receive "earned income" and those who benefit from some tax preference.

The advantage of using AGI as the measure is, simply, that it already exists. Professor Alan L. Feld, who has considered this problem extensively, has offered a solution that achieves far more equity among taxpayers. His solution is to take AGI and to add back those items of tax preference designated in § 57(a) to create a measure of income that more closely approximates the taxpayer's real discretionary income.[33] It is debatable, however, whether the increased degree of equity achieved by such a proposal outweighs the disadvantage of adding still another complex definition of income to the Code.

b. $18,000 as the Income Ceiling. Since 1954, Congress has prescribed income ceilings for married couples. The 1954 Code set

29 §§ 62(5) and 167.

30 §§ 62(5), 611, and 613.

31 §§ 62(3) and 1201.

32 *E.g.*, income from municipal bonds under § 103 and life insurance under § 101(a).

33 Feld, *Deductibility of Expenses for Child Care and Household Services: New Section 214*, 27 TAX L. REV. 415 (1972).

the limit at $4,500; a 1964 amendment raised it to $6,000.[34] Why there was no ceiling for single taxpayers is not clear. Perhaps the premise was that since all working single taxpayers would have to incur child care expenses to be able to work, there should be no income ceiling. Yet Congress failed to recognize or acknowledge that the economic realities of a couple earning $6,000 dictated that the second spouse would have to pay for child care to be able to work. Therefore, some commentators urged the Congress to remove income limits altogether or to make them applicable to married and single taxpayers alike.[35]

In 1971 the Senate Finance Committee reported out the bill with an income ceiling of $12,000 applicable to married couples. The Committee Report explained the increase:

> [T]he committee believes that the income level above which this deduction is not allowable in the case of a husband and wife under present law is much too low. Since 1964 median family incomes have risen from about $6,000 to nearly $10,000 in 1970 and it is anticipated that the levels will be appreciably higher than this in 1972. The committee, on this basis, has concluded that the combined family income level below which the household service and dependent care expense deductions should be available, should be raised to $12,000.[36]

On November 15, 1971, Senator Tunney introduced an amendment proposing that the ceiling be raised from $12,000 to $18,000. As he explained:

> I believe that the $12,000 limit is unrealistically low. I realize that the $12,000 limit was put on because it was assumed $12,000 would be the median income for families in the coming year. However, it seems to me that families should be able to take such a deduction beyond the median when we are talking about work-related activities.
>
> . . . .
>
> Inasmuch as Federal taxes alone increase progressively, we ought to have some additional form of tax relief for families with incomes between $12,000 and $18,000 — particularly

34 Act of Feb. 26, 1964, Pub. L. No. 88-272, § 212(a), 78 Stat. 49.

35 *E.g.*, Members of the New York Bar, Comments on Revised Section 214, November, 1971 (on file with Professor Stanley S. Surrey, Harvard Law School).

36 COMMITTEE REPORT, *supra* note 24, at 60.

> when that form of tax relief would allow a mother to work, and at the same time it would have the added benefit of giving work to a babysitter.[37]

In the debate on the proposed amendment, Senator Long, who had proposed the increase to $12,000 in the committee, threw his support to the $18,000 limit.[38] The only senator to speak against the proposal was Wallace Bennett of Utah:

> I think that with this amendment we cross an interesting line. We are not providing tax relief to take care of the one-parent family, where it is usually necessary for the mother to go out to work and she needs some help to pay for care necessary for her children. . . .[39]

The Tunney amendment passed the Senate by a vote of 59 to 24.[40] In conference, the $18,000 ceiling was made applicable to unmarried as well as married taxpayers.[41] So modified, the bill was passed and the income limitation became enacted as § 214(d).

One searches in vain for a reasoned explanation for the level of the limitation. If the purpose of § 214 is to remove work disincentives, the $18,000 limit is not appropriate since the law provides no help at the income levels where the disincentive is relatively more severe. If the rationale behind the section is that child care expenses are similar to business expenses, any income ceiling is unwarranted, since income is irrelevant to the rationale behind deducting business expenses. If the section is designed to alleviate hardship, the $12,000 approximation of national median family income may have borne some relation to an objective measure of hardship, but only if one is willing to accept the conclusion that half of the nation's families are suffering "hardship." With the level pegged at $18,000, the conclusion must be that the vast majority of families endure a hardship.[42]

If the purpose of the income limitation is to target a governmental subsidy to families most in need, the $18,000 line is unsatis-

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37 117 CONG. REC. S18550-51 (daily ed. Nov. 15, 1971).
38 *Id.* at S18551.
39 *Id.* at S18552.
40 *Id.* at S18555.
41 CONFERENCE REPORT, *supra* note 27 at 42.
42 Professor Feld estimates that 86.1% of all families have AGI less than $18,000. Feld, *supra* note 33, at 439.

factory. An examination of programs like H.R. 1, S. 2003, and S. 2007 indicates that, when Congress has considered direct subsidy programs for child care, it has preferred to bestow benefits on low income families first;[43] only if appropriations are plentiful has there been an intention to assist middle income taxpayers. Further, the fees charged child care users under the above programs are to increase as income rises, indicating a clear intention to reduce rather than to increase federal benefits as income rises.[44] No parents earning incomes of $18,000 would receive assistance under H.R. 1; the Child Development Act would have given subsidies at that level only if appropriations were voted at levels far greater than expected. If this policy direction is expressed in programs where Congress contemplated direct subsidies, it is hard to justify a contrary policy when the subsidies are channeled through the tax structure.

c. Same Income Level for Single and Married Taxpayers. Section 214(d) adopted a uniform ceiling applicable to both single and married taxpayers. While a single taxpayer earning $20,000 is entitled to a substantial child care deduction, a husband and wife, who each earn $15,000 are entitled to no deduction. Section 214(d) requires that married individuals combine their incomes in applying the income ceiling. This situation breeds an incentive for tax-sophisticated taxpayers to divorce or to avoid marriage, a factor to be weighed in terms of one's assessment of how much tax motivations affect primary behavior.[45] A higher income ceiling for married couples than single taxpayers would perhaps be more equitable and could alleviate the problem.

d. Month-by-Month Allocation. Finally, subsection (d) introduces a perplexing problem by using both an annual measure of income and a periodic month-by-month measure. Complexities are produced in the margin created by the phaseout[46] (from $18,000

43 *See* text at notes 17 to 23.

44 *See, e.g.*, 117 CONG. REC. S13914-17 (daily ed. Dec. 2, 1971) (colloquy among Senators Mondale, Nelson, and Taft).

45 Comments on Revised Section 214, *supra* note 35, at 9. For a more detailed discussion of the impact of § 214 on tax-motivated divorce, see Hjorth, *A Tax Subsidy for Child Care: Section 210 of the Revenue Act of 1971*, 50 TAXES 133 (1972).

46 As originally enacted, § 214(b)(2)(B) provided that the amount of the deduction was to be reduced a dollar for every dollar by which AGI exceeded the income ceiling. The effect of the one-for-one phaseout was that a $100 increase in earnings was coupled with a $100 loss in deductions, yielding $200 extra taxable income. Though it was still more profitable to earn the extra dollars than not, the pro-

to $27,600), in situations in which bunching of income occurs. Suppose that a taxpayer's AGI for the taxable year is $24,000 but because of the special nature of his employment all the exertions which produced income and the receipt of income occurred within one month. Section 214(d) provides that the amount of the maximum allowable deduction under § 214(c)(1) ($400 a month) is reduced by that portion of one half the excess of the adjusted gross income over $18,000 which is properly allocable to that month (half of $6,000, or $3,000, in this illustration). If all of the annual income is "allocable" to the month in which it is earned, the $400 allowable is reduced to zero for that month (unless a negative deduction is to be contemplated). Since no excess over $18,000 is "allocable" to the remaining 11 months, the full $400 may be deducted per month, or $4400 yearly. On the other hand, if the month-by-month allocation is intended to be applied pro rata regardless of the timing of the taxpayer's exertions and receipt of income, one-twelfth of the income ($2,000) would be allocable to each month. The $400 maximum each month would then be reduced by half the difference between the allocated monthly share and $1500. For a taxpayer with an income of $24,000, this would result in an $1800 deduction for the year. The gap between $4400 and $1800 is significant to the taxpayer and the Treasury, but the statute and its history do not clearly indicate the proper method of allocation.

The Conference Report addressed the problem obliquely but is not too helpful:

> For the purposes of the reduction for adjusted gross income in excess of $18,000, expenses incurred during any month (regardless of when paid) are to be compared to the adjusted gross income properly allocable to such period. Generally, the period for this purpose will be the taxable year, but allocations to shorter periods (such as a month) may be necessary where there is, for example, a change in marital status.[47]

The Conference Report indicates that in normal circumstances the proper treatment is to make yearly comparisons. Therefore, one

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vision effectively doubled the taxpayer's marginal tax rate. The Congress recognized this disincentive and provided a two-for-one phaseout in new § 214(d) with all benefits terminating when AGI reached $27,600.

47 CONFERENCE REPORT, *supra* note 27 at 43.

would determine one half the excess of AGI over $18,000 and subtract that amount from the $4,800 maximum annual allowance to determine how much the taxpayer may deduct for the taxable year. Only where there are special circumstances would one undertake month-by-month matching. This approach arguably does violence to the words of the statute which define the amount deductible as a monthly sum.[48] It also fails to specify what other special circumstances are to invoke month-by-month matching. And, when matching is appropriate, there is no guidance as to the method of allocations.

Seasonal workers, including teachers, could be faced with this problem of computing monthly allocations. Shareholders of close corporations often have disbursements distributed on one or only a few occasions. Athletes, writers, consultants, and architects may concentrate their efforts in relatively discrete parts of the year. The Treasury has the power to meet the problem,[49] yet there is no sure indication of congressional intent. And neither bunching nor spreading will consistently benefit either the government or the taxpayer.

2. Gainful Employment

a. The "Substantially Full-Time Employment" Requirement. Amounts are to be deductible under § 214(b)(2) "only if such expenses are incurred to enable the taxpayer to be gainfully employed." A second gainful employment requirement is found at § 214(e)(2), which colors the meaning of subsection (b)(2). Section 214(e)(2), which applies only to married taxpayers, disallows the deductions unless "(A) both spouses are gainfully employed *on a substantially full-time basis,* or (B) the spouse [is physically or mentally incapable of caring for himself]" (emphasis added).

The Committee Report explains that "the term 'employed on a full-time basis' means employed for three-quarters or more of the normal or customary work week (or the equivalent on the average during the month)."[50] Since the language of subsection (e)(2) does not say that gainful employment *means* substantially full-time

48 § 214(c)(1).
49 § 214(f).
50 COMMITTEE REPORT, *supra* note 24, at 62.

work, the absence of the qualifying phrase "on a substantially full-time basis" in subsection (b)(2) could be construed to mean that a single taxpayer may be entitled to the deduction if child care were necessary to enable him to undertake even part-time work. The Conference Report casts a gloss on the language with an implication that such is not to be the construction, but rather the three-quarters of full-time criterion is to apply across the board.[51] For reasons of equity, it would appear proper that the condition be applied across the board so as not to favor single over married taxpayers.

The requirement of "substantially full-time" employment, however, does not seem to have a clear policy rationale. For those in the Senate, especially Senator Bennett, who were concerned that allowance of a child care deduction would drive mothers out of the home,[52] the full-time-employment requirement should cause alarm because it may induce mothers who wish to work only half time to work *more* hours in order to get the deduction. If the intention of Congress was to be neutral in allowing a mother to choose between working or remaining at home, this employment criterion is counterproductive in that it creates an additional work incentive once the initial decision to work part time has been made.

A hardship theory fails to justify the full-time requirement. One may work part time because of physical, mental, or emotional deficiencies which preclude full-time work. A part-time worker may have very young children and be unable to arrange full-time care for them. Or, full-time work may be unavailable because the worker has no special skills to offer. Child care arrangements would be no less essential for such workers and the hardship from disallowance of the deduction could be as severe as it would be to a full-time worker. Nor does a subsidy theory support the full-time requirement. The taxpayer's need depends far less on the number of hours worked than on the family's income, the number of family members, and the cost of child care.

Congress may have been reluctant to underwrite the cost of full-time child care for a part-time worker, since it did not explicitly consider child care costs as an independent benefit in the

51 CONFERENCE REPORT, *supra* note 27, at 42.
52 117 CONG. REC. S18552 (daily ed. Nov. 15, 1971).

child development sense. However, the solution of total disallowance for less than full-time employment is too extreme. A better response might have been to allow a deduction only for child care expenses attributable to periods when parents were prevented by employment from providing care.

b. Other Productive Activities. The gainful employment condition poses further difficulties. Before the 1971 revision, the deduction under § 214(a) was allowable "only if such care is *for the purpose of enabling* the taxpayer to be gainfully employed." (Emphasis added.) The Treasury had read a "hot pursuit" notion into the gainful employment requirement: "The term 'gainfully employed' has been interpreted as also including active search for gainful employment."[53]

In the 1971 changes, the text of the statute underwent a subtle change so that a deduction is allowed "only if such expenses are incurred *to enable* the taxpayer to be gainfully employed." (Emphasis added.) The change in the phrase from "for the purpose of enabling" to "to enable" should be seen in light of the Conference Report which said, "In addition, the Conference Agreement clarifies the fact that a deduction is allowed *only* for expenses incurred to enable a taxpayer to be employed on a *substantially full-time basis.*"[54]

If one reads § 214(e)(2) consistently with the section disallowing a deduction for the part-time worker. Congress appears to have intended a more restrictive rule which would disallow a deduction while the taxpayer is looking for a job. If a taxpayer working half time is to be denied the deduction, it is hard to see why it should be allowed to one who is not employed at all, but who is just looking for a job.[55] Such a result would be unfortunate since in effect it discriminates against those workers whose skills may be less readily marketable. It reinforces the suggestion of Senator Bennett that the deduction is a mere windfall for those who have already obtained employment.[56]

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53 Rev. Rul. 169, 1956-1 CUM. BULL. 135, 136, *citing* S. REP. No. 1622, 83d Cong., 2d Sess. 221 (1954).

54 CONFERENCE REPORT, *supra* note 27, at 42.

55 *But see* Feld, *supra* note 33, at 423, 431-32, who without discussion assumes that the "active search" interpretation is carried over.

56 117 CONG. REC. S18554 (daily ed. Nov. 15, 1971).

Even the original "hot pursuit" concept seems to have been unduly rigid under a hardship or incentive theory. It disfavors activities which may be necessary for the taxpayer's eventual employment, but which are not proximate enough to qualify either as active search for work or gainful employment. For example, the situation which prompted a 1956 Revenue Ruling[57] involved a taxpayer who claimed a deduction for expenses incurred while at school. The Treasury advised that it would disallow the deduction on the grounds that the gainful employment terms of the statute were not satisfied. Other job training programs may have a more proximate relationship to gainful employment, but one may infer from the Treasury's posture that child care costs during job training were to be absorbed by the taxpayer. This conclusion seems more certain under the present law.

A better legislative solution would be to expand and clarify the gainful employment condition by including within its meaning vocational training, educational pursuits, and other preparatory activities normally undertaken with a view to eventual employment. The Treasury can preclude the deduction of expenses incurred by a taxpayer to pursue purely personal activities. For example, Treasury Regulations provide:

> *Purpose of expenditure.* Even if an expense is incurred for the care of a dependent, it is not deductible unless it is incurred for the purpose of permitting the taxpayer to be gainfully employed. Whether that is the true purpose of the expense depends upon the facts and circumstances of the particular case. Thus, the fact that the cost of providing care for a dependent is greater than the amounts anticipated to be received from the employment of the taxpayer may indicate that the purpose of the expenditure is other than to permit the taxpayer to be gainfully employed.[58]

It is to be noted that this regulation and the considerations discussed above retain economic matters as the central determinants of deductibility. One may wish to take account of independent values of volunteer and low-paying work, among which may be the social importance of the work itself, and the morale, self-

57 Rev. Rul. 169, 1956-1 CUM. BULL. 135.
58 Treas. Reg. § 1.214-1(f)(4) (1956).

esteem, and self-reliance of the worker. One wonders whether the tax laws should create an additional disincentive to people taking low paying jobs, such as with VISTA or community action programs.

B. *Amounts Allowable as a Deduction*

1. "Amounts Paid"

Terminology in the statute raises doubts about the deductibility of non-cash expenditures. Subsection (a) reads in part: "[T]here shall be allowed as a deduction the employment-related expenses (as defined in subsection(b)(2)) paid by him during the taxable year." Subsection (b)(2) provides that " 'employment-related expenses' means amounts paid for the following expenses. . . ." The word "means" should be read to give the definition an exclusive character (if the definition were not to be exclusive, the statute, to be unambiguous, should have used the word "includes"[59]). Therefore, it is arguable that nothing should be read into the word "expenses" in subsection (a) other than what is expressly set forth in subsection (b)(2), which speaks in terms of "amounts paid."

Other Code sections dealing with deductions seldom make reference to "amounts." In contexts in which the word "amounts" is used in the allowance of a deduction, such as § 213 medical expenses, non-cash expenditures are apparently not deductible. The value of the taxpayer's sickroom in his own residence, for example, presumably gives rise to no deduction under § 213. That "amounts" is modified by "paid" in § 214 rather than "paid or incurred" butresses the conclusion that only cash or cash equivalents may now be deductible under § 214. Further, no illustrations in the legislative history indicate that non-cash allowances may be deducted under § 214.[60]

Professor Feld arrives at a contrary conclusion.[61] He sees a new source of tax shelter in § 214, most often where there is a live-in situation. For example, in the situation where a student lives with

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59 *Cf.* § 7701(b).

60 Hjorth, *supra* note 45, at 137, comes to the same conclusion based on an analysis of the word "paid."

61 Feld, *supra* note 33, at 436-38.

a family and does babysitting, Feld concludes that the value of the student's room and board may be deducted under the present statute.

2. Eligible Expenses

a. Total Amount. The maximum amount of expenses allowable under § 214(c)(1) is $400 a month, or $4800 a year. This is an eight-fold increase over the amount allowable for care of one child under old § 214(b)(1)(A); it is five times as great as the amount allowed for two or more dependents under old § 214(b)(1)(B).

HEW feels a minimum of $1600 is required for full-time year-round day care for a preschool child.[62] Other authorities have estimated the minimum cost of desirable care to be $2400.[63] That the amount is intended to absorb child care costs for one or more children, as well as the cost of domestic help, is a partial explanation for the generous upper limit. Thus, the section authorizes deduction of expenditures for services at a quality level well above that which is merely "necessary" to care for one child. It is a significant extension of the principle under existing regulations[64] that the manner of providing care need not to be the least expensive available to the taxpayer.

One position that Congress might have taken would have been to provide for an allocation of the cost of care between that which is "custodial" and minimally necessary to relieve the parents of that obligation and "enrichment" or "developmental" costs which could be seen as personal consumption choices of the taxpayers and which would be non-deductible. Nothing in the statute or in the history suggests such a principle, unless the language "to enable the taxpayer to be gainfully employed" is to be read as a check on "luxury" expenditures. That interpretation is not suggested in the legislative history of the 1971 revisions, however.

b. Expenses for the Care of a Qualifying Individual. Subsection (b)(2)(B) defines "employment-related expenses" in part to mean

62 *Child Care Hearings, supra* note 3, at 104-05 (testimony of HEW Secretary Elliott L. Richardson and Dr. Edward Zigler, Director, Office of Child Development, HEW).

63 *Id.* at 280 (testimony of Mary P. Rowe, Economic Consultant).

64 Treas. Reg. § 1.214-1(f)(2)(ii) (1971).

amounts paid for the care of a "qualifying individual." In subsection (b)(1) "qualifying individuals" are defined to mean, generally, the taxpayer's children under the age of 15[65] and a physically or mentally incapacitated dependent or spouse of the taxpayer.[66]

The taxpayer may deduct up to $200 a month for care of one child "outside the taxpayer's household," $300 for two, and $400 for three or more such dependents. The $2400 allowance for one child compares favorably with HEW estimates of the cost per child for full-time year-round day care ($1600) and is approximately the amount independent analysts have estimated is needed for high quality full-time care.[67]

If two or more children are to be given full-time care, however, the 50 percent reduction for the second and third child is unrealistic because day care centers typically do not give discounted rates for the additional children.[68] On the other hand, if the rate reductions are explained by the assumption that subsequent children will not need full-time care (*i.e.*, are in school part of the day) then the allowances are excessive. The Children's Bureau of HEW and the Day Care and Child Development Council of America indicate that the cost per child for before and after school care and for summer care at a "desirable" level is only $653 a year,[69] not the $1200 suggested by § 214.

An alternative method of placing limitations on the deductibility of day care expenses would consider not the number of taxpayer's children, but rather the age of each child to reflect the

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65 Individuals covered include: child of the taxpayer (§§ 151(e)(1)(B) and 152(a)(1)); grandchild (§§ 151(e)(1)(A) and 152(a)(1); stepson or stepdaughter (§§ 151(e)(1)(B), 151(e)(3), and 152 (a)(2)); (step)brother or (step)sister under 15 (§§ 151(e)(1)(A) and 152(a)(3)); nephew or niece (§§ 151(e)(1)(A) and 152(a)(6)); brother-in-law or sister-in-law (§§ 151(e)(1)(A) and 152(a)(8)); or other individual under age 15 in taxpayer's household (§§ 151(e)(1)(A) and 152(a)(9)).

66 The care of mentally and physically handicapped individuals is unquestionably an important social and family concern. Section 214 has important ramifications for the taxpayer supporting such handicapped individuals, but an analysis of this aspect of § 214 is well beyond the scope of this article.

67 *Child Care Hearings, supra* note 3, at 104-05 (testimony of Elliot L. Richardson and Dr. Edward Zigler).

68 *Cf.* Blumberg, *Sexism and the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFFALO L. REV. 49, 96 n.184 (1971).

69 *Child Care Hearings, supra* note 3, at 280 (testimony of Mary P. Rowe, Economic Consultant, referring to three categories of child care: minimum, acceptable, and desirable).

need for care. The Senate Finance Committee Report would disallow "educational expenses incurred for a child in the first or higher grade level since these expenses are not necessary for the taxpayer to be gainfully employed."[70] This policy may well be extended to disallow the deduction where there are public nursery schools or where the taxpayer is eligible for, but does not accept, publicly (or possibly even privately) subsidized nursery schools or day care centers. Under this view the maximum deduction under subsection (c)(2)(B) should not routinely be allowed for each child, but only for each pre-school or handicapped child for whom satisfactory publicly operated or subsidized day care alternatives are not available.

c. Expenses for Household Services. Under subsection (b)(2)(A), a deduction is to be allowed qualifying taxpayers for "expenses for household services." "Household services" are not defined in the statute, although the Committee Report states:

> Household service expenses for this purpose include employment in and about the home whether or not these expenses are limited to care of the children; they include caretaker services as well as employment in the home. They do not, however, include the services of a chauffeur.[71]

Whether household services must be in some way tied to dependent care is not entirely clear. The unqualified terms of § 214(b)(2)(A) and the equal billing of household services in the title of § 214 indicate that the answer is in the negative. If one reads the deduction for household services restrictively, one could infer from the phrase "whether or not these expenses are *limited* to care of the children" (emphasis added) that such expenses must at least be related, even though not limited, to dependent care.

The legislative history, however, especially the testimony of pivotal senators during the floor debate of November 15, 1971, seems to dispel such restrictive inferences. Senator Long, the Chairman of the Senate Finance Committee and a strong advocate of the household services deduction, gave his more liberal interpretation:

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70 COMMITTEE REPORT, *supra* note 24, at 61. This position is contrary to that of the Treasury under old § 214 in Treas. Reg. § 1.214-1(f)(5) (ex. 3) (1956).

71 COMMITTEE REPORT, *supra* note 24, at 61.

> Mr. President, I personally think we should do much more for people who hire someone to do domestic work than we are doing in this bill, and I tried to do much more than that. We arrived at the point where there appeared to be about a tie vote on doing more than this; and in order to try to get the committee in agreement on something, I suggested we simply take the $12,000 income limit in the House-passed welfare bill, H.R. 1, and see how many votes we could muster for the formula there.[72]

Senator Bennett, speaking in opposition, gave his interpretation of the household services aspect as an independent ground for deductibility and was not refuted by any of the bill's sponsors: "This amendment, presumably, is limited to the providing of help for child care; but it is so written that once a person qualifies for it, once a family qualifies for it, the money can be spent for domestic help of any kind."[73]

Later in the debate, Senator Tunney added that the provision was "not designed to enable a family to write off the cost of a butler or gardener, or someone like that."[74] Senator Bennett then interjected the question whether the cost of bartenders would be an expense for household services, to which Senator Tunney responded: "It is clear that the purpose of the provision is not to pay for a butler serving drinks but to pay for a babysitter or some other individual to take care of the child while the mother is working and provide normal domestic services."[75]

At this point in the debate the intention seemed to be to limit "household services" to duties performed by an employee incidental and subordinate to his primary obligation to take care of the child. But subsequently, Senator Tunney took a contrary position:

> Obviously, the suggestion that, occasionally, we might have a member of the household doing something other than the job for which he is hired, that is, taking care of the child, is logical, but *if the major purpose of being in the home is to take care*

72 117 CONG. REC. S18551 (daily ed. Nov. 15, 1971).
73 *Id.* at S18552.
74 *Id.* at S18553.
75 *Id.*
76 *Id.* (emphasis added).

> *of the home, then I think the purpose of the committee language is served. . . .*[76]

The Conference Report defined household services only indirectly through the gainful employment requirement: "The requirement that the expenses be incurred to enable the taxpayer to be gainfully employed is not intended to include amounts paid to an individual who is employed, for example, predominantly as a gardener, bartender, or chauffeur."[77] The conferees seem to have indicated that one is to look at the supplier of the services, rather than the functions performed. The full costs of a babysitter are deductible, even though the babysitter may also tend bar.

While the answers drawn from legislative history are not conclusive, it appears fairly certain that the costs of a domestic, whether or not he provides any child care, will be deductible in full, as long as the primary reason for hiring the employee is not to perform the disfavored "luxury" services.

This result is unfortunate. The child is merely a ticket; a working couple presents the Treasury their child and the Treasury provides them cut-rate maid service through tax savings. Because of the subsection (c)(2)(B) day care allowance, the child and domestic need never meet each other and yet the deduction for the domestic is conditioned on the child's existence. Equity between childless couples and couples with young children is lost as long as the household services deduction is available only to the latter. This inequity may be one of the few tax classifications which cannot withstand constitutional scrutiny even under the undemanding rational basis test.[78]

One way in which the household services deduction can be restricted is by a Treasury interpretation that leans heavily on the requirement that deductible "employment-related expenses" un-

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77 CONFERENCE REPORT, *supra* note 27, at 43.

78 Golden Rule Church Ass'n, 41 T.C. 719, 729 (1964); 1 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 4.09 (1969). *Cf.* Reed v. Reed, 404 U.S. 71 (1971) (not a tax case).

A recent Supreme Court decision, Stanley v. Illinois, 405 U.S. 645 (1972), appears to hold that a statutory classification based on marital status violates the equal protection clause (unwed father's right to custody of children). It is not unreasonable to believe that a court that invalidates laws grounded on distinctions between *marital* statuses would arrive at a comparable decision when faced by arbitrary and capricious classifications based on family statuses.

der § 214 must be necessary "to enable the taxpayer to be gainfully employed." Unlike child care, household work has no time dimension, so can be deferred until there is leisure time to do it. The Treasury could, under its broad power to issue regulations "to carry out the purposes" of § 214,[79] require taxpayers to overcome a presumption that household services are incurred for personal reasons.

A second way to confine the household services deduction to reasonable bounds is legislative. A reasonable and responsible limitation would be to provide that a supplier of dependent care services in the taxpayer's home may perform household services incidental and subordinate to the primary obligation of caring for the dependent without jeopardizing the dependent care deduction and without requiring an allocation. This formulation would expand the availability of a deduction for household services over the original § 214.[80] It would preclude the taxpayer from hiring a maid and sending the children to a day care center, because the deduction is allowed only if the maid is primarily a babysitter. It obviates some of the complexities under the old law, which required taxpayers to allocate costs between child care and dishwashing.[81] Indeed, one suspects that it was this last problem, in part at least, that was at the root of Senator Tunney's support for Senator Long's proposal: "[W]e do not want the Federal government sending I.R.S. agents to everyone's home to make the mother punch a timeclock, to determine how many minutes a day are spent doing various jobs."[82]

C. *Miscellaneous Provisions*

1. Maintaining a Household

Section 214(a) allows the deduction to a taxpayer "who maintains a household which includes as a member" a qualifying child or de-

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79 Under § 214(f), the Treasury's regulation-making power is quasi-legislative. Absent the power to write "purpose" regulations, the Treasury's regulation-making authority is limited to interpretation and enforcement. § 7805; B. BITTKER, FEDERAL INCOME, ESTATE AND GIFT TAXATION 25 (3d ed. 1964).

80 Treas. Reg. §§ 1.214-1(f)(2)(iii) and (f)(5)(ex. 2) (1956) illustrate the allocations necessitated under original § 214.

81 *See id.*

82 117 CONG. REC. S18553 (daily ed. Nov. 15, 1971).

pendent. In determining whether that condition is satisfied, § 214 (b)(3) provides a financial test. The taxpayer "shall be treated as maintaining a household for any period only if over half the cost of maintaining the household" is furnished by the taxpayer, or the taxpayer and spouse if married. Two related questions arise: First, what is a "household"? Second, is the financial test exclusive?

In § 214 the word "household" appears to mean both a "family unit" and a "home" or "residence." In § 214(a) and § 214(b)(3) the word appears to mean a family unit, since one is a "member" of an association or family unit far more readily than a member of a physical location or structure. In §§ 214 (c)(2)(A) and (B), however, the word "household" is used geographically, as a reference to where child care is being provided. The Senate Finance Committee Report interpreted "household" by translating subsection (a) as "families with a child (or incapacitated dependent) in the home."[83]

If the geographical requirement is made the primary determinant of whether the conditions of subsections (a) and (b)(3) are met, the taxpayer must satisfy two tests. The financial test of half the support must be satisfied, and the dependent must normally reside in the taxpayer's home. This interpretation accords with the purposes of § 214, since if the child does not normally reside with the family, he presents no impediment to the second spouse's working. Read with the gainful employment provision, this interpretation would arm the Treasury with a rationale for disallowing certain expenditures which may appear to comport with the letter of the law but which finance personal consumption activities which have no relationship to taxpayer's gainful employment. Under the existing regulations, for example, there are several indications that deductions for boarding schools and summer camps are authorized.[84] When the deductible amount was only

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83 COMMITTEE REPORT, *supra* note 24, at 60.

84 Treas. Reg. §§ 1.214-1(f)(2)(i) and (ii) and 1.214-(1)(f)(5) (ex. 1) and (ex. 3) (1956). Treas. Reg. § 1.152-1(b) (1956) interpreted the meaning of "maintaining a household" for the purposes of defining a § 152(a)(9) dependent and authorized "temporary absences" (including boarding school for up to six months of the year) before an individual can no longer be construed to be a dependent. This interpretation does not shed much light on the problem under § 214, however, because the statutory formulation of § 152(a)(9), in addition to a comparable "member of a household" test, requires the dependent to make "his principal place of abode" at "the home of the taxpayer."

$600 or $900, and an income ceiling of $6000 was applicable to many taxpayers, not much leakage was likely to result from the Treasury's largesse. With the deductible amount for day care now ranging between $2400 and $4800 and an income ceiling of $18,000, more activities which were undertaken primarily for their educational or recreational value could be claimed than heretofore. The Treasury should be prepared to rule in some circumstances that (1) the child was not a member of the taxpayer's "household" as the word implies a situs where the taxpayer's home is found, and (2) the expenses were not necessary to enable the taxpayer to be gainfully employed, since the child did not live with the taxpayer and the taxpayer had no ongoing supervisory obligations to the child which threatened to impede the taxpayer's employment.

2. Payments to Relatives

Subsection (e)(4) of § 214 disallows a deduction for payments made to "an individual bearing a relationship to the taxpayer described in paragraphs (1) through (8) of section 152(a) (relating to definition of dependent) or to a dependent described in paragraph (9) of such section."[85] The original § 214 had a similar disallowance, but only if the taxpayer had been allowed a dependency exemption for the person to whom payment had been made.

The current law tightens the limitation by disallowing a deduction if the specified relationship obtains whether or not a dependency exemption is claimed. The Committee Report made it clear that the deduction is to be disallowed "whether or not the individual had as his principal place of abode the home of the taxpayer."[86] This restriction could be of potential significance:

> The most recent detailed information on the care of children while their mothers work is contained in a study entitled "Child Care Arrangements of Working Mothers in the United States," conducted by the Children's Bureau and the

85 The process of defining relatives through § 152(a) creates special problems omitted in this discussion. One illustration of the kind of issue that can be raised is how to treat in-laws once a tie of affinity has been broken by death or divorce. Steele v. Sowalski, 75 F.2d 885 (7th Cir. 1935) (held that if the affinity relationship is once established for purposes of §§ 151 and 152, it was not broken by death or divorce of taxpayer's spouse).

86 COMMITTEE REPORT, *supra* note 24, at 61.

> Women's Bureau based on 1965 statistics. The study showed that about half of the 8.3 million children of mothers working full-time in 1965 were cared for in their own home, usually by a member of their own family or a relative. Ten percent were cared for in the home of a relative, and another ten percent were cared for in the home of someone who was not a relative. Only three percent of the children were cared for in a group care center.[87]

It would be harsh to completely disallow a deduction for payments made by the taxpayer to a relative for providing child care. If the tax savings were significant to parents, they would be induced to attempt to find non-related child care suppliers, however satisfactory the arrangements with the relatives may have been.

A major reason for the restriction may be the concern that taxpayers would use the deduction as a way of shifting income among related taxable units in order to decrease aggregate family income tax. Professor Hjorth has given two responses to this issue.[88] First the income limits themselves take care of the problem, because low income families do not make gifts to relatives except in very special circumstances. Aside from the questionable sociological assumption, this answer is unsatisfactory since the $18,000 limit takes in far more than half the taxpaying population;[89] the section's provisions are not limited to low income families. Hjorth's second response admits the problem: "We already permit the very wealthy to shift income to their poor relatives by means of short-term trusts. Why we should be so concerned about income splitting in the area of child care is somewhat of a mystery."[90]

An alternative to § 214(e)(4) would be to put the taxpayer to a choice between taking a dependency exemption or a child care deduction. Assuming the relative is a dependent, the latter choice would be taken only where the taxpayer had enough other expenses to itemize and the child care costs exceeded $750. Not much leakage would come from this solution.

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87 STAFF OF THE SENATE COMM. ON FINANCE, 92d CONG., 1ST SESS., MATERIAL RELATED TO CHILD CARE 6-7 (Comm. Print 1971).

88 Hjorth, *supra* note 45, at 142.

89 *See* note 42, *supra*.

90 Hjorth, *supra* note 45, at 142.

III. Policy Considerations

If the purposes behind § 214 — to free parents to work, to provide educational opportunities for poor children, and to provide employment opportunities for child care professionals — are to be realized, the present tax deduction for child care expenses should be reformulated or an alternative non-tax program should be funded.

An expenditure program has several advantages over the tax subsidy as a way of channeling government financial assistance for child care. First, the amount of relief that can be given through tax subsidies is a function of each taxpayer's income and is limited by it. Second, a direct expenditure program does not rely on passive incentives; expenditures in needed areas can be assured by federal direction. In addition, when appropriations are limited, a direct expenditure program can be designed in such a way as to target scarce funds. Tax provisions roughly establish priorities, because the tax laws distribute benefits in a passive manner; a qualifying taxpayer can decide how much federal aid to allocate to himself by choosing how much to spend for child care. Finally, child care provided through direct expenditure programs can probably be evaluated and monitored more efficiently and effectively than can subsidies which are channeled through tax relief.

Of course there are disadvantages as well to direct expenditure programs. Bureaucratic costs of administering, monitoring, and evaluating are high. Most of the presently envisioned programs are designed to give financial support to day care centers; whether parents who desire care for their children will receive any subsidized benefits would depend on whether their community has a federally assisted center for which their child is eligible. A tax subsidy, on the other hand, is comprehensive and allows the taxpayer some freedom to choose the kind of child care he wishes.

An attempt to weigh the effectiveness of a direct expenditure program against a program providing for child care through tax incentives is beyond the scope of this article. This discussion accepts as the starting point the fact that Congress has already made the decision to involve the Internal Revenue Code with child care. Once that decision has been made, that tax device should be

utilized which distributes benefits in the fairest and most efficient manner.

A. *Evaluating Present § 214*

The itemized deduction for child care expenditures provided for in § 214 does not adequately effectuate the purposes behind the legislation. It is unlikely to be effective in increasing the opportunities of poor children. The poverty level for a four-member family has been determined by the Bureau of Labor Statistics to be $4320 a year; the "lower living standard budget" for the same four-member family is $6900.[91] Treasury estimates show that, under 1972 tax laws, only 12 percent of the taxpayers earning less than $5000 will itemize, and only 18 percent of those below $7000.[92] Of those who are indeed poor, then, and whose children will be in need of developmental programs, more than four out of five families will be unable to obtain any advantage at all under § 214.

Furthermore, the one poor taxpayer out of five who does itemize is not likely to get much relief over what he had under old § 214. Figures showing what amounts families are able to pay for child care and the costs of child care indicate that 95 percent of *all* parents with children under six pay less than $10 per week per child for day care.[93] Almost all the poor fall into that 95 percent. Since $600 to $900 could have been deducted under old § 214, the increase in deductible amounts and the raising of income ceilings should bring virtually no tax relief to low income families. Treasury estimates show that only about $1.2 million of the estimated $145 million saved by taxpayers in 1972 because of the liberalization of § 214 will stay in the pockets of taxpayers earning less than $7000.[94] Even within the ranks of the poor, one might expect that much of the tax savings will go to the "temporary poor," such as graduate students whose "gainful employment" is teaching a seminar in return for a fellowship stipend. Children of such taxpayers are seldom the most needy candidates for "enrichment" experiences.

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91 117 CONG. REC. S13925 (daily ed. Sept. 8, 1971).

92 H.R. REP. No. 553, 92d Cong., 1st Sess. 16 (1971).

93 *Child Care Hearings, supra* note 3, at 260 (testimony of Mary P. Rowe, Economic Consultant).

94 117 CONG. REC. H12120 (daily ed. Dec. 9, 1971).

Since § 214 fails to give the poor tax relief, it fails to meet the standard of "developmental" child care and does not help free low income mothers for working. President Nixon greatly overstated the benefits of § 214:

> [W]e support the increased tax deduction written into the Revenue Act of 1971, which will provide a significant Federal subsidy for day care in families where both parents are employed, potentially benefitting 97% of all such families in the country and offering parents free choice of the child care arrangements they deem best for their families.[95]

In spite of this far-reaching claim, the effect of § 214 in providing new employment is likely to be negligible, as brought out by Senator Long in the Senate debate:

> [P]eople at this income level [$12,000] cannot afford to hire people at $400 a month, so the cost in revenue to the Government is limited by the fact that we are restricting the benefit of the provision to people who cannot afford to fully use it. When you get up to about $18,000, you are getting to people who can afford to fully use the $400 deduction for hiring someone to look after their children.[96]

Immediately after this statement, Senators Long and Tunney praised the bill's economic virtues as a source of multiplier effects: a domestic will now get a job and pay taxes, a parent will now work and pay taxes, and a domestic will not be on welfare. Yet the amount of tax relief will not be likely to encourage new hiring of domestics because the dollar amount of tax relief is not high enough to be a real incentive. But it is high enough to be a "sweetener" to those who have already found it desirable to hire maids.[97] As Senator Bennett pointed out in floor debate: "[M]ost

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95 VETO MESSAGE, *supra* note 20, at 4.

96 117 CONG. REC. S18551 (daily ed. Nov. 15, 1971).

97 At AGI of $18,000, a married couple with one child, taking the full $4800 § 214 deduction and no other itemized deductions, has taxable income of $10,950, and a tax of $1809 at 1972 rates. Without the § 214 deduction and taking the standard deduction, taxable income is $13,950, and the tax is $2748. Section 214 gives a tax savings of $939. (Similar computations for a single taxpayer on the same assumptions yield savings of $811.) Savings this large are available only if one chooses to spend a full 27 percent of one's AGI for child care and household services ($4800/$18,000), and new hiring of domestics will occur only if one is willing to spend $3861 ($4800 less $939) for services one was previously unwilling to buy.

of the people with incomes of above $18,000 a year, between $18,000 and $20,000, up in that category, probably already have their child care arranged. So, this is just a nice windfall for people in that category."[98]

If one assumes, *arguendo*, that new employment for domestics is stimulated, the tax incentive at middle income levels and its absence at low levels may have paradoxical and regressive effects in distributing social benefits. It is axiomatic that higher income parents hire lower income workers to care for their children and do housework. Hence, the usual effect will be to free higher income mothers to work, while lower income workers care for their children. In many cases it is conceivable that the lower income workers will have to leave their own children uncared for or with inadequate care in order to take the jobs. The results of this tax subsidy, therefore may well be that: (1) the only ones given an incentive to work were those better off to begin with; (2) the middle income parent will carry home a second income, increasing the gap in wealth between middle and low income families; (3) the child of the middle income family will have had adequate care subsidized in part by the federal government; and (4) the child of the lower income worker will have had lesser care, aggravating the disparity in opportunities between the two.

B. *Possible Alternatives of Financing Child Care through the Internal Revenue Code*

1. A Business Expense Deduction

Permitting child care expenses to be deducted as a business expense could lead to results similar to those found under the present § 214. While such an approach would provide more tax incentive to utilize child care than does the itemized deduction approach, the fundamental defect of using deductions for subsidy purposes persists. An inverse distribution of benefits will always result because increasing marginal tax rates give more relief to higher income taxpayers for a fixed child care expenditure.

In addition, child care expenses should not be characterized as business expenses. Too often commentators have been slack in

98 117 CONG. REC. S18554 (daily ed. Nov. 15, 1971).

their approach to the process of categorizing expenses, without fully appreciating the ends to be served by the policy of permitting business expenses under § 162. For example, one commentator takes the following position:

> Child care . . . is . . . an expense which necessarily arises only when both parents are employed . . . A working mother's provision for child care is a nondiscretionary expense directly related to the fact of her employment. . . . A proper analysis of borderline expenses that might be characterized as either business or personal should entail a careful inquiry into the nature of the expense. Would it have been incurred absent gainful employment? If so, it is not deductible.[99]

This position was echoed by Senator Tunney in the debate on his proposed amendment to § 214:

> One news commentator on television several days ago commented that if John D. Rockefeller needed to hire a new secretary in order to utilize his time more effectively in his work, he would be able to obtain a business expense under present Federal tax laws. If, on the other hand, a mother wants to go out and earn some money, perhaps so that her family can live better or so that her children can have more opportunities, and she wants to hire somebody to help care for her home and help look after her children, she is not able to claim such a salary cost as a business expense. It really is not fair to grant relief to the businessman and at the same time not grant that same relief to the mother who wants to work.[100]

Merely to state that expenses are employment-related, however, is not to say that the expenses are properly taken into account as an offset against gross income in measuring the taxpayer's ability to bear a tax burden. Carried to its logical conclusion, this sort of "employment related" or "but for" test would bring all sorts of expenses that are not now deductible under § 162 or § 212 within the scope of these sections. The present § 214 indicates that Congress did not intend that child care expenses be treated like business expenses since they allowed the deduction only for items which are denominated "employment-related expenses."

In evaluating whether to allow child care expenses as a business

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99 Blumberg, *supra* note 68, at 64-65.

100 117 CONG. REC. S18550 (daily ed. Nov. 15, 1971).

deduction, one must analyze § 162(a), § 212(1), and § 262. The operative language in § 162(a) is to be read with an eye to the disallowance of family and personal expenses in § 262. Section 162(a) allows deduction only of expenses "paid or incurred . . . in carrying on any trade or business." While § 212(1) does not repeat the "carrying on" language of § 162(a), the Supreme Court in *Gilmore v. United States* held that the absence of this qualifying language is not to be given special significance.[101]

The *Gilmore* case involved divorce litigation fees incurred by a taxpayer allegedly for the purpose of protecting his interest in an automobile dealership from an adverse property settlement. The Court strongly rejected the taxpayer's attempt to deduct the expenses on the theory that the divorce litigation could have disastrous consequences on his business. "[T]he origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer is the controlling basic test whether the expense was 'business' or 'personal' and hence whether it is deductible or not" within the meaning of § 162(a) and § 212(1).[102]

It is submitted that the terms of § 162(a) and § 212(1) as colored by *Gilmore* present a satisfactory test for marking the borderline between "costs of living" and "costs of earning a living."[103] It is the function of these sections to distinguish between the taxpayer's split personality:

> An individual is thus regarded for tax purposes as having two personalities: one is seeker after profit who can deduct the expenses incurred in that search; the other is a creature satisfying his needs as a human and those of his family but who cannot deduct such consumption and related expenditures.[104]

Sections 162(a) and 212(1) do not allow offsets against income for every expenditure of a taxpayer which may affect his profit-making activities. The statute has drawn a defensible line between these expenses incurred "in the carrying on" of a business — the costs of

101 372 U.S. 39, 45 (1963).

102 *Id.* at 49.

103 Bittker, *A Comprehensive Tax Base as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 952 (1967).

104 S. SURREY & W. WARREN, CASES ON FEDERAL INCOME TAXATION 272 (1960), cited with approval in United States v. Gilmore, 372 U.S. 39, 44 (1963).

transacting the taxpayer's business activities, of *exercising the functions* which reward the taxpayer with gain[105] — and those expenses which are preparatory costs — those which facilitate the taxpayer's *availability to undertake employment,* or which *put him in a position* to reap profits. These provisions obviate the need to test the constitutional issue whether the sixteenth amendment power to tax "incomes, from whatever source derived" constitutionally authorizes taxation of gross receipts, or whether the power to tax extends only to net receipts on the theory that certain necessary costs of earning income are deductible as a matter of fundamental right.[106]

Even the availability of the "origins" or "character" test propounded in the *Gilmore* case does not greatly simplify the inquiry, because there are no guidelines as to how far back to go in seeking the origins of an expense.[107] One commentator who consciously applied *Gilmore*'s test to child care went back very far indeed to find the source of the expense:

> [T]he costs of child care . . . originate in a personal/family need or relationship, the need of the child or aged parent for his parent's or relative's care. . . . [S]uch expenses as those incurred for 'commuting, clothing, and a babysitter for a working mother . . . [although] necessary to an individual's occupation . . .' are not deductible because they originate in personal need or choice.[108]

Such a statement of the origin of child care expenses seems too remote. The commentator found the origin of the working mother's or father's duty of support to the child in the parent-child relationship, but one need not go so far back to find the origin of the decision to expend money for a substitute rather than for the parent to care for the child. In many but not all cases the origin of the decision will be the wish to obtain profitable employment. Even where the origin is profit motivated, however, the conclusion

105 Mildred A. O'Conner, 6 T.C. 323 (1946); 4A J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 25.02 n.13 (rev. 1966).

106 *Cf.* Davis v. United States, 87 F.2d 323 (2d Cir.), *cert. denied,* 301 U.S. 704 (1937); R. MAGILL, TAXABLE INCOME, 367 (rev. ed. 1945); Comment, *supra* note 9, at 433. *See also* Comm'r v. Sullivan, 356 U.S. 27 (1958).

107 Lykes v. United States, 343 U.S. 118, 127 (1952) (dissenting opinion).

108 Comment, *supra* note 9, at 275-6, *citing* Carroll v. Comm'r, 418 F.2d 91, 95 (7th Cir. 1969).

does not necessarily follow that the item is a business expense. The origins test is most satisfactorily employed to pinpoint the taxpayer's motivation in order to apply the condition in § 162 that the expense arise "in carrying on" a business. Where the origin of the child care expense is taxpayer's personal need or desire for employment, it is not a cost of doing business, but a preparatory cost.

A deductible item often contrasted with the child care costs is the cost of business-related travel and entertainment, the deductibility of which is provided for in § 162(a) and § 274(a).[109] Travel and entertainment have undeniably personal aspects and often marginal business "necessity." To conclude that "T&E" expenses are justifiably deductible under the policy of § 162 does not require one to be comfortable with the conclusion. While "T&E" expenses fill personal needs of leisure and nourishment and in a sense are "preparatory" to business-related functions, they are unlike child care costs in that they presuppose an on-going business relationship by the taxpayer. "T&E" expenses are preparatory to the specific occasion of business activity involved. They are not preparatory to the taxpayer's overall undertaking of employment. While child care expenses may be viewed as incurred to enable the taxpayer to be freed of a conflicting obligation that would prevent him from engaging in profitable activity, "T&E" merely involve a discretionary business judgment by one who has already established a business relationship that profit-making will be advanced through the environment which "T&E" expenses enhance. An analogous business judgment is an employer's decision to run an office day care center in the belief that he may attract better and more contented workers. The likely tax treatment is that the employer would be entitled to deduct his share of the expenses, and employees would have to turn to § 214 to determine deductibility of any fees they pay.

A great many other expenses fall on the non-deductible side of the border between deductible business and non-deductible personal expenses. Joseph Pechman, analyzing the original § 214

109 *See generally* R. GOODE, THE INDIVIDUAL INCOME TAX 76 (1964); Bittker, *supra* note 103, at 950-52; Comment, *supra* note 9, at 276-67.

shortly after its enactment, enumerated some combined business-personal expenses that were non-deductible at that time.

> [A] physically handicapped person may have to use taxicabs each day for transportation to and from work; school teachers, university professors, and other professional people are required to obtain advanced degrees as a prerequisite to entry or advancement in their fields; and wage earners incur heavy moving expenses when their employers move their place of doing business or if they are required to seek employment in another area.[110]

This list could easily be lengthened.

To conclude that child care expenses are not properly considered expenses of doing business is not to conclude that the expenses should be non-deductible. Instead, it argues that child care expenses should not be appended to § 162 or § 212 for fear that other erosions such as commuting costs, clothing costs, and some educational costs may be compelled once the "doing business" principle is stretched and child care expenses are accorded business deduction treatment.

2. Non-itemized Deduction

A legislative answer which would attain essentially the same result for child care expenses as a business deduction is to provide that the costs may be deducted from gross income under § 62 in determining adjusted gross income, thereby putting the expenses outside the standard deduction. Presently § 217 and § 62(8) effect this solution for an employee's moving expenses. Formally at least, this would have been the solution achieved by Senator Tunney's first proposed amendment to § 214.[111]

In allowing personal deductions, Congress is viewed as exercising "legislative grace" and has traditionally been viewed as limited only by the requirement that there be a rational basis related to legitimate legislative concerns for according different treatment to different classes of taxpayers.[112] The personal deduction classifica-

110 Pechman, *supra* note 12, at 122.

111 See text at page 7, *supra*.

112 On legislative grace, see Deputy v. Dupont, 308 U.S. 488, 493 (1940); Friedman v. Delaney, 171 F.2d 269 (1st Cir. 1948), *cert. denied*, 336 U.S. 936 (1949).

tion is characteristically reserved for hardship expenditures which distort a family's capacity to absorb a tax liability, a purpose which is in accord with the perspective many analysts and proponents have taken of § 214 expenses.[113] A § 62 deduction, however, suffers from the same policy defect as the business expense deduction. It will give greater relief to higher income taxpayers because of the increasing marginal tax rates.

3. Exemption

One alternative to the use of deductions is to employ exemptions. The exemptions of § 151 (generally, personal exemptions and dependency exemptions) illustrate that they need not relate to expenditures made by taxpayers. Furthermore, as the 1971 Revenue Act showed, the allowable amounts may be reset periodically at levels which are intended to provide for social needs. A sliding scale of exemptions, to vary inversely with the taxpayer's income and possibly the age of the child, could be structured to target tax benefits to those who will most need the federal assistance.

To tailor the distribution of tax benefits through a graduated scale of exemptions, however, leads to undesirable complexities. Complexity is an especially undesirable characteristic for provisions like § 214 because the taxpayers who are to benefit from the law are low and middle income taxpayers who are unlikely to engage professional help competent to work out difficult tax provisions. A more serious weakness is that an exemption need not be tied to an expenditure; consequently, the taxpayer is not required to spend his tax saving on child care.

4. Tax Credit

A tax credit related to amounts paid can be tailored to have the desired effect and can be more easily understood than an exemption. Unlike an exemption, a tax credit is tied to a percentage of child care expenditures. Use of a tax credit is preferable to a de-

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On the rational basis test, see Reed v. Reed, 404 U.S. 71 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). *Cf.* Helvering v. Lerner Stores Corp., 314 U.S. 463 (1941).

113 *See* White, *supra* note 12; Pechman, *supra* note 12. *But see* Blumberg, *supra* note 99, at 77: "A proper analysis of child care deductions should not focus on hardship; it should not even refer to it."

duction because the government's dollar cost is the same across all income brackets. To put it differently, a credit of a fixed dollar amount is the equivalent of a smaller deduction at higher income levels than at lower income levels.

A tax credit fixed at a high percentage of the amounts spent for child care would seem to be the tax device most consistent with the purposes of federal financial assistance for child care. A limit on the amount of a credit could be set at a level such that expenditures for more than minimally adequate care (as measured by dollars of outlay) would not increase the amount of the credit, thereby disqualifying the "luxury" component of expenditures for child care. A second limit could be imposed on incomes of taxpayers who may claim the credit, with a phaseout of benefits similar to that of § 214. This latter limit is justified on the grounds that taxpayers who can afford high cost child care are likely to be those whose children are in least need of developmental child care. Of course, tax laws are not substantive prohibitions; this provision would not preclude high income taxpayers from providing high quality, high cost care for their children. Rather it would provide that they would not be eligible to receive tax relief for this high expenditure. By the use of credits rather than deductions, it could be made clear that the tax laws were being used to grant subsidies rather than purporting to measure income. Hence, a ceiling on benefits would be desirable to avoid squandering benefits in income classes where they were not needed.

A fixed percentage subsidy would have two beneficial effects at low income levels. First, the credit itself would ensure that low income taxpayers would receive benefits whether or not they were to elect the standard deduction. Second, by setting the percentage of the credit at a level higher than the marginal tax rates applicable in low income brackets, even those taxpayers who previously had itemized deductions would receive higher effective subsidies.

A credit tied to amounts paid still would not remedy the fact that low income taxpayers would not have the money to afford adequate care for their children. But, a high percentage credit would have the effect of increasing the value of the dollars poor taxpayers could spend. In addition, a conservative limit both on the amount of the credit to be allowed and on the income would

prevent leakage of subsidies to higher income taxpayers. While a credit seems preferable to a deduction as a tax subsidy device, it would fail to provide significant financial assistance to families with very low incomes. This weakness illustrates well a serious problem with tax subsidies, namely, that tax benefits can be distributed only to those with a certain threshold level of income. For comprehensive child care objectives to be met, supplementary reliance needs to be placed on direct expenditure programs.

APPENDIX

SEC. 214. EXPENSES FOR HOUSEHOLD AND DEPENDENT CARE SERVICES NECESSARY FOR GAINFUL EMPLOYMENT.

[Sec. 214(a)]

(a) ALLOWANCE OF DEDUCTION. — In the case of an individual who maintains a household which includes as a member one or more qualifying individuals (as defined in subsection (b)(1)), there shall be allowed as a deduction the employment-related expenses (as defined in subsection (b)(2)) paid by him during the taxable year.

[Sec. 214(b)]

(b) DEFINITIONS, ETC. — For purposes of this section —

(1) QUALIFYING INDIVIDUAL. — The term "qualifying individual" means —

(A) a dependent of the taxpayer who is under the age of 15 and with respect to whom the taxpayer is entitled to a deduction under section 151(e),

(B) a dependent of the taxpayer who is physically or mentally incapable of caring for himself or

(C) the spouse of the taxpayer, if he is physically or mentally incapable of caring for himself.

(2) EMPLOYMENT-RELATED EXPENSES — The term "employment-related expenses" means amounts paid for the following expenses, but only if such expenses are incurred to enable the taxpayer to be gainfully employed:

(A) expenses for household services, and

(B) expenses for the care of a qualifying individual.

(3) MAINTAINING A HOUSEHOLD. — An individual shall be treated as maintaining a household for any period only if over half of the cost of maintaining the household during such period is furnished by such individual (or if such individual is married during such period, is furnished by such individual and his spouse).

[Sec. 214(c)]

(c) LIMITATIONS ON AMOUNTS DEDUCTIBLE —

(1) IN GENERAL. — A deduction shall be allowed under subsection (a) for employment-related expenses incurred during any month only to the extent such expenses do not exceed $400.

(2) EXPENSES MUST BE FOR SERVICES IN THE HOUSEHOLD —

(A) IN GENERAL. — Except as provided in subparagraph (B), a deduction shall be allowed under subsection (a) for employment-related expenses only if they are incurred for services in the taxpayer's household.

(B) EXCEPTION. — Employment-related expenses described in subsection (b)(2)(B) which are incurred for services outside the taxpayer's household shall be taken into account only if incurred for the care of a qualifying individual described in subsection (b)(1)(A) and only to the extent such expenses incurred during any month do not exceed —

(i) $200, in the case of one such individual,

(ii) $300, in the case of two such individuals, and

(iii) $400, in the case of three or more such individuals.

[Sec. 214(d)]

(d) INCOME LIMITATION. — If the adjusted gross income of the taxpayer exceeds $18,000 for the taxable year during which the expenses are incurred, the amount of the employment-related expenses incurred during any month of such year which may be taken into account under this section shall (after the application of subsections (e)(5) and (c)) be further reduced by that portion of one-half of the excess of the adjusted gross income over $18,000 which is properly allocable to such month. For purposes of the preceding sentence, if the taxpayer is married during any period of the taxable year, there shall be taken into account the combined adjusted gross income of the taxpayer and his spouse for such period.

[Sec. 214(e)]

(e) SPECIAL RULES. — For purposes of this section —

(1) MARRIED COUPLES MUST FILE JOINT RETURN. — If the taxpayer is married at the close of the taxable year, the deduction provided by subsection (a) shall be allowed only if the taxpayer and his spouse file a single return jointly for the taxable year.

(2) GAINFUL EMPLOYMENT REQUIREMENT. — If the taxpayer is married for any period during the taxable year, there shall be taken into account employment-related expenses incurred during any month of such period only if —

(A) both spouses are gainfully employed on a substantially full-time basis, or

(B) the spouse is a qualifying individual described in subsection (b)(1)(C).

(3) CERTAIN MARRIED INDIVIDUALS LIVING APART. — An individual who for the the taxable year would be treated as not married under section 143(b) if paragraph (1) of such section referred to any dependent, shall be treated as not married for such taxable year.

(4) PAYMENTS TO RELATED INDIVIDUALS. — No deduction shall be allowed under subsection (a) for any amount paid by the taxpayer to an individual bearing a relationship to the taxpayer described in paragraphs (1) through (8) of section 152(a) (relating to definition of dependent) or to a dependent described in paragraph (9) of such section.

(5) REDUCTION FOR CERTAIN PAYMENTS. — In the case of employment-related expenses incurred during any taxable year solely with respect to a qualifying individual (other than an individual who is also described in subsection (b)(1)(A)), the amount of such expenses which may be taken into account for purposes of this section shall (before the application of subsection (c)) be reduced —

(A) if such individual is described in subsection (b)(1)(B), by the amount by the which the sum of —

(i) such individual's adjusted gross income for such taxable year, and

(ii) the disability payments received by such individual during such year,

exceeds $750, or

(B) in the case of a qualifying individual described in subsection (b)(1)(C), by the amount of disability payments received by such individual during the taxable year.

For purposes of this paragraph, the term "disability payment" means a payment (other than a gift) which is made on account of the physical or mental condition of an individual and which is not included in gross income.

(f) REGULATIONS. — The Secretary or his delegate shall prescribe such regulations as may be necessary to carry out the purposes of this section.

STATUTORY COMMENT AND AMENDMENTS

STRENGTHENING THE FEDERAL TITLE I MIGRANT EDUCATION PROGRAM

Introduction

No precise figure exists for the number of migrant farm workers in the United States, but by any estimate the number is substantial.[1] These migratory workers travel principally along one of three major routes which start in the South and head north. One starts in Florida and continues up the East Coast; another begins in Texas and fans out through the middle of the Continent; the third originates in Texas and Southern California and travels north along the West Coast.[2] Most of the workers who travel over the first route are black and Puerto Rican, while the majority who move on the other two routes are Mexican-American.[3] Driven by the low wages or limited amount of work available locally, migrants travel because of economic necessity.[4] Their labor is welcome in agricultural areas where the local supply of workers is insufficient, particularly for brief periods of peak seasonal demand during the harvest.[5] Although the migrants' labor is essential,[6] their incomes are consistently below the poverty level.[7] In addition, migrants have received little benefit from governmental poverty and assistance programs.

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1 S. REP. No. 83, 91st Cong., 1st Sess. 4 (1969) [hereinafter cited as 1969 SUBCOMMITTEE REPORT], lists figures ranging from about 275,000 to 480,000 for the total number of migrant farm workers for each of the years 1949 to 1967. The SUBCOMMITTEE REPORT also says that "farmworkers and their families numbering more than 1 million" migrate from their home counties every year. *Id.* at 1.

2 *Id.* at 2; OFFICE OF EDUCATION, DEPT. OF HEALTH, EDUCATION, AND WELFARE, CHILDREN AT THE CROSSROADS 4-5 (1970) [hereinafter cited as CROSSROADS BOOKLET].

3 *Id.* at 4-5.

4 1969 SUBCOMMITTEE REPORT, *supra* note 1, at 5.

5 *Id.* at 1.

6 In all, migrant workers perform over nine percent of the nation's seasonal farmwork. *Id.* at 1.

7 CROSSROADS BOOKLET, *supra* note 2, at 1. "Their family income averages $1,400 a year and many of course make far less." *Id.*

> . . .[M]igrants have either been expressly excluded, or written out in actual practice, from almost all conventional citizen and worker benefits enacted by Federal and State law, including unemployment insurance, social security, workmen's compensation, wage payment and collection laws, and others. Residence requirements bar them from participation in the political process, and likewise, exclude migrants from receiving desperately needed help from public assistance programs, including welfare and food subsistence allowances.[8]

In short, migrants are one of the neediest minorities in America; yet they are among the least assisted.[9]

Migrant children bear the full weight of this deprivation.[10] Migrants generally travel as family groups,[11] and the children are frequently relied upon to make important contributions to their family's income.[12] While other children are in school, the children of migrant farmworkers are often out in the fields with their parents. In a 1965 report, the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare described the effect of these circumstances on the education of migrant children:

> Migratory farmworkers and their children have been called the most educationally deprived group in our Nation. With respect to the children, study after study has found well over half to be behind their proper school grade levels. Substantial percentages are retarded by 2 years or more. Dropout rates are predictably high.[13]

The low educational attainment of migratory children can be explained in part by the failure of many to attend school on a full-

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8 1969 SUBCOMMITTEE REPORT, *supra* note 1, at viii.

9 *Id.* at 24-40.

10 *See generally* R. COLES, *Uprooted Children: The Early Life of Migrant Farm Workers*, in THE MIGRANT SUBCULTURE, in *Hearings on the Migrant Subculture Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2nd Sess. 358-459 (1970); P. PORTER, CHILDREN OF THE HARVESTERS (1969). *See also* CALIF. STATE DEPT. OF EDUCATION, EDUCATION FOR FARM MIGRANT CHILDREN: REPORT ON THE SIX-STATE PROJECT FOR DEVELOPING STATE LEADERSHIP IN IMPROVING THE EDUCATIONAL OPPORTUNITIES OF FARM MIGRANT CHILDREN (1971).

11 1969 SUBCOMMITTEE REPORT, *supra* note 1, at 8-11.

12 *Id.* at 10-11; CROSSROADS BOOKLET, *supra* note 2, at 1.

13 S. REP. No. 155, 89th Cong., 1st Sess. 11 (1965) [hereinafter cited as 1965 SUBCOMMITTEE REPORT].

time basis during the regular school year and by the inability of local school systems to absorb the impact of the somewhat unpredictable seasonal influx of such children.[14] The root of the problem, however, may lie even deeper — in the basic conditions of migrancy and poverty. The culture of poverty and the sense of inferiority and helplessness it instills in children have been identified as prime factors in causing low educational achievement,[15] and the psychological syndromes associated with poverty have been clearly documented in migrant children.[16] The implication is that the ultimate solution to the problem of educating migrant children may have to begin with the removal of such children from the pattern of migrancy.

At the present time, however, the children remain in the migratory stream and must be dealt with where they are found. To be sure, preparing migrant children for departure from the migratory stream should be one of the major goals of migrant education programs. With the severe reduction expected by 1980 in the need for migrant agricultural labor, the migrant worker faces a nearly hopeless future.[17] But, the plight of the migrant child will be even more desperate unless special educational efforts to facilitate his assimilation into the non-migrant culture are made now.

Despite the traditional resistance of the states to federal involvement in education,[18] the necessity of federal action in the area of

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14 *Id.* at 11; FLORIDA STATE LEGISLATIVE COUNCIL AND LEGISLATIVE REFERENCE BUREAU, MIGRANT FARM LABOR IN FLORIDA: A SUMMARY OF RECENT STUDIES 38-39 (1961).

15 *See* S. BAILEY & E. MOSHER, ESEA-THE OFFICE OF EDUCATION ADMINISTERS A LAW 220 (1968) [hereinafter cited as BAILEY & MOSHER].

16 R. COLES, *The Migrant Farmer* (rev. ed. 1968), *cited in* 1969 SUBCOMMITTEE REPORT, *supra* note 1, at 14.

17 *See* 1969 SUBCOMMITTEE REPORT, *supra* note 1, at 72, 104-06.

18 Tradition, efficiency, or any of a number of other factors may lead to a conclusion that a particular governmental service is or is not an appropriate concern of the federal government. Thus, as of 1963, federal grants represented approximately 27% of the more than $11 billion spent by state and local governments for highways but less than 6% of the $24 billion which they spent for education, suggesting, on the one hand, traditional recognition of federal responsibility for interstate commerce and, on the other, traditional concern over federal control of education. The same conclusion is suggested by a comparison of the relative importance of these items in the federal budget: more than a third of all federal grants to state and local governments in 1965 were for highways, while little more than 5% was for education.

migrant education is clear. Education in America is usually organized on a local basis, each locality providing for the needs of its resident children. Migrant children, however, are rooted in no locality. The constant traveling of the migrant child, which takes him from one school district to the next without regard for the schedules of local schools, also serves to remove him from the special concern of the localities through which he passes. Providing special programs for transient pupils is a burden, and it is by no means clear that local and state agencies would be willing to bear that burden without federal assistance. Furthermore, the mobility of the migrant children necessitates coordination and cooperation among the state and local agencies providing migrant educational services. Unless there is sufficient coordination, the migrant child will have little opportunity for continuity in his education. Migrant children thus present a unique educational problem, "national in scope and interstate in nature," whose solution will require significant leadership and planning on a national level.[19]

In enacting title I[20] of the Elementary and Secondary Education Act (ESEA) of 1965,[21] which established a far-reaching program of categorical grants-in-aid to state educational agencies, Congress recognized for the first time the need for substantial federal in-

F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS: CASES—COMMENTS—QUESTIONS 985-86 (1970) (footnote omitted).

19 *See* NATIONAL COMMITTEE ON THE EDUCATION OF MIGRANT CHILDREN, WEDNESDAY'S CHILDREN: A REPORT ON PROGRAMS FUNDED UNDER THE MIGRANT AMENDMENT TO TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 5 (1971) [hereinafter cited as NATIONAL COMMITTEE STUDY].

20 20 U.S.C. § 241a *et seq.* (1970) [hereinafter cited as title I].

The success of title I programs in general has been questionable, and there exists an extensive literature criticizing title I projects and their administration. *See, e.g.*, BAILEY & MOSHER, *supra* note 15; Cohen & Van Geel, *Public Education*, in THE STATE AND THE POOR 222-49 (Barringer & Beer eds. 1970) [hereinafter cited as Cohen & Van Geel]; R. MARTIN & P. MCCLURE, TITLE I OF ESEA: IS IT HELPING POOR CHILDREN? (1969) [hereinafter cited as MARTIN & MCCLURE]; OFFICE OF EDUCATION, DEP'T OF HEALTH, EDUCATION AND WELFARE, EDUCATION OF THE DISADVANTAGED: AN EVALUATIVE REPORT ON TITLE I (1968); Yudof, GENERAL MEMORANDUM ON TITLE I, in A LITIGATION PACKET FOR TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 5-23 (1971) [hereinafter cited as Yudof]; Ginsburg & Wilensky, *Reforming Title I—A Study in Great Design*, 24 NAT'L TAX J. 235 (1971); Murphy, *Title I: Bureaucratic Politics and Poverty Politics*, INEQUALITY IN EDUCATION, 1971, at 9-15 [hereinafter cited as *Murphy Article I*]; Murphy, *Title I of ESEA: The Politics of Implementing Federal Education Reform*, 41 HARV. EDUCATIONAL REV. 35 (1971) [hereinafter cited as *Murphy Article II*]; Note, *Title I at the Operational Level*, 1971 L. & SOCIAL ORDER 324.

21 U.S.C. §§ 236-44, 331-32b, 821 *et seq.* (1970) [hereinafter cited as *ESEA*].

volvement in the attack on the educational disadvantages of children of low income families.[22] Although migrant children were eligible to participate in general title I programs,[23] it soon became apparent that such children would receive substantial benefits only if funds were expressly earmarked for them.[24] In response to this situation, Congress in 1966 passed an amendment to title I of the ESEA.[25] This amendment earmarked funds for special aid[26] to migrant education and became the major tool of federal involvement with the education of migant children.[27]

The purpose of this statutory comment is to examine the way in which these earmarked funds have been used and to suggest how their use in the future can be made more effective. Particular attention is paid to the administration of the programs and to the improvement of federal efforts in that area. Statutory recommendations are made, and amendments to the provisions of the ESEA are set forth with comments.

I. An Overview of the Title I Migrant Program

Beginning in 1967, allocations have been made in increasing amounts under the special migrant provisions of title I. Over 57.5 million dollars was spent in 1971[28] for over 1400 educational pro-

22 *See* Declaration of Policy, title I, *supra* note 20. Since 1965, more than seven billion dollars has been spent under title I. One and a half billion dollars was spent in fiscal year 1971 alone. Office of Education, Dep't of Health, Education, and Welfare, Commissioner's Annual Report 2, 11 (1971) [hereinafter cited as Commissioner's Annual Report].

23 Office of Education, Dep't of Health, Education, and Welfare, Questions and Answers: Migrant Children under ESEA Title I 12 (1971) [hereinafter cited as OE Booklet].

24 Interview with Cassandra Stockburger, Director of the National Committee on the Education of Migrant Children, in New York City, April 6, 1972.

25 20 U.S.C. §§ 241c(a)(6), 241e(c) (1970) (reprinted with proposed amendments *infra* at part V). *See* H.R. Rep. No. 1814, 89th Cong., 2d Sess. 10 (1966).

26 State and local funds for education are not to be reduced as a result of the existence of this title I money, which is to be used for special remedial projects, and not for the basic educational effort; this "comparability" requirement for maintenance of the level of state and local funds is set out in 20 U.S.C. § 241(e)(a)(3) (1970), as amplified by 45 C.F.R. §§ 116.17(h), 116.26, 116.45 (1972). *See also* guidelines 4.1 and 7.1 in Office of Education, Dep't of Health, Education, and Welfare, Title I ESEA Program Guides 11, 19 (1969).

27 It should be noted, however, that under title III-B of the Economic Opportunity Act, 42 U.S.C. § 2861 (1970), the federal educational effort on behalf of migrants is not insignificant. 1969 Subcommittee Report, supra note 1, at 67.

28 OE Booklet, *supra* note 23, at 4.

jects,[29] with 48 states participating in the program.[30] It is estimated that the amount of such expenditures in fiscal year 1972 will reach 72 million dollars.[31]

These funds are administered at the federal level by the Office of Education of the Department of Health, Education, and Welfare (HEW). The Office of Education channels these funds to state educational agencies which in turn distribute them to those agencies operating title I migrant projects at the local level.[32] These funds, however, are not distributed to the state educational agencies without strings attached. Before the Commissioner of Education may approve the application of a state educational agency for funds, he must determine, among other things, that ". . . payments will be used for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) which are designed to meet the special educational needs of migratory children of migratory agricultural workers . . . ."[33]

A "migratory child of a migratory agricultural worker" is defined as "a child who has moved with his family from one school district to another during the past year in order that a parent or other members of his immediate family may work in agriculture or related food-processing activities."[34] Under this definition, not all children of seasonal farmworkers qualify for title I migrant projects. Furthermore, the program is not directed at all children who frequently move from place to place, but only at the children of workers connected with agriculture.

Although the title I migrant program is directed primarily at children who are actually migrating with their parents, certain

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29 Interview with Vidal Rivera, Jr., Chief, Migrant Programs Branch, Office of Education, Washington, D.C., by telephone, Sept. 11, 1972.

30 S. REP. No. 346, 92d Cong., 1st Sess. 116 (1971) [hereinafter cited as SENATE REPORT ON S.659].

31 Interview with Patrick F. Hogan, Education Program Specialist, Migrant Programs Branch, Office of Education, Washington, D.C., by telephone, Sept. 19, 1972.

32 *See* 20 U.S.C. § 241c(a)(6) (1970); 45 C.F.R. § 116.3(f) (1972); OE BOOKLET, *supra* note 23, at 8.

33 20 U.S.C. § 241e(c)(1) (1970), *as amended by* Pub. L. No. 92-318, § 507(a), 86 Stat. 235 (June 23, 1972).

34 OE BOOKLET, *supra* note 23, at 4; Office of Education, Dep't of Health, Education, and Welfare, Memorandum to Chief State School Officers (January 13, 1972) (OE Reference: ESEA Title I DCE/P & P); *see also* 29 C.F.R. §§ 41.12-.14 (1972) for the definition of a "migrant worker."

"formerly migratory" children are eligible to participate in title I migrant projects. Such a child is permitted, with the agreement of his parents, to benefit from the title I migrant program for a period up to five years after he has ceased migrating.[35] "True migrants" are, however, to receive priority in being served by the program.[36]

To delineate the range of service available to these statutory beneficiaries, the Office of Education has defined the general purposes of the special title I migrant projects:

> To identify and meet the specific educational needs of migrant children through: remedial instruction; health, nutritional, and psychological services; cultural development; and prevocational training and counseling. Special attention in instructional programs is given to development of the language arts, including reading, speaking, and writing in both English and Spanish.[37]

In an effort to fulfill these purposes, title I migrant funds have been used in a wide variety of programs and in a number of different ways. The Office of Education has identified the following uses for migrant funds:

> Improving the educational program offered to migrant children through such techniques as bilingual instruction, remedial courses, and individualized education.
>
> Hiring the additional teachers, aides, counselors, and social workers needed to offer such a program.

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35 20 U.S.C. § 241e(c)(3) (1970); 45 C.F.R. § 116.1(cc) (1972). At present, while a "formerly migratory" child may be served in the projects, only the "true migrants" are counted for purposes of the allocation formula. However, Patrick F. Hogan felt strongly that funds for the formerly migrant child should, at least for a few years after he leaves the migratory stream, be allocated under the title I migrant program. Under the present system, efforts to get migrants to leave the stream are impeded, as even less may be done educationally for their children after their departure from the stream than before. Interview with Patrick F. Hogan, *supra* note 31. On the other hand, it was generally agreed by the participants in a symposium on rural-migrant education legislation held in Washington, D.C., April 19, 1972, that the issue of the formerly migrant child should be dealt with in a comprehensive bill on rural education. Other sources suggest that special educational services for the formerly migrant child should be provided through regular title I funds. *See* SENATE REPORT ON S. 659, *supra* note 30, at 117; S. REP. No. 634, 91st Cong., 2d Sess. 13 (1970).

36 Act of June 23, 1972, Pub. L. No. 92-318, § 507(c), 86 Stat. 235, *amending* 20 U.S.C. § 241e(c)(3) (1970).

37 OE BOOKLET, *supra* note 23, at 4.

> Providing recreational, cultural, and library services to the children.
>
> Training staff members to understand the needs and culture of the migrant child.
>
> Purchasing additional educational materials, including mobile classrooms to follow the children from camp to camp, bilingual course materials, art supplies, and industrial arts and prevocational equipment.[38]

Generally speaking, title I migrant funds may be used at any grade level through grade 12 or at any age level below 21 years.[39] Preschool projects are specifically encouraged by the statute,[40] and in practice about 85 percent of the funds has been spent on the preschool and elementary grades.[41] Special summer schools for migrant children have also been funded through the title I migrant provisions.[42]

Migrant funds are used not only for purely educational programs but also on a variety of ancillary programs. They have been spent on health and nutritional services, on activities designed to involve parents in the education of their children, and on various efforts to promote interstate cooperation and exchange of information.[43]

The following breakdown of expenditures for 1969 provides a general picture of the usage of title I migrant funds:

> Sixty-five and three tenths percent of the planned expenditures are allocated for instruction and instructional supplies. . . . Services in the areas of food, health, attendance, transportation, community services and student body activities represent nineteen and five tenths percent of the total planned expenditures. Therefore, eighty-four and eight tenths percent of the total planned expenditures of $35,347,361 are for instructional and ancillary services to the migrant child.[44]

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38 *Id.* at 14.

39 *Id.*at 4.

40 Act of June 23, 1972, Pub. L. No. 92-318, § 507 (a), 86 Stat. 235, *amending* 20 U.S.C. § 241e(c)(1) (1970).

41 OE BOOKLET, *supra* note 23, at 4.

42 NATIONAL COMMITTEE STUDY, *supra* note 19, at 16.

43 Mattera, *Migrant Education in the United States—Some Significant Developments*, in MIGRANT CHILDREN: THEIR EDUCATION 51-57 (S. Sunderlin ed. 1971).

44 OPERATIONS BRANCH, DIVISION OF COMPENSATORY EDUCATION, BUREAU OF ELE-

The rest of the funds were devoted to construction and other long-term fixed charges.[45]

II. Design of the Title I Migrant Program

Before federal standards can be enforced systematically, they must be articulated. Certain standards are implicit in the nature of the statute; others are explicitly spelled out in varying degrees of detail.[46] Where statutory standards are expressed in broad, general terms, the agency charged with the implementation of the statutory program must amplify the legislative standards through the issuance of regulations and guidelines.[47] The following federal standards relating to the title I migrant program are therefore drawn from both statutory and administrative sources:

> Federal funds are to be used for projects supplementing existing state and local efforts to educate migrant children. State and local funds for this purpose are to be maintained at the same level despite the availablity of the federal funds.[48]
>
> Projects must be of sufficient size, scope, and quality to give reasonable assurance of substantial progress for meeting the special needs of migrant children.[49]
>
> Federal expenditures for equipment and construction, as opposed to the actual provision of educational services, should be kept to a minimum.[50]

MENTARY AND SECONDARY EDUCATION, OFFICE OF EDUCATION, DEPT. OF HEALTH, EDUCATION, AND WELFARE, PROGRESS REPORT ON MIGRANT EDUCATIONAL PROGRAMS, 1st QUARTER FY 1969, 1 (1969).

45 Interview with Patrick F. Hogan, *supra* note 31.

46 Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 603 (1972) [hereinafter cited as Tomlinson & Mashaw].

47 *Id.* at 604, 610, 663-66; BAILEY & MOSHER, *supra* note 15, at 110-11.

48 *See* note 26, *supra*.

49 20 U.S.C. § 241e(a)(2) (1970); 45 C.F.R. § 116.18 (1972); Guidelines 4.2 and 4.7 in TITLE I ESEA PROGRAM GUIDE #44 at 12, 14 (issued Mar. 18, 1968). The guide is printed along with GUIDE #45A (issued July 31, 1969) in OFFICE OF EDUCATION, DEPT. OF HEALTH, EDUCATION, AND WELFARE, TITLE I ESEA PROGRAM GUIDES (Dec., 1969) [hereinafter cited as PROGRAM GUIDES].

50 Guidelines 5.6 and 5.7 in PROGRAM GUIDES, *supra* note 49, at 17.

> Consideration in staffing should be given to personnel such as paraprofessionals and volunteers, and in-service training should be specifically provided for.[51]
>
> Involvement in title I projects by the parents of the migrant children served should be specifically provided for.[52]
>
> The effectiveness of all projects is to be evaluated at least annually.[53]
>
> Information regarding projects must be distributed to educational professionals and to the public.[54]

State educational agencies and local projects which do not conform to these requirements should not receive federal funding. Non-conforming projects can, as a practical matter, be detected in several basic ways: (1) through analysis of funding applications, since such applications are accompanied with descriptions of plans for the coming year and reports of the programs for the past year; (2) by site visits and other evaluative techniques; and (3) by investigating complaints received from various sources about the functioning of the program.

Responsibility for implementing these federal standards in the 1400 local projects is, to a large degree, shared by the federal government and the state educational agencies. The respective administrative powers and responsibilities of the federal government and of state and local educational agencies are outlined in the current law. Subject to federal review, the states and their subdivisions are responsible for initiating projects, administering their operation, and evaluating their impact.[55] State educational agencies apply to the Office of Education for funding,[56] subject

51 20 U.S.C. § 241e(a)(12) (1970); Guidelines 5.1, 5.2 and 5.3 in PROGRAM GUIDES, *supra* note 49, at 14-16.

52 20 U.S.C. § 1231d (1970); 45 C.F.R. § 116.17(e) (1972); Guideline 5.4 in PROGRAM GUIDES, *supra* note 49, at 16.

53 20 U.S.C. § 241e(a)(6) (1970); 45 C.F.R. § 116.22 (1972); Guideline 6.1 in PROGRAM GUIDES, *supra* note 49, at 18.

54 20 U.S.C. § 241e(a)(8), (10) (1970); 45 C.F.R. § 116.17(n); Guideline 5.8 in PROGRAM GUIDES, *supra* note 49, at 18.

55 OE BOOKLET, *supra* note 23, at 6, 12.

56 20 U.S.C. § 241e(c)(1) (1970); 45 C.F.R. § 116.31(a) (1972).

to a statutory maximum which is set mechanically by a legislatively determined formula.[57] So long as the state educational agency complies with the requisite federal standards, it is entitled as a matter of right to its share of title I migrant funds up to the statutory maximum.[58] Should any state not apply for its full share of funds, the Commissioner of Education is authorized to allocate the remaining funds to areas of maximum need.[59]

A state's application must describe the way migrant projects will be operated locally, whether by the state educational agency directly or through a private agency or local educational agency.[60] In practice, most states grant funds to local educational agencies to run the projects.[61] Where local agencies are employed, they must submit applications for funding to the state educational agency for approval, according to criteria set by the federal government,[62] and must provide the state agency with annual reports for review.[63] In their applications for funding, the state educational agencies must, in turn, give assurance that each approved local project complies with the relevant title I requirements;[64] that they will adopt such fiscal control and fund accounting procedures as are necessary to proper disbursement of federal funds;[65] and that

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57 20 U.S.C. § 241c(a)(6) (1970); *see also* 45 C.F.R. § 116.3(f) (1972).

58 20 U.S.C. §§ 241c(a)(6), 241e(c)(1) (1970); *see also* 45 C.F.R. § 116.3(f) (1972).

59 20 U.S.C. § 241c(a)(6) (1970).

60 20 U.S.C. § 241e(c)(1) (1970); 45 C.F.R. § 116.17(k) (1972); *see also* OE BOOKLET, *supra* note 23, at 8.

61 NATIONAL COMMITTEE STUDY, *supra* note 19, at 8. Five states have, at some point, experimented with programs that did not involve the local educational agencies. Experience has shown programs involving these agencies to be more desirable on several grounds. Direct approaches not involving local educational agencies seem more expensive. It is also hard to find reputable private agencies in this area; programs in one state went bankrupt when the private contractor mismanaged the funds. The local educational agencies are more likely to have both the financial integrity and the teaching expertise needed. In addition, the local agencies develop a stake in the program; hopefully, they will become involved in the problems of migrant children and gradually develop a sense of responsibility for them. Such a sense of responsibility could provide the impetus for soliciting state aid in this area. Interview with Patrick F. Hogan, Education Program Specialist, Migrant Programs Branch, Office of Education, Washington, D.C., by telephone, March 24, 1972.

62 45 C.F.R. § 116.34 (1972).

63 45 C.F.R. § 116.23 (1972).

64 20 U.S.C. § 241f(a)(1) (1970); 45 C.F.R. § 116.31(c) (1972).

65 20 U.S.C. § 241f(a)(3) (1970).

they will furnish reports, as reasonably required, to the Commissioner of Education for review.[66]

While the states have a role in seeing that federal standards are met,[67] the Commissioner has the ultimate responsibilty for enforcing these substantive federal requirements. Theoretically, he has ample resources for determining whether such requirments are being met and for helping states to meet them. The Office of Education is authorized to receive money for administering the programs within its jurisdiction,[68] and a substantial sum is specifically allocated for use in program planning and evaluating.[69] The Commissioner is also authorized to provide state educational agencies a broad range of advice and technical assistance if they request it.[70]

If it is found that one or more of the migrant projects in a state do not meet the federal standards, then several sanctions in the current law may be applied after the state has had reasonable notice and opportunity for a hearing. The Commissioner may reject the state's next application for funding.[71] In extreme cases,

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66 *Id.*; 45 C.F.R. § 116.31(g) (1972).

67 The supervisory operations and coordinating activities of the state educational agencies will not be considered in detail in this statutory comment.

The state directors for the title I migrant projects meet in closed session for several days before each yearly National Conference of Migrant Educators, as well as holding their own annual meeting at another time. In addition, there is frequent interaction between directors from different states at various regional workshops, and the directors frequently visit the other projects on an informal basis. Interview with Patrick F. Hogan, *supra* note 31.

On the other hand, the appraisal by Cassandra Stockburger of the efforts of the directors was that they had "very slight" impact, in general, in bringing about more efficient projects and a critical interchange of ideas in the field. The chief problem is reaching some consensus on how to approach migrant education. Ms. Stockburger points out that it took three years for the state directors to formulate and agree upon a rather broadly stated set of proposed national goals for migrant education. Those goals are contained in a two-page mimeograph distributed at the 1971 National Conference of Migrant Educators. Interview with Cassandra Stockburger, director of the National Committee on the Education of Migrant Children, by telephone, Sept. 19, 1972.

For a discussion of the role of a state agency in the general title I design, see Cohen & Van Geel, *supra* note 20, at 229-35; *Murphy Article II*, *supra* note 20, at 52 ff.

68 20 U.S.C. § 1221(c) (1970).

69 *Id.*, § 1222(a).

70 *Id.*, § 1231c.

71 *Id.*, § 241e(c)(1); 45 C.F.R. § 116.51 (1972). The Commissioner's discretion in using this sanction as a means for overseeing the quality of local projects and

he may make alternative arrangements within the state to provide for migrant education, thus by-passing the state educational agency altogether.[72] Where substantial noncompliance is involved, funds for a state's current title I migrant program may be withheld, or the state may be ordered not to pass on funds from the program to particular offending local agencies.[73] In addition, a suit may be brought to recover funds previously paid to the state for the projects in question.[74]

III. Evaluations to Date of the Title I Migrant Program

To date, the Office of Education has not conducted a comprehensive evaluation of the title I migrant program.[75] From October,

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forcing them up to a certain standard may, however, be somewhat limited by the terms of 20 U.S.C. § 1232a (1970):

> No provision of the . . . Elementary and Secondary Education Act of 1965 . . . shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

72 20 U.S.C. § 241e(c)(2) (1970). How effective a sanction this section actually represents is unclear in the light of the difficulty in finding a suitable agency or group to run the particular project or state program well, without recourse to the expertise of the state educational agency or local educational agency or both. *See* note 61, *supra*.

73 20 U.S.C. § 241j (1970); C.F.R. § 116.52 (1972).

74 See 45 C.F.R. § 116. 31 (1971).

> Suits for injunctive relief are a potentially effective sanction for enforcing federal standards in grant-in-aid programs. Grantee officials are likely to respect any decree issued by a court ordering them to comply with federal standards, and if they do not obey such a decree, they may be held in contempt of court.
>
> The legal basis for enforcement suits of this type is clearly established. . . . [The] interest [of the United States] is a contractual one. Therefore, "the acceptance by the recipient of the grant to which the conditions and stipulations are attached creates an obligation to perform the conditions on the part of the recipient."

Tomlinson & Mashaw, *supra* note 46, at 681 (footnotes omitted).

75 Congress has responded to the need for a thorough evaluation of the title I migrant program by requiring the Commissioner to conduct a study of the operation of the program evaluating its effectiveness and to submit a report to Congress by December 31, 1973. Act of June 23, 1972, Pub. L. No. 92-318, § 507(c), 86 Stat. 235; *see* S. Rep. No. 346, 92d Cong., 1st Sess. 116 (1971).

1969, through October, 1970, however, the National Committee on the Education of Migrant Children,[76] with funding from the Ford Foundation, attempted to monitor title I migrant projects across the nation in order to evaluate their success in meeting the special educational needs of the children involved. The Committee's report was discouraging; in the preface its authors announce, "We regret to add yet another to a growing list of failures in the public schools."[77] While the Committee did not find that the program was a total failure, it did conclude that as constituted and administered the program was inadequate. The Committee singled out the following types of failures as prevalent at the local levels: non-participation of eligible children;[78] inadequate staffing and lack of appropriate in-service training opportunities;[79] absence of educational planning and of individualized instruction;[80] deficient health and day care services;[81] and insufficient parental involvement in project planning, implementation, and evaluation.[82]

An earlier and less comprehensive Office of Education study based upon site visits to migrant programs in 30 counties in the states of Arizona, California, Georgia, Florida, New Mexico, and Texas reached similar, though less negatively cast, findings.[83] The researchers arrived at the following conclusions:

> Major strengths of the observed programs included a high percentage of bilingual staffs, assimilation of migrant children into school activities, and good vocational programs. Major weaknesses included a shortage of qualified teachers, a lack of definition of the migrant child, and generally inadequate materials. It was also observed that methods of recruitment

76 NATIONAL COMMITTEE STUDY, *supra* note 19, at iii, 1-4. The National Committee on the Education of Migrant Children is a private, non-profit organization. It operates as a program division of the National Child Labor Committee which was founded in 1904 to oppose the exploitation of children in industry and agriculture.

77 *Id.* at iii.

78 *Id.* at 23-27, 111.

79 *Id.* at 33-50, 111-12.

80 *Id.* at 51-71, 112.

81 *Id.* at 77-94, 113-14.

82 *Id.* at 95-99, 114.

83 Office of Education, Dept. of Health, Education, and Welfare, The Direction of Migrant Education as Revealed by Site Visits in Selected Counties of Six States, (1968) (Educational Resources Information Center, Education Document 031 354).

> of migrant school-aged children into schools varied both within and between states. In addition, very few examples of curriculum modification were observed, resulting in teachers relying primarily upon relating textbook materials to experiences of the migrant child.[84]

Generally, it is easier to determine whether or not the local agencies have made the proper inputs than to measure the quality of the results they are achieving.[85] Although local educational agencies attempt to evaluate the impact of their programs on the children involved, measurements in many areas are difficult to make. How, for example, can it be determined whether or not the program is preparing the migrant child for life outside the migrant stream? Although it is beyond the scope of this statutory comment to make such qualitative output evaluations, means of improving input evaluation and enforcing input standards are suggested. With this analysis, better use may be made of the resources now being devoted to title I migrant programs.

IV. The Role of Federal Administration in the Title I Migrant Program

A. *The Need for Stronger Federal Administration*

The federal administrative agency has a central role to play in developing the title I migrant program. That role is to translate a congressional authorization of grant-in-aid funds into a coherent, unified program capable of achieving the purposes for which Congress created it. This role requires more than a passive rubber-stamping of applications and mechanical distribution of funds by a statutory formula. The Office of Education can and should play a more creative role:

> The role of the central headquarters in a collaborative system is indispensable in many ways. It includes the research that individuals, states and localities could not do by themselves or would do only at the cost of much duplication. It goes beyond the valuable contribution of the central government as a clearing house of experience. It provides the guiding norms

84 *Id.* at unnumbered Document Resume page.

85 Tomlinson & Mashaw, *supra* note 46, at 606-07.

> that, fusing the national and local objectives, afford a flexible basis for regional supervision.[86]

The lack of "guiding norms" for the ESEA migrant program has been perceived at all levels of that program. The lack of such a philosophy has been detected at the local level by the authors of the National Committee Study:

> In many of the migrant education projects visited, consultants felt the lack of any educational plan. They often reported that a listing of educational techniques or the repetition of currently popular educational phrases was being substituted for clearly defined program objectives and components.[87]

The Senate Subcommittee on Migratory Labor likewise determined that ". . . not enough has been done to carve out an educational methodology, or a conceptual framework, for migrant children. . . . *The Migrant Unit of the U.S. Office of Education must take the lead in conducting a nationwide discussion of the underlying philosophy of migrant education.*"[88]

This search for an appropriate educational philosophy — the attempt at doing some amount of national planning in this area — does not imply that facile solutions are available. The Office of Education has cautioned that no magic key exists for formulating an educational strategy to cope with the problem of educating migrants:

> Educating migrant children is a massive undertaking. Anyone looking for some simple nationwide system, some easy formula for getting the youths to school and gaining their confidence, will be disappointed. The crops are different and so, to some extent, are the people and their needs. There are no quick answers to migrant education. . .[89]

The ideal strategy for dealing with the educationally disadvantaged is still ill-defined.[90] Furthermore, local needs vary from place to

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86 A. MACMAHON, ADMINISTERING FEDERALISM IN A DEMOCRACY 92 (1972) [hereinafter cited as MACMAHON]; *see also* BAILEY & MOSHER, *supra* note 15, at 211-18.

87 NATIONAL COMMITTEE STUDY, *supra* note 19, at 51.

88 1969 SUBCOMMITTEE REPORT, *supra* note 1, at 75.

89 CROSSROADS BOOKLET, *supra* note 2, at 41.

90 *See* BAILEY & MOSHER, *supra* note 15, at 222.

place, and project design must take these local needs into account.[91] Accordingly, different projects will of necessity take different approaches in the mix of services they provide migrant children.

On the other hand, the federal administrative agency should introduce the necessary critical element into this scheme by closely monitoring the success of the individual projects and actively directing feedback to all involved. Support should be withdrawn from programs that are not demonstrably successful in serving the special needs of the particular migrant children involved. Yet efforts in the area of migrant education should not be directed toward attempting to formulate a uniform national curriculum, which the federal government would then impose upon all the states participating in the title I migrant program. Rather, a main goal of active federal involvement should be to establish underlying principles and to encourage that the diversity of local approaches continues so that the full value of such experimentation is realized.

The federal administrative agency, besides being responsible for formulating unifying principles for the title I migrant program, is also particularly capable of coordinating various types of interstate efforts. The Office of Education should exercise leadership in bringing states together to coordinate services and projects so that continuity of education in enhanced.[92] Better communication is needed among the states as to the nature of their respective migrant projects and curricula,[93] and the federal administration can help facilitate the flow of such information. More effective ways of evaluating overall project success should also be developed at the federal level, utilizing the experience of the states in this area.

In addition, the federal administrative agency should play an active role in coordinating different types of federal programs for migrant children. Migrant children are currently eligible to receive the benefits of various federal and state[94] assistance programs be-

91 For some concrete examples of title I migrant projects, *see* CROSSROADS BOOKLET, *supra* note 2, 31-37, 41-48.

92 *See* H.R. REP. No. 1814, 89th Cong., 2d Sess. 10 (1966).

93 1969 SUBCOMMITTEE REPORT, *supra* note 1, at 76.

94 In addition to qualifying for aid, either directly or indirectly, from federal programs, migrant children receive educational services from their "home-base" states — Florida, Texas, and California, for the most part — during the portions

sides the special title I migrant program. Frequently, the services provided by these various programs overlap. For example, funding for special migrant projects, or aspects thereof, is available under the general title I provisions[95] and under title III-B of the Economic Opportunity Act;[96] funding for health care is available under the Migrant Health Act.[97] Other federal resources may also be available to help, directly or indirectly, in the task of migrant education.[98] Given these different sources of funds, coordination by the state and local title I migrant administrators becomes an exceptionally complicated task. Despite the difficulties inherent in attempting to coordinate programs, such coordination is essential if funds are to be deployed in the most efficient manner. While a full scale discussion of the resolution of coordination problems is beyond the scope of this statutory comment, it should be noted that the federal administration should do everything in its power to simplify the task of coordination at the state and local levels and to provide assistance to local agencies having coordination difficulties.

B. *Causes of the Inadequacy of Present Federal Administrative Efforts*

The federal government has not been sufficiently forceful in administering the title I migrant program.[99] The Office of Educa-

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of the year when they are not in transit in the migratory stream. Several states, — Texas, New York, Colorado, and New Jersey — have also set up their own programs to help deal with the problem of the education of migrant children. Interview with Vidal Rivera, Jr., *supra* note 29.

95 20 U.S.C. §§ 241a *et seq.* (1970).

96 42 U.S.C. § 2861 (1970).

97 42 U.S.C. § 242h (1970).

98 *E.g.*, Title II of the ESEA, 20 U.S.C. §§ 821 *et. seq.* (1970) (school library resources, textbooks, and other instructional materials); Title III of the ESEA, 20 U.S.C. §§ 841 *et seq.* (1970) (supplementary educational centers and services); Title IV of the ESEA, 20 U.S.C. §§ 331 *et seq.* (1970) (educational research and training); Title V of the ESEA, 20 U.S.C. §§ 861 *et seq.* (1970) (grants to strengthen state departments of education); Title VII of the ESEA, 20 U.S.C. §§ 880b *et. seq.* (1970) (bilingual education programs); Education Professions Development Act, 20 U.S.C. §§ 1091 *et seq.* (1970), *as amended* Act of June 23, 1972, Pub. L. No. 92-318, 86 Stat. 235 (Teacher Corps, grants for advanced training); Vocational Education Act, 20 U.S.C. §§ 1241 *et. seq.* 1970); Child Nutrition Act, 42 U.S.C. §§ 1771 *et seq.* (1970) (school breakfast program); National School Lunch Act, 42 U.S.C. §§ 1751 *et seq.* (1970).

99 *See* NATIONAL COMMITTEE STUDY, *supra* note 19, at 5, 115; 1969 SUBCOMMITTEE REPORT, *supra* note 1, at 73-74.

tion has not yet even established satisfactory means of acquiring information about the projects; the primary source of such information is still the self-evaluation reports submitted annually by the state educational agencies. The authors of the National Committee Study concluded, "In a word, the USOE is performing a funding function but has little knowledge of how the funds thus granted are being spent."[100]

A major reason for the lack of vigorous federal involvement in the administration of title I migrant projects lies simply in the dearth of organizational and monetary resources devoted to the effort. The administrative body directly responsible for the ESEA migrant program is the Migrant Programs Branch of the Office of Education. The Branch has only seven of the ninety Office of Education professionals assigned to work on title I programs and is low in the HEW organizational hierarchy.[101] As a result of its low status, the Branch is in a poor position to secure for itself the funds and manpower necessary to play a more creative role in the program it administers.[102] Unlike grant-in-aid funds, administrative funds are not allocated by Congress on a specific program basis, but rather are given in a lump sum to HEW and then filter down to the Department's component agencies.[103] Thus, in order to get funds for carrying out such essential tasks as conducting site visits to projects, the Migrant Programs Branch must compete for funds within the massive HEW hierarchy. The size of the Branch's operating budget to date indicates that the Branch has not fared well in such competition.[104]

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100 NATIONAL COMMITTEE STUDY, *supra* note 19, at 6.

101 The Migrant Programs Branch is part of the Division of Compensatory Education of the Bureau of Elementary and Secondary Education in the Office of Education of the Department of Health, Education and Welfare. The Department consists of three offices; the Office of Education is divided into seven bureaus. The Bureau of Elementary and Secondary Education comprises five divisions, and the Division of Compensatory Education is divided into eight branches. Interview with Patrick F. Hogan, Education Program Specialist, Migrant Programs Branch, Office of Education, Washington, D.C., by telephone, Oct. 7, 1971; letter from Boren Chertkov, Counsel to the Subcommittee on Migratory Labor of the Senate Committee on Labor and Welfare, to the author, July 30, 1971.

102 NATIONAL COMMITTEE STUDY, *supra* note 19, at 6-7.

103 Interview with Patrick F. Hogan, *supra* note 101.

104 Thus, of the approximately $40,000 the Branch requested for fiscal year 1972 for travel expenditures and other operating expenses, the Branch was initially told it would receive $10,000, although later reallocations of funds from other

Given its inadequate resources, the Branch has been led to adopt the role of being "mainly a clearing house for state programs," approving applications, supplying funds, and circulating the ideas of state educators.[105] Although it has been asserted that a large percentage of existing title I migrant projects fail in significant respects to comply with federal standards,[106] no state has ever had its federal funds cut off because of noncompliance on the part of an ongoing project or projects.[107] Such enforcement efforts as the Branch has undertaken have, for the most part, been infrequent and on an informal level.[108]

Apart from staffing and budgetary considerations, there are other reasons why the migrant education program is inadequately administered. Federal passivity in the administration of educational grants-in-aid is not confined to the migrant projects; it has been frequently noted as characterizing the overall title I program[109] and federal grant-in-aid programs in general.[110] Weak administration of grant-in-aid programs may in part be the result of political and bureaucratic realities which a federal administrative agency typically faces in dealing with the states.[111] Funds are allocated to the states by a mechanical formula;[112] such an automatic, nonflexible appropriation device leaves federal officials virtually without leverage in bargaining for program improvement.[113] In addition, the basic remedy in the title I area is the fund cut-off.[114] If it is applied, the program-beneficiaries are hurt most, the federal bureaucrats are left with no program to administer, and the recalcitrant state loses the least.[115] Thus, the federal administrative agency is inherently limited in how it can deal with the states.

Branches in the Division have allowed it to spend about $25,000. Interview with Vidal Rivera, Jr., *supra* note 29.

105 Interview with Patrick F. Hogan, *supra* note 61; *see also* CROSSROADS BOOKLET, *supra* note 2, at 23.

106 Interview with Cassandra Stockburger, *supra* note 24.

107 *Id.*; interview with Patrick F. Hogan, *supra* note 61.

108 Interview with Patrick F. Hogan, *supra* note 61.

109 *See* S. REP. No. 634, 91st Cong., 2d Sess. 8 (1970).

110 *See* MACMAHON, *supra* note 86, at 94-95.

111 *See generally Murphy Article I*, *supra* note 20; *Murphy Article II*, *supra* note 20; Tomlinson & Mashaw, *supra* note 46, at 629.

112 *See* 20 U.S.C. § 241c(a)(b) (1970).

113 *Murphy Article I*, *supra* note 20, at 10-11.

114 *See* 20 U.S.C. § 241e(c)(2) (1970).

115 *See generally* Tomlinson & Mashaw, *supra* note 46, at 618-20.

> Since USOE's influence comes mostly from the power of persuasion . . . it is absolutely essential that USOE maintain cordial relations with the states. Under these bargaining conditions, the states are in a position to exact a price for their good will. . . . Thus, the agency's service orientation and deference to local officials can be understood in part as rational behavior, designed to achieve the greatest possible influence from a weak bargaining position. USOE's problem, then, is not simply the lack of will or lack of staff, but lack of political muscle.[116]

Lack of participation by the program beneficiaries accentuates the lack of federal administrative vigor. Low pressure by the beneficiaries allows other groups such as state educational agencies to be lax in seeing that the program is most directly aimed at the migrant children who are supposed to benefit from it. In fairness, it is necessary to point out that beneficiaries of federal grant-in-aid programs have no effective way to trigger HEW review of state compliance with federal standards.[117] Existing complaint procedures do not provide a publicized and convenient forum for resolving compliance problems. While agencies do respond to complaints and complainants, the process is too often haphazard.

The way federal funds under this title are allocated by a state to areas within the state is another cause of weak federal administration. The Commissioner must rely primarily on the judgment of the states in allocating funds within their borders. Unless a massive federal agency is established, the Office of Education is in no position to even locate these migratory children, let alone make informed judgments on the relative needs of these children or of the areas in which they reside. In short, under the present system, the federal government has virtually no role in assuring that the various needs of migrant children in different areas within a state are adequately met. That such a situation is unsatisfactory is evident from a finding in the National Committee Study of an "extraordinary range in per-pupil expenditures" within the projects studied: "There was *no* pattern relating per-pupil expenditures to location or size of project, length of time migrant

116 *Murphy Article I, supra* note 20, at 11-12.

117 *See* Tomlinson & Mashaw, *supra* note 46, at 637-56. In the related area of welfare hearings, the Supreme Court has held that beneficiaries of the federal program have no way to trigger HEW review of state compliance. Rosado v. Wyman, 397 U.S. 397 (1970).

children were served, grade placement patterns, number of high school graduates, or number of migrant children receiving health services."[118]

In response to the above situation the following recommendation was made:

> Present allocation procedures must be changed. Financial support should be provided on the basis of pupil needs, providing higher per-pupil expenditures where needs are greater and less where needs are less. Assistance formulas should consider not only the concentration of pupils in a project area, but the financial ability of the area to provide for the needs of pupils. The federal allocation procedures must apply not only to state grants, but also to the distribution of funds by the state to local projects.[119]

An effort to improve the intrastate allocation process was recently undertaken by the Senate, which would have amended title I to provide that the Commissioner of Education should establish criteria that would link the distribution of funds to a consideration of the areas and educational agencies within the state which have the highest concentrations of migrant children. However, the House disagreed and the provision was deleted in conference "with the understanding that the Commissioner will study the extent to which children of migratory workers are provided for under title I. . . ."[120] Accordingly, this allocation problem remains unresolved at the present time.

V. Suggested Legislative Changes in the Title I Migrant Program

The most direct way to increase federal initiative in the area of special educational projects for migrant children is simply to provide by legislation for added duties and responsibilities for the Branch within the existing title I context. Such a strategy of incremental change involving a relatively conservative modification of

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118 National Committee Study, *supra* note 19, at 21.

119 *Id.* at 115-16.

120 S. Rep. No. 798, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. and Admin. News, 2399.

current law, appears to be the most fruitful approach at present in light of the limited political power of migrants.[121] The following amendments to title I seek to satisfy many of the criticisms leveled at the current program.[122]

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121 Another way to upgrade the status of the Migrant Programs Branch might be to remove the current education program from title I and to create, probably as an added title to the ESEA, a new program for migrant children with separate funding and authorization. Interview with Patrick F. Hogan, *supra* note 101. The new branch (or division, as it might become after the above change) would be likely to receive more HEW administrative funds than at present, and the number of professionals working on migrant education in the Office of Education would probably be increased. In addition, separate regulations and guidelines could be written which would be specially geared to the administration of migrant projects.

From a conceptual point of view, such an arrangement is attractive because it would create direct accountability in Congress for the support of migrants. Funding would be expressly allocated for special educational projects for migrant children, rather than, as at present, coming to the program as a part of allocations for title I projects as a whole.

Practically speaking, however, such isolation of the migrant program seems inadvisable at the present time because it may well result in the allocation of less money than is presently available for educational projects for migrant children. In the battle for appropriations a group should attempt separateness in program funding only on the basis of political strength, and migrants conspicuously lack the requisite political strength at the present time. Interview with Cassandra Stockburger, *supra* note 24. However, in the future, as migrants organize more effectively and elicit increasing responsiveness from the political system an approach such as this may become more feasible.

122 The provision of a raised administrative budget of $60,000 to $65,000 and the doubling of the Branch's staff from seven to fourteen title I migrant professionals (at an average salary cost per professional of about $14,000 if the increase is spread among individuals of different salary grades) would be required to manage the title I migrant program if all the legislative changes described *infra* were made. *See* Interview with Vidal Rivera, Jr., *supra* note 29.

PROPOSED AMENDMENTS TO THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965

[New matter is shown in italics; matter to be omitted is lined through.]

TITLE I — FINANCIAL ASSISTANCE TO LOCAL EDUCATIONAL AGENCIES FOR THE EDUCATION OF CHILDREN OF LOW-INCOME FAMILIES

* * * *

PART A — BASIC GRANTS

GRANTS — AMOUNT AND ELIGIBILITY

SEC. 103. (a). . .

* * * *

(6) A State education agency which has submitted and had approved an application under section 141(c) for any fiscal year shall be entitled to receive a grant for that year under this part, based on the number of migratory children of migratory agriculture workers to be served, for establishing or improving programs for such children. The maximum total of grants which may be made available for use in any State for any fiscal year shall be an amount equal to the Federal percentage of the average per pupil expenditure in that State or, if greater, in the United States multiplied by (A) the estimated number of such migratory children aged five to seventeen, inclusive, who reside in the State full time, and (B) the full-time equivalent of the estimated number of such migratory children aged five to seventeen, inclusive, who reside in the State part time, as determined by the Commissioner in accordance with regulations, except that if, in the case of any State, such amount exceeds the amount required under the preceding sentence and under section 141(c)~~(2)~~*(5)*, the Commissioner shall allocate such excess, to the extent necessary, to other States whose

maximum total of grants under this sentence would otherwise be insufficient for all such children to be served in such other States. *The Commissioner shall by regulation establish standards for the allocation within each State of funds for which a State educational agency is entitled under this paragraph. Such standards shall require that a State, in making allocations of funds under this paragraph, take into account (A) the concentration of migratory children of migratory agriculture workers within each school district of the State, (B) the needs of such migrant children within each school district of the State for special programs of education, and (C) the financial abilities of each school district within each State to provide such special programs of education.*

COMMENT: This section would require the Migrant Programs Branch to draft and implement regulations to insure that the states allocate the federal funds from this title to those areas within each state with the highest migrant needs. These needs are to be measured in terms of the numerical concentration of migrant children a generalized right of testimonial privacy,[55] nor is it a right to deny cooperation to the government. To be sure, a witness has an interest in avoiding public disgrace or infamy, but this interest is

SEC. 141. . . .

(c)(1) A State educational agency or a combination of such agencies may apply for a grant for any fiscal year under this title to establish or improve, either directly or through local educational agencies, programs of education for migratory children of migratory agricultural workers. The Commissioner may approve such an application only upon his determination—

(A) that payments will be used for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) which are designed to meet the special educational needs of migratory children of migratory agricultural workers, and to coordinate these programs and projects with similar programs and projects in other States, including the transmittal of pertinent information with respect to school records of such children;

(B) that in planning and carrying out programs and projects

there has been and will be appropriate coordination with *all Federal and State programs under which benefits are provided to the migratory children of migratory agricultural workers, including but not limited to* programs administered under *titles I, II, III, IV, V and VII of the Elementary and Secondary Education Act of 1965;* part B of title III of the Economic Opportunity Act of 1964; *the Education Professions Development Act; the Vocational Education Act; the Migrant Health Act; the Child Nutrition Act; and the National School Lunch Act;* ~~and~~

(C) that, effective after June 30, 1972, in planning and carrying out programs and projects, there has been adequate assurance that provision will be made for the preschool educational needs of migratory children of migratory agricultural workers, whenever such agency determines that compliance with this clause will not detract from the operation of programs and projects described in clause (A) of this paragraph after considering the funds available for this purpose;

(D) that in planning and carrying out programs and projects persons broadly representative of all elements of the population whose children are served and others in the community knowledgeable about the needs of such children have been given an opportunity to participate in the implementation and evaluation of such programs; and

~~(C)~~*(E)* that such programs and projects will be administered and carried out in a manner consistent with the basic objectives of clauses (1)(B) and (2) through (12) of subsection (a), and of section 142.

The Commissioner shall not finally disapprove an application of a State educational agency under this paragraph except after reasonable notice and opportunity for a hearing to the State educational agency.

COMMENT: Two adjustments are made in the application process.

Coordination with other Federal and State programs. Section 141(c)(1)(B) is revised to expand the requirement that title I

migrant projects be coordinated with each other as well as with related activities under title III-B of the Economic Opportunity Act. The amended coordination provision would encompass all relevant state and federal programs which can benefit migrant children.

Community Action. Section 141(c)(1)(D) is added to require the Commissioner, before approving a state application for title I migrant funds, to determine that the projects covered in the application have been developed and will be implemented and evaluated in consultation with people representative of the parents whose children are served by the projects and of others knowledgable about the needs of children of migrants. The language used in drafting this provision has been adapted from that of the Migrant Health Act[123] in which successful constituent participation has been generated recently.[124] The provision should lead to more involvement of the constituents in the migrant projects than is required currently by law[125] and regulations[126] which are not specifically directed to parents of migrant children, but rather to parents of low-income children in the general title I program.

[SEC. 141(c) . . .]

(2) The Commissioner, or his delegate, shall visit yearly at least 15% of the educational projects for migratory children of migratory agricultural workers, which projects are receiving funds under the provisions of this subsection. At least one project in each of the States receiving funds under this subsection shall be visited yearly. Such visits shall be for the purpose of evaluating whether the projects meet the special educational needs of such children.

COMMENT: One of the major problems in federal administration of a grant-in-aid program is the difficulty of arriving at suitable objective measures of evaluating program success.[127] To insure

123 42 U.S.C. § 242h (1970).

124 Interview with Jerry Berman, Center for Community Change, Washington, D.C., at symposium on rural-migrant education legislation held in Washington, D.C., April 29, 1972.

125 20 U.S.C. § 1231d (1970).

126 45 C.F.R. § 116.17(o) (1972).

127 *See* Tomlinson & Mashaw, *supra* note 46, at 606-7.

better evaluation of all projects — whether or not funded under the new special grant provisions below — and to increase federal experience with local situations in general, the bill would provide that fifteen percent of the local projects and all of the states funded under the title I migrant program be visited each year by the Commissioner or his delegate. Site visits and subjective evaluation by a federal expert[128] familiar with the goals of the program frequently represent the most effective means of insuring project compliance with federal standards[129] and judging overall project success.[130] At present, discretionary funds for such visits are available in the Office of Education; however, the Migrant Programs Branch is of such low status in the hierarchy that it rarely obtains funds from this source and therefore does not conduct many site visits now.[131]

[SEC. 141(c) . . .]

(3) Any person or organization, complaining that a program or project of education of migratory children of migratory agricultural workers is in substantial noncompliance with the provisions of this section, may apply to the Commissioner by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commissioner to the educational agency or agencies involved. The educational agency or agencies involved shall satisfy the complaint or answer it in writing within a reasonable time of receipt of the complaint. If the educational agency does not or agencies involved do not satisfy the complaint within the time specified or if there shall appear to be any reasonable ground for investigating said complaint, it shall be the

128 20 U.S.C. § 1231 (1970) provides that the Commissioner can delegate certain of his functions — including those called for here — to any officer or employee of the Office of Education. It is hoped that in cases in which such delegation does take place, it will be a professional in the Migrant Programs Branch who will make the visit in question on the Commissioner's behalf.

129 Tomlinson & Mashaw, *supra* note 46, at 624.

130 Interview with Cassandra Stockburger, *supra* note 24.

For an example of the types of information that can be gathered through site visits and the kinds of evaluations that can be made, see E. REISER, THE DIRECTION OF MIGRANT EDUCATION AS REVEALED BY SITE VISITS IN SELECTED COUNTIES OF SIX STATES (1968).

131 Interview with Patrick F. Hogan, *supra* note 101. "Very few" site visitations have been carried out by the migrant Programs Branch. 1969 SUBCOMMITTEE REPORT, *supra* note 1, at 74.

duty of the Commissioner to investigate the matters complained of in such a manner and by such means as he shall deem just and proper. If such investigation does not indicate a substantial failure to comply with the provisions of this section, the Commissioner or his designee shall so inform the recipient and the matter shall be resolved by informal means whenever possible. If the investigation does indicate substantial noncompliance, and if the noncompliance cannot be corrected by informal means, then compliance with the provisions of this section may be effected as provided in section 146 of this title by the suspension or termination of or refusal to grant or to continue Federal financial assistance in whole, or at the discretion of the Commissioner, in part, to the educational agency or agencies involved. The Commissioner may also seek compliance by other means, including, but not limited to recommending that (A) appropriate proceedings be brought to enforce any rights of the United States under the law of the United States or any assurance or other contractual undertaking, and (B) appropriate proceedings be brought under any applicable provision of State or local law.

COMMENT: This provision encourages broader public participation in title I migrant program administration by establishing a system of official federal investigations and conformity hearings.[132] These investigations and hearings will be initiated in response to public complaints of substantial noncompliance with statutory standards in one or more projects in a state. The language in this provision is adapted from that in 45 C.F.R. §§ 80.7 and 80.8 (1972), which cover the conduct of investigations and the procedure for effecting compliance concerning title VI of the Civil Rights Act of 1964.[133] "Substantial" compliance for purposes of the federal complaint procedure should be established by regulation,[134] and precise regulations concerning the details of the state procedure will have to be issued because of state or local resistance to the establishment of the procedure at the grantee level.[135] However, it is impossible

132. Such a compliance procedure is recommended by Tomlinson & Mashaw, *supra* note 46, at 637-56.

133 42 U.S.C. § 2000d *et seq.* (1970).

134 *See* Tomlinson & Mashaw, *supra* note 46, at 638.

135 *Id.* at 666-67.

to anticipate how such regulations should be drafted for complaint procedures in the migrant education area; some experience under the broad statutory standards will be necessary before detailed policies can be established.[136]

A system for officially recognizing and acting upon public complaints is desirable because the beneficiaries of a program are apt to be among the individuals most familiar with its operation in practical terms and so are among those most able to discover flaws in the program. At present, however, complaints in the absence of a statutorily authorized procedure might have no impact.[137]

While the parents of migrant children may have standing to sue directly to see that statutory requirements are met in a project,[138] an initial effort to work through conformity hearings would seem preferable for several reasons.[139] Courts are not receptive to challenges to an agency's exercise of administrative discretion. It is best to defer, at least at first, to the expertise of the relevant administrative agency, rather than venturing directly into the overcrowded courts. In addition, most of the cost of a hearing is borne by the government, while the burden of a court action falls upon the private litigant. Finally, there are a number of possible procedural difficulties in this type of suit in such areas as jurisdictional amount, standing, exhaustion of remedies, and ripeness.

Even if a conformity hearing process involving recipients is established, it is clear that litigation will have an important role to play in the future in obtaining compliance with federal standards. The emphasis, however, may shift to suits by the federal government, as opposed to ones by the beneficiaries of a grant-in-aid program.[140] Hence, the proposed amendment provides that the Commissioner may recommend that appropriate litigation be brought.

[SEC. 141(c) . . .]

(4) If the Commissioner determines that a State is unable or unwilling to conduct educational programs for migratory children of

136 *See id.* at 643-45, 659-62.

137 *See* text at note 117, *supra.*

138 *See* Colpitts v. Richardson, Civil Action No. 1838 (D. C. Me., Oct. 20, 1970); Gomez v. Florida State Employment Serv. 417 F.2d 509 (1969); *see also* Rosado v. Wyman, 397 U.S. 397 (1970).

139 *See* Tomlinson & Mashaw, *supra* note 46, at 633-37.

140 *Id.* at 682-83.

migratory agricultural workers, or that it would result in more efficient and economic administration, or that it would add substantially to the welfare or educational attainment of such children, he may make special arrangements with other public or nonprofit private agencies to carry out the purposes of this subsection in one or more States, and for this purpose he may set aside on an equitable basis and use all or part of the maximum total of grants available for such State or States.

(5) For purposes of this subsection, with the concurrence of his parents, a migratory child of a migratory agricultural worker shall be deemed to continue to be such a child for a period, not in excess of five years, during which he resides in the area served by the agency carrying on a program or project under this subsection. Such children who are presently migrant, as determined pursuant to regulations of the Commissioner, shall be given priority in the consideration of programs and activities contained in applications submitted under this subsection.

SEC. 143 . . . .

(d) From the sums appropriated for the purposes of subsection 141(c) for each fiscal year, the Commissioner shall reserve an amount equal to five percent thereof. The Commissioner shall disburse all such reserved funds by making grants to, and contracts with, state and local educational agencies, and other public and nonprofit private agencies and organizations (or a combination of such agencies and organizations) for the purpose of conducting special programs and projects carrying out activities administered in a manner consistent with the provisions of clauses (1)(B), (1)(C), (1)(D), and (1)(E) of subsection 141(c) and which the Commissioner determines will make substantial progress toward serving the special educational needs of the migratory children of migratory agricultural workers.

COMMENT: This subsection reserves five percent of the funds annually appropriated under the title I migrant provisions for use in grants to state or local educational agencies at the discretion of the Branch. Such a change is not novel. The Senate Subcommittee on Migratory Labor recommended that a fixed percentage of the title I migrant funds be allotted to the Branch "for use in carrying

out State-requested leadership functions and assisting in the implementation of interstate migrant projects."[141] Such grants would be used for a variety of projects which, like those currently funded under title I, would serve the special needs of migrant children. Ideally, however, these projects should become models for the efforts planned by state and local agencies.

SEC. 148. . . .

* * * *

(d)(1) The Commissioner shall establish in the Office of Education a National Advisory Council on the Education of Migrant Children, (hereinafter in this subsection referred to as the "Advisory Council"), consisting of seven members appointed by the Commissioner in accordance with the provisions of section 433 of the Elementary and Secondary Education Amendments of 1967. At least three of the members of the Advisory Council shall be educators experienced in dealing with the educational problems of migratory children of migratory agricultural workers.

(2) The Advisory Council shall review the administration of the provisions of law administered by the Commissioner with respect to the migratory children of migratory agricultural workers including the effect of such law as administered in improving the educational attainment of such children and make recommendations for the improvement of such administration and operation with respect to such children. The Advisory Council shall advise the Commissioner in the preparation of general regulations and with respect to policy matters arising in the administration of this section, including the development of criteria for approval of applications thereunder.

(3)(A) Members of the Advisory Council shall receive compensation in accordance with the provisions of section 434 of the Elementary and Secondary Education Amendments of 1967. Meetings of the Advisory Council shall be held at the call of the chairman thereof but not less than two times each year. Such meetings shall be conducted in accordance with the provisions of section 436(b) of said act. (B) The Advisory Council will be subject to such regula-

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141 1969 SUBCOMMITTEE REPORT, *supra* note 1, at 75.

tions as the Commissioner promulgates pursuant to section 437(a) of the Elementary and Secondary Education Amendments of 1967 and shall be subject to review of its activities in accordance with the provisions of section 437(b) of said Act. The Commissioner shall engage such personnel and technical assistance as may be required to permit the Advisory Council to carry out its functions as prescribed by law.

COMMENT: This provision creates a National Advisory Council on the Education of Migrant Children. Such a group would insure that the critical eye of outside experts will focus on the work of the Migrant Programs Branch and of the Office of Education in the migrant area. At present, the National Advisory Council on Disadvantaged Children[142] is the only official source of this type of oversight, and the main focus of its work has been the low income child in general.

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142 Established by 20 U.S.C. § 241(1) (1970).

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NOTES

A RE-EXAMINATION OF DEFENSE WITNESS IMMUNITY: A NEW USE FOR *KASTIGAR*

> "[T]he criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated. . . .
> ". . . .
> "[O]ur common law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt."[1]

Introduction

American prosecutors have long had the power to grant immunity to a witness in order to compel testimony which would otherwise be protected by the witness' privilege against self-incrimination.[2] With only occasional intimations to the contrary,[3] the Supreme Court has repeatedly upheld the validity of such immunity grants as a prosecutorial tool.[4] The focus of debate has not been on the validity of immunity statutes but rather on their constitutionally required scope.[5] From the enactment of the Immunity Act of 1893[6]

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1 Estes v. Texas, 381 U.S. 532, 564-65 (1965) (Warren, C.J., concurring).

2 "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

3 *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 467 (1972) (Douglas, J., dissenting).

4 *See, e.g.*, Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896); *accord*, Gardner v. Broderick, 392 U.S. 273, 276 (1968); McCarthy v. Arndstein, 266 U.S. 34, 42 (1924) (Brandeis, J.); Heike v. United States, 227 U.S. 131, 142 (1913) (Holmes, J.).

5 *See, e.g.*, Note, *Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity,"* 51 B.U.L. REV. 616 (1971); Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959 (1968); Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).

6 Act of Feb. 11, 1893, ch. 83, 27 Stat. 443. This statute was a congressional response to the Supreme Court's decision in Counselman v. Hitchcock, 142 U.S. 547 (1892), in which the Court refused to uphold a defective "use" immunity statute

until the enactment in 1970 of the Federal Immunity of Witnesses Act,[7] the approach of numerous federal immunity statutes had been to provide for what is known as "transaction immunity." Such statutes protected against prosecution for any *matter* about which any witness testified under the grant of immunity. The 1970 Immunity Act,[8] which is applicable in all cases involving a violation of a federal statute, grants only what is known as "use and derivative use" immunity.[9] "Use" immunity protects the witness from having his testimony or any fruits derived therefrom used against him.

An issue equally as important as the type of immunity granted,

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which merely offered immunity limited to the "use" of the testimony without placing a restriction on the derivative "use" of such testimony.

7 18 U.S.C. §§ 6001-05 (1970) (passed as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 926) [hereinafter cited as the Immunity Act].

8 Although the Immunity Act, *id.* at § 6003(a), speaks in terms of ". . . any individual who has been or may be called to testify . . ." receiving immunity when a United States attorney requests and receives a court order requiring such individual to testify, neither the legislative history nor the statutory language indicates that the Immunity Act was intended to provide for defense witness immunity. The National Commission on Reform of Federal Criminal Laws recommended a general immunity law to aid the Government in gathering evidence against organized crime. H.R. REP. No. 1188, 91st Cong., 2d Sess. 8 (1970). The House Committee on the Judiciary emphasized the beneficial effect on law enforcement of the proposed Immunity Act. *Id.* at 11. Finally, the controversy during the Senate and House hearings centered, as has the judicial history, around the use-transaction immunity distinction without mentioning the defendant's need for a similar investigatory tool. *See, e.g., Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292, Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 284-87, 459-61, 505-06 (1969).

Section 6003 of the Immunity Act sets out the procedure to be followed in court and grand jury proceedings. The court's role in granting the order is merely to find the facts on which the order is predicated. With the approval of the Attorney General, the Deputy Attorney General, or a designated Assistant Attorney General, a United States attorney may seek a court order compelling a witness to testify. The witness must have refused, or be likely to refuse, to testify, and the United States attorney must be satisfied that the testimony is "necessary to the public interest". Immunity Act § 6003(b)(1), (2). No testimony or other information compelled under the order may be used, directly or indirectly, against the witness in a subsequent criminal case. *Id.* § 6002. The statute does not define what is testimony needed in the "public interest," and it is unlikely that a prosecutor would ever feel bound to interpret that phrase to include otherwise unavailable testimony of defense witnesses. While the Immunity Act could be amended to cover immunity for defense witnesses, there is no indication that this legislative action is likely. This Note, therefore, focuses on the responsibility of the courts to provide the due process safeguard of defense witness immunity.

9 Unless otherwise specifically noted, this Note will employ the term "use" immunity to include "use and derivative use" immunity.

and one which has been largely ignored, is whether defendants should also have the right to immunize witnesses.[10] Although one noted legal commentator spoke out on the need for defense witness immunity as early as 1959,[11] only a handful of courts have even acknowledged the issue, and then without thorough analysis.[12] In each of these few cases, the court denied the defendant's request that his witnesses be immunized[13] to permit the defense to compel otherwise unavailable testimony.

A recent Supreme Court case decided the issue of what breadth of immunity was constitutionally required. In *Kastigar v. United States*,[14] and related cases decided at the same time,[15] the Court held that the state or federal government may compel testimony from a witness who invokes the fifth amendment privilege against self-incrimination by granting the witness use immunity.

The limitations on immunity set forth in the Immunity Act and

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10 For a discussion of the question as it stood several years ago, see Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967).

11 "Yet it cannot be denied that defendants and their counsel often sorely need this aid [defense witness immunity] in building up fair presentations. If society is willing to go the length of furnishing public defenders, a carefully regulated immunization system to further honest, adequate defense would be by no means ridiculous or unbeneficial." J. MAGUIRE, EVIDENCE OF GUILT § 2.081, at 80 (1959).

12 *See* Brady v. United States, 39 F.2d 312 (8th Cir. 1930), which involved the immunity statute contained within the National Prohibition Act, Act of Oct. 28, 1919, ch. 85, tit. II, § 30, 41 Stat. 317 (repealed Aug. 27, 1935, ch. 740, tit. I, § 1, 49 Stat. 872). *Brady* held that although the statute provided immunity for a person duly subpoenaed under its provisions, the statute properly construed only applied to governmental witnesses. The defense witness immunity issue has recently been raised again. *See* United States v. Smith, 436 F.2d 787 (5th Cir.), *cert. denied*, 402 U.S. 976 (1971); United States v. Lyon, 397 F.2d 505 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968); Morrison v. United States, 365 F.2d 521 (D.C. Cir. 1966); Earl v. United States, 361 F.2d 531, *petition for rehearing denied*, 364 F.2d 666 (D.C. Cir. 1966); People v. Bernal, 254 Cal. App. 2d 283, 62 Cal. Rptr. 96 (1967), *cert. denied*, 393 U.S. 865 (1968).

13 *See, e.g.*, United States v. Smith, 436 F.2d 787 (5th Cir.), *cert. denied*, 402 U.S. 976 (1971). (request for court granted immunity); United States v. Lyon 397 F.2d 505 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968) (request for prosecutor-granted immunity); Morrison v. United States, 365 F.2d 531 (D.C. Cir. 1966) (request for either the prosecutor to grant immunity, the court to order the prosecutor to grant immunity, or the court to grant immunity); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966) (request as in *Morrison*); *see also* People v. Bernal, 254 Cal. App. 2d 283, 62 Cal. Rptr. 96 (1967), *cert. denied*, 393 U.S. 865 (1968) (reviewing court did not reach question since defendant had not requested immunity at trial).

14 406 U.S. 441 (1972).

15 Sarno v. Illinois Crime Investigation Comm'n, 406 U.S. 482 (1972); Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972).

in *Kastigar* provide a basis for a re-examination of the problem of defense witness immunity. This Note first explores the need for such immunity. After analyzing various approaches, the Note concentrates on the rationale for defense witness immunity provided by due process considerations. The conflicting interests are described, analyzed, and balanced in light of the *Kastigar* decision. The Note then examines the practical problems of implementing a due process rule requiring defense witness immunity and concludes that such a rule is not only constitutionally required but also practicable and manageable.

I. A Rationale for Defense Witness Immunity

On petition for rehearing en banc in *Earl v. United States*,[16] which was denied by an equally divided court, Judge Leventhal, writing for those in favor of rehearing, would have considered two arguments for compelling the testimony of defense witnesses: the unfairness of giving the tool of immunity to the prosecution but not to the defense, and the independent need to compel such testimony to afford the defendant due process and a fair trial. He concluded by noting that the questions raised by defendant's request for defense witness immunity, involving as they do the relationship between the prosecution, the defense, and the courts, were difficult, novel, and significant and hence worthy of reconsideration.[17]

A. *The Unfairness Argument*

Judges and commentators occasionally express the opinion that the resources and techniques of the criminal justice system ought to be evenly balanced between the government and the defendant.[18] The "unfairness argument" referred to by Judge Leventhal

16 364 F.2d 666 (D.C. Cir. 1966).

17 *Id.* at 667.

18 *See generally* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149 (1960). This attitude is also reflected in United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (Hand, J.). For a criticism of this *quid pro quo* approach to the administration of criminal justice, see Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 Harv. L. Rev. 994, 1017-21 (1972).

in *Earl v. United States*[19] rests on the premise that this "balance" is disrupted if only the government is able to immunize witnesses. The argument, however, fails to take into account that the government inherently has a definite advantage in the techniques and resources available to it for gathering and utilizing evidence. The prosecutor, for example, by beginning his investigation before the defendant has been put on notice of that fact, has the opportunity to collect evidence and interview witnesses well before the defendant. The prosecutor can compel witnesses to cooperate through the use of grand juries and subpoenas.[20] Given probable cause, he may search private premises and seize evidence[21] and establish legal wiretaps.[22] Without reference to counterbalancing these advantages possessed by the prosecutor, the traditional due process safeguards available to the defendant have been developed for the purpose of providing a fair trial and reliable determination of guilt.[23] The criminal justice system is not a game in which all players are assigned handicaps. As the Supreme Court has noted: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of criminal justice suffers when any accused is treated unfairly."[24]

The solutions to the problem posed by the unfairness argument also illustrate its weakness. For example, one solution would be to abolish immunity as a tool available to the prosecutor. But statutes providing for the prosecutorial grant of immunity have historical roots deep in Anglo-American jurisprudence[25] and have "become part of our constitutional fabric."[26] Repeatedly, the Court has upheld immunity grants as sufficient basis for compelling testimony in face of a claim of fifth amendment privilege.[27] A second solution,

19 364 F.2d 666 (D.C. Cir. 1966).

20 State v. Iverson, 187 N.W.2d 1, 11 (N.D.), *cert. denied*, 404 U.S. 956 (1971).

21 Warden v. Hayden, 387 U.S. 294, 306-10 (1967).

22 Osborn v. United States, 385 U.S. 323 (1966).

23 *See* Estes v. Texas, 381 U.S. 532, 565 (1965) (Warren, C.J., concurring).

24 Brady v. Maryland, 373 U.S. 83, 87 (1963).

25 *See* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 328, 495 (1968). For a history of the various federal immunity statutes, see Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).

26 Ullmann v. United States, 350 U.S. 422, 438 (1956), *quoted in* Kastigar v. United States, 406 U.S. 441, 447 (1972).

27 *See, e.g.*, Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896); *accord*, Gardner v. Broderick, 392 U.S. 273, 276 (1968); McCarthy v.

that of taking a *quid pro quo* approach by granting defense witness immunity whenever the prosecutor also immunizes one of his witnesses, would not only be extremely arbitrary and fortuitous, but also completely unrelated to the needs of a particular defendant. A third method of avoiding "unfairness" would be to provide both the prosecution and the defense with the tool of immunity. In practical terms this leads to the same result as granting defense witness immunity on the theory that it is required by due process, independent of any prosecutorial immunity. Because a stronger case can be made for the defendant's independent right to defense witness immunity as an element of due process than can be made under the unfairness argument, this Note proceeds to demonstrate that defense witness immunity is an element of due process and, as such, must be provided in proper cases.

B. *The Due Process Argument*

The due process requirements in the fifth and fourteenth amendments and the compulsory process clause of the sixth amendment require procedures that will assure a defendant a fair trial.[28] The right to compel the attendance of witnesses,[29] to offer their testimony,[30] and to confront the prosecution's witnesses[31] are fundamental elements of the right to present a defense guaranteed by the due process clause. These elements are part of what our jurisprudence defines as a fair trial. Although a trial need not be perfect to be considered fair, it must be free both of actual bias and of the appearance of unfairness.[32]

The right to defense witness immunity should likewise be considered an element of due process. When the witness' testimony would be relevant and helpful to the defense of an accused or would be essential to a fair trial and when the interests of the

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Arndstein, 266 U.S. 34, 42 (1924) (Brandeis, J.); Heike v. United States, 227 U.S. 131, 142 (1913) (Holmes, J.).

28 *See* Estes v. Texas, 381 U.S. 532 (1965).

29 The sixth amendment gives the right to compulsory process only where it is within the power of the federal government to provide it. *See* United States v. Greco, 298 F.2d 247, 251 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962).

30 *See* Washington v. Texas, 388 U.S. 14, 19 (1967) (holding unconstitutional a state rule which disqualified an alleged accomplice from testifying).

31 *See, e.g.*, Pointer v. Texas, 380 U.S. 400 (1965).

32 *See In re* Murchison, 349 U.S. 133, 136 (1955).

witness and the prosecutor can be adequately protected, the prosecutor should be required either to immunize the witness or to drop the prosecution.

Of course, the defendant's need for defense witness immunity as an element of due process cannot be considered in a vacuum. Countervailing interests must be examined to determine what relevance, if any, each has to the defendant's right to a fair trial. Where the relevant countervailing interests and privileges are ones which are adequately protected by the immunity procedure, they must give way.

A similar situation occurs when the government relies on the "informer privilege" of withholding the identity of persons who furnished information concerning violations of law.[33] Fifteen years ago in *Roviaro v. United States*[34] the Court held that when the informer's testimony or identity was relevant or helpful to an accused, the privilege had to give way in the name of due process. Just as with the case for defense witness immunity, there is no precise rule for disclosure of the informer's identity. Facts such as the crime charged, possible defenses, and the significance of the informer's testimony determine in each case whether non-disclosure is constitutional. The process is one of balancing the public interest in protecting the flow of information to law enforcement officers against the individual defendant's right to prepare his defense.

1. The Prosecutor's Interest

A defendant who demands that a defense witness be granted immunity and compelled to testify challenges the prosecutor's interest in maintaining complete discretion over the decision to prosecute and the timing of the prosecution. The prosecutor may be interested in prosecuting both the defendant and, at some subsequent time, the witness called by the defendant. Defense witness immunity places a burden upon these interests, a burden whose weight depends upon the scope of the immunity granted.

The Supreme Court's ruling in *Kastigar v. United States*[35]

33 *See, e.g.*, Scher v. United States, 305 U.S. 251 (1938).

34 353 U.S. 53 (1957).

35 406 U.S. 441 (1972). *Kastigar* arose when petitioners were subpoenaed to appear before a United States grand jury. The government, prior to the scheduled appearances, applied to a district court for an order directing petitioners to answer ques-

makes it possible to minimize this potential interference with the prosecutor by limiting the scope of the immunity to use immunity. After analyzing prior immunity decisions, the Court concluded that the conceptual basis of *Counselman v. Hitchcock*[36] and language in *Murphy v. Waterfront Commission*[37] supported the proposition that immunity from use and derivative use satisfied the privilege against self-incrimination by leaving the witness and the government in the same position as if the witness had claimed his privilege in the absence of a grant of immunity.[38]

The principles underlying *Kastigar* are analogous to the exclusionary rule applied to confessions elicited in violation of the fifth amendment, in that the government must prove that all the evidence it proposes to use was derived from independent sources.[39] By allowing the government to prosecute the witness upon a showing that the subsequent prosecution is not based upon the compelled testimony, *Kastigar* therefore diminishes the invasion of prosecutorial discretion and reduces the problem that concerned the earlier courts considering the problem of defense witness immunity.[40]

A grant of transactional immunity can be likened to a decision not to prosecute, while the proscription placed upon the prosecutor

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tions and produce evidence for the grand jury under a grant of immunity conferred pursuant to the Immunity Act, 18 U.S.C. §§ 6001-05 (1970). Petitioners opposed issuance of the order, contending that the scope of the immunity provided by the statute was not coextensive with the scope of the privilege against self-incrimination and, therefore, was not sufficient to supplant the privilege and compel their testimony. The district court rejected this contention. When petitioners persisted in their refusal to answer the grand jury's questions, the court found them in contempt. The Court of Appeals for the Ninth Circuit affirmed, Stewart v. United States, 440 F.2d 954 (9th Cir. 1971), as did the Supreme Court, with Justices Douglas and Marshall dissenting. Justices Brennan and Rehnquist took no part in consideration or decision.

36 142 U.S. 547 (1892).

37 378 U.S. 52 (1964).

38 Kastigar v. United States, 406 U.S. 441, 453-59 (1972).

39 *Id.* at 461-62.

40 In Earl v. United States, 361 F.2d 531, *petition for rehearing denied*, 364 F.2d 666 (D.C. Cir. 1966), Judge Burger upheld the denial of defense witness immunity on the theory that court-granted or court-ordered transactional immunity, in the absence of enabling legislation, would infringe upon "one of the highest forms of discretion conferred by the Congress on the executive: the prosecutorial decision to grant or withhold immunity." *Id.* at 534. The opinion suggests that in the absence of legislative authorization, the executive is also precluded from granting immunity to a witness.

by a post-*Kastigar* grant of defense witness immunity is more analogous to the exclusionary rule in cases of coerced confessions and in cases of evidence procured as the result of an illegal search and seizure. The parallel is not perfect, however — an exclusionary rule is designed to redress an infringement of a defendant's constitutional rights and does not change in any way the unconstitutional character of the behavior, while a grant of immunity purports to legitimize an otherwise unconstitutional compulsion of testimony.[41] Yet the exclusionary remedies serve the purpose of leaving the defendant and the government in substantially the same position as if the witness had claimed his privilege.[42] The same rationale was the basis for upholding the grant of use immunity.[43] The Court in *Kastigar* noted that a coerced confession does not bar prosecution even though such a confession is as fertile a source of leads as testimony given in exchange for immunity.[44] The importance of drawing the analogy between the exclusionary rule and use immunity is the understanding that the prosecutorial burden of proving an independent source for evidence is the same in either case.

After the defendant in a subsequent prosecution demonstrates that he has previously given immunized testimony, the prosecutor must prove that the evidence he proposes to use is derived from a legitimate source wholly independent from the compelled testimony.[45] This requirement exists even if the subsequent prosecution of the witness occurs in another American jurisdiction.[46] To be sure, the prosecutor in a subsequent prosecution of a once immunized witness is faced with the additional time-expenditure

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41 This point was stressed by Mr. Justice Marshall in his dissent in *Kastigar*, 406 U.S. 441, 470-71 (1972).

42 *See* Mishkin, *Foreword—The High Court, The Great Writ and Due Process of Time and Law*, 79 HARV. L. REV. 56, 77-92 (1965).

43 Kastigar v. United States, 406 U.S. 441 (1972); *cf.* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

44 406 U.S. at 461, *citing* Murphy v. Waterfront Comm'n, 378 U.S. 52, 103 (1964).

45 406 U.S. at 460.

46 *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), *overruling* Feldman v. United States, 322 U.S. 487 (1944); *cf.* Elkins v. United States, 364 U.S. 206 (1960). In Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972), the Court recognized but did not reach the question of whether a grant of use immunity can supplant the fifth amendment privilege of an individual in substantial fear of foreign prosecution.

and nuisance of having to establish independent sources for his evidence. However, as in the analogous search and seizure and wiretap cases — where the burden of proof is likewise on the government once the defendant has established the unlawful search or wiretap — once a defendant demonstrates that he has testified under a prior grant of immunity to matters related to the subsequent prosecution, the government must bear the burden of showing that its evidence is not tainted. Since the government has the relevant information in its control, valid prosecutions need not be sacrificed.

2. The Witness' Interest

A great deal has been written about the privilege against self-incrimination.[47] The privilege has been recognized as the "essential mainstay" of an accusatorial, rather than an inquisitorial, system of criminal prosecution and as a reflection of many of our "fundamental values and most noble aspirations."[48] It forces the government to establish guilt by evidence independently and freely secured. A witness' privilege against self-incrimination is an exception to the general rule that the public has the right to every man's evidence.[49]

Equally well established, but often conflicting with the individual's fifth amendment interest, are the public's interest in information and the government's power to compel testimony before official judicial and semi-judicial proceedings.[50] Immunity statutes have long been the device chosen by courts and legislatures to accommodate the individual's privilege against self-incrimination with the interest of society in having a witness' information and testimonial aid in enforcing the law.[51] Immunity statutes provide

47 *See, e.g.*, Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103; McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193; Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963).

48 Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

49 United States v. Bryan, 339 U.S. 323, 331 (1950). *See also* 8 J. WIGMORE, EVIDENCE § 2192 (3d ed. 1940).

50 Kastigar v. United States, 406 U.S. 441, 443 (1972); Blair v. United States, 250 U.S. 273, 281 (1919); 8 J. WIGMORE, EVIDENCE §§ 2192, 2197 (3d ed. 1940).

51 *See generally* Note, *Immunity Statutes: The Constitutional and Functional Sufficiency of "Use Immunity"*, 51 B.U.L. REV. 616 (1971); Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959 (1968).

an effective displacement of the privilege against self-incrimination by granting protection coextensive with the privilege. The Court has consistently upheld these statutes as constitutional,[52] thus implicitly rejecting any absolute right to silence under a theory of fifth amendment "privacy."[53]

The only constitutional inquiry remaining is whether the immunity granted the witness is coextensive with the scope of the privilege. *Kastigar v. United States* established that the use immunity provided for in the Federal Immunity of Witnesses Act satisfies the constitutional protection against self-incrimination by leaving the witness and the government in the same position as if the witness had claimed his privilege in the absence of a grant of immunity. The witness does not have a constitutional claim for more than this. Thus protected, the witness' fifth amendment privilege against self-incrimination is theoretically irrelevant to the defendant's interest in a fair trial. The privilege against self-incrimination only protects the witness from testifying as to matters which have criminal consequences, whether or not any non-criminal consequences incidentally follow.[54] The privilege is not within each school district, the degree of educational deprivation of these children, and the relative financial ability of different school districts within each state to provide migrant projects.
not protected by the fifth amendment.[56]

3. The Defendant's Interest

Although the Constitution does not guarantee a perfect trial, it does entitle every defendant to a fair one. For this reason the defendant does not have a right to be able to present every witness and every bit of testimony he desires. Rather, a defendant has the

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52 *See, e.g.*, Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896); *cf.* Counselman v. Hitchcock, 142 U.S. 547 (1892).

53 *See* Note, *The Federal Witness Immunity Act in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1568-87 (1963).

54 Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892).

55 *See* Note, *Immunity Statutes and the Constitution*, 68 COLUM. L. REV. 959, 963-64 (1968).

56 *See* Brown v. Walker, 161 U.S. 591, 605-06 (1896); *cf.* Ullmann v. United States, 350 U.S. 422 (1956); Hale v. Henkle, 201 U.S. 43 (1906).

right only to introduce material evidence[57] sufficient to defend himself. This right is an implied element of due process.[58] Many courts have either assumed or affirmed that a defendant who is denied the right to present his evidence has been denied a fair trial.[59]

The line of Supreme Court cases which culminated with *Brady v. Maryland*[60] in 1963 established that due process requires a prosecutor to disclose evidence in his possession favorable to the defendant.[61] The case law originally focused upon the issue of prosecutorial bad ethics, frequently in the form of prosecutorial perjury.[62] Later cases, however, held that suppression of favorable material evidence by the prosecutor, irrespective of good or bad faith, violated due process.[63] These later suppression cases illustrate that due process is denied not only where the prosecutor's conduct approaches fraud or transgresses the principles of fair play, but also where the defendant is harmed by suppression of favorable evidence notwithstanding the prosecutor's good faith.

This due process analysis recognizes that a defendant's limited investigatory facilities, vastly inferior to the prosecution's, may be hard pressed to develop evidence for the defense. Although the suppression cases have not gone so far as to put a burden on the

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57 *See, e.g.*, Cauley v. United States, 294 F.2d 318 (9th Cir. 1961); Eberhart v. United States, 262 F.2d 421 (9th Cir. 1958).

58 *See* Washington v. Texas, 388 U.S. 14, 19 (1967); *In re* Oliver, 333 U.S. 257 (1948).

59 *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963); Palermo v. United States, 360 U.S. 343, 362 (1959); Jencks v. United States, 353 U.S. 53 (1957); *see also* Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 288 (1964).

60 373 U.S. 83 (1963).

61 *Cf.* Napue v. Illinois, 360 U.S. 264 (1959) (the state may not knowingly use false testimony even where the testimony goes only to the credibility of the witness); Alcorta v. Texas, 355 U.S. 28 (1957) (overturning a conviction where the prosecutor failed to correct false testimony of witness); White v. Ragen, 324 U.S. 760 (1945) (conviction obtained through the knowing use of false and perjured testimony was not permitted to stand); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935). *See also* United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir.), *cert. denied*, 345 U.S. 904 (1952).

62 See note 61 *supra*.

63 *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963); United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962).

prosecutor to provide the defendant with better investigatory facilities, they have increasingly focused on the effect which the suppressed evidence had upon the substance and strategy of the defense.[64] Following this development to its logical end, the only rational standard for determining what the prosecutor must reveal is the evidence's usefulness to the defense.[65] When the testimony is material, just as in the informer's privilege cases,[66] the prosecutors's privilege to grant or deny immunity at his discretion must give way.

Given the rationale of the suppression cases and the public's interest in ensuring testimony sufficient to provide a fair trial, it would be anomalous to hold that a defendant is denied a fair trial when he does not know of evidence of which the prosecutor is aware but does not reveal, while a defendant who knows of material evidence but cannot use that evidence without the assistance of the prosecutor is not thereby denied a fair trial. Unless there is some strong countervailing interest, the prosecutor should not be allowed to withhold access to information, just as he is not allowed to withhold the information itself. The state cannot allow a man to be convicted because of lack of evidence when it is within the power of the prosecutor to produce the necessary evidence. The interest emphasized in the later suppression cases — that of ensuring that insufficient evidence does not prejudice a defendant in his attempt to present a defense — is an empty interest unless the defendant can also present the evidence to which he has access. The prosecutor's duty to provide access to the evidence implies a duty to immunize witnesses who assert their fifth amendment privilege and whose testimony is material to the accused's defense.

4. Balancing the Interests

Identifying the relevant interests of the prosecutor, witness, and defendant is an essential first step. To determine whether due

64 The most striking recognition of this problem by the courts is found in Ashley v. Texas, 319 F.2d 80 (5th Cir.), *cert. denied*, 375 U.S. 931 (1963), which recognized that minimum standards for prosecutorial conduct was the significant issue in the suppression cases.

65 It has been suggested that the judge could decide the usefulness of the evidence without first revealing it to the defense. Application of Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962).

66 See text at note 33 *supra*.

process requires that defense witness immunity be granted in a particular case, these interests must be balanced. How to balance them is an issue which has also been affected by the Supreme Court's decision in *Kastigar*. In holding that use immunity is commensurate with the protection afforded by the fifth amendment privilege, the Court diminished the weight henceforth to be given to the interests of the prosecutor and witness. The relevant constitutional interest of any defense witness compelled to testify has been limited to protection from incriminating use, direct or indirect, of the compelled testimony. A grant of immunity of the nature and extent provided for by the Federal Immunity of Witnesses Act protects the only interest of the witness otherwise capable of overriding the due process requirement of a fair trial.[67]

That prosecutorial interest which would be infringed by a grant of defense witness immunity has also been narrowed by *Kastigar*. A grant of immunity, which under the older transactional standard was equivalent to a decision not to prosecute, seems to have been metamorphosed into a form of exclusionary rule.[68] Under use immunity the only burden upon the prosecutor in a subsequent prosecution of a previously immunized witness is that of showing that the evidence offered has an independent source. After *Kastigar*, a prosecutor who is required to grant a witness use immunity has been left in nearly the same position as if the witness had never testified. Just as the prosecutor's interest in obtaining a conviction must be subordinated to a defendant's privilege against self-incrimination when a coerced confession is excluded, so must the prosecutor's interest be balanced against the defendant's right to a fair trial. Viewed as such, *Kastigar* means that the prosecutor should always grant immunity to material defense witnesses when the defendant so requests.

The interest of the defendant and the public in a fair trial with sufficient evidence for determination of the truth has not been limited by recent decisions. It holds as much claim to judicial protection as when it was discussed in the suppression cases. Therefore, given a determination that the testimony desired by the defendant is indeed material to his case and cannot be obtained in

67 See text at note 47 *supra*.
68 See text at note 39 *supra*.

any other manner, a strong showing of prosecutorial burden and prejudice will be required to deny the defendant's request for witness immunity.

II. Proposed Solutions

Having established the need for defense witness immunity, this Note turns to the nature of the remedy and the procedures through which the remedy might be effectuated. It is a well-established principle that every constitutional right should find vindication in an effective constitutional remedy.[69] While Congress could amend the Immunity Act to provide for defense witness immunity, there is no indication that it is about to do so. Where an element of due process is not sufficiently provided for by legislation, it is the duty of the courts to provide a judicial safeguard.

The substantive legal norm with regard to defense witness immunity — that there be sufficient evidence for a fair trial — is one which the courts have traditionally protected.[70] The courts have recognized that the due process requirements in both the fifth and fourteenth amendments and the provisions of the sixth amendment require a procedure that will assure a fair trial, not merely in form, but in actuality. It is therefore the responsibility of the courts to provide for defense witness immunity to protect the fundamental right to a fair trial as expressed in the due process clause, in general, and the compulsory process clause of the sixth amendment, in particular. Four possible procedures for accomplishing this are analyzed below.

A. *Judicial Review of the Good Faith of the Prosecutor's Decision*

Although the right to defense witness immunity is an element of due process and, as such, constitutionally protected, courts may hesitate to act to safeguard this right. Interference with the role of the prosecutor and the division between the judicial and execu-

69 *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

70 For two forceful discussions of the court's duty to provide a fair trial for a defendant, see Washington v. Texas, 388 U.S. 14 (1967), and Estes v. Texas, 381 U.S. 532 (1965).

tive branches may make the courts reluctant to step in, thus creating a situation ripe for a remedy that minimizes the amount of court interference. A remedy which would utilize the court's more traditional role of review of executive action would permit a court to overrule a prosecutor if he did not act in good faith in denying immunity to any material defense witness where due process required it to ensure a fair trial. This remedy is already available to the extent that prosecutorial bad faith is subject to court review.[71]

Such limited review would be inadequate, however. Whether or not the prosecution acted in good faith seems irrelevant to the question raised by defense witness immunity. The principle which emerged from the suppression cases[72] is that the defendant is denied due process whenever the prosecutor withholds material evidence regardless of his good faith. The court, not the prosecution, is the judge of whether or not testimony is material and relevant. The fair balancing of interests required by due process implies that an impartial party should strike the balance.

B. *Prosecutorial Choice of Granting Defense Witness Immunity or Incurring a "Missing Witness" Instruction*

An alternative and more effective remedy would be for the court, upon determining the need for the testimony of a defense witness, to offer the prosecutor the choice of immunizing the witness or incurring a "missing witness" instruction — an instruction to the jury that they might draw an unfavorable inference from the fact that one party did not reasonably explain the absence of a witness under its control. In a defense witness immunity case, the instruction would comment upon the inference which may be drawn from the failure of the government to grant immunity to a material witness.

Six years before the *Kastigar* decision, the use of this instruction in an immunity situation was rejected in *Morrison v. United States*.[73] The District of Columbia Circuit Court held that a miss-

71 See text at note 62 *supra*.
72 See text at note 60 *supra*.
73 365 F.2d 521 (D.C. Cir. 1966).

ing witness instruction was not required as a remedy where the prosecutor refused to grant transactional immunity to a defense witness.[74] As the court recognized, the missing witness instruction is usually applied where the witness is solely within a party's control and there is no other reasonable explanation for his failure to produce the witness other than the possibility that the witness' testimony would be detrimental to him. Given the array of other concerns behind a decision not to grant transactional immunity, the court concluded the missing witness instruction was inappropriate. The court rightly recognized that the failure of the government to immunize a defense witness need not imply that the government knew the witness' testimony would be damaging to its case. Perhaps the government already was eager to prosecute the witness and did not wish to immunize an important potential defendant. Still, the court's point carries less weight after *Kastigar* since the consequence of a grant of immunity is now a prohibition on use of the testimony, rather than a complete bar to prosecution of the witness.

While the missing witness instruction may not be the most appropriate remedy for resolving the defense witness immunity problem, it is a more finely-honed tool than outright dismissal of the case. This is especially true if a procedure were developed whereby the judge charged the jury that it may draw the natural inference from the prosecutor's failure to immunize the defense witness, subject to the prosecutor's explanation.

C. *Prosecutorial Choice of Granting Defense Witness Immunity or Dropping the Case*

Although granting immunity may be considered an inappropriate function for the courts,[75] the same result may be reached by putting the prosecutor to the choice of granting immunity to the defense witness or dropping the case.[76] This authority stems from the judge's power actively to control the proceedings in his courtroom. Such a solution would have the advantage of technically

74 The court indicated that the missing witness instruction was not even permissible in such a situation. *Id.* at 524 (dictum).

75 *See, e.g.*, Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966).

76 *See* Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953 (1967).

leaving the power and decision to grant immunity in the hand of the prosecutor.

In *United States v. Powell*[77] a federal district court recommended putting the government to a similar choice in an analogous situation. The defense attorney in *Powell* had requested that his passport be validated by the State Department for travel to Communist China in order to depose a material defense witness. The court held that, although in its opinion it had no power to interfere with the foreign policy of the United States as formulated by the executive branch of the government by directing the State Department to validate the passport, it did have the power and indeed the duty to control the course of prosecution of the action by putting the government to the choice of making an exception to its passport regulations so that the defendant would be ensured a fair trial or else discontinuing the prosecution.[78] The court stated that if it appeared that the government had adopted policies which would deprive the defendant of an adequate opportunity to prepare and present his defense to the charges in the indictment, dismissal of the indictment would be proper. *Powell* illustrates the effectiveness of the putting-the-prosecutor-to-the-choice remedy in a situation involving executive authority and discretion.[79] The court, while not directly exercising traditionally executive authority, was assuring that the defendant was not convicted because of a lack of evidence where access to that evidence was in the government's control.

D. *Court-Granted Defense Witness Immunity*

The defendant's right to defense witness immunity is, as an element of due process, a constitutional right and, if not otherwise provided for, ought to be protected by the courts.[80] Therefore, the "purest" remedy would be one which provided that the judge,

77 156 F. Supp. 526 (N.D. Cal. 1957).

78 *Id.* at 530-31.

79 For a discussion of passport area restrictions which concludes that they should be subject to judicial rather than executive control, see *Developments in the Law — The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1141-50 (1972).

80 Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) (discussion of a court's power to premise judicial remedies on constitutional rights).

upon a determination of the need for defense witness immunity, would directly immunize the witness. The end result, of course, would be the same as in the previous alternative of putting the prosecutor to the choice of granting immunity or dropping the prosecution since the prosecutor would still have available the option of dismissing the case.

Judicially-granted immunity has not fared well at the hands of most courts. Immunity has been viewed as a discretionary policy question and, as such, more appropriately a matter for the executive branch. When statutory immunity has been involved, it has been said that the court was prohibited from exercising its discretion in approving a grant of immunity and could only ascertain whether the required procedure precedent to giving the grant has been complied with fully.[81] However, defense witness immunity is concerned not merely with judicial application of a statute, but with judicial protection of a constitutional right. Those cases which counseled judicial restraint where Congress has acted are therefore inapposite.[82]

Two basic arguments may be made in support of the appropriateness of the court's either granting immunity or compelling the prosecutor to do so. First, it is the court's duty to see that guilt or innocence is determined by a fair trial.[83] Guilt is a judicial matter, not a policy matter. The second argument is that the courts have traditionally had the power to develop remedies based on federal statutes and constitutional norms,[84] and in doing so have always made decisions containing some element of policy.

In *Bivens v. Six Unknown Named Federal Narcotics Agents*[85] the Supreme Court recently took the opportunity to discuss the

81 Ullmann v. United States, 350 U.S. 422, 431-34 (1956); *see Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292, Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 312-13 (1969).

82 *See, e.g.*, Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969). The court stated that because Congress had specifically limited the power to grant immunity under the federal immunity act to a distinct group of federal officials, the power was "plainly outside the judicial province." *Id.* at 797. The court specifically refrained from considering the legal right to immunity in the absence of such a statute.

83 *See* Washington v. Texas, 388 U.S. 14 (1967); Estes v. Texas, 381 U.S. 532 (1965).

84 *See generally* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

85 403 U.S. 388 (1971).

power of the judiciary to develop remedies and procedures to guarantee and protect constitutional rights and the appropriateness thereof. The Court held that a warrantless search and arrest without probable cause in violation of the fourth amendment gave rise to a federal cause of action for damages.[86] Although the fourth amendment does not explicitly provide for its enforcement by an award of money damages, the Court noted that one whose rights have been invaded is entitled to redress his injuries through this particular remedial mechanism.[87] The Court in *Bivens* found that it had the authority to involve itself in controlling and directing the activities of another branch of the government.

Like a court's "policy" decision to limit the prosecutor's freedom to prosecute by imposing an exclusionary rule burden upon him, the decision in *Bivens* involved a policy decision about the allocation of limited resources — judicial resources. If it is appropriate for the courts to use judicially created remedies (such as the exclusionary rule and damages) to protect the fourth amendment right against unreasonable searches and seizures, it seems appropriate for the courts to use an immunity procedure to protect constitutional rights which are not otherwise protected. *Bivens* has opened the door for the courts to step in to create affirmative causes of action in protection of constitutional rights.

III. Suggested Procedure for Implementing Defense Witness Immunity

The practice of defense witness immunity is likely to be subject to a large number of frictions and subtle problems. This is inherent in its nature as a tool which attempts to protect conflicting interests. The following proposal of a standard procedure for granting defense witness immunity is presented as a vehicle for exposing, discussing, and resolving some of the foreseeable problems.

A. *The Procedure*

When in a criminal trial a witness which the defendant has called refuses to testify claiming his fifth amendment privilege

86 *Id.* at 397.

87 "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 397, *quoting* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

against self-incrimination, the initial burden of requesting immunity for the witness should lie with the defendant. Defense counsel should move that this witness be granted immunity, which motion may be presented and supported by a brief bench conference between the judge and defense attorney. If a more extensive proceeding is necessary, there may be an ex parte hearing *in camera* at which only the defendant, the defense counsel, and the judge should be present. The ex parte nature of the hearing is necessary in order to prevent the prosecutor from learning both the defense strategy and the contents of the testimony proposed to be immunized. This latter point is especially important if the judge should decide not to request immunity for the witness. At this point, however, the defendant should only have to make a minimum showing of his need for the testimony.

The judge, having satisfied himself that the defense counsel is acting responsibly in requesting immunity, should then request the prosecutor to immunize the witness under the Federal Immunity of Witnesses Act[88] or under a comparable state statute. If the prosecution grants the request, the witness can be immunized and the testimony compelled in accordance with the provisions of the Act. If, however, the prosecutor refuses the request, the burden of proving the materiality and need for the testimony must be met by defendant. In another *in camera,* ex parte hearing, defense counsel should present to the judge the questions which he wished to ask the witness and the expected answers. He must show how this testimony is material to either his case-in-chief, a defense, or the credibility of a party or another witness. Defense counsel must also show that he has reason to believe that equivalent evidence is not otherwise available.

At this point the prosecutor should join the hearing. To be successful in refusing immunity, the prosecutor must show that the burden on him in terms of nuisance value and wasted time outweighs the value of the testimony. If the prosecutor can show that the time required to prove independence of sources for all evidence he proposes to introduce in a subsequent prosecution would be prohibitive, the judge may determine that the defendant's need for the testimony must be subordinated and, therefore,

88 *See* note 8 *supra.*

relieve the prosecutor of the duty of immunizing the witness. Otherwise, the prosecutor should be put to the choice of granting immunity to the witness or dropping the prosecution. Even if the court itself granted the immunity, the prosecutor would still have the option of dismissing the case.

B. *Problems with Implementation*

1. Timing

As a matter of defense strategy and economy of judicial resources, the defendant ought to move for defense witness immunity as early as possible, preferably at a pretrial hearing. Motions for disclosure of a government informer's identity,[89] for suppression of evidence[90] or illegally obtained confessions,[91] for severance if a co-defendant's incriminating statement is to be introduced at trial,[92] and for inspection of illegally obtained wiretap evidence[93] are customarily made at pretrial hearings. This eliminates mid-trial interruptions and prevents the problem of double-jeopardy which could arise should a prosecutor, having once decided to dismiss the case, subsequently reactivates it.[94]

Because motions for witness immunity may often result in the government's deciding to dismiss the case,[95] permitting such motions at any time during the trial could at best result in a waste of judicial and prosecutorial resources and at worst become a tool of harassment for use by unscrupulous defense attorneys. This consideration also pushes toward a preference for requesting defense witness immunity by a pretrial motion. To be sure, legitimate cases may occur in which the defense attorney discovers a new witness and requests immunity at mid-trial; the defendant

89 Roviaro v. United States, 353 U.S. 53 (1956).

90 Mapp v. Ohio, 367 U.S. 643 (1961).

91 Miranda v. Arizona, 384 U.S. 436 (1966).

92 Bruton v. United States, 391 U.S. 123 (1968).

93 Alderman v. United States, 394 U.S. 165, 180-85 (1969).

94 The modifications of the double jeopardy rule are beyond the scope of this Note. It is evident that judicial resources could be conserved if the motion for defense witness immunity were required to be made at a pretrial hearing.

95 This possibility may be recognized by a comparison with motions requesting disclosure of evidence gathered by means of an allegedly illegal wiretap. That such a motion will compel the government to dismiss some prosecutions "in deference to national security or third party interests" was recognized in Alderman v. United States, 394 U.S. 165, 184 (1969).

should not be denied this request merely for reasons of conservation of judicial resources.

2. Extent of Burden on Prosecutor

It remains to be seen how the trial courts will interpret *Kastigar.* If they hold that the prosecutor's burden of proof must be met by a showing of an independent source not only of the evidence used against the witness-defendant but also of the decision to file the specific charges and even of the decision to investigate the witness-become-defendant,[96] the burden upon the prosecutor increases. If, however, the prosecutor need show only an independent source for the evidence he proposes to introduce, the burden more closely resembles that of the exclusionary rule for evidence obtained from an illegal search and seizure or from coerced confessions.

It should be noted that the exclusionary rule does not operate to provide all-encompassing immunity to the individual. For example, although no inference is permitted to be drawn from an individual's claim of the fifth amendment privilege during trial, a prosecutor hearing such a claim may be influenced to initiate an investigation against that individual on the basis of the inference he drew from the witness' refusal to testify. After *Kastigar,* the prosecutor must prove no more than that his evidence was independently obtained. If this extends to the evidence which originally convinced him to initiate an investigation of the witness, the result is merely that the prosecutor might have to spend more time substantiating more sources. However, good planning in light of *Kastigar* may minimize the prosecutor's burden. For example, if the prosecutor had already initiated an investigation against a defense witness seeking use immunity, the court could permit the prosecutor to file a sealed affidavit, stating the extent and results of the investigation at that point, to be opened and examined by the judge should the prosecutor subsequently bring charges against the immunized witness.

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96 "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an investigatory lead, and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." Kastigar v. United States, 406 U.S. 441, 460 (1972) (footnote omitted).

The judge, in his role as supervisor of the proceedings in his court, would be responsible for preventing abuse of the immunity grant. The only answers of the witness which would be protected are those which are directly responsive to questions. At any rate, the extent of the extra time expenditure and inconvenience facing the prosecutor will be considered by the judge in the process of determining whether to relieve the prosecutor of the duty of granting defense witness immunity in a particular case. Irrelevant testimony would be excluded from evidence, thus guaranteeing that a witness could not attempt to give himself an immunity both by letting his testimony range widely while he is on the stand. These safeguards are not designed specially for the grant of defense witness immunity, but rather are the result of the judicial application the usual rules of evidence.[97]

It has been suggested that some of the possible ways in which a witness' testimony might be used by a prosecutor are so subtle that the "taint" would be almost impossible to prove.[98] While this may be true, defense witness immunity is not the only procedural tool about which this criticism may be made. In any jury case, an instruction to the jury to disregard evidence subsequently struck from the record is of questionable effect. The Court in *Kastigar* set out the burden of proof which must be met by a prosecutor in a subsequent proceeding, and future cases will more closely define that burden.

IV. Conclusion

Defense witness immunity is an element of due process which can no longer be overlooked or summarily dismissed. Recent Supreme Court cases establishing use immunity as the proper scope of immunity and affirming the appropriateness of judicially fashioned remedies to protect the guarantees of the Bill of Rights have removed those obstacles which once led courts to believe that defense witness immunity was too unwieldy a tool and too far

97 *See, e.g.*, Uniform Rule of Evidence 45.

98 *See Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292, Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 460-61 (1969) (statement of Lawrence Speiser, Director, Washington Office, American Civil Liberties Union).

beyond the scope of judicial authority to merit serious consideration. With the way thus opened, defense witness immunity can now be recognized for what it is: an element of due process as valuable to and as much a right of a defendant as the right to an attorney or compulsory process. Surely a system which guarantees the second and third rights can no longer justify denying the first.

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A CASE STUDY OF LEGISLATIVE IMPLEMENTATION: THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

Introduction

Legal writers and students of legislation too often concentrate on choosing the best possible policy solution to a problem without focusing on the problems that will be associated with its implementation.[1] This case study of a major piece of legislation suggests, however, that few issues about government are more critical "than the matter of whether the federal government is . . . capable of translating intentions into outcomes."[2]

This Note evaluates the first two years of implementation of a federal regulatory act — The Coal Mine Health and Safety Act of 1969.[3] After briefly setting forth the history, key provisions and the statistical results of the 1969 Act, this Note analyzes the major actors in the implementation process to see how implementation was handled. In particular, it examines how the Bureau of Mines, the Social Security Administration, and the industry responded to their responsibilities under the 1969 Act. The information and ideas drawn from this analysis are intended to help legislators recognize problems of implementation in advance, in order to plan for better implementation in future laws.

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1 This Note uses the analytical framework established in G. ALLISON, ESSENCE OF DECISION (1971). According to Professor Allison, analysts seem to assume that either the preferred solution will command agreement or that it is someone else's job to implement policy. In fact, he suggests that normally only 10 per cent of the work of achieving a desired governmental outcome is done when the preferred analytic solution is reached. *See id.* at 267.

2 *Id.* at 265.

3 Pub. L. No. 91-173, 83 Stat. 742 (codified at 30 U.S.C. §§ 801-960 (1970)) [hereinafter cited and referred to as 1969 Act]. The section numbers of the Act, as used in this Note, are taken from the statute as enacted. This reflects the practice in government and in the industry to refer to portions of the Act by the original section numbers. Parallel citation to the *United States Code* is provided in the footnotes.

I. BACKGROUND

A. *Brief History of Federal Coal Mine Acts: Legislating in Response to Disasters*

The 1969 Act was preceded by several unsuccessful federal ventures into the coal mine health and safety field. Federal interest began as early as 1865 when a bill to create a federal bureau of mines was introduced into Congress.[4] It was not until 1910, however, that Congress, reacting to a public aroused by a series of coal mine disasters, created a Bureau of Mines in the Department of the Interior.[5] The Bureau was charged with researching better methods to increase production and prevent accidents, but it lacked any power to make inspections. Enforcement of its policies was therefore ineffective.[6]

In 1941 the Bureau was given the power to make inspections in order to supplement the work of state agencies.[7] The 1941 legislation was not regulatory — it merely authorized federal inspectors to make inspections under ground without permission and authorized the Bureau to publicize its findings and recommendations.[8]

In 1951 an explosion in West Frankfort, Illinois, took the lives of 119 deep coal miners.[9] Spurred by public demands, Congress passed another major act, the Federal Coal Mine Health and Safety Act of 1952.[10] The 1952 Act imposed an administratively established federal safety code on underground mine operations. Although it constituted a major step in mine safety legislation, the law had defects that were commented on by President Truman

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4 S. 21, 39th Cong. *See also* S. REP. No. 411, 91st Cong., 1st Sess. 3 (1969). *See also* Howerton, *The Federal Coal Mine Health and Safety Act of 1969*, 16 ROCKY MOUNTAIN MINERAL LAW INST. 539, 541 (1970).

5 30 U.S.C. § 1 (1970); *see also* S. REP. No. 411, 91st Cong., 1st Sess. 3 (1969).

6 *See id.* at 4; National Academy of Public Administration, The Coordination of Federal and State Coal Mine Health and Safety Programs with Special Reference to the Federal Coal Mine Health and Safety Act of 1969 at 4, Apr. 15, 1971 (report submitted to Bureau of Mines) [hereinafter cited as Federal State Relations].

7 Pub. L. No. 77-49, 55 Stat. 177; *see also* S. REP. No. 411, 91st Cong., 1st Sess. 4 (1969).

8 *Id.* at 4.

9 *Id.* at 5.

10 Pub. L. No. 82-552, 66 Stat. 692 (1952). *See* Federal State Relations, *supra* note 6, at 5.

upon signing the bill.[11] For example, responsibility for enforcement remained with the states in spite of their poor record. Mines employing less than 15 persons underground were exempted from coverage under the Act. Regulation of electrical and ventilation systems was inadequate. Finally, there were significant procedural loopholes.

The recurrence of major mine disasters led to a 1966 amendment of the 1952 law. While this amendment eliminated the small mine exemption, it failed to correct many of the other weaknesses of the earlier laws.[12]

In 1968 President Johnson proposed a new Federal Coal Mine Health and Safety Act[13] to correct some of the problems of the earlier laws; but he was unable to secure passage by the Ninetieth Congress.[14] Professor Allison explains this pattern of policy making in government: "Dramatic change occurs usually in response to major disasters. Confronted with an undeniable failure of procedures and repertoires, authorities outside the organization demand change. . ."[15]

The 1969 Act,[16] like those before it, was precipitated by yet another disaster, a mine explosion in Farmington, West Virginia, that killed 78 men.[17] While there were other pressures for mine safety reform at the time the bill was introduced, the Farmington disaster and the press campaign which followed were the primary catalysts of reform. In the words of the House Report on the bill: "[D]ead miners have always been the most powerful influence in securing passage of mining legislation."[18]

Coal miners' pneumoconiosis, or black lung disease, also be-

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11 S. REP. No. 411, 91st Cong., 1st Sess. 5 (1969).

12 80 Stat. 84, *see also* S. REP. No. 411, 91st Cong., 1st Sess. 5 (1969).

13 H.R. 19698, 90th Cong., 2d Sess. (1968); *see also* S. REP. No. 411, 91st Cong., 1st Sess. 6 (1969).

14 S. REP. No. 411, 91st Cong., 1st Sess. 6 (1969).

15 G. ALLISON, ESSENCE OF DECISION 85 (1971).

16 30 U.S.C. §§ 801-960 (1970).

17 S. REP. No. 411, 91st Cong., 1st Sess. 8 (1969). For the story of the Farmington disaster and the press campaign for reform which followed, see B. HUME, DEATH AND THE MINES ch. 1 (1971). The press campaign was exerting pressure as late as mid-summer, 1970. *See Hearings on Health and Safety in the Coal Mines Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 192 (1970) [hereinafter cited as *1970 Senate Hearings*].

18 S. REP. No. 411, 91st Cong., 1st Sess. 7 (1969).

came a major issue at about the same time as the Farmington disaster. The need to prevent the disease drew nearly as much attention in Congress as mine safety.[19]

Still more pressure for reform was added when Joseph Yablonski and a group of dissident miners made coal mine health and safety a major issue in their well publicized campaign in 1969 to unseat W.A. Boyle as President of the United Mine Workers of America.[20] The struggle between these two factions in the union continued throughout the first two years of the implementation of the 1969 Act.[21]

Congress responded to these pressures by passing the Coal Mine Health and Safety Act of 1969[22] which was signed into law in December, 1969. The Act constitutes a major advance in legislative efforts to lessen disease and injury in the coal mining industry.

B. *The 1969 Act*

The primary purposes of the 1969 Act are to lower the incidence of accidental injuries and occupational diseases associated with coal mining and to compensate those who have been permanently disabled by black lung disease and the families of miners whose deaths can be attributed to the disease.

1. Provisions for Minimizing Accidental Deaths and Injuries and Occupational Diseases

Accidental deaths and injuries — which are more traumatic than black lung disease — have traditionally been the most publicized index of success in improving conditions in coal mines. The 1969 Act established new interim safety standards[23] to lessen the accident rate in mines and empowered the Secretary of the Interior

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19 *See id.* at 6-7. A recent comprehensive collection of papers on the subject of medicine and mining is National Conference on Medicine and the Federal Coal Mine Health and Safety Act of 1969, Papers and Proceedings, June 15, 1970 (Washington, D.C.).

20 The campaign of Yablonski is the subject of B. HUME, DEATH AND THE MINES (1971). Its influence in the passage of the act is mentioned briefly in Note, *The 1969 Coal Mine Health and Safety Act: A Survey of Coal Mine Safety Legislation in Pennsylvania*, 31 U. PITT. L. REV. 665, 672 (1970).

21 *See, e.g.*, Conti, *Coalfield Clash*, The Wall Street Journal, Sept. 8, 1972, at 1, col. 6.

22 30 U.S.C. §§ 801-960 (1970).

23 1969 Act tit. III, 30 U.S.C. §§ 861-78 (1970).

to promulgate regulations making these or similar standards permanent.[24] The standards are specifically aimed at various dangers, including roof falls, electrical equipment failures, misuse of explosives, and poor ventilation.

In addition to these new safety standards, the 1969 Act establishes innovative health standards. While collections of dust have always been recognized as a cause of explosions and one of the industry's most severe hazards,[25] the 1969 Act places special emphasis on reducing the danger of coal dust contributing to black lung disease.[26] Related to silicosis and asbestosis, black lung disease is caused by the inhalation of coal dust[27] and results in shortness of breath and a serious inability to take oxygen into the bloodstream.[28] The ailment can result in total disability and death and has recently been associated with coronary failure.[29] The disease is far more widespread in the coal mining regions of the United States than previously estimated. At the time of passage of the 1969 Act, it was generally believed that about 4000 men died annually from the disease and that there were about 100,000 totally disabled miners who would qualify for benefits under the 1969 Act.[30] By the end of the second year of implementation, however, over 348,000 persons had made claims under the 1969 Act, and 159,534 persons had qualified for benefits.[31]

Title II of the 1969 Act, considered by many to be the most innovative and important feature of the legislation,[32] provides that the working conditions in each underground mine are to be sufficiently free of respirable dust concentrations to permit each miner to work "underground during the period of his entire adult life without incurring any disability from pneumoconiosis or any other

24 1969 Act § 101, 30 U.S.C. § 811 (1970).

25 Note, *The Price of Coal: The Coal Mine Health and Safety Act of 1969*, 20 CATH. U.L. REV. 496, 496-98 (1971).

26 *Id.* at 496.

27 S. REP. No. 411, 91st Cong., 1st Sess. 7 (1969).

28 Note, *The Price of Coal: The Coal Mine Health and Safety Act of 1969*, 20 CATH. U.L. REV. 496, 498 (1971).

29 *Id.*

30 S. REP. No. 743, 92d Cong., 2d Sess. 2 (1972).

31 GENERAL ACCOUNTING OFFICE, ACHIEVEMENTS, ADMINISTRATIVE PROBLEMS, AND COSTS IN PAYING BLACKLUNG BENEFITS, REP. B-164031 (4), at 18 (1972) [hereinafter cited as GAO BENEFITS REPORT].

32 *See, e.g.*, letter from Frederick D. Price, Acting Deputy Director, Safety Div., United Mine Workers of America, to author, December 23, 1971.

occupationally related disease."[33] The standards of the 1969 Act require that the average concentration of respirable dust in mine atmospheres be reduced, in steps, to a level not to exceed 2.0 milligrams of respirable dust per cubic meter of air (mg/m^3).[34] According to a report by the Department of the Interior,[35] men working in a dust environment of 2.0 mg/m^3 run a two percent risk of developing simple pneumoconiosis. When the dust concentration is increased to 3.0 mg/m^3, the risk of simple pneumoconiosis is five percent and the risk of complicated pneumoconiosis, two percent. At 4.5 mg/m^3, the risk of simple is 15 percent and of complicated four percent.[36] In a survey made by the Bureau of Mines before passage of the 1969 Act, 51 percent of the mine sections surveyed were operating under environmental conditions where the concentration of dust was over 4.5 mg/m^3.[37]

To provide for early detection of black lung disease, the 1969 Act also requires that miners undergo periodic medical examinations.[38] If the examination reveals that a miner has pneumoconiosis, he may transfer to a job at the mine where the dust concentration in the air is less than in his present working position.[39]

A variety of tools are used to enforce the health and safety standards of the 1969 Act and the regulations promulgated under it. These include periodic mandatory inspections,[40] investigations following accidents,[41] monetary penalties or assessments,[42] and closure orders.[43] Closure of the mine can be ordered for an existing imminent danger, for an unwarrantable failure to comply with

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33 1969 Act § 201(b), 30 U.S.C. § 841(b) (1970).
34 1969 Act § 202(b)(2), 30 U.S.C. § 842(b)(2) (1970).
35 *See* S. REP. No. 411, 91st Cong., 1st Sess. 16 (1969).
36 *Id.* Pneumoconiosis is classified according to the stage of progression which it has reached in the lung of the miner. The disease occurs in two forms — simple and complicated. Simple pneumoconiosis is characterized by small opacities present in the lung seen as dark spots on x-rays. Complicated pneumoconiosis, a more advanced stage, is recognized on x-rays by conglomerate or massive lesions larger than one centimeter in diameter. *See* GAO BENEFITS REPORT, *supra* note 31, at 8-9.
37 Interview with Murray Jacobsen, Div. of Health, Bureau of Mines, Dep't of Interior, in Washington, D.C., Sept. 15, 1972.
38 1969 Act § 203, 30 U.S.C. § 843 (1970).
39 *Id.*
40 1969 Act § 103, 30 U.S.C. § 813 (1970).
41 *Id.*
42 1969 Act § 109, 30 U.S.C. § 819 (1970).
43 1969 Act § 104, 30 U.S.C. § 814 (1970).

the standards, for repeated violations of a similar character, for an unsafe or unhealthy condition which is not correctable, or for violation of the dust standard.[44]

2. Black Lung Compensation Benefits

Title IV of the 1969 Act seeks to "provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to the disease."[45] As amended in 1972,[46] the Act provides for federal payment of black lung compensation benefits to miners who file claims before July 1973[47] and for dependents who meet certain statutory qualifications.[48] Those filing after that date will have benefits paid by the operators of the mine where they are employed, either through workmen's compensation funds, if the funds provide "adequate coverage for pneumoconiosis,"[49] or directly from the operator if the funds are inadequate.[50]

C. *Contrasting Intentions and Outcomes*

One issue that arises during the implementation of a program is the problem of determining what will constitute successful implementation. Administrators and legislators have a tendency to evaluate implementation in terms of whether or not a particular agency accomplished the specific duties assigned to it by the legislation. For example, they might ask whether the agency accomplished the requisite number of inspections during 1970. A more appropriate and meaningful evaluation would focus on whether or not the program has succeeded in achieving the desired outcome or goals as stated in the legislation. An evaluator, using the purposeful or outcome approach, would ask: Are mines safer now?

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44 *Id.*

45 1969 Act § 401, 30 U.S.C. § 901 (1970).

46 Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150, *amending* 30 U.S.C. §§ 901-36 (1970).

47 Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 5(1), 86 Stat. 150, *amending* 1969 Act § 414(a), 30 U.S.C. § 924 (1970).

48 Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 2, 86 Stat. 150, *amending* 30 U.S.C. 922(a) (1970). Widows, orphans, dependent brothers and sisters and dependent parents are provided for.

49 1969 Act § 421, 30 U.S.C. § 931 (1970).

50 1969 Act § 422, 30 U.S.C. § 932 (1970).

Are miners healthier now? Are miners who are disabled from black lung receiving benefits?

The Bureau of Mines annually publishes data on the number of deaths and injuries occurring in coal mines in the United States. The statistics are given in both absolute numbers and in terms of a "frequency rate," that is, the number of deaths or injuries per million man-hours worked by the industry. In 1969, there were 203 deaths in coal mines in the United States. The frequency rates for fatalities was 0.85 deaths per million man-hours worked. In that same year there were 9917 injuries in United States mines, with a resulting frequency rate of 41.76 injuries per million man-hours worked.[51]

Although the 1969 Act was expected to reduce the number and frequency of accidents significantly during the first year or two of implementation,[52] fatalities were up 28 percent in 1970 over the 1969 levels to a level of 260 deaths and a frequency rate of 1.00 per million man-hours. Nonfatality experience was 16 percent worse in 1970, rising to a level of 11,552 injuries and an injury frequency of 44.40 per million man-hours.

In 1971, the number killed in coal mines in the United States was the lowest, in absolute terms, in recent history; there were 180 deaths at a frequency rate of 0.71. But in 1971, injury experience worsened as the frequency rate increased to 45.14. The 1972 data now available indicates that the 1971 trend is continuing as the number of deaths continues to decline and the frequency of injuries continues to rise.[53] Although the Bureau notes its disappointment with the 1971 injury rate, the worst since 1957, it points with pride to the fatality rate in 1971.

Relating injuries to the size of the work force as opposed to the hours worked,[54] however, creates a less favorable perspective on

51 This work is done by the Accident Analysis Group within the Technical Support Division of the Bureau of Mines. The data in the text on deaths and injuries was obtained during an interview with Forest Moyer, Chief, Office of Accident Analysis, Bureau of Mines, Dep't of Interior, in Washington, D.C., Sept. 18, 1972. The same information is collected annually in Mineral Industry Surveys, a publication of the Dep't of Interior.

52 *See* S. REP. No. 411, 91st Cong., 1st Sess. 13 (1969).

53 Interview with Forest Moyer, *supra* note 51.

54 The approach is suggested by Thomas W. Bethell, Editor, Coal Patrol, a newsletter published periodically in Washington, D.C. *See* Coal Patrol, Sept. 9, 1972, at 6-8.

the Bureau's data. The combined total of deaths and injuries to coal miners remained nearly constant during the last 10 year period (with a two year dip in 1968 and 1969), while the size of the work force declined. Matching the two figures to produce a percentage of the work force injured or killed annually demonstrates that the average risk of injury in mines was worse in 1970 (8.2 percent) and in 1971 (8.1 percent) than in the 1960's (7.4 percent).[55]

Drawing firm conclusions from the statistics is difficult. Injury data is complicated by the fact that the government believes that reporting today is better than in the past. But the Bureau also confirms that serious injuries are still under-reported.[56] It is clear, however, that a drastic reduction in the risk of death or injury in mines has not been achieved by the 1969 Act.

While injury frequency rates have not declined under the 1969 Act, the dust sampling program instituted by the Bureau reveals a steady reduction in dust concentration levels. As of June 1972,[57] 94.9 percent of all mine sections were in compliance with the interim standard of 3.0 mg/m^3. This can be compared with 68.4 percent in June of 1971 and 88.9 percent in December of 1971.[58] What is even more encouraging is the fact that 76.9 percent of the coal mine sections now meet the permanent standard of 2.0 mg/m^3.[59]

The second overall goal of the 1969 Act is the lessening of the dislocational effects of black lung disease by the distribution of benefits.[60] There can be little doubt that the dislocational effects of the disease are major. Disabled miners and their families suffer greatly from a loss of income, demoralization, and a lower standard of living as a result of the disease. To the extent that these dislocational costs have been lifted from the shoulders of miners suffering from black lung disease and their families and borne by a

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55 *Id.*

56 Bureau of Mines, Dep't of Interior, Mineral Industry Survey, July 13, 1972.

57 Interview with Murray Jacobsen, *supra* note 37.

58 SECRETARY OF THE INTERIOR, TOWARDS IMPROVED HEALTH AND SAFETY FOR AMERICA'S COAL MINERS, 1970 ANNUAL REPORT 39 [hereinafter cited as 1970 ANN. REP.].

59 A special survey conducted by the Bureau of Mines from 1968 to 1972 confirms this trend. In a selected sample of 29 mines, the number of mine sections in compliance with the 3.0 mg/m^3 standard had improved from 28.4 percent in 1968-69 to 74.1 percent in 1972. Interview with Murray Jacobsen, *supra* note 37.

60 1969 Act tit. IV, 30 U.S.C. §§ 901-36 (1970).

larger number of persons, dislocational costs have been lessened by the 1969 Act.[61]

Therefore, another index for evaluating the implementation of the 1969 Act should be the success of the benefit program (implemented by the Social Security Administration) in reaching persons afflicted with the disease. It is more difficult, however, to evaluate the implementation of the benefit provisions than of the health and safety sections, since it is harder to measure the effects of benefits than the reduction of illness and injuries. At the end of December 1972, after two years under the 1969 Act, benefits were being paid at the rate of about $336 million a year, and officials estimate that about $566 million would be paid in 1973 under the 1969 Act. The national approval rate of claims made is about 50 percent with significant variation from state to state.[62] The questions of successful implementation of this portion of the 1969 Act have centered around the ease with which the benefits were paid and the denial of benefits to a large class of persons. The controversy resulted in a congressional amendment to title IV of the 1969 Act[63] and a General Accounting Office report on the implementation of that title.[64]

II. Implementation by Major Actors

The principal actors[65] in the first two years of implementation of the 1969 Act were: the Department of the Interior, and within it,

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61 *Cf.* G. Calebresi, The Costs of Accidents, 39-67 (1970) (analyzing dislocational costs as secondary costs). Professor Calebresi suggests that the overall costs analysis of any accident system should also include tertiary or administrative costs. *Id.* at 28. This Note, however, does not deal with tertiary costs since Congress apparently did not intend to use them as a measurement of success of this particular program. The 1969 Act made state laws supplemental to the federal system of enforcement and did not pre-empt the coal mine health and safety field. The result was an expensive dual system of enforcement. See text at notes 104 to 109, *infra*. Furthermore, Congress showed a complete willingness to fund the program at the national level throughout the first two years of implementation and did not show concern with administrative cost minimization.

62 GAO Benefits Report, *supra* note 31, at 18.

63 For a discussion of title IV, see text at part II. B *infra*.

64 GAO Benefits Report, *supra* note 31.

65 Professor Allison has isolated three models of decision making which helped put into perspective the role of these actors in the first two years of implementation. The first model describes a "rational actor paradigm" and analyzes government actions in terms of deliberate and rational choices by the participants of the

the Bureau of Mines; the Department of Health, Education and Welfare, and within it, the Social Security Administration; and the mine operators, a non-homogeneous group including large and small operators, captive and commercial.[66]

In addition, Congress played a part in implementing laws as well as legislating the 1969 Act by oversight hearings and other activities carried on by individual congressmen, committees, or other sub-groups of the institution. Finally, private persons or groups not affiliated with operators or government, including the United Mine Workers, public interest law firms, and private individuals, influenced the way the Act was implemented.

A. *The Bureau of Mines*

1. Changes in Bureau Leadership and Organization

The implementation tasks assigned to the Bureau of Mines by the 1969 Act were difficult.[67] The Bureau was charged with the drafting and promulgation of regulations,[68] the making of inspections,[69] the assigning of penalties for violations,[70] and a number of other matters.[71] In the words of one Interior official, the 1969 Act

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value-maximizing means of reaching a desired objective. G. ALLISON, ESSENCE OF DECISION 32 (1971). Professor Allison's second model is based on an organizational process theory. This model sees the behavior of units less as the product of deliberate choice and more as the combined outputs of sub-units of the larger organization, responding to request for action by the use of standard operating procedures or incremental deviations from such procedures. According to the second model, learning in such units occurs gradually over time and significant change usually occurs in response to dramatic events. *Id.* at 67, 78-96. The third model sees the action of the various parties, or the outcomes to be explained, as the result of politics and bargaining on the part of actors involved in implementation. *Id.* at 162-81. While this Note did not attempt to apply these models directly, it did use them to gain a prospective for studying and analyzing the first two years of the implementation of the 1969 Act.

66 A captive firm, in the sense it is used here, is one which produces coal for shipment to a parent company for use in the making of steel or some other product. A commercial firm, while it may be one of several businesses of a conglomerate, sells its production primarily on the open marketplace.

67 The text of the 1969 Act assigns enforcement responsibility to the Secretary of Interior or his "representatives." *E.g.*, 1969 Act § 103(a), 30 U.S.C. § 813(a) (1970). The Secretary's powers under the 1969 Act have, for the most part, however, been delegated to the Bureau of Mines within the Department of Interior.

68 1969 Act § 101, 30 U.S.C. § 811 (1970).

69 1969 Act § 103, 30 U.S.C. § 813 (1970).

70 1969 Act § 109, 30 U.S.C. § 819 (1970).

71 *E.g.*, 1969 Act § 302(a), 30 U.S.C. § 862(a) (1970), directs the "Secretary" to approve roof support plans prepared by the operators.

required a "safety revolution in coal mines within 90 days."[72] Every level within the Bureau felt the pressure of deadlines established by Congress.[73] Some believe that the short deadlines were unrealistic, and set by Congress in order to emphasize that "it would not tolerate any delays which could not be fully explained and justified."[74] On the other hand, there is every indication that Congress felt that the requirements of the 1969 Act could be met on schedule, or that sufficient safety valves were built in to protect those who would require more time to comply than the statutory period.[75]

Changes in personnel and organizational developments within the Bureau made it more difficult to achieve full implementation under the 1969 Act. Shortly after the Farmington disaster, the Bureau had begun an aggressive safety campaign within the limitation of its powers under the 1952 Act.[76] At that time the Bureau was headed by John F. O'Leary, who had been Director since October of 1968. O'Leary was heavily involved in the drafting of the 1969 Act and after passage, in the drafting of regulations to implement it.[77] As is customary with a change of administrations,

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72 *1970 Senate Hearings, supra* note 17, at 367 (statement by Hollis Dole, Assistant Secretary, Mineral Resources, Dep't of Interior).

73 Interviews with personnel, Bureau of Mines, Dep't of Interior, in Washington, D.C. in September, 1972. The various timetables imposed by the 1969 Act are collected in 1970 ANN. REP., *supra* note 58, at 6. *See also* GENERAL ACCOUNTING OFFICE, PROBLEMS IN IMPLEMENTATION OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, REP. B-170686, at 9 (1971) [hereinafter cited as GAO IMPLEMENTATION REPORT].

74 *1970 Senate Hearings, supra* note 17, at 367.

75 There is flexibility in the 1969 Act in the form of provisions for less stringent application of the health and safety standards upon a showing of necessity by the operator. Section 301(c), 30 U.S.C. § 851(c) (1970), allows the Secretary of the Interior to modify the application of any mandatory standard to a mine if he determines that an alternative method of achieving the same result will not result in a diminution of safety to the miners. Also, an Interim Compliance Panel is provided for in § 5(a), 30 U.S.C. § 805(a) (1970); this panel has authority to furnish temporary relief to operators who could not comply with certain dust and electrical equipment standards during implementation. *Id.* Of the 1439 mines that applied for noncompliance permits during the first year, 443 were granted permission to deviate from the required standard, at least for a short period of time. Interim Compliance Panel, Annual Report Calendar Year 1970 (undated).

76 *Hearings on H.R. 4047, H.R. 4295 and H.R. 7976 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 55 (1969) (statement of John O'Leary, Director, Bureau of Mines, Dep't of Interior).

77 Interview with Herschel Potter, Div. of Safety, Bureau of Mines, Dep't of Interior, in Washington, D.C., Sept. 19, 1972.

O'Leary, an appointed official, had sent an undated resignation to the President. The President exercised his prerogative to accept this resignation on February 28, 1970, one month prior to the issuance of regulations implementing the new 1969 Act.[78] For the next seven months the Bureau was without a permanent Director. Several other appointments also were not made during this period.[79]

The effect on the agency of having only an "acting" director and other "acting" officials is impossible to document. In terms of the day-to-day operation of the organization, it may have been minimal; in terms of active policy-making activity it may have been substantial. Congressional hearings reveal, however, that elements of the public, including those affected by the 1969 Act, believed that the Bureau was less effective without an appointed director:

> Of the Bureau of Mines, I think . . . that criticism stems not so much on perhaps what seems to be apparent slowness in . . . the inspection features, but stems from a feeling . . . that a Bureau of Mines without a director is less than effective.[80]

Congress,[81] the United Mine Workers,[82] public interest groups,[83] and operators[84] all indicated concern over these early delays. The effect on the morale of the inspection force and miners must be considered serious. At least in the view of those outside the Bureau, no clear implementation policy was forthcoming.

The 1969 Act led to changes in the organizational structure of the Bureau.[85] During the early period of implementation, the necessity of reorganization was debated. The Bureau had been reorganized earlier in 1969 to upgrade its "health function."[86] The reorganization in 1970 rescinded the 1969 arrangement and did essentially two things: it separated the coal mine responsibilities in the Bureau from its other responsibilities, and it separated

78 Mandatory Safety Standards, Underground Coal Mines, 35 Fed. Reg. 5335 (1970).
79 *See 1970 Senate Hearings, supra* note 17, at 212-13,
80 *Id.* at 580 (statement of Senator Jennings Randolph (D-W. Va)).
81 *See, e.g., id.* at 291.
82 *See, e.g., id.* at 195.
83 *See, e.g., id.* at 224.
84 *See, e.g., id.* at 253.
85 1970 ANN. REP., *supra* note 58, at 11.
86 *1970 Senate Hearings, supra* note 17, at 244.

enforcement responsibilities under the 1969 Act from the research activities of the Bureau.[87] Congressional critics of the reorganization felt that it consumed time and energy that should have been devoted to "implementation," and that it resulted in a "downgrading" of the health function of the Bureau.[88] Yet reorganization was forseeable and probably necessary given the increased responsibilities of the Bureau under the 1969 Act. The field force of the Bureau, for example, had to be organized to accommodate the expansion of the field personnel from 250 at the time of passage to 1350 in 1972.[89] However, there was a detrimental side to the reorganization as well. Compounding the problem created by the failure of the executive to fill existing vacancies in the Bureau structure, several new positions created by the reorganization were filled by temporary appointees. At one point a total of 31 top Bureau positions, old and new, were filled with persons who had not received a permanent appointment.[90] In some cases one person filled more than one office.[91]

There can be little doubt that during the crucial initial period of implementation, the Bureau policy formulation process was hindered by the absence of a strong director and other high level persons. The lines of authority were not as clear as they would have been had the key staff members been permanently assigned to their tasks. With the introduction of new functions and responsibilities, time and energy were expended on familiarization with new job requirements and development of organizational roles. Unclear policy and lines of authority only compounded difficulties of implementation.

From this experience it can be seen that a prior inquiry by Congress into the preparedness of an agency for implementing a major piece of legislation, particularly at the policy-making levels, will permit Congress to make allowance for needed changes within the implementing bureaucracy and thereby minimize transitional

87 *Id.* at 581.
88 *Id.* at 244.
89 Interview with John Crawford, Assistant Director, Coal Mine Health and Safety, Bureau of Mines, Dep't of Interior, in Washington, D.C., Sept. 15, 1972.
90 *1970 Senate Hearings, supra* note 17, at 243.
91 *Id.*

delays. The experience also emphasizes the need for permanent and accountable leadership when an attempt is made to alter the output of an agency.

2. Inspections

One year to the day after the passage of the 1969 Act a disaster occurred in Hyden, Kentucky, which took the lives of 38 men.[92] During the hearings which followed the tragedy, the dialogue between members of the House General Subcommittee on Labor and officials of the Bureau of Mines and the Department of the Interior raised a number of questions about the Bureau's implementation of the 1969 Act.[93] In particular the hearings focused on the number of inspections made by the Bureau, the role of the closure penalty provided for in the 1969 Act, and the relationship between the federal and state systems of enforcement.

The 1969 Act requires that at least four inspections for compliance with health and safety requirements be made by the Bureau at each underground mine in the United States every year.[94] In addition the Bureau must make inspections every five working days in mines which liberate methane or other explosive gases.[95] By December of 1970 it was evident that the Bureau could not make the required number of inspections. In two districts surveyed by the General Accounting Office (GAO), the Bureau had completed only 31 percent of the required safety inspections and about one percent of the required health inspections.[96] It was not until 1972 that the Bureau could feel confident that it would meet the statutory requirement of four safety inspections per year.[97] The Bureau justified this in terms of a personnel shortage and the

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92 *Hearings on H.R. 5680 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 1 (1971) [hereinafter cited as *Hyden Hearings*].

93 *Id.* The hearings were held following the Hyden disaster, ostensibly to consider the method used by the Bureau of reporting coal mine accidents. But in opening the hearings, Representative Dent noted that the primary purpose was to investigate the Hyden tragedy. *Id.* at 2.

94 1969 Act § 103(a), 30 U.S.C. § 813(a) (1970).

95 1969 Act § 103(i), 30 U.S.C. § 813(i) (1970).

96 GAO IMPLEMENTATION REPORT, *supra* note 73.

97 Interview with John Crawford, *supra* note 89.

amount of time that had to be devoted by the inspectors to the investigation of accidents and the required auditing and approval of operator ventilation and roof control plans.[98]

The problem was not one of funding,[99] but of limited manpower resources and procedures. To deal with the problem, the Bureau deviated from its existing procedures in two ways. First, in cooperation with the Civil Service Commission, the Bureau lowered its standards for new inspectors and undertook a stepped-up recruitment campaign.[100] Even though these changes were instituted six months before passage of the 1969 Act, it was not until mid-1971 that the size of the inspector force was doubled.[101] Second, the Bureau decided to make only partial-but-representative inspections of the mines during the initial period of implementation, instead of the full inspection required by the Act.[102] It was felt that these inspections served to educate operators with the provisions of the new law while reaching the largest number of mines with the limited manpower resources available. Inevitably, several mine sections were not inspected during the initial implementation period. The Bureau was, in other words, forced "to determine which provisions of the Act could be fully or only partially implemented to achieve maximum health and safety progress with the then available resources."[103]

During the Hyden hearings the question was raised why state inspectors were not deputized and used during the implementation period.[104] The Senate bill had authorized the Bureau to enter into agreements with states to utilize their services, personnel and facilities in carrying out the implementation of the Act. This theme, however, was struck in conference with the specific notation that the provision for federal-state cooperation in § 503[105] of the 1969 Act did not authorize the Secretary to delegate his enforcement authority to state agencies or personnel.[106] The result was

98 1970 ANN. REP., *supra* note 58, at 34.
99 *Hyden Hearings*, *supra* note 92, at 21-22.
100 1970 ANN. REP., *supra* note 58, at 17.
101 *Id.* at 18.
102 *Id.* at 25.
103 *Id.*
104 *Hyden Hearings*, *supra* note 92, at 71.
105 30 U.S.C. § 953 (1970).
106 H.R. REP. No. 761, 91st Cong., 1st Sess. 67 (1969).

an overlapping of enforcement systems that were coordinated only indirectly. Frustrated by the inability of the Bureau to utilize state inspectors during implementation (especially after the Hyden disaster) one Representative commented: "By the time you get to 1000 federal inspectors . . . the mining industry will be relegated to a scrap heap . . . I think that state inspectors and state inspection [systems] should be made part of the Federal system . . . ."[107] Shortly thereafter he was reminded of the reason such a plan was not possible: "Counsel advises me that we rejected the idea . . . because of state bureaus having a fear that we were going to take over, and all these jobs would be lost, and we tried to get support for the bill, and we could not. . . ."[108] Thus, in the very process of enacting the 1969 Act Congress closed off a potentially useful avenue of implementation because of political fears.[109]

Today the future of the state inspector systems is in doubt. The general feeling at the Bureau is that they will move toward serving the function of educating and training miners.[110] The National Academy of Public Administration has recommended that they be abolished.[111]

3. Use of Closures

Section 104 of the 1969 Act[112] provides that inspectors may close a mine for violation of the safety regulations if an imminent danger is determined to exist, if repeated violations of the Act are detected,

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107 *Hyden Hearings*, *supra* note 92, at 71 (statement by Representative Dent).
108 *Id.* at 72.
109 Yet Congress has allowed federal agencies to share enforcement responsibility with state agencies in other areas. The Occupational Health and Safety Act of 1970 allows for a "state plan," whereby states may promulgate and enforce safety and health regulations equal to or more stringent than federal standards and assume responsibility for the enforcement of health and safety standards. Standards are set which must be met before the plan may go into operation, thus protecting the worker from abuses of the shared enforcement arrangement. *See* 29 U.S.C. §§ 667 (a)-(c) (1970); 29 C.F.R. pt. 1902, § 17 (1972). The Federal Metal and Non-metallic Mine Safety Act of 1966 has similar provisions. 30 U.S.C. § 735 (1970). Under the Federal Railroad Safety Act of 1970, states are given an opportunity to participate in carrying out investigations and surveillance activities in connection with standards promulgated by the federal government. Under special circumstances states may enforce federal standards. 45 U.S.C. §§ 435, 437 (1970). *See also* Federal State Relations, *supra* note 6, at 47-56.
110 Interview with John Crawford, *supra* note 89.
111 Federal State Relations, *supra* note 6, at 65.
112 30 U.S.C. § 814 (1970).

and under several other conditions. Much of the more heated discussions at the Hyden hearings centered around why the Bureau's inspectors had not closed the Hyden mine prior to the disaster.[113] In testifying before the subcommittee, the Director of the Bureau acknowledged that the mine had been repeatedly cited for violations of the 1969 Act and closed temporarily on several occasions,[114] but he argued that penalties and inspections did not prevent violations of the 1969 Act and could not have prevented the Hyden disaster. Subsequent to the Hyden hearings the GAO reported that it believed that the Bureau could have made more effective use of the closure provisions at other mines during the first year of implementation.[115]

Although almost all the safety personnel in the Bureau believe that the closure order is at the heart of the enforcement provisions of the 1969 Act,[116] there are some limitations on its use. First, in the majority of cases where closure is threatened in a "notice" given by an inspector, the cited violation is corrected in the time allowed. In those instances where a closure order is given, the duration of the closure is usually short.[117] Closing the mine permanently is a much more lengthy and complicated process involving an investigation and the opportunity for a public hearing.[118] Thus it is possible for a mine to have a record of violations and closure after closure, yet not be closed permanently if the operator corrects the violation after each order.[119]

There is also room for inspectors to exercise discretion in the issuance of closure orders. While the Act makes the issuance of notices and closure orders mandatory if certain unhealthy or unsafe conditions exist in a mine,[120] inspectors may exercise judgment in the finding of these conditions. Also, § 104(b)[121] provides for an

113 *Hyden Hearings, supra* note 92, at 68.

114 *Id.* at 4.

115 *See* GAO IMPLEMENTATION REPORT, *supra* note 73, at 49.

116 Interviews with Bureau of Mines personnel in the Division of Coal Mine Health and Safety, in Washington, D.C., September 1972.

117 1970 ANN. REP., *supra* note 58, at 32.

118 1969 Act § 104(h)(1), (2), 30 U.S.C. § 814(h)(1), (2) (1970).

119 1969 Act § 104(c), 30 U.S.C. § 814(c) (1970).

120 *E.g.*, § 104(a) states: "If, upon any inspection . . . [an inspector] finds that an imminent danger exists, such representative *shall* issue forthwith an order [closing the mine]." *Id.*, 30 U.S.C. § 814(a) (1970) (emphasis added).

121 30 U.S.C. § 814(b) (1970).

extension of allowed violation abatement time where the violation is not an "imminent danger." Considerable pressure is placed upon an inspector contemplating the issuance of a closure order not only by the operator but also by the miners. While § 110(a)[122] provides for compensation of miners when a mine is temporarily closed for the purpose of complying with an order, the provision has a short time limitation.[123] Although the mine inspector is not called upon by the 1969 Act to balance the economic hardship of closure with the risk of injury incurred by the continuance of an unsafe practice, such considerations are probably inevitable.

A final reason why implementation of the closure sanction may be limited is the position of the Department of Interior. The Bureau's inspector force was recently reminded by an Interior Department officer of the need to "reconcile the requirements for mine safety with the need for efficient production."[124] This position reflects the Bureau's often criticized[125] dual role of promoting the industry while regulating it.

The Bureau now has collected data showing that the number of violations and notices issued by inspectors increased in 1972, while the number of withdrawal orders (closures) for failure to correct unsafe conditions decreased. Unsure whether the new statistics reflect the increase in the size of the inspector force (more violations cited) and improved safety habits on the part of operators (less closures) or merely an increase in the number of extensions and a reluctance to use the closure penalty, the Bureau has undertaken an investigation of the data.[126] In addition, the Bureau has undertaken the rotation of inspector managers and a number of other changes aimed at altering existing patterns of behavior in

122 30 U.S.C. § 820(a) (1970).

123 If a coal mine or an area of a coal mine is closed ". . . all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator . . . but for not more than the balance of such shift . . . . If a coal mine or area of a coal mine is closed . . . for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who are idled due to such order shall be fully compensated . . . for lost time . . . or for one week, whichever is the lesser." 1969 Act § 110(a), 30 U.S.C. § 820(a) (1970).

124 118 CONG. REC. H8138-40 (daily ed. Sept. 16, 1972) (remarks of H. Dole, Assistant Secretary, Dep't of Interior).

125 *See, e.g., 1970 Senate Hearings, supra* note 17, at 222 (statement by Ralph Nader).

126 Interview with Herschel Potter, *supra* note 77.

the field.[127] The Bureau's increased sensitivity can be attributed to several factors, including the apparent failure of the first year's operation to reduce injuries, a growing militancy on the part of young miners, and a recognition of the need to change existing procedures in the field.

This discussion should not be taken as an indictment of the use of closures for enforcement of the 1969 Act. The economic impact on the operator of a loss of production in a large mine for even a few hours is a significant penalty. But, the use of the investigation and closure enforcement mechanism or comparable devices has limits. The limits are most severe during transitional periods.

Given the limitations on the use of inspections and closures during the implementation period, an operational, effective monetary penalty system takes on new importance. Unfortunately, as noted below, the potential of the assessment penalty was not reached during the implementation period.

4. Monetary Civil Penalties

Most of the criticism of the Bureau during the first two years of implementation has centered around the assessment and collection of monetary civil penalties provided for in § 109 of the 1969 Act.[128] This section provides that each occurrence of a violation may constitute an offense for which a monetary penalty may be assessed.[129] Section 109(a)(1)[130] provides that in determining the amount of a penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. As there was no precedent for this kind of provision in the Bureau of Mines, there was no accumulated experience to be used to guide officials in establishing procedures for the assessment

127 Dep't of Interior, Bureau of Mines, News Release Sept. 30, 1971.
128 30 U.S.C. § 819 (1970).
129 1969 Act § 109(a)(1), 30 U.S.C. § 819(a)(1) (1970).
130 *Id.*

of penalties.[131] The Bureau was faced with the task of designing a new system of enforcement.

In March 1970 the Bureau announced its assessment procedure. In spite of the 1969 Act's mandate that each penalty should be tailored to the size of the offending mine, the Department of Interior announced that a "penalty schedule" would be used.[132] The regulations setting forth the schedule provided that an operator could make a penalty payment in accordance with the schedule if he chose to do so, or he could await a determination of a penalty tailored to his particular case.[133] The schedule was applicable to all mines, large and small.

The schedule concept along with the Bureau's safety standards were attacked less than a month after the implementing regulations were published.[134] On April 23, 1970, 75 Virginia operators obtained a temporary restraining order enjoining the use of the schedule, the new regulations, and the interim standards in the 1969 Act to the extent they could not be met by existing technology.[135] The penalty schedule was also attacked in a mandamus action by Representative Ken Heckler (D–W.Va.) and others who alleged that the schedule was in violation of § 109 and seriously delayed implementation of the 1969 Act.[136]

Although restrained from using the March 1970 penalty schedule, the Bureau published a revised penalty schedule in May 1970, which reduced the penalties for initial violations occurring between March 30 and September 30.[137] The Department then accepted voluntary payments in lieu of penalties from mine operators charged with violations. Some payments were made according to the March schedule and other in accordance with the May schedule. Many penalties levied were not paid at all.[138] The pay-

131 Interview with Everett Turner, Chief Assessment Officer, Office of Assessment and Compliance Assistance, Bureau of Mines, Dep't of Interior, in Washington, D.C., Sept. 18, 1972.

132 35 Fed. Reg. 5257, §§ 301.50-.53 (1970).

133 GAO IMPLEMENTATION REPORT, *supra* note 73, at 43.

134 Ratcliff v. Hickel, Civ. Action No. 70-C-50-A (W. D. Va. Apr. 23, 1970).

135 *Id.*

136 Complaint of plaintiff, Heckler v. Hickel, Civ. Action No. 861-70. (D. D.C. 1970) (reproduced at *1970 Senate Hearings, supra* note 13, at 236-37).

137 35 Fed. Reg. 7181-82 (1970); *see also* GAO IMPLEMENTATION REPORT, *supra* note 73, at 50.

138 GAO IMPLEMENTATION REPORT, *supra* note 73, at 57.

ments under the May schedule were token and "could not reasonably have been expected to induce compliance."[139] While the 1969 Act allows for penalties of up to $10,000, violations under the May schedule (even those which created an imminent danger) could be discharged for a maximum of $20.[140] Furthermore, despite the fact that there was nothing in the restraining order to prohibit assessment of penalties by means other than a penalty schedule, no penalties were assessed from April 30 to November 11, when the restraining order was dissolved. During that period thousands of violations had been cited in the field.[141]

In January 1971 the Bureau promulgated new regulations which provided for a new penalty assessment procedure, one which ostensibly took into account the six criteria established in § 109 of the 1969 Act.[142] During 1971 the Bureau established an Office of Assessment and Compliance Assistance to assess and collect penalties. The new office faced an immediate backlog of 39,000 violations not processed during the previous year.[143] Since the implementation of the January 1971 regulations, the Bureau has been charged with undue delay in the assessment of penalties, reducing 94 percent of the penalties assessed, failing to collect penalties, and failing to apply the six criteria of the 1969 Act.[144]

There are at least two possible interpretations of this data. The first, which is essentially the analysis given by the Bureau, is that the period can be understood in terms of the administrative and legal problems which the Bureau faced in implementing the assessment provision. Apparently the Bureau did not believe that Congress intended the six criteria to be used in its assessment policy in initial implementation. This unusual reading stemmed from a desire by the Bureau to avoid its inspectors having to appear at hearings to defend assessments during the initial period. The

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139 *Id.* at 51-52.

140 35 Fed. Reg. 7181-82 (1970).

141 GAO IMPLEMENTATION REPORT, *supra* note 73, at 52.

142 30 C.F.R. pt. 100 (1972).

143 GENERAL ACCOUNTING OFFICE, IMPROVEMENTS NEEDED IN THE ASSESSMENT AND COLLECTION OF PENALTIES—FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, REP. B-1708, at 11 (1972) [hereinafter cited as GAO ASSESSMENT REPORT].

144 *Id.* at 45-47. This Report noted that as of September 1971, the Bureau had assessed $16.3 million in penalties and collected only $800,000. *Id.* at 46. As of July 1, 1972, $12.5 million had been assessed and only $1.4 million collected. *Id.* at 9.

penalty schedules avoided this problem. In the words of one official:

> I don't think that either the members of this committee or of Congress could have contemplated an assessment procedure which would have done violence to the role of the inspectors in inspecting mines. . . .
>
> We had to read section 109 so as to make it workable. . . . [I]f section 109 has to be read . . . that the Secretary must take into account each of the statutory factors on each of the violations, we would find ourselves with an absurdity.
>
> We would find ourselves faced with a task which we could not accomplish without at the same time involving the inspectors.[145]

The Bureau also argues that more time was necessary to implement the assessment provision after the penalty schedule was abolished. Specifically the Bureau argues that it needed time to staff the Office of Assessment and Compliance Assistance, and to establish procedures within that office for assessing the penalties.[146] Furthermore, the Bureau points out that even given the most rapid processing procedure, the collection of a penalty from an unwilling operator can take several months.[147] Finally, Bureau personnel suggest that it was necessary to provide the operators and their lawyers with an educational period to become familiar with assessment procedures since the monetary civil penalty was a new concept in the Bureau.[148]

Another interpretation of the actions of the Bureau during this

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145 *1970 Senate Hearings*, *supra* note 17, at 743.

146 GAO ASSESSMENT REPORT, *supra* note 143, at 30-32, 39-42; interview with Everett Turner, Chief Assessment Officer, Office of Assessment and Compliance Assistance, Bureau of Mines, Dep't of Interior, in Washington, D.C., Sept. 18, 1972.

147 After the operator is cited for a violation a copy of the citation is sent to the assessment office. Subsequently, the operator receives a proposed assessment. Within 20 days the operator may protest to the Assessment Office, and a meeting with an agency official may be scheduled to discuss the assessment. After consideration of the protest, an amended penalty is set. The operator then has 20 working days to either pay the assessment or ask for a hearing. If he requests a hearing, a petition listing the violations is filed with the Office of Hearings and Appeals and the operator is given 20 days to respond. The hearing board's decision exhausts the operator's administrative remedies. If at any stage the operator fails to request further proceedings or pay the penalty, the case is referred to the Justice Department for collection under the Federal Claims Collection Act, 31 U.S.C. § 151 (1970). *See also* 30 C.F.R. pt. 100 (1970); GAO ASSESSMENT REPORT, *supra* note 143.

148 Interview with Everett Turner, *supra* note 131.

period, however, suggests that considerable departmental discretion was used in order to make the scheme more platable to the coal mining industry.[149] This interpretation is fueled by several considerations. When the new Office of Assessment and Compliance Assistance was established, power within that organization was factored considerably. Administratively, the assessment responsibility was assigned to a Chief Assessment Officer who was a lawyer with coal mine experience. Overall management of the office, however, was placed in the hands of a political appointee, whose duties also involved work in the Office of the Director of the Bureau. This decision drew considerable criticism from Congress throughout the implementation period.[150]

Another factor supports this theory of foot-dragging. Throughout the first two years of implementation the six statutory criteria for penalty assessment were given little weight.[151] This drew fire from small operators[152] as well as congressmen. Use of both formal and informal[153] penalty schedules worked a hardship on small operators and resulted in penalties too small to produce compliance among large operators.

Whatever the reason for the ineffective implementation of § 109 during the first two years of the 1969 Act, it had two important results. First, it hampered the work of the inspectors who had to rely on the organizationally separate Office of Assessment and Compliance Assistance to enforce notices of violation. These notices meant little to operators who could expect to have the assessed penalty drastically reduced or deferred.[154] To induce

149 *See, e.g., 1970 Senate Hearings, supra* note 17, at 222 (statement by R. Nader).

150 Representative Ken Hechler, Press Release, Jan. 19, 1971. *See also* Vecsey, *Mine Safety Effort Draws Rising Criticism*, N.Y. Times, Sept. 19, 1972, at 35, col. 1.

151 GAO IMPLEMENTATION REPORT, *supra* note 73, at 54. New regulations which qualify the role the six factors will play in assessment after September 1972 were published on August 26, 1972. 37 Fed. Reg. 17,395-97.

152 A recent suit by the National Independent Coal Operators Association charged that the failure to distinguish between large and small mine operators worked a hardship on small miners by resulting in assessments on small miners that are equal to those assessed large operators for similar violations. N.I.C.O.A. v. Morton, Civ. Action No. 397-72 (D.D.C. March 1972).

153 The "informal" schedule is that mentioned by the GAO in the GAO IMPLEMENTATION REPORT, *supra* note 73, at 54. *See also* Wall Street Journal, Jul. 28, 1971, at 1, col. 6.

154 In a letter to the GAO requesting an investigation of assessment proceedures under the 1969 Act, Representative Henry Reuss (D.-Wis.) reported that 94 percent

compliance, the inspector depended on both closure orders *and* monetary penalties.

Second, ineffective implementation served to dampen public confidence in the Bureau as a whole. While decisions about implementation were often actually made at the departmental level, criticism of these decisions was focused on the inspectors in the field or on their immediate supervisors. Confidence in the field force of the Bureau is necessary for effective cooperation at the operator level. To a large extent, both of these problems could have been avoided by strict and speedy enforcement of § 109 in 1970.

In September of 1972 the Chief Assessment Officer[155] could point to significant improvements in the assessment procedures: assessments were larger in 1971 as the record of the operator became a significant factor in making assessments; the time required for assessment was considerably shorter; the backlog of cases was reduced considerably; and techniques of documenting the six criteria in each case were being developed.[156] It was also his feeling that as larger assessments began reaching operators on a regular basis and legal fees to protest assessments became significant, the assessment of penalties would provide an effective deterrent to unsafe conduct in mines, providing a true complement to the closure provisions.

5. The Criminal Sanction

Six months after the Hyden disaster the Attorney General filed suit against the operators of the Hyden mine alleging 24 violations of the 1969 Act.[157] The disaster points out the magnitude of violations and consequences necessary to bring the Bureau to recommend criminal proceedings.

Section 109(b) of the Act[158] provides for mandatory criminal fines and/or imprisonment for any operator who willfully violates a mandatory health or safety standard, or who knowingly violates

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of the penalties assessed during the first quarter of 1971 which were protested were amended. GAO ASSESSMENT REPORT, *supra* note 143, at 45. The Assessment Officer now reports that drastic reductions in penalties are being made at the hearing stage of assessment proceedings. Interview with Everett Turner, *supra* note 131.

155 *Id.*

156 *Id.*; *see also* 37 Fed. Reg. 17395-97 (1972).

157 N.Y. Times, Jun. 24, 1971, at 26, col. 1.

158 30 U.S.C. § 819(b) (1970).

or fails or refuses to comply with any closure order. The mandatory nature of the punishment and the large amount of the penalties prescribed by these provisions distinguish these criminal sanctions from comparable federal criminal statutes.

For a variety of reasons, officials hesitate to employ criminal sanctions on a wide scale when lesser civil penalties are available. First of all, criminal punishment carries with it society's moral condemnation of the accused's act and his criminal state of mind. Second, there are practical problems. Prosecutors and enforcement officials have serious time demands which may lead to indefinite postponement of charges. Liability is difficult to assign because of the complex nature of corporate management structures and the complex nature of the regulations promulgated under the 1969 Act. Proving willfulness and knowledge beyond a reasonable doubt is difficult. Third, there is a general feeling in the Bureau that the closure provision, not the criminal sanction, is the heart of the enforcement provision.[159] Closure can be ordered on the spot by the inspector, and it carries a substantial deterrent effect because of the financial loss to operators during "down time."

Despite the problems associated with using the criminal sanction, Congress has included it in the 1969 Act apparently for two reasons. First, Congress intended in some cases to express moral condemnation of the operator's reckless or willfull disregard for human life. Second, it wanted a "backstop" remedy, a sanction of last resort, to be employed "after the fact" where it appeared that civil sanctions would neither deter future actions of a similar nature nor satisfy public demands for retribution. These were the purposes for using the criminal sanction in the Hyden case.

6. Summary

The absence of a full inspection force and the limitations on the use of the closure and criminal sanction during the first two years of implementation made it imperative that civil monetary penalties be used effectively. Congress apparently foresaw the potential for abuses of discretion and political influence with regard to § 109(a)[160] during the implementation period and set strict

159 See text at note 116 *supra*.
160 30 U.S.C. § 819(a) (1970).

standards for the assessment of penalties. Those responsible for assessments at the Bureau, however, neither used the standards nor exercised their powers fully. A dilemma was thus created. Congress could not have provided for more stringent or detailed standards since that would only have hampered attempts at intelligent implementation by the Bureau. Less detailed standards would have allowed even further deviation from statutory intent.

This apparent dilemma provides instruction for those planning for major policy changes which are expected to achieve less than full acquiescence on the part of implementing actors. Standards should be set not only with agency rule making in mind, but should also be formulated as a guide to public and private interests who play a major role in holding the agency accountable. More active congressional oversight, furthermore, as evolved in this case, is mandatory to assure successful implementation of a statute like the 1969 Act.

B. *Implementation by the Social Security Administration of the Black Lung Compensation Provisions*

As the Act was passed in 1969, title IV provided for the payment of monthly cash benefits from general tax funds to coal miners who were totally disabled by black lung disease arising out of employment in underground mines and to the widows of coal miners who had died of the disease.[161] The responsibility for benefits was scheduled to pass to state workmen's compensation funds or to mine operators after a period of implementation during which the federal government would absorb the huge backlog of cases arising out of employment prior to 1969[162] On May 19, 1972, the 1969 Act was amended to expand coverage of the benefits title.[163] The program now covers orphans, totally dependent surviving parents, brothers and sisters, and surface miners and their dependents. Furthermore, the statutory definition of total disability was altered so as to make it easier to qualify for benefits.

The Social Security Administration (SSA) was given two weeks notice that it would be responsible for the implementation of the

161 1969 Act §§ 401-02, 30 U.S.C. §§ 901-02 (1970).
162 1969 Act tit. IV, pts. B and C, 30 U.S.C. §§ 911-36 (1970).
163 Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150, *amending* 30 U.S.C. § 901-36 (1970).

benefits portion of the Act.[164] In order to implement title IV of the 1969 Act the SSA was required to: inform potentially eligible persons about the new program and advise them to file applications immediately; develop policies and procedures for administering the program; and establish criteria for determining when miners would be "totally disabled" due to black lung disease.[165]

Generally the SSA escaped criticism where it was able to implement responsibilities under the 1969 Act using existing procedures; it was most heavily criticized where it was forced to make substantive policy decisions and create new procedures. By the end of the first month, over 100,000 claims had been accepted by the SSA, 18,000 of which were filed during the first week.[166] This success in making potential beneficiaries aware of the program was due in large measure to the fact that the SSA had pre-established procedures and a network of offices around the country. By the day the 1969 Act was signed, the SSA had provided every office in the country with instructions for implementation of the new law.[167]

The 1969 Act mandates that the benefits will be distributed where possible using existing procedures and personnel.[168] For this reason administration of the program was delegated to the Bureau of Disability Insurance within the Social Security Administration. According to the 1971 SSA Report on implementation of the 1969 Act, the processing of black lung claims is handled in largely the same manner as regular social security disability claims.[169] Thus the physical administration of benefits — consideration of the completed file, notification of decisions, determination of the amount of offsets, and certification of payment to the Treasury — is accomplished with efficiency in the SSA. In several cases the GAO found that the SSA had awarded benefits

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164 DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, FIRST ANNUAL REPORT ON PART B OF TITLE IV OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, 91st Cong., 1st Sess. 4 (Comm. Print 1971) [hereinafter cited as REP. ON PART B].

165 *Id.*; *see also* GAO BENEFITS REPORT, *supra* note 31, at 15.

166 REP. ON PART B, *supra* note 164, at 4.

167 *Id.* at 4. No doubt publicity generated by passage of the 1969 Act made this task easier.

168 1969 Act § 413(b), 30 U.S.C. § 923 (1970).

169 REP. ON PART B, *supra* note 164, at 13.

where files were incomplete or did not support a claim for benefits. However, SSA officials argued that the deviations were within departmental "tolerance rules."[170]

Accumulated experience made implementation easier in another area. Prior to 1969 some states, such as Pennsylvania, had paid disability benefits to miners with black lung disease and had required substantiation of claims with medical evidence. Because medical and other evidence needed to support a claim for compensation under the Pennsylvania program was similar to that required on the federal level, Pennsylvania claimants had the advantage of having their evidence assembled on the day the 1969 Act was passed. This was particularly important in the case of widows, as widows in other states may not have assembled the proper evidence prior to the death of their husbands. For this reason and others the ratio of claims awarded to applications made was higher in Pennsylvania (67.4 percent) than in Kentucky (32.2 percent) and in other states.[171]

Most of the criticism of the handling of the benefit program has centered around the SSA's rules as to what constitutes "total disability" and "death due to pneumoconiosis" and what evidence of disability suffices to support the claim. The most controversial rule was that governing acceptable evidence of black lung disease. During the first 20 months of implementation, 65 percent of the rejected claims were based on the miner's failure to show an occurrence of the disease.[172] HEW regulations required autopsy, biopsy or x-ray evidence of the disease;[173] generally the x-ray was considered the most reliable tool with which to diagnose the existence of the disease.[174] This position appears contrary to congressional intent since § 411(c)(3)(C)[175] permits diagnosis by other means. However, SSA felt that without the right to deny claims on the basis of a negative x-ray, it would be "faced with a provision

170 GAO BENEFITS REPORT, *supra* note 31, at 50.
171 *Id.* at 18.
172 *Id.* at 21.
173 *Id.* at 23; *Hearings on S. 2675, 2289 and H.R. 9212 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 424 (1972) [hereinafter cited as *1972 Hearings*].
174 GAO BENEFITS REPORT, *supra* note 31, at 22.
175 30 U.S.C. § 921(c)(3)(C) (1970).

which is meaningless in terms of making medically valid determinations of total disability due to pneumoconiosis."[176]

By the end of the second year of implementation, Congress began hearings to consider amendments to extend benefits to a number of persons not reached by the 1969 Act as interpreted by the SSA.[177] The official record reflects the important role played by private individuals and groups. Considerable medical evidence to counter SSA's view of the necessity of x-rays to establish black lung was advanced by these groups.[178] Furthermore, documentation was provided of a number of cases in which miners who were disabled due to the disease had been unable to prove total disability from the disease. Arnold Miller (now seeking the presidency of the United Mine Workers)[179] and the Appalachian Research and Defense Fund[180] (a private public-interest law firm) fought to extend and expand benefits under the 1969 Act. Representative Hechler, who sits on no committee responsible for congressional oversight of the 1969 Act, made a substantial effort as well.[181] Congress responded in 1972 by amending the 1969 Act to expand benefits.[182] Included was a provision prohibiting denial of benefits solely on the basis of negative x-rays.

The role of these private individuals and groups was as prominent in bringing about a change in the implementation of title IV as the various disasters were in altering the enforcement by the Bureau of safety standards under title I. The experience gives credence to the soundness of Professor Allison's belief that major governmental change occurs primarily in response to major performance failures.[183] In this case outsiders demanded change be-

176 *1972 Hearings, supra* note 173, at 426.

177 *1972 Hearings, supra* note 173.

178 *See, e.g., id.* at 115-37 (statement of Dr. Donald Rasmussen); *see also* H.R. REP. No. 460, 92d Cong., 1st Sess. 8-10 (1971).

179 Wall Street Journal, Sept. 8, 1972, at 21, col. 5; *see also 1972 Hearings, supra* note 173, at 73.

180 *1972 Hearings, supra* note 173, at 179 (statement of Paul Kaufman, Director of ARDF, explaining the role of the organization).

181 Representative Hechler, in an interview in Washington, D.C., Sept. 19, 1972, described his role as first involving the mobilization of public opinion in order to effect the more rapid implementation of the 1969 Act and second as serving as an ombudsman when individual cases of injustice arise.

182 Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150, *amending* 30 U.S.C. §§ 901-36 (1970).

183 See text at note 15, *supra*.

cause the SSA either failed to carry out congressional guidelines according to legislative intent[184] or, at a minimum, failed to meet the expectations of the mining public generated by the debate and subsequent passage of the 1969 Act.

C. *Implementation by the Industry*

1. Effects on Industry Structure

Three changes in the structure of the industry possibly brought about by the Act are noteworthy: A change in the comparative costs of captive and commercial firms, a decline in productivity in the industry as a whole, and shifts in capital due to the legislation.

In 1970, 614 bituminous and lignite coal mining companies in the United States, 15 percent of all coal mining firms, produced nearly 94 percent of the coal mined in the United States. Sixty-nine of these companies produced over one million tons. The largest commercial organization produced 11 percent of the total production; the second largest produced almost as much. The remaining 85 percent, smaller coal companies, produced only 6 percent of the 1970 tonnage in the bituminous industry.[185]

The large companies are of two types: commercial and captive. Captive coal mine operations, owned primarily by large steel and utility companies, account for about 15 percent of the United States annual bituminous production.[186] Most of the remaining production is produced by large commercial coal companies, conglomerates, or fuel companies. Almost without exception, the workers at large mines are members of the United Mine Workers of America. In the larger companies several layers of corporate structure separate the top management from the worker. By contrast, the smaller companies are usually family-held corporations, sole proprietorships, or partnerships. Often the owners can be found at the mine site working on the job with company employees.

Throughout the fifties and early sixties the costs of operating a mine (including the price of labor and machinery) increased,

184 *See, e.g., 1972 Hearings, supra* note 173, at 2.

185 KEYSTONE COAL INDUSTRY MANUAL, U.S. COAL PRODUCTION BY COMPANY . . . 1970 at 3 (1971).

186 *Id.* at 5. *See also* NATIONAL COAL ASS'N, BITUMINOUS COAL DATA, 1970, at 15 (1971).

while the average value of coal remained relatively stable.[187] The commercial firms reportedly were hurt more by the cost-price squeeze during this period than the captive firms[188] since the captives were in large measure producing coal for consumption by other industries which could pass the increasing coal costs on to their customers. During this period the industry strived in every way possible to increase productivity. From 1950 to 1969 it was remarkably successful, raising productivity by nearly 300 percent.[189] Commercial firms stayed viable not only by increasing productivity but also by cutting costs — in many instances by failing to make expenditures in the area of health and safety appliances and procedures.[190] One can only speculate as to the comparative effect of the 1969 Act on commercial firms and captive firms, but it is likely that captive firms were able to achieve compliance easier because of their superior safety stance prior to 1969.

Productivity in the industry as a whole, including strip mines, fell during the implementation period about 7 percent,[191] although in individual underground companies the decline was much higher.[192] This decline reflects the fact that operators were required to add appliances, personnel, and new procedures to their existing methods of production. The addition of new staff resulted in more man-hours worked and a decline in the productivity ratio (tons per man-hour). The decline can also be attributed to the effect of the 1969 Act on mining practices, such as the need to stop machinery periodically for dust and safety checks.[193] Production

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187 Statement by Joseph Moody, President, Bituminous Coal Operators Ass'n, Press Conference, July 15, 1971.

188 Interview with John Crawford, *supra* note 89.

189 Statement by Joseph Moody, *supra* note 187.

190 Interview with John Crawford, *supra* note 89.

191 Interview with Forrest Moyer, Accident Analysis Div., Bureau of Mines, Dep't of Interior, in Washington, D.C., Sept. 15, 1972. *See also* Vecsey, *Mine Safety Effort Draws Rising Criticism*, N.Y. Times, Sept. 19, 1972, at 35, col. 1.

192 Bureau statistics demonstrate that from 1969 to 1971 the decline in productivity at the two largest commercial and the two largest captive firms was as follows:

Top Commercial	14 percent
Second Commercial	23 percent
Top Captive	20 percent
Second Captive	21 percent

Data supplied during interview with Forrest Moyer, *supra* note 191.

193 Interview with Herschel Potter, *supra* note 77.

also declined during implementation, although relating this to the 1969 Act is more difficult to document.

The Act is not entirely responsible for the decline in productivity or production. Productivity had been growing at an increasingly slower rate during the period 1967 to 1969. Furthermore, during the first two years of implementation, the average value of coal increased considerably,[194] making the decline in productivity and production easier for the producers to accommodate.

There was some fear at the time of passage of the 1969 Act that the increased cost of safety to the operator would drive marginal operators out of business. In fact, the total number of mines increased in 1970.[195] But small operators have consistently argued that the 1969 Act has put several small operations out of business, especially underground mines.[196] This may be true since many of the new mines are above ground (strip mines). Unfortunately, the Bureau of Mines does not collect data on why mines fail, but only on the total number of mines operating each year. The 1969 Act may also have accelerated shifts in capital from underground mining to strip mining.[197] Safety costs at strip mines, with much higher productivity ratios than underground operations, are lower than in underground mines. It is also possible that companies are finding it profitable to close old mines, not designed to meet modern safety requirements, and to build new mines elsewhere, designed to meet the new regulations.

Unfortunately, much of the debate about implementation of the 1969 Act is speculative because sufficient data about changes in industry structure due to the 1969 Act is unavailable . A conclusion of this study is that such information is necessary to make a thorough evaluation of implementation. The Bureau should undertake immediately to collect information on changes in the industry's structure since 1969 and determine the extent to which the 1969 Act is responsible for these changes.

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194 Statement by Joseph Moody, *supra* note 187.

195 Interview with Forrest Moyer, *supra* note 191.

196 Independent Coal Leader (Richlands, Va.), Nov. 1971, at 1, cols. 1, 2.

197 Vecsey, *Mine Safety Effort Draws Rising Criticism*, N.Y. Times, Sept. 19, 1972, at 35, col. 1.

2. Operator Response to the 1969 Act

Operators responded in various ways to the new regulation during the first two years of the 1969 Act. Opposition by the small operators was, on the whole, more vocal and public. It was a group of small operators who obtained the Abington injunction which the Bureau blames for preventing full enforcement of the 1969 Act during 1970.[198] The small operators also challenged the constitutionality of the 1969 Act on the grounds that its assessment procedures violate the equal protection clause, in that fines against the small mine operators are in a different proportion and ratio than in large mines and enforcement is thereby discriminatory.[199] They have also used the public forum of congressional hearings[200] and the press[201] to comment on the extremely zealous enforcement of the 1969 Act by the Bureau.

Large operators generally exhibited a willingness to accept the 1969 Act, but attempted to influence Bureau policy making during the first two years of implementation. Stressing the pending "energy crisis" and the need to make improved safety standards compatible with sustained production, they participated formally in public hearings on proposed Bureau regulations implementing the 1969 Act, they submitted comments on proposed regulations to the Bureau for their consideration, and appeared at formal public debates on the proposed regulations. Other interest groups by and large devoted their energies to appearances before congressional committees and to representation of coal miners in benefit proceedings. Informally, the large operators visited those officials who drafted regulations to comment on the impact of the regulations on the industry. No other interest group took such action.[202]

The activities of both the small and large operators are illustrative of the willingness of any industry to attempt to influence

198 Ratcliff v. Hickel, Civ. Action No. 70-C-50-A (W. D. Va. April 23, 1970); *see 1970 Senate Hearings, supra* note 17, at 256.

199 Ramsey, *Legality of Mine Safety Act Challenged in Federal Suit*, Louisville Courier Journal, Jun. 30, 1971, at A 11, col. 1. The litigation is reported to be near resolution. Independent Coal Leader (Richlands, Va.), Sept. 1972, at 12, col. 1.

200 *1970 Senate Hearings, supra* note 17, at 257.

201 *See, e.g.*, Ramsey, *Legality of Mine Safety Act Challenged in Federal Suit*, Louisville Courier Journal, Jun. 30, 1971, at A 11, col. 1; Vecsey, *Mine Safety Effort Draws Rising Criticism*, N.Y. Times, Sept. 19, 1972, at 35, col. 1.

202 Interview with Herschel Potter, *supra* note 77.

policy during the early implementation of a regulatory act as well as during the enactment process. Representative Hechler has said that one of his primary functions during implementation of the 1969 Act was to counterbalance this influence in the absence of a strong safety sense in the mineworkers' unions.[203]

As far as compliance is concerned, operators succeeded in lowering dust levels in a great majority of mine sections for several reasons. Technology for lowering dust concentrations to the initially required levels, including water sprays, ventilation equipment, and sharp cutting tools, was available before the 1969 Act was passed.[204] It was also relatively inexpensive at an estimated average cost of about $.07 per ton.[205] Unlike accident prevention measures, the dust control process is easily monitored on a continuous basis, and the Bureau was able to implement a monitoring system with which operators could easily comply within a relatively short time after enactment.[206] The monitoring system involves the use of samples taken by operators[207] and by the Bureau.[208] The information from all samples is compared and stored on a computer, and the Bureau is informed periodically of the concentrations of dust in every mine. Dust control is also relatively free from human discretion. Control equipment can be installed outside of the mine and ventilation can be controlled by mine engineers.

However, in mid-1971 the GAO reported that operators, both large and small, had failed to comply with significant safety provisions of the 1969 Act[209] and were repeatedly violating the same regulations.[210] Specifically, companies were failing to submit on time plans for roof control, ventilation, and emergency exits from the mines,[211] and they were failing to make operator inspections.[212] As late as 1972, Bureau officials stated that they were meeting operator resistance to implementation.[213]

203 Interview with Representative Hechler, in Washington, D.C., Sept. 19, 1972.
204 Interview with Murray Jacobsen, *supra* note 37.
205 32 Occupational Health and Safety Reporter 636 (1971).
206 *Id.*; interview with Murray Jacobsen, *supra* note 37.
207 1969 Act § 202(a), 30 U.S.C. § 842(a) (1970).
208 1969 Act § 103(a), 30 U.S.C. § 413(a) (1970).
209 *See* GAO IMPLEMENTATION REPORT, *supra* note 73, at 1.
210 *Id.* at 47.
211 *Id.* at ch. 2.
212 *Id.* at 19.
213 Interview with John Crawford, *supra* note 89.

Two significant reasons were given for operator non-compliance. Operators argued that a shortage of safety appliances and personnel made compliance impossible.[214] To an extent this was true during the initial period of implementation, since the Bureau had made major purchases of various required sampling appliances and thereby created an equipment shortage.[215] Operators also argued that qualified or "certified" safety inspectors were being heavily recruited by both state and federal officials during this period,[216] causing a personnel shortage in the industry.

Another roadblock to implementation can be described as one of industry attitude. The GAO reported that operators had adopted a "wait and see" attitude,[217] that they "disagreed with the Bureau inspectors' judgment," and that operators felt that there was considerable "inconvenience and time lost in correcting conditions."[218] Some of these feelings were said to stem from a feeling that the law might not be rigidly enforced,[219] but it is more likely that the gestures of non-compliance reflect a continued emphasis within the industry on production.

At the 1970 Senate hearings the issue of whether or not the industry was excessively oriented toward production was raised again and again. Consider the testimony of one miner:

> The first thing that the mine foreman asks the assistant mine foreman when he comes out is "How many cars of production did you get?" . . .
>
> I worked at one company for approximately 20 years, and the superintendent in a period of 4 or 5 years fired 53 bosses [section foreman]. This was all over production. . . . They believed in the safety of the miner but when he came out with 10 and 15 cars of coal he didn't last too long. They fired him.[220]

This is, of course, isolated testimony in a political context, but at

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214 *See* GAO IMPLEMENTATION REPORT, *supra* note 73, at 17, 21, 56, 64.

215 *Id.* at 64.

216 Interview with Samuel Schwartz, Vice President for Planning, Continental Oil Co., in Stamford, Conn., April 17, 1972.

217 *See* GAO IMPLEMENTATION REPORT, *supra* note 73, at 17.

218 *Id.* at 21.

219 *Id.* at 17.

220 *1970 Senate Hearings, supra* 17, at 351.

the Hyden hearings a Bureau official publicly recognized the attitude problem of production oriented operators:

> You would think that the disasters would stop them from taking risks, but for some reason they take risks, and I think we know what some of those reasons are, but we have just got to get very tough, first with the supervisors, the management . . . and second, we have to convince workers that if management does not prevent these things from happening in the mines that the workers themselves must not work in the mines under these circumstances.[221]

Unfortunately, organized labor has failed to provide a needed counter-stimulus toward effective implementation of the 1969 Act by operators. Some attempts have been made by a militant element of the United Mine Workers. In one instance, these men undertook a wildcat strike that closed 168 mines.[222] The Union hierarchy thought the strike unwarranted,[223] but according to one of the leaders of the group, the strike was "triggered by this lack of enforcement of the new mine safety bill."[224] The militant elements of the Union have testified during every series of congressional hearings on the implementation of the 1969 Act. It is generally believed that the movement will change the United Mine Workers and force it to become more attentive to mine safety.[225]

A second reform battle is being fought by the Nader organization.[226] It has sought to change corporate attitudes by proxy battles within one coal mine company and by stressing the production orientation of the industry at the 1970 hearings.[227]

IV. Conclusion

Given the tendency of Congress in recent years to make rather broad delegations of rule-making power in cases where large in-

221 *Hyden Hearings, supra* note 92, at 67.
222 *1970 Senate Hearings, supra* note 17, at 351-59.
223 *Id.* at 267.
224 *Id.* at 352.
225 Wall Street Journal, Sept. 8, 1972, at 1, col. 1.
226 Interview with Davit McAteer, Center for the Study of Responsive Law, Washington, D.C., Sept. 19, 1972.
227 *See 1970 Senate Hearings, supra* note 17, at 221.

dustries are regulated, it is reasonable to ask why specificity was deemed necessary in the present case. One hypothesis is that Congress sought in this case to limit the discretion of an agency which is traditionally thought of as being politicized, *i.e.*, subject to informal influence both directly and indirectly by the regulated industry. In this sense, standards can be seen as tools with which the Bureau could be held accountable for policies which deviate from the purpose and scope of the 1969 Act.

Both Congress and the General Accounting Office have focused on standards as a means of evaluating the performance of the Bureau. The failure of the Bureau to meet deadlines and inspection quotas and to take into account the six criteria of § 109(a)[228] in assessing penalties were special targets of congressional scrutiny. In the same way, the dust standards have been used to evaluate operator performance.

The standards have also been used by private interests to hold the Bureau accountable for its actions. The small operators have been especially vocal during implementation and have on two occasions resorted to the courts to hold the Bureau to statutory mandates. Similarly, other private individuals and groups have focused on standards in public hearings. The use of standards as a focal point for public discussion has served two functions. First, it has sensitized Bureau personnel to the miners' interests to be furthered by the 1969 Act, thus providing a counterpoint to the influence of the operators in various proceedings. Second, the discussion of standards has served an educational purpose by providing the Bureau, operators, and miners with opportunity to explain their actions and the injury statistics during the first two years of implementation. In short, as a tool of ensuring accountability during implementation, Congress was well advised to legislate specific standards.

This Note has also demonstrated the value of using existing procedures and programs where possible. Implementation is faster and more efficient where an existing framework for translating policy into outcomes is available. The experience under the 1969 Act suggests that the existence or absence of channels for implementation should influence initial policy.

228 30 U.S.C. § 819(a) (1970).

The implementation of the 1969 Act leads to a third general conclusion: every legislative program generates unanticipated second order effects. These effects can be on a small scale, as where Bureau recruiting and purchasing during implementation resulted in shortages of resources available to the operator. Some second order effects are major, however, as demonstrated by the changes in the structure of the industry and the potential shifts in methods of mining.

Perhaps the major issue raised by this Note is the need during the early implementation of a major piece of legislation to change the attitudes of major actors or to acquire their acquiescence in the policy to be implemented. Congress sought in this case to change operator attitudes by the use of disincentives — penalties and closures. However, the Bureau failed to reinforce the congressional effort by strict application of the penalties. To a degree, congressional inquiries, investigations, and hearings help to change attitudes by educating and pressuring the bureaucracy and other actors into fulfilling congressional policy. Private actors complement this effort. In this case the pressure for changing attitudes came from the bottom of the industry structure and public interest groups as well as from the higher levels of government and agency personnel. More than one observer has recently noticed an increasingly militant miner demanding better working conditions as part of his improved lifestyle. It is a combination of these forces that may lead to improved implementation of the Coal Mine Health and Safety Act of 1969.

In sum, this Note documents in one case the problems of politics, organization, procedure, and attitudes that were encountered during the implementation of a detailed piece of legislation. The experience suggests, above all, that during the policy-formulation process policy makers should consider in detail likely implementation problems.

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BOOK REVIEW

THE POLITICS OF FINANCE: The House Committee on Ways and Means. By *John F. Manley*,[1] Boston: Little, Brown & Co., 1970. Pp. 395. $7.50.

Introduction

John F. Manley's book on the House Committee on Ways and Means,[2] *The Politics of Finance*, has been hailed as a complete and detailed study of one of the most important committees in the U.S. House of Representatives.[3] As the only major study of the Committee,[4] it has been relied upon by political scientists, who have used excerpts from his work as chapters in their anthologies,[5] or thanked him in their prefaces for reviewing and commenting on their perceptions of the Committee.[6]

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1 Professor of Political Science, University of Wisconsin. Hereinafter citations to the book will be by page number.

2 The current membership of the Committee is as follows:

Democrats	*Republicans*
Wilbur D. Mills, Arkansas	*John W. Byrnes, Wisconsin
Al Ullman, Oregon	*Jackson E. Betts, Ohio
James A. Burke, Massachusetts	Herman T. Schneebeli, Pennsylvania
Martha W. Griffiths, Michigan	Harold R. Collier, Illinois
Dan Rostenkowski, Illinois	Joel T. Broyhill, Virginia
Phil M. Landrum, Georgia	Barber B. Conable, New York
Charles A. Vanik, Ohio	Charles E. Chamberlain, Michigan
Richard H. Fulton, Tennessee	Jerry L. Pettis, California
Omar Burleson, Texas	John J. Duncan, Tennessee
James C. Corman, California	Donald G. Brotzman, Colorado
William J. Green, Pennsylvania	
Sam Gibbons, Florida	
Hugh L. Carey, New York	
Joe D. Waggonner, Louisiana	
Joseph E. Karth, Minnesota	

*Retiring at the end of the Ninety-second Congress.

SOURCE: CONG. DIRECTORY 303, 92d Cong., 2d Sess. (1972).

3 Jones, Book Review, SOC'Y, Oct. 1971, at 55; N.Y. Times, Nov. 29, 1970, § III, at 12, col. 3. *But see* Letter from Theodore R. Marmor to the editor, in SOC'Y, Apr. 1972, at 11.

4 For an excellent article comparing the House Committee on Ways and Means and the Senate Finance Committee processes, powers, and staff support, see Fowlkes & Lenhart, *Congressional Report/Two Money Committees Wield Power Differently*, 3 NAT'L J. 779 (1971).

5 *E.g.*, Manley, *The House Committee on Ways and Means: Conflict Management in a Congressional Committee*, in NEW PERSPECTIVES ON THE HOUSE OF REPRESENTATIVES 101 (Peabody & Polsby eds., 2d ed. 1969).

6 *E.g.*, R. RIPLEY, PARTY LEADERS IN THE HOUSE OF REPRESENTATIVES (1967); I. SHARKANSKY, THE POLITICS OF TAXING AND SPENDING xiii (1969).

The Politics of Finance adds a great deal to the all too sparse literature on the internal workings of the committee system, which has long been recognized as the key decision-making mechanism in Congress.[7] Manley focused on many aspects of Ways and Means activities, including the Committee's relationships with the House, the Senate, the executive branch, and to a lesser extent, with various staffs and lobbyists. He also studied the internal operations of Ways and Means (including recruitment to the Committee) and the style of leadership of its Chairman, Wilbur D. Mills. Statistical data, numerous footnotes to articles and congressional documents, and reports of Manley's interviews with Committee members and with other persons familiar with the Committee's process are all valuable to anyone interested in the development of tax policy or in the relationship of the Ways and Means members to their respective political parties.

However, the sociological theories into which Manley tried to fit his observations of the Committee distort and conceal the "real politics" of the Committee's process. In addition, Manley tended to either rationalize and legitimize or completely ignore many important parts of the story of Ways and Means. Although he may appear to have covered his subject thoroughly, the book does not merit the reliance that others have placed on it. Nor does it live up to its title: *The Politics of Finance.*

I. Manley's View of the Power of the Committee

Manley's treatment of the elements contributing to the Committee's power and prestige reveals his preoccupation with the "attractiveness" of power. In describing the Committee's power, he emphasized only the benefits of being a Committee member,[8]

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7 ". . . Congress in session is Congress on public exhibition, whilst Congress in its committeerooms is Congress at work." W. Wilson, Congressional Government 79 (15th ed. 1901). *See also* sources cited at p. 1 n.3; R. Fenno, The Power of the Purse (1966) (a recent study of the House and Senate Appropriations Committees); J. Robinson, The House Rules Committee (1963).

8 Manley notes how those members who do not care to work on Committee legislation still get all the benefits of the power and prestige of the Committee without any of the costs, except perhaps relinquishing their voting independence by relying on Representatives Mills' and Byrnes' expertise. Pp. 78, 140. Although general proxies are no longer permitted, the use of special proxies for particular issues continues. Legislative Reorganization Act of 1970, § 106, 2 U.S.C. § 190(d)

such as formulating nationally important revenue and social welfare legislation, easily guiding provisions for special interests into law, and, in the case of the Democrats, placing members on other House committees. Yet Manley failed to examine the implications of these powers to the nation as a whole.

For example, the study omitted an analysis of the problems presented by the huge scope of the Committee's jurisdiction, which grows each year. Based on its jurisdiction over the Social Security Act, during the 1960's and 1970's the jurisdiction of Ways and Means expanded to include new Medicare programs,[9] major welfare reform,[10] and the question of a national system of health insurance.[11] The Committee has also steered trade,[12] revenue,[13] and revenue sharing[14] through the House. Recently, the Committee has considered aid to education by establishing a trust fund to assist public schools, along with tax credits for tuition paid for private and parochial school education.[15] Manley did not analyze how the Committee coped with these complicated matters without subcommittees and without adequate staff. Alternatives to deal with this broad scope of authority, such as the creation of subcommittees or a new committee on social welfare should have been analyzed.

Another source of power available to Committee members is the privilege of reporting one or two "members' bills" each year. Manley minimized the importance of these bills, explaining that "they are regarded as 'little,' of no special interest to anyone other

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(1970). During the Ninety-second Congress (through August 1972), out of the 27 recorded votes, five members (Representatives Corman, Green, Watts, Collier, and Pettis) used proxies for between 30 and 40 percent of the votes. Six members (Representatives Ullman, Vanik, Burleson, Gibbons, Karth, and Byrnes) did not vote at all by proxy. Records of these votes are on file at the office of the House Committee of Ways and Means [hereinafter cited as Recorded Votes]. Several Democrats on the Committee do not attend many meetings, nor participate much in decision making. P. 74.

9 42 U.S.C. §§ 1395 *et seq.* (1970).

10 H.R. 1, 92d Cong., 1st Sess. (1971).

11 *E.g.*, Health Security Act (H.R. 22), Health Care Insurance Act of 1971 (Medicredit) (H.R. 4960), National Healthcare Act of 1971 (H.R. 4349), National Health Insurance Partnership Act (H.R. 7741), 92d Cong., 1st Sess. (1971).

12 H.R. 18970, 91st Cong., 2d Sess. (1970).

13 Most recently, Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497.

14 H.R. 14370, 92d Cong., 2d Sess. (1972).

15 H.R. 16141, 92d Cong., 2d Sess. (1972).

than the member who introduced them,"[16] and criticized former-Representative Curtis of Missouri who objected to many of the bills as being substantive changes in the law.[17] Manley did not discuss the broad policy implications nor the substantive effects on tax and trade law raised by the members' bills. A glance at any legislative calendar of the Committee would reveal the multitude of "equities" for special interests that Committee members and their House colleagues have proposed and enacted through this process.

Manley also failed to evaluate a third element of the power of Ways and Means, the Democrats' power-broker status as their party's Committee-on-Committees which selects Democrats for all other House Committees.[18] Rather than merely noting this function as just another attractive benefit to make the hard work and long meetings of Ways and Means more palatable for the Democrats, Manley should have elicited the reactions of the Republican Committee members and other Representatives to this system. Even without this additional research, he should have questioned the continuation of a system, whose only justification is historical, which is an "important resource" for favors,[19] and which Chairman Mills can use as an "informal whip system" to get his legislation

16 P. 80.

17 P. 81. Representatives Vanik and Gibbons have objected to many special interest bills. During the spring of 1972, Common Cause lobbied against these members' bills, particularly Representative Burke's bill to favor cigar manufacturers. Representatives Patman and Aspin objected to several members bills on the House floor, thereby preventing their adoption by unanimous consent. Chairman Mills withdrew most of these members bills from the House floor, so that the Committee could consider reporting them later as an omnibus measure under a closed rule. *E.g.*, 118 CONG. REC. H1495-508 (daily ed. Feb. 29, 1972). *See also* 30 CONG. Q. 474, 918 (1972).

18 The Republicans make committee assignments through a Committee-on-Committees which is unrelated to the Committee on Ways and Means.

Each Democrat is responsible for placing the 12 to 25 Democrats in his geographical zone; zone assignments for the Democratic Committee-on-Committees, as of January 25, 1972 were: Mills — Arkansas, Oklahoma, and Missouri; Ullman — Oregon, Washington, Colorado, Arizona, and Nevada; Burke — Massachusetts, Connecticut, Rhode Island, Maine, and New Jersey; Griffiths — Michigan, Wisconsin, and Indiana; Rostenkowski — Illinois; Landrum — Georgia, South Carolina, and North Carolina; Vanik — Ohio, West Virginia, and Maryland; Fulton — Tennessee, Kentucky, and Virginia; Burleson — Texas, New Mexico, and Utah; Corman — California; Green — Pennsylvania; Gibbons — Florida, Hawaii, Alaska, and Alabama; Carey — New York; Waggonner — Louisiana and Mississippi; Karth — Minnesota, Kansas, Wyoming, Iowa, Montana, North Dakota, and South Dakota.

19 P. 24.

through Congress.[20] For example, one member told Manley that he considered how other Democrats had voted when they come to ask for a change in committee assignments.[21] The fact that the members of one committee control their party's membership on all the other committees surely is significant and should have been analyzed in terms of its ramifications in the House and not just in terms of benefits accruing to the Ways and Means members.

The secrecy in which the Committee operates produces a hidden power of the Committee to which Manley only alluded. Meeting in secret executive sessions more often than almost any other committee,[22] Ways and Means is free to act and decide as it chooses. Since the bills it reports are customarily considered under closed rules, the Committee is accountable to the House only by means of a yes-or-no vote. Yet Manley never analyzed the effects of this secrecy. He merely mentioned that some hearings were closed,[23] that there was much criticism of the difference between members' public votes and their operating records behind the closed door of Committee meetings,[24] that one Committee member felt committees hid things from the House,[25] and that the sessions which were closed to members' personal staff were open to executive branch advocates.[26] Taken together, these observations reveal how an important Committee operates autonomously from the House and completely hidden from view of the ordinary citizens who reap the benefits and bear the burdens of the products of the process.

II. Manley's Perception of Chairman Mills

Manley's sociological approach distorts his perception of the leadership role played by Chairman Mills and the relationship between him and the Committee. Manley's conclusions are incon-

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20 P. 244.

21 P. 245.

22 P. 348. For a statistical analysis of secrecy in Congress, see 30 Cong. Q. 301 (1972).

23 P. 88 n.30 (in the context of the Mills-Byrnes relationship).

24 P. 315. Manley felt this criticism was extreme, however. *Id.*

25 P. 329 (in the context of House-Executive relations).

26 P. 348 (in the context of the Committee's decision-making style).

sistent with his general descriptions and with the specific examples he used as illustrations.

Throughout the book, Manley referred to Representative Mills as a chairman who wielded great power. For example, he noted that "as a matter of fact, bills he opposes do not come to the floor;"[27] that the absence of subcommittees "makes for a highly centralized operation around Mills in the Committee;"[28] and that "[o]n this kind of issue Mills is virtually a divine right monarch."[29] Yet Manley argued that Mills' relations with Committee and other House members were based on influence, not power.[30] In light of his portrayal of Chairman Mills in other sections of the study, the distinction between influence and power seems artificial and detracts from the reader's understanding of the Chairman.

Manley also analyzed Mills' leadership roles in terms of sociological categories. During his interviews, Manley asked 20 members of the Committee two questions to determine who were its "instrumental" (task achievers) and "affective" (peacemakers) leaders.[31] He concluded that Representatives Mills and Byrnes shared the task achiever role, while Chairman Mills was the peacemaker. Since the particular members interviewed were not identified, the information that nine Democrats out of 15 saw the Chairman as the task achiever is not particularly useful, even assuming the two questions were properly designed to elicit this information. Did the nine include those who often gave Chairman Mills their "proxies" or voted regularly with him, or were they the more independent members? Manley should have analyzed the responses to his questions more critically to see why they supported his theory, if in fact they did.

Nor did Manley fully evaluate the two examples he presented because he was too preoccupied with fitting the responses to his questions into sociological small group theory, where one person is the peacemaker and another is the task achiever. In both decision-making cases Manley cited (Medicare and excise tax reduction), he conceded that the ranking Republican, John Byrnes, ini-

27 P. 144.
28 P. 129.
29 P. 346.
30 P. 121 ff.
31 Pp. 101-02.

tially made the compromise proposal or formed the consensus (was the peacemaker), and then Chairman Mills adopted it as his own after he realized the proposal had enough votes to pass.[32] Manley should have chosen better examples to support his theory of Mills' role, if in fact his theory is supportable.

III. Manley's Analysis of Pressure on the Committee

Manley scattered discussions of "pressure" throughout his study,[33] thereby minimizing the fact that representatives from industry, the Treasury, and the public continuously present their demands to the Committee members or their staffs.[34] He treated the subject of lobbying without adequate specific examples and without enough investigation into the ability of Ways and Means members and staffs to cope with these outside pressures.

By omitting specific examples, Manley de-emphasized the real effect of special interest lobbying, especially on the tax and trade laws. He continually praised the Committee for its smooth internal decision making but only implied why it was so devoid of conflict. Specific examples would have demonstrated that members made bargains and trade-offs to ensure their special interests were included in bills. Recently, for example, Representative Broyhill inserted a provision into the revenue sharing law to protect his suburban Washington constituents from paying a commuter tax to the District of Columbia,[35] and Representative Fulton helped a local industry gain favorable treatment.[36]

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32 P. 115 ff. Chairman Mills allegedly has operated in this manner on many occasions. Interview with Robert Boyd, Legislative Assistant to Representative Pettis, in Washington, D.C., on July 27, 1972; interview with Representative Conable, in Washington, D.C., July 27, 1972.

33 P. 14. Manley categorizes members' responses to a question containing the word "pressure." While members denied that they had been pressured by threats and reprisals, they nevertheless admitted that representatives of interest groups did contact them. Manley concludes that this type of "pressure" can be fun for members. Pp. 234-37. He should have emphasized this point more by noting the private airplane rides with lobbyists, open invitations to dinners, and direct contributions to re-election campaigns, which make "pressure" not just fun but profitable for some members.

34 Three out of the 10 most heavily lobbied issues during 1971 were in Ways and Means. 30 Cong. Q. 9 (1972).

35 *See* Washington Post, Sept. 19, 1972, at C1, col. 1.

36 H.R. 14186, 92d Cong., 2d Sess. (1972) (a special tariff provision for glycine

The Treasury Department is another one of the extra-congressional pressure groups that Manley treated inadequately. In the last chapter on "The Committee and the Executive: Interest Aggregation," Manley's major point is that Congress stood up well against Treasury in formulating tax policy and that in this regard Congress was not declining in influence as much as some observers believe.[37] The way Manley demonstrated this point, however, does not support his conclusion. Comparing Treasury's original proposals to the final products of the Committee's deliberation, he concluded from the magnitude of the changes made that Ways and Means was not influenced by the executive. Yet he overlooked the fact that Treasury played a bargaining game (just as the House does vis-à-vis the Senate) and may well end up with bills very much like it wanted. Furthermore, Treasury, as Manley noted elsewhere,[38] is a continuous participant in the Committee's closed executive sessions. Therefore, if Treasury strongly advocated certain provisions, its representatives can hammer away at opposing arguments. In 1971, Treasury advocated and worked for the DISC[39] and ADR[40] provisions in the revenue act. Although the Committee somewhat watered down the final version of DISC, Treasury basically achieved its goal. The same process occurred when the Foreign Investors Tax Act of 1966[41] was considered, although the Senate added so many special interest baubles that the Act became a "Christmas tree." It may be that *both* Congress and Treasury "win," but Treasury rarely loses.

The primary reason that Treasury prevails is that the resources for long-range planning, including complex computers and data from tax returns, are all in its control. The Committee's staff resources are inadequate, and without Treasury assistance the Committee could not function. Manley virtually ignored the staff

and related products). Although the committee's most recent Legislative Calendar shows no action on this bill, Representative Pettis said it had been slipped into a law. Interview with Representative Pettis in Washington, D.C., July 27, 1972.

37 Pp. 324, 335-39.

38 P. 348.

39 Act of Dec. 10, 1971, Pub. L. No. 92-178, §§ 501-07, 85 Stat. 497 (codified at INT. REV. CODE OF 1954, § 991-97).

40 Act of Dec. 10, 1971, Pub. L. No. 92-178, § 109, 85 Stat. 497 (codified at INT. REV. CODE OF 1954, § 167(m)).

41 Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, 80 Stat. 1539 (codified in scattered sections of INT. REV. CODE OF 1954).

of Ways and Means and the personal staffs of each Committee member. Although the Ways and Means staff is of high quality, it has only seven professionals. On revenue matters, the Committee is assisted by the staff of the Joint Committee on Internal Revenue Taxation.[42] Manley described the outstanding job performed by the Joint Committee's staff, but failed to note that even it cannot serve all the members of both House and Senate financial committees. During final deliberations, or "mark-ups," of bills in Ways and Means, the Joint Committee staff is usually too busy drafting provisions and working with Chairman Mills and Representative Byrnes to provide the detailed advice desired by some of the less senior members. Some Committee members have expressed interest in a larger staff, and three members have contemplated hiring and sharing one professional if the staff is not enlarged.[43] Even if more members had professionals on their personal staffs to assist them with Ways and Means legislation, these aides would be excluded from the Committee's executive sessions. Thus a member's knowledgeable participation and ability effectively to evaluate the information provided by lobbyists and Treasury is frustrated.[44] Manley ignored this problem entirely and presumed that most members do not care to participate anyway.[45]

By comparing the reactions of the Committee and the Treasury to special interest demands, Manley concluded that Ways and Means was more successful in responding to such special interests.[46] While describing the special interests as "constituencies"[47] and "clienteles"[48] of both the Committee and the executive branch, Manley documented the lack of representation for the ordinary taxpayer.[49] His tables also demonstrate how the various provisions

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42 For a discussion of the Joint Committee, see p. 307 ff.

43 Interview with Representative Gibbons in Washington, D.C., on July 20, 1972.

44 The lack of adequate staff not only hinders knowledgeable participation by many members but also limits the scope of oversight the Committee can exercise over executive branch administration of the Social Security Administration, the Internal Revenue Service, and other programs under Ways and Means jurisdiction. Lack of oversight capability is one of the major problems facing Congress and deserved at least some mention in Manley's study.

45 P. 74.

46 P. 381.

47 P. 354.

48 P. 330.

49 P. 363 ff.

of the Revenue Act of 1963 as reported by the Committee "remarkably resemble the direction of testimony received from relevant interests."[50] He concluded that "[o]ccasionally a member of Ways and Means will represent the unexpressed interests of the 'little man,'" and by implication praised the Committee for its ability to respond more positively than Treasury to special interest demands.[51] Manley did not address the intense need for more regulation of lobbying and more effective citizen counter-lobby groups to combat the outside pressures which confronts Committee members.

IV. Time Has Proven Manley's Theories Incorrect

Manley's aim was to generalize Committee behavior over time, and he implied there would be few changes in the Committee and the way it operated. The Committee membership, however, has changed since Manley researched his study,[52] and at the same time there has been much impetus from inside[53] and outside the Committee for reform, particularly on the use of the closed rule.

Manley saw "restrained partisanship" as a significant influence on Committee members' behavior.[54] "Restrained partisanship" is Manley's concept of reaching solutions to policy disagreements without internal partisan political strife.[55] In this context, Manley stressed the role of Chairman Mills as the swing vote on the Committee. An analysis of Committee votes, however, demonstrates that he is no longer the key vote in Committee decisions.[56] In addition, Chairman Mills' campaign for the Presidency brought a great deal of partisan political action to the Committee on Ways and Means, such as his suggesting a 20 percent increase in social

50 P. 362.

51 P. 381.

52 Since Manley conducted his interviews, 10 of 18 Democrats interviewed are no longer on the Committee, and six of 12 Republicans are gone, not including Representatives Byrnes and Betts who are retiring this year.

53 Manley notes that there are "really no reform-minded liberals" on Ways and Means. P. 314. This has changed; Representatives Vanik, Corman, and Gibbons are often joined by Burke, Rostenkowski, Fulton, Green, and Carey in voting for reforms. *See* Recorded Votes, *supra* note 8.

54 P. 63.

55 For a lengthy historical study of partisanship on the Committee, see pp. 154-211.

56 *See* Recorded Votes, *supra* note 8.

security benefits and his pushing through that legislation without hearings.[57] Furthermore, other members, including Representatives Vanik, Gibbons, and Waggonner, have behaved in a less orthodox manner and do not conform well to Manley's "restrained partisanship" paradigm.[58] On procedural questions, Representatives Vanik and Corman are now regularly joined by Gibbons, and sometimes by a few others. Representatives Watts and Herlong, the Democrats who always voted with the Republicans, are no longer on Ways and Means. Most important perhaps, Representative Byrnes is retiring this year, along with second ranking Republican, Jackson Betts. Since Representative Byrnes has played a major role in Committee consensus building, it will be interesting to see if restrained partisanship will continue as the norm in the Ninety-third Congress.

Manley assumed that the use of the closed rule[59] for Committee bills was so well entrenched there was little likelihood of changing it.[60] However, this procedural practice has recently come under attack, and the Committee membership has changed sufficiently that either the Committee itself or a reform-minded Congress might well restrict the use of closed rules. Yet Manley merely accepted the closed rule as necessary to protect the Committee's reputation[61] and summarized the usual reasons given in its defense: the complexity of the legislation, its susceptibility to the logrolling of special interest groups, and the possibility of floor amendments destroying a carefully drafted measure, as Senate amendments often do.[62] He added that a closed rule makes it easier for party leaders to pass important bills without worrying about "defeating objectionable amendments."[63] But Manley has no statistics on the support of the closed rule among members.

Recently, some congressmen have proposed several types of

57 *See* CONG. REC. H1424 (daily ed. Feb. 23, 1972); 30 CONG. Q. 498 (1972).

58 *See* Recorded Votes, *supra* note 8.

59 Under a closed rule, which takes the form of a resolution introduced by the Rules Committee, no amendments except committee amendments are permitted during the House floor debate, which is limited to from two to eight hours on important issues such as tax reform, revenue sharing, social security, medicare, and tariffs. P. 226. For a summary of the history of the closed rule, see p. 220 ff.

60 P. 226.

61 P. 220.

62 *Id.*

63 P. 221.

modified rules,[64] and many Committee members now doubt the wisdom of requiring a closed rule for *all* Committee bills, not merely revenue bills. Although most Ways and Means members do not favor abolishing the closed rule altogether, a surprising number have expressed support for modified or open rules. At least 12 members out of 17 interviewed, not including Representatives Green and Fulton, do not fully support the closed rule; only four of the 17 adamantly opposed all alternatives to it.[65]

V. Conclusion

Manley has well documented the Committee on Ways and Means of the 1960's. Yet, as an apologist for the Committee's status quo, he revealed complacent attitudes towards the tools of power and procedure which have recently come under attack. His sociological approach disguised the real picture of the Committee and distorted his analysis, making the study in many areas superficial and incomplete. The book's real value is as an historical picture of Chairman Mills and his Committee at the peak of his influence.

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64 Recent modified rule proposals aim to provide a mechanism for the House to consider responsible amendments and thereby avoid the utter chaos predicted by opponents of purely open rules. Until recently, modified closed rules were usually designed to permit one particular amendment to be voted on separately. P. 228. For the 1970 trade bill, Representative Gibbons, a free trader on the Committee, proposed a modified rule permitting any motions to strike provisions, but forbidding additions to the bill by amendment. 116 Cong. Rec. 37835 (1970). He also suggested that amendments from the floor could be submitted three days in advance, to give the House and Ways and Means time to evaluate the soundness of the proposals. Interview with Representative Gibbons in Washington, D.C., July 20, 1972. Others have suggested that from four to five members of the Committee could offer amendments on the floor, but this would inevitably increase the favor-trading power of Committee members and make lobbyists' work easier. Interview with Representative Byrnes in Washington, D.C., Aug. 15, 1972.

65 Interviews with Committee members in Washington, D.C., June-Aug. 1972.

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