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FOREWORD: LAWYERS AND THE LEGISLATIVE PROCESS

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Introduction

In this issue the *Harvard Journal on Legislation* undertakes a survey of significant legislation in the past session of Congress. It is hoped that the survey will become an annual feature of the *Journal.* Unlike periodic reviews of legislation in other legal journals,[1] this survey will not be confined to summaries of the substance of statutes, but will also seek to explore in depth the problems which generated the legislation and the pressures and procedures which shaped it. This undertaking promises not only to contribute to the general state of knowledge concerning legislative bodies, but also to meet a specific and important need for educating lawyers about the legislative process and the responsibilities of the legal profession in legislative law making. This Foreword will seek to underline that need and then will pose some general questions about the legislative process that may be of special pertinence to lawyers.

I. NEGLECT OF THE LEGISLATIVE PROCESS

Writing over 40 years ago, James Landis complained of law schools — as he might have of the legal literature and much of the legal profession — that in the main they disregarded "both the content of the statute book and the manner of its making."[2] Because the law has become increasingly statutory in its founda-

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1 *E.g., Legislative Survey: 91st Congress, Second Session,* 3 L. & POLICY IN INT'L BUS. 564 (1971); *The Minnesota Legislature, 1969 Regular Session,* 54 MINN. L. REV. 1029 (1969); *1961 Survey of New York Law,* 36 N.Y.U.L. REV. 1407-596 (1961); *Review of Selected 1971 California Legislation,* 3 PAC. L.J. 195 (1972).

2 Landis, *The Study of Legislation in Law Schools, An Imaginary Inaugural Lecture,* 39 HARV. GRADUATES' MAG. 433 (1931); *cf.* Griswold, Book Review, 50 HARV. L. REV. 154 (1936).

tions,[3] the profession today has escaped from the dominating spell of the common law to the extent that most practitioners and law students have a tolerable working knowledge of at least some portions of the statute books. Moreover, the legal literature now abounds with analyses of the content of statutes and their interpretation and application. But the second half of Landis' complaint — disregard of the process of statute making — is still apt.

A statute does not spring full blown from the legislature, but the lawyer often acts as if it had.[4] In contrast to judge-made law, where the origins and development of a rule elicit close attention, statutory law is typically taken as a "given," with scant professional concern for the social, economic, and political soil out of which the statute grew or the parliamentary procedures and strategic compromises which shaped its content. The lawyer's concern is generally fixed on the statute's implementation by administrators and courts, and any quarrying he may undertake in the legislative history is usually limited to a search for quotations that can be used as ammunition in the battle of statutory interpretation.

The lawyer's lack of concern with the legislative process and the interplay of that process with the substance of legislation is reflected in the legal literature. Although there are a number of periodic surveys of legislative output, normally limited to a particular jurisdiction or subject matter, they usually contain only brief summaries of the substantive changes that have been accomplished in the law.[5] Here, as elsewhere in the literature, the processes that produced the statute are generally ignored; to the extent that such processes are considered at all, it is usually from a judicial perspective, most commonly in the context of statutory interpretation or judicial control of legislative procedure.[6] While

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3 Many of the traditional subjects, such as commercial law, have been fitted almost entirely into the statutory mold. Other subjects that have recently developed in importance, such as taxation and economic regulation, have been statutory in origin from the beginning. The basic structure, procedure and output of the administrative agencies, which have assumed increasing importance as lawmakers, are all directed by statute.

4 *See* Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 891 (1930).

5 See note 1 *supra.*

6 Grant, *Judicial Control of Legislative Procedure in California,* 1 STAN. L. REV. 428 (1949); Lloyd, *Judicial Control of Legislative Procedure,* 4 SYRACUSE L. REV. 6

there are exceptions in the legal literature to this indictment,[7] the general record of professional concern with this subject is meagre, particularly in comparison to the quantity and quality of legal scholarship that has been devoted to lawmaking by appellate courts or administrative agencies.[8]

This lack of expressed interest on the part of lawyers in the legislative process is surprising when we consider not only the importance of statutory law today, but also the fact that lawyers have long been major participants in that process. In recent years well over half of all United States Senators and Representatives have been lawyers, and while the percentage in state legislatures is lower, it is still considerable.[9] Moreover, lawyers are prominent in a variety of legislative roles other than that of legislator. In Congress lawyers man technical facilities, such as the legislative drafting service, and serve as professional staff for committees, the leadership, or individual congressmen. In addition, they play important roles in the legislative process as lobbyists or counsel for both governmental and private clients.[10]

In light of this manifold involvement in the legislative process, the bar has been surprisingly reticent both about its activities and its professional responsibilities in this area. Even at the level of biographical accounts of the lawyer's role in the legislative process, there is little to be found.[11]

There is also little published on the extent of the bar's professional responsibilities in the legislative arena. At one level,

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(1952); Note, *Constitutional Regulation of the Legislative Procedure in Pennsylvania*, 11 U. PITT. L. REV. 670 (1950).

7 *E.g.*, Cohen, *Hearing on a Bill: Legislative Folklore?*, 37 MINN. L. REV. 34 (1952); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953-54); Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145 (1957).

8 *See* Traynor, *A Foreword to the Vanderbilt Law Review's New Section on Legislation*, 16 VAND. L. REV. 1261 (1963).

9 Pertinent statistics are collected in J. EULAU & H. SPRAGUE, LAWYERS IN POLITICS: A STUDY IN PROFESSIONAL CONVERGENCE (1964). *See also* M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 107-11 (1966).

10 *See* C. HORSKY, THE WASHINGTON LAWYER (1952); Netherton, *Legislative Advocacy and the Government Lawyer*, 49 A.B.A.J. 293 (1963).

11 *But see* Maslow, *FEPC—A Case History in Parliamentary Maneuver*, 13 U. CHI. L. REV. 407 (1946); Rauh, *Representation Before Congressional Committee Hearings*, 50 J. CRIM. L.C. & P.S. (1959); Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 863-72 (1969).

there are important unresolved issues concerning the ethical limits of legislative advocacy. Is it proper for a lawyer to engage in the "manufacture" of legislative history, and, if so, what are the proper limits of the practice?[12] May a lawyer-lobbyist devote himself to advancing his clients' interests with the same wholehearted zeal he may assume in the context of adversary litigation, or must he also take account of larger and potentially conflicting obligations to the public interest, however defined?[13] Charles Horsky attempted to raise some of these issues,[14] but elsewhere in the legal literature such questions are normally passed over,[15] if they are recognized at all. The Canons of Ethics and the new Code of Professional Responsibility provide little illumination on such questions.[16]

In addition there are larger issues of the profession's responsibilities as a body. First, there is the question of expanding the provision of legal representation to various interests affected by the legislative process. Are interest groups which can afford to hire lawyer-lobbyists significantly advantaged in the legislative struggle compared to those that cannot? If so, is the bar under an obligation, similar to that it has accepted in criminal proceedings and has begun to recognize in civil proceedings in courts and before administrative agencies, to provide such representation to all? How should any such obligation be discharged?[17] Second, does

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12 *See* F. NEWMAN & S. SURREY, LEGISLATION, CASES AND MATERIALS 158-78 (1955).

13 *See* Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 560-62 (1905).

14 C. HORSKY, THE WASHINGTON LAWYER 34-58 (1952). *See also* J. GOULDEN, THE SUPERLAWYERS (1972); *Inside Washington Law: The Roles and Responsibilities of the Washington Lawyer*, 38 GEO. WASH. L. REV. 527 (1970).

15 *E.g.*, Davis, *Procedures and Skills for Passage of Sound and Proper Federal Legislation*, 18 BUS. LAW. 521 (1963).

16 *See* ABA Canons of Professional Ethics No. 26; ABA Code of Professional Responsibility EC 8-04, 8-05. However, the special ethical problems of the lawyer-legislator have received more helpful attention. *See* ABA Code of Professional Responsibility, Disciplinary Rule 8-101; SPECIAL COMMITTEE ON CONGRESSIONAL ETHICS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONGRESS AND THE PUBLIC TRUST 78-117 (1970); Borah, *The Lawyer and the Public*, 2 A.B.A.J. 776 (1916).

17 *See* Mikva, *Interest Representation in Congress: The Social Responsibilities of the Washington Lawyer*, 38 GEO. WASH. L. REV. 651 (1970); Miller, *Ethical Problems of Tax Practitioners: Transcript of Tax Law Review's 1952 Banquet*, 8 TAX L. REV. 19 (1952); Surrey, *Congress and the Tax Lobbyist — How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145, 1170-82 (1957). The impact of the tax laws on the availability of legislative representation for various interests has attracted recent attention. *E.g.*, Note, *The Poor and the Political Process: Equal Access to Lobbying*, 6 HARV. J. LEGIS. 369 (1969).

the bar have an obligation to improve the quality of statutory law from the perspective of society as a whole? The efforts of the American Law Institute, the American Bar Association, and other law-reform agencies in drafting and advocating legislation[18] appear to presuppose such an obligation, although such efforts have sometimes been attacked as covert promotions of clients' interests.[19] Third, there is the related matter of the bar's responsibility in improving the legislature as an institution. While the bar investigates and proposes reforms of almost every conceivable aspect of the workings of courts and agencies, there is scarcely any organized professional study of or concern with the functioning and possible improvement of the legislature.[20]

The bar's responsibilities in these areas are rooted in the ongoing and substantial involvement in the legislative process of lawyers acting in various professional capacities. This involvement implies a correlative duty to ensure that the process is equitable and yields sound results from the viewpoint of society as a whole. Moreover, lawyers have a responsibility to the sound working of the legal order as a whole,[21] and it is myopic to suppose this goal can be achieved by focusing on the functioning of courts or agencies alone and in isolation, when all parts of the legal order, including the legislature, act in dynamic interdependence.

Why has the bar failed substantially to examine the legislative process and its involvement and responsibilities in that process? Half a century ago an explanation might have been found in the

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18 *See, e.g.*, Friendly, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 802-07 (1963); *Symposium, The New York State Law Revision Commission — The Impact of Twenty Years*, 40 CORN. L.Q. 641 (1955).

19 Beutel, *Law Making by Professional and Trade Associations*, 34 NEB. L. REV. 431 (1955); Dykstra, *The Impact of Pressure Groups on the Legislative Process*, 1951 WASH. U.L.Q. 306, 309. Particularly in the tax field, there have been calls for the bar to rise above concern for the special interests of clients and to speak out in behalf of the public interest in a sound and equitable tax system. *E.g.*, Surrey, *supra* note 17, at 1170-82.

20 *See* Newman, *A Legal Look at Congress and the State Legislatures*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 66, 70-71 (M. Paulsen ed. 1959) [hereinafter cited as Paulsen].

21 ABA Code of Professional Responsibility, Canon 8: "A Lawyer should assist in improving the legal system." *See also id.* at EC 8-1, 8-9.

mystique of the common law as proclaimed by Langdell,[22] Carter,[23] and others who saw judge-made law as the fittest evolution of social standards, tailored interstitially to the conditions of the times. Landis tellingly satirized the reverence which the law schools and the profession had for the common law as against legislation:

> . . . . For the common law [lawyers] have untold respect; it is of their making. Its "perfection of human reason," as Lord Coke stated the case, makes the lawyer proud of his heritage, and the layman fearful to intrude. Contrast with this the statute, appearing merely as the voice of a majority, and seemingly only as durable as that majority. It simply states its commands and pleads no reasons for its cause. No precedents patently restrain the legislature; it does what it pleases. And what it pleases, means to the true common law lawyer, what the butcher, the baker and the candlestick maker pleases — a laying on of profane hands upon the law. What respect can attach to this process? What principles underlie these sporadic and vacillating commands?[24]

Deflating analyses by the legal realists of judge-made law[25] and recognition of the growing importance of statute law have since undermined the exaggerated pretensions of the common law. Yet allegiance to judge-made rules as the archetype of law lingers on, reflecting the continued emphasis on judicial decisions in legal education and the fact that most lawyers are predominantly concerned in their day-to-day work as litigators or counsellors with influencing or predicting court decisions. Only a comparatively small proportion of the total profession is involved in the legislative process on a regular basis. From the perspective of most practicing lawyers there is thus a good deal of common sense appeal in John Chipman Gray's notion that statutes are only "sources of law" and that operative significance is given to law only in the decisions of courts.[26]

However, lawyers may often neglect valuable opportunities to

22 C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vii-viii (2d ed. 1879).

23 J. CARTER, LAW: ITS ORIGIN GROWTH AND FUNCTION 70-75, 128-31, 230-31, 327-29 (1907).

24 Landis, *The Study of Legislation in Law Schools, An Imaginary Inaugural Lecture*, 39 HARV. GRADUATES' MAG. 433 (1931).

25 *E.g.*, Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 761 (1932).

26 J. GRAY, THE NATURE AND SOURCES OF THE LAW 93-100, 123-25, 170-73 (2d ed. 1921); *cf.* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

advance clients' interests through the legislative process, in large part because they have not been trained to be effective participants in it.[27] If so, the law schools must bear a considerable measure of responsibility, for they have largely neglected the training of lawyers in legislative roles.[28]

This neglect may account in part for the attitude that lobbying is a somewhat disreputable activity for a lawyer,[29] or that the legislative process does not call upon the distinctive intellectual skills of the profession. This latter attitude is illustrated by an exchange occurring some years ago between two senators, both lawyers. Senator Reed, who had but recently joined the Senate from law practice, had engaged the veteran Senator Norris over a question of law:

> Senator Reed: "How long has the gentleman been in Congress?"
> Senator Norris: "Twenty-nine years."
> Senator Reed: "It is too much to expect a senator to remain a lawyer after all that time."[30]

Such attitudes may explain in part why the legal literature contains so little about the legislative process and lawyers' involvement in it, but the difficulties of the subject are also a factor. Contrast, for example, the analysis of a statute with that of a court decision. A judicial opinion will contain within itself the controlling facts, the pertinent background, the surrounding state of the law, and the reasoning behind the result. A statute, on the other hand, contains little or nothing about the problem it was designed to solve or the pertinent facts. The complex process by

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27 Breitel, *A Commentary on the Legislative Process*, 1 SYRACUSE L. REV. 59 (1949). *See* Cohen, *On the Teaching of "Legislation,"* 47 COLUM. L. REV. 1301, 1302-04 (1947).

28 While courses in legislation have been widely offered for some time, published teaching materials consist in large part of court decisions on topics such as statutory construction, constitutional requirements as to legislative procedure, and the like. *See, e.g.*, C. NUTTING, S. ELLIOTT, & R. DICKERSON, CASES AND MATERIALS ON LEGISLATION (4th ed. 1969). Such materials would appear to be of doubtful value in teaching a would-be lawyer how the legislative process in fact works and how he can be an effective participant in that process. However, there are indications of fresh interest in the legislative process and lawyers' roles therein. Law schools whose catalogues offer courses in the legislative process include Chicago, George Washington, Harvard, U.C.L.A., and Yale.

29 *See* Ablard, *The Washington Lawyer-Lobbyist*, 38 GEO. WASH. L. REV. 641, 645 (1970).

30 Quoted in Steiwer, *The Lawyer in Congress*, 10 ORE. L. REV. 30, 31 (1930).

which the particular provisions in question came to be law remain hidden behind the general words of the enacting clause. These facts can be ascertained, if at all, only by protracted labor in the legislative history.[31] Many of the most important aspects of a statute's history, including the private initiatives for its enactment, the reactions of antagonistic interest groups, and the compromise negotiations which occurred, rarely appear in any printed record. These difficulties are obviously multiplied when we pass from the enactment of a particular statute to a consideration of the legislative process as a whole.

These difficulties, however, have not deterred the editors of the *Journal* from seeking, through the initiation of their survey of Congress, to redress the neglect of the legislative process in the legal literature. The focus on Congress is particularly timely in light of what appears to be a renascence of interest in it and the adequacy and responsiveness of its decisional processes.[32] Moreover, "case studies" of selected items of legislation may prove the soundest path of advance in improving our understanding of the legislative process while remaining true to the rich diversity of that process. A modern legislature is an extremely complex system, and efforts to reduce it to a single model are likely to prove procrustean in their effects.

At the same time, one must not lose sight of larger themes. This Foreword presents an occasion to raise in a preliminary manner two legislative issues that would appear to be especially within a lawyer's area of interest and competence: the impact of procedure on substance and the proper law-making role of the legislative process as compared to that of the other law-making organs in the legal order.

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31 The materials available to the researcher are, in the case of many state legislatures, extremely scanty. Where records of legislative history are more abundant, as they are for Congress, the records are not organized to facilitate research. Occasionally, however, a congressional committee has assembled the legislative history of a measure in one format and had it reproduced. *E.g.*, ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79TH CONGRESS, 1944-46, S. Doc. No. 248, 79th Cong., 2d Sess. (1946). It would be desirable to do this on a regular basis for major legislation.

32 Particularly noteworthy is the recent attention which Common Cause, Ralph Nader, and other reform groups have directed at Congress. *See, e.g.*, M. GREEN, J. FALLOWS, & D. ZWICK, WHO RUNS CONGRESS? (1972) [hereinafter cited as GREEN].

II. The Effects of Legislative Procedures

Lawyers count themselves experts in procedure. It is one of the profession's articles of faith that procedure shapes substance in important and characteristic ways — that is, that the process of decision will, over a wide range of inputs, channel the outcome in a distinctive fashion.

In a judicial or administrative context, procedure may characteristically shape substance by allocating the responsibility for decision among different bodies, or by structuring the input and processes of decision-making. An example of the former type of rules are those defining the responsibilities of judge and jury. For example, in the context of civil tort litigation, a procedural rule which makes it more difficult to secure summary judgment is likely to produce more frequent and more generous awards (or anticipatory settlements) in favor of plaintiffs.[33] Examples of rules shaping the process of decision are those requiring an adversary hearing with notice, confrontation, and cross-examination, procedures which promote more accurate fact finding than alternative modes of resolution.[34]

Do procedures for decision in the legislative context similarly operate to shape outcomes in characteristic ways? It is clear that legislative procedures have enormous tactical significance, often proving decisive in the passage or defeat of particular measures. Skill and experience in manipulating procedural rules is an advantage in the legislative game, and a wily parliamentarian may often be able to tip the balance of forces in a marginal situation.[35] Students of the legislative process, however, often seem to suggest that legislative procedures have a longer-term, systematic impact on outcomes analogous to that they are thought to

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33 Of analogous significance are the rules which allocate decisional responsibility between administrative agencies and courts.

34 *See* Silver v. New York Stock Exchange, 373 U.S. 341, 366 (1963).

35 *See, e.g.*, L. Froman, The Congressional Process: Strategies, Rules, and Procedures xi (1967); Fenno, *The Internal Distribution of Influence: The House*, in The Congress and America's Future 52, 59 (D. Truman ed. 1965) [hereinafter cited as Truman]; Finer, *The Tasks and Functions of the Legislator*, in Legislative Behavior, 281, 283 (J. Wahlke & H. Eulau eds. 1959) [hereinafter cited as Wahlke].

have in a judicial or administrative context. A representative view is the following:

> Just as the law is said to be no better than the procedures by which it is carried out, so the substance of legislation is shaped and modified by the procedures that may be required under the Senate rules, or by the mere threat to invoke these procedures, for they are compelling.[36]

In fact, however, legislative procedures have rarely been demonstrated to have affected outcomes in a systematic way. Certainly if substantive impact is defined in terms of a liberal-conservative or other ideological axis, experience over the long run indicates that given rules of legislative procedure can be harnessed to one cause as readily as another. Take, for example, the Senate rules on cloture, which may be regarded either as rules that shape the process of decision or that allocate decisional responsibility to minorities. The filibuster and the threat of it are equally at the service of whatever minority is prepared to use it. While it has often been used by southern conservatives to block or water down civil rights legislation, in the Ninety-second Congress it was used by liberals to oppose legislation restricting busing as a remedy to achieve school desegregation and to oppose the government loan to Lockheed, the extension of the draft, and the nomination of William Rhenquist to the Supreme Court.[37]

Examples of other procedural rules which have frequently been claimed to shape legislative outcomes in conservative directions include those that fix the prerogatives of the House Rules Committee, permit committees to pigeonhole legislation, and fix the position of committee chairmen. Congress, and particularly the House, is frequently said to be unresponsive to popular opinion because such rules lodge decisional power in committees and subcommittees and in chairmen who, because of the seniority system,

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36 Shuman, *Procedural Rules and the Substance of Policy*, in Wahlke, *supra* note 35, at 84. *See also* D. BERMAN, A BILL BECOMES A LAW: THE CIVIL RIGHTS ACT OF 1960, at vii (1962).

37 *See* 27 CONG. Q. ALMANAC 13-15, 160-61, 286, 295, 858 (1971); 30 CONG. Q. 2699-700 (1972). During the Ninety-second Congress filibuster tactics were also directed at the SALT pact with Russia, the proposals to amend Rule 22 to make it easier to invoke cloture, and at legislation to give additional enforcement powers to the EEOC and to create an independent consumer protection agency. *See* 30 CONG. Q. 2700 (1972).

are not as representative of the nation as is the membership of the legislature as a whole.[38] But, as we have already seen in the use of the filibuster, such rules do not shape outcomes in a single political direction. There are progressive as well as conservative committee chairmen. Attitudes of liberal critics toward the powers of the House District of Columbia Committee and its chairman, for example, may be expected to be very different now that Representative Diggs of Michigan, a black, has replaced Representative McMillan of South Carolina as committee chairman.[39] And even liberals have on occasion sought to use the Rules Committee's power to block legislation distasteful to them.[40] In short, complaints about the political bias of procedural rules in Congress may simply reflect shifting political fortunes and whose ox is being gored at the moment.[41]

It may nevertheless be argued that, regardless of the existence of a systematic substantive bias with respect to individual rules of procedure, these rules in the aggregate do have the consistent effect of favoring the status quo by making it difficult to enact legislation. They do so by fragmenting responsibility for decision. To become law, a measure normally must at a minimum secure approval from a subcommittee and a full committee in at least one house as well as the approval of both houses and the President. In many instances approvals by standing committees, including the House Rules Committee, must be secured. Disagreement between the two houses necessitates a further round of approvals. In the absence of effective party discipline for ensuring consistent action at each stage in the decisional process, such rules give the advantage to those opposed to passage of legislation.

It is uncertain whether such a status quo bias can be corrected by procedural rules, even were it thought desirable to do so.

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38 *E.g.*, D. BERMAN, A BILL BECOMES A LAW: THE CIVIL RIGHTS ACT OF 1960, at 28-31 (1962); J. CLARK, CONGRESS: THE SAPLESS BRANCH 144-46, 174-84 (rev. ed. 1965); Hopkins, *Congressional Reform: Towards a Modern Congress*, 47 N.D. LAW 442, 477-87 (1972); Sittig, *The United States Congress and Internal Reform*, 20 VAND. L. REV. 61 (1966).

39 *See* Leventhal, *Outlook, '73/Turnover in Key Committee Chairmanships Foreshadows Policy Changes in 93rd Congress*, 4 NAT'L J. 1750 (1972). For a systematic critique of the claim that the seniority system results in "unrepresentative" leadership, see B. HINCKLEY, THE SENIORITY SYSTEM IN CONGRESS (1971).

40 FROMAN, *supra* note 35, at 148.

41 *Id.* at 183-84.

Given the necessity for division of labor and consequent decentralization in congressional decision making,[42] and given the correlative need for some orderly method for channelling measures for action by the entire legislature, processes that fragment decision and, therefore, make it more difficult to pass legislation seem to a large extent inevitable.[43]

This last observation suggests that procedural rules in the legislative context may often lack the ability systematically to alter outcomes because the basic determinants of legislative decision are not easily subject to manipulation by procedural rules. In a judicial context, decision operates in a more or less closed environment where the major inputs — the parties, the record facts and authoritative precedents — are limited and can be controlled by rules such as those relating to standing and those requiring notice, hearing and reasoned decision. Such rules may be less determinative of the outcome when the process of decision is more open — as, for example, in the case of administrative adjudication, where the decision is an institutional one often reached with a view to broad regulatory considerations. The legislative system of decision seems to be even more open, with inputs — the interests and pressures of constituencies and other organized groups — that may not readily be susceptible to control in their impact on members by procedural rules.[44] Also, the congressional process for resolving inputs may be largely fixed by its decentralized and fragmented character, the product of a parochial political orientation on the part of many members, a lack of strong party discipline, and the necessity for specialization in order to dispose of a substantial and complex legislative workload. Given these basic features of the

42 *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 727-30 (Tent. ed. 1958); Huntington, *Congressional Responses to the Twentieth Century*, in Truman, *supra* note 35, 5, 18-22; Fenno, *The Internal Distribution of Influence: The House*, in *id.* at 52, 53-58.

43 Historically, significant shifts in the status quo bias of congressional processes of decisions have apparently been attributable not to changes in procedural rules but to shifts in political forces that have strengthened the hand of legislative or executive leadership. *See* Huitt, *The Internal Distribution of Influence: The Senate*, in Truman, *supra* note 35, at 77, 82-83.

44 Ideally, lobbying rules may be viewed as efforts to control such inputs through requirements of disclosure that better enable legislators to assess the source and political strength of such inputs, but in practice lobbying rules rarely achieve this purpose. *See* Note, *Improving the Legislative Process: Federal Regulation of Lobbying*, 56 YALE L.J. 304 (1947).

system, formal procedural rules may in many instances be of only minor significance compared to the inherent need for logrolling, compromise, and other forms of accommodation between divergent interests in order to pass legislation,[45] as well as the balance of forces in particular situations.

Rules which are most likely to shape legislative outcomes in a systematic fashion would seem to be those that either alter fundamentally the bargaining process among members or materially change the weight given to inputs from constituencies and other affected interests, including those interests represented by congressional leadership and committee chairmen. An example of the former is the closed rule in the House of Representatives, which prohibits floor amendments other than those sponsored by the committee. Frequently used on Ways and Means Committee bills, the closed rule restricts the capacity for logrolling among members of the entire House and arguably tends to promote more rational and consistent tax and revenue policy.[46] Of course, the effectiveness of the rule depends in large part on the internal discipline of the Ways and Means Committee, for otherwise the process of logrolling would simply be pushed backwards from the floor into

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45 *See* Burnett, *Legislative Log-Rolling*, 8 ORE. L. REV. 141 (1929); *The Legislative Process in Alabama: A Microcosm — The 1969 Regular Session and the Consumer Credit Fiasco*, 23 ALA. L. REV. 181, 225-26 (1970).

The interplay between procedural rules and their institutional context may be illustrated by considering how hearing procedures, which in a judicial context serve to promote accurate fact finding, are often transformed in the legislative setting into a device to promote a preconceived policy held by those in control of an investigation or to enhance their reputations or bargaining power. *E.g.*, Cohen, *Hearing on a Bill: Legislative Folklore?*, 37 MINN. L. REV. 34 (1952).

46 *See* J. MANLEY, THE POLITICS OF FINANCE 220-32 (1970); J. ROBINSON, THE HOUSE RULES COMMITTEE 44-45 (1963).

The closed rule on the Revenue Sharing bill in the Ninety-second Congress not only prohibited amendments but also waived points of order against the bill, thus foreclosing a challenge by Chairman George Mahon of the House Appropriations Committee that the measure was out of order because it appropriated funds in a legislative bill. 30 CONG. Q. 1565-66 (1972). In the Ninety-second Congress the bill allocating the lucrative sugar import quotas among various importing nations was sent to the House under a closed rule, presumably with the design of preventing undue logrolling on the floor and preserving the benefits of logrolling opportunities to members of the House Agriculture Committee. A floor move to reject the closed rule in order to permit an amendment stripping South Africa's quota was defeated. *See* 27 CONG. Q. ALMANAC 487-89 (1971). The Rules Committee has also cleared legislation for floor consideration under a modified closed rule that permits a separate vote on selected portions of proposals but prohibits other amendments. *See, e.g.*, 27 CONG. Q. ALMANAC 423, 524-25 (1971).

the committee room.[47] While the ultimate impact of the closed rule is diluted by the practice of free amendment in the Senate, the contrast between the House and the Senate underscores how important is the closed rule in shaping bargaining outcomes in the House.

The discussion of the closed rule suggests that the bargaining processes in committee and on the floor are substantially different. If so, procedures for determining whether a bill passed by the other house should be referred to a committee or sent directly to the floor for consideration may have a systematic impact on outcomes. There are also important differences between the House and the Senate in political inputs and bargaining structure. Moreover, it appears to be easier to enact legislation if it originates in the house in which it enjoys a greater measure of support.[48] Taken together, these two factors suggest that the constitutional requirement that revenue measures originate in the House[49] and the practice of originating appropriations bills in the House[50] may have systematic significance.[51] Such rules are among the more promising candidates for inquiry into the possible long-run impact of procedures on substance.

An example of how a procedure may systematically shape outcomes by altering the weight accorded inputs from interested groups is the rule determining whether an individual member's vote is recorded. Before 1971, recorded votes could not be obtained on amendments in the House Committee of the Whole.[52] The lack of recorded votes made it practically impossible for most outsiders to assess the voting performance of a member on the important issues resolved in the Committee of the Whole. This

47 The Ways and Means Committee does engage in a form of logrolling on members' tax bills which are generally designed to afford tax relief to a particular firm, individual, industry, or other interest and thus are politically valuable to Ways and Means members. *See* J. MANLEY, THE POLITICS OF FINANCE 79-81 (1970). However, in the Ninety-second Congress Representatives Wright Patman and Les Aspin objected to floor consideration of a number of such members' bills under the unanimous consent procedure, effectively killing them. *See* 30 CONG. Q. 474, 918 (1972).

48 FROMAN, *supra* note 35, at 156-57.

49 U.S. CONST. art. I, § 7.

50 For a brief history, see S. HORN, UNUSED POWER 246-53 (1970).

51 The author is indebted to his colleague, Professor Stanley S. Surrey of Harvard Law School, for these suggestions, and for numerous helpful criticisms.

52 For a description of procedures in the House Committee of the Whole, see CONGRESSIONAL QUARTERLY GUIDE TO CONGRESS viii (1971).

lack of vital feedback information arguably undercut the importance of the impact of outside opinion on voting. Members under this rule were likely to be more responsive to the views of the House leadership, committee chairman, or knowledgeable lobbyists representing well organized interests.

Under the Legislative Reorganization Act of 1970,[53] recorded votes are available in the Committee of the Whole at the request of 20 members. Recorded votes have resulted in increases in the number of members voting and also changes in outcomes, apparently in a direction more responsive to outside public opinion. For example, SST funding was easily approved under the old procedures, with only 188 members voting,[54] while in 1971, immediately after the recorded vote provisions came into effect, SST funding was defeated 217 to 203.[55] Representative Gates, who offered the successful amendment to delete SST funds, stated, "I think the [recorded] teller vote made the difference."[56] The long-run impact of this change, as well as the analogous change providing for the recording of votes in House committees,[57] calls for more comprehensive study.

But beyond the obvious need for a better understanding of the operation of legislative procedures is the question of what procedures we ought to have. Too often this question appears to have been considered in terms of whether a given procedure is likely to favor the particular political views which the analyst favors. But to the lawyer who takes a broader institutional view, such an approach appears too short-sighted and nominalistic. The fact, for example, that liberals who once condemned the filibuster as undemocratic are now utilizing it to defeat legislation they dislike seems to confirm such a judgment. Perhaps legislative procedures

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53 Pub. L. No. 91-510, 84 Stat. 1140 (1970).

54 116 CONG. REC. 17,320 (1970).

55 117 CONG. REC. H1748 (daily ed. March 18, 1971).

56 27 CONG. Q. ALMANAC 133 (1971). *See also* GREEN, *supra* note 32, at 64. Changes in House membership resulting from the 1970 elections apparently were also a factor in the changed outcome. *See* 27 CONG. Q. ALMANAC 133-34 (1971).

57 HOUSE MANUAL Rule I, cl. 5, H.R. Doc. No. 439, 91st Cong., 2d Sess. (1971). GREEN, *supra* note 32, at 64-65, cites as an effect of the changed rules for recording committee votes a proposal by Representative John Melcher in the House Interior Committee to make strip miners repair the damage they inflict. The proposal was rejected by voice vote, but when Representative Melcher called for a recorded vote it passed by a wide margin.

should not be judged by their effect on outcomes but by the extent to which they accord with our conception of the legislature and its role in the polity. For example, requiring recorded votes in the Committee of the Whole is desirable not because it may produce more "liberal" results,[58] but because a recorded vote on important decisions is essential to the principle of public accountability inherent in the American notion of representative democracy.

III. Institutional Considerations

In considering the legislature's appropriate role, it is natural to assume that lawyers would focus on the proper place of the legislature in the entire system for making and applying law.[59] Lawyers are attuned to the capabilities and limitations as law-making institutions of courts, administrative agencies, and the various processes of private ordering, and they might, therefore, be thought peculiarly fit to assess the analogous institutional capacities of and constraints on legislatures.[60] In fact, however, few legal writers have given thought to the proper role of legislatures among law-making institutions, and those that have do not appear to have based their prescriptions on close analysis of the legislative processes of decision or the implications of those processes in determining those tasks which the legislature is capable and fit to discharge.[61]

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58 An analysis by Congressional Quarterly of the conservative coalition between Republicans and southern Democrats during the Ninety-second Congress found that the coalition formed on a greater number of votes in 1971 than in 1970, and that most of the votes on which the coalition formed in the House were recorded teller votes in the Committee of the Whole. *See* 27 Cong. Q. Almanac 84-90 (1971). For more recent figures, see 30 Cong. Q. 3022 (1972). The exact relation between the recorded vote rule and this result obviously bears further investigation.

59 The legislature, of course, has important functions other than enacting laws, including oversight, "casework" for constituents, Senate confirmation of presidential appointments and ratification of treaties, and serving as a forum for raising and airing broad issues of national concern. Apart from oversight, which may be regarded as a species of law making, these other functions will not be considered in this Foreword.

60 It may be asked whether the picture of the legislative process implicit in the judges' use of legislative materials — the picture generally being one of rational deliberation — is an accurate one. If it is inaccurate, one must ask whether the free use of legislative history needs to be reconsidered. *See* Breitel, *The Courts and Law-making*, in Paulsen, *supra* note 20, at 1, 20-22, 32-34.

61 While Bentham analyzed legislative procedure, see Greaves, *Bentham on the*

All too often legislation has been uncritically posited as a *deus ex machina* to remedy the perceived shortcomings of other law-making organs. For example, Ernst Freund assigned to the legislature specific tasks, such as determining "[m]easured quantity, conventional form, administrative arrangements, and . . . compromise and concession,"[62] as well as the larger function of a social laboratory that would experiment with a variety of institutional remedies and eventually tailor the fittest to the social problem at hand. Yet Freund at no point in his major works dealing with legislation[63] undertook to analyze the decisional processes by which policy is actually made in legislatures in order to determine whether they are capable of playing the roles he assigned to them. More recently, lawyer-critics such as James Landis[64] and William T. Gossett,[65] as well as non-lawyers such as Theodore Lowi[66] have called for clearer resolution of policy issues by legislators in regulatory matters without closely analyzing the legislature's institutional ability to do so.[67]

The Hart-Sacks *Legal Process* materials appear to reflect the same shortcoming, though in less egregious degree. In the Hart-Sacks model, legislatures are called upon to perform those residual first-line functions that are not already discharged by the other law-making institutions in the legal order — principally raising and spending money and creating new governmental structures.[68] While it may be plausible to assume, as the materials do, that the legislature, and no other body, is capable of discharging these functions, there is still no articulated analysis of the fitness of the

Functioning of Legislatures, in Whalke, *supra* note 35, at 78, his views as to the appropriate role and content of legislation appear to have been formed quite independently of any study of legislative processes.

62 *Prolegomena to a Science of Legislation,* 13 ILL. L. REV. 264, 270 (1918) (emphasis in original deleted).

63 STANDARDS OF AMERICAN LEGISLATION (2d ed. 1965); LEGISLATIVE REGULATION (1932).

64 J. LANDIS, THE ADMINISTRATIVE PROCESS 55-60 (1938). *But see id.* at 70-75.

65 Gossett, *Comment,* in Paulsen, *supra* note 20, at 155, 158-60, 166-68.

66 T. LOWI, THE END OF LIBERALISM 289-92, 297-99 (1969). *See also* T. LOWI, THE POLITICS OF DISORDER 181-85 (1971).

67 For a more discriminating assessment of Congress' law-making capabilities with respect to regulatory problems, see H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES (1962). However, Judge Friendly prescribes a more detailed policy role for Congress without a convincing analysis of its institutional capability for discharging such a role. *See id.* at 163-73.

68 HART & SACKS, *supra* note 42, at 186, 718-19.

legislative process for the tasks assigned it. Do we not first have to ask what the legislature is in fact capable of doing in the way of law making before we can posit its appropriate role?[69]

As a starting point for discussion we may take the view implicit in the Hart-Sacks model and explicit in some political science literature that Congress' law-making capabilities are significantly limited. This view is the product of the following factors. First, legislative resources are limited in relation to the range of conflicts to be resolved and accommodations to be devised in a complex society.[70] Hence, the quantity of law Congress can make in relation to the total societal need for law is limited.[71] Second, the decentralized nature of Congress and the multiple responsibilities of its members render it ill suited for policy initiatives. In many fields, at least, it is largely limited to choosing among and validating initiatives by others, principally those that emerge from unresolved conflicts in the regime of private ordering[72] and those pressed by the executive.[73] Third, the decentralized structure of Congress and the pluralistic nature of our politics normally necessitates coalition building to get legislation passed, and coalition building generally requires compromise, accommodation, and reciprocity.[74] As a result, Congress is often unable to resolve questions of policy in a clearcut way or mandate an uncompromising method of implementing policy.[75]

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69 While this Foreword will stress the limitations on congressional law-making capability, there is an issue of whether Congress should fully exercise such capabilities as it has. It is at least worth noting that the assumption that Congress is the preferred organ for setting major policy because it is the institution that is most effectively accountable and responsive to the society may be subject to challenge. If we put received political dogma to one side, is Congress in fact more "responsive," by whatever measure of responsiveness is appropriate, than courts, agencies, or private law-making institutions? Is a greater degree of "responsiveness" altogether desirable in many policy areas? For example, in the environmental area, responsiveness to the existing electorate may lead to undue neglect of long-term environmental values.

70 *See* HART & SACKS, *supra* note 42, at 6-9, 190-203, 312-13, 725-26.

71 *See* Hart, *Comment*, in Paulsen, *supra* note 20, at 40, 44-45.

72 HART & SACKS, *supra* note 42, at 183-88; Breitel, *The Courts and Lawmaking*, in Paulsen, *supra* note 22, at 1, 20.

73 *E.g.*, Huntington, *Congressional Responses to the Twentieth Century*, in Truman, *supra* note 35, at 5, 22-24; Robinson, *Decision Making in Congress*, in CONGRESS: THE FIRST BRANCH OF GOVERNMENT 259, 262-64 (American Enterprise Institute for Public Policy Research ed. 1966).

74 See note 45 *supra*.

75 *See, e.g.*, M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 10-11 (1966).

The view that Congress' law-making capabilities are limited and not suited to detailed resolution of policy appears substantially accurate in many areas. Certainly it is true of many of the regulatory programs Congress has created under administrative agencies[76] and of many social welfare programs as well. The most striking example in the Ninety-second Congress was the legislature's inability to provide a sound direction for federal policy in urban housing. The massive failure rate in current programs to underwrite house ownership for the urban poor[77] and the razing by governmental authorities of structurally sound public low-rent housing facilities[78] provided dramatic evidence of the failure of current programs. Yet Congress was unable to formulate a coherent alternative and was ultimately forced to continue the old, discredited programs.[79]

But experience in other areas belies the view that Congress is totally incapable of legislating policy in meaningful detail. The tax system is one outstanding example of a highly complex field in which Congress has been capable of law making in relatively precise and consistent terms. In the labor-management area Congress has been able to strike a meaningful balance between politically powerful forces and to readjust that balance, at times independently of executive initiative.[80] The Clean Air Amendments of 1970[81] and the Federal Water Pollution Control Act Amendments of 1972,[82] the latter passed by the Ninety-second Congress over presidential veto,[83] bespeak a similar power of significant initiative in the environmental area.

What accounts for these differences in the performance of Congress? Is it the nature of the subject matter? Professor Davis suggests, for example, that regulatory questions may be inherently so complex and their resolution so dependent upon specialized working experience that, given Congress' limited resources, de-

76 *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE 46-50 (Supp. 1970).

77 Lilley & Clark, *Urban Report/ Federal Programs Spur Abandonment of Housing in Major Cities*, 4 NAT'L J. 26 (1972).

78 Lilley & Clark, *Urban Report/Immense Costs, Scandals, Social Ills Plague Low Income Housing Programs*, 4 NAT'L J. 1075 (1972).

79 *See* 30 CONG. Q. 2421-23 (1972); 118 CONG. REC. H9002-05 (daily ed. Oct. 2, 1972).

80 *See* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 36-45 (1962).

81 Pub. L. No. 91-604, 84 Stat. 1676 (codified in scattered sections of 42 U.S.C.).

82 Pub. L. No. 92-500, 86 Stat. 816 (1972).

83 30 CONG. Q. 2754 (1972).

velopment of detailed regulatory policy must inevitably be left to administrative agencies.[84] Yet Congress has nonetheless taken considerable responsibility for the details of complex tax policy, and done so with reasonable success. Are such differences in performance explained by differences among committees and legislative procedures? For example, do the special institutional characteristics of the Ways and Means Committee,[85] together with the effects of the closed rule and the requirement that revenue bills originate in the House,[86] explain Congress' performance in the tax area? Are Congress' successful policy initiatives in the atomic energy field the result of the joint nature of the Joint Committee on Atomic Energy?[87] Or are variations in congressional performance attributable to individual congressmen or the nature of the underlying political forces in various situations rather than any institutional variables?

While we are very far from having satisfactory answers to these questions, there appear to be basic constraints on legislative law-making capability that may in many areas significantly limit Congress' ability to take policy initiatives and direct their implementation in meaningful detail. Although there have been proposals to improve Congress' law making capabilities by increasing congressional staffs and streamlining procedures,[88] certain inherent limiting factors will remain: the press of congressional duties other than law making, the decentralized and fragmented nature of congressional decision making, the necessity for reciprocity and compromise, and the ever-growing complexity of the society and its need for law. These limiting factors suggest that, while Congress may from time to time be able to take detailed policy initiatives in selected areas, its ability to do so across the board is far more doubtful.

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84 K. DAVIS, ADMINISTRATIVE LAW TREATISE 46-50 (Supp. 1970).

85 J. MANLEY, THE POLITICS OF FINANCE 59-97 (1970); Fowlkes & Lenhart, *Congressional Report/Two Money Committees Wield Power Differently*, 3 NAT'L J. 779 (1971).

86 U.S. CONST. art. I, § 7.

87 *See* H. GREEN & A. ROSENTHAL, THE GOVERNMENT OF THE ATOM 266-73 (1963); Green, *The Joint Committee on Atomic Energy: A Model for Legislative Reform?*, 32 GEO. WASH. L. REV. 932 (1964).

88 *E.g.*, CONGRESS: THE FIRST BRANCH OF GOVERNMENT 475-80, 492-93 (American Institute for Public Policy Research ed. 1966); P. DONHAM & R. FAHEY, CONGRESS NEEDS HELP 194-203 (1966); *see also* Washington Post, Dec. 11, 1972, at A2, col. 1.

Because of these institutional limitations, some observers have concluded that the appropriate role for Congress is that of oversight — to review, evaluate, and correct the elaboration of policy by other law-making bodies.[89] But this conclusion appears inconsistent with the institutional characteristics that limit the Congress' capability to make law by passing statutes, for, realistically, effective oversight is legislation by other means.[90] If it is difficult for Congress collectively to specify policy by statute, it would seem at least as difficult to pull legislators together to exercise oversight functions. Oversight activity is normally highly decentralized, primarily the work of a few staff people and perhaps a subcommittee chairman.[91] This fact, combined with the low political visibility of most oversight activities (other than the occasional spectacular exposé) means that oversight often will be spotty, unsystematic, and susceptible to leverage by organized special interests.[92] Long experience on the part of congressmen and staffs and efforts to increase staff support for oversight functions through increased use of the General Accounting Office[93] may partially offset these limitations. But, even if such limitations could be entirely overcome, the problem of ensuring effective accountability for the exercise of oversight functions would raise serious questions as to the desirability of Congress' assuming greater law-making power through strengthened oversight capability.[94]

The foregoing discussion suggests that Congress' ability either to make policy or to responsibly oversee its making by others is significantly limited. If so, in many areas the practical guarantee

89 *E.g.*, Huntington, *Congressional Responses to the Twentieth Century*, in Truman, *supra* note 35, at 5, 22-25, 29-31; Carter, *Legislative Oversight*, in CONGRESS: THE FIRST BRANCH OF GOVERNMENT 32-35, 68 (American Enterprise Institute for Public Policy Research ed. 1966).

90 *See* H. GREEN & A. ROSENTHAL, GOVERNMENT OF THE ATOM 71-114, 267-70 (1963); M. KIRST, GOVERNMENT WITHOUT PASSING LAWS (1969).

91 *E.g.*, M. KIRST, GOVERNMENT WITHOUT PASSING LAWS 12-14, 122-23, 125-29 (1969); W. RHODE, COMMITTEE CLEARANCE OF ADMINISTRATIVE DECISIONS 50-61 (1959).

92 *See* J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 70-71 (1964); W. KEEFE & M. OGIVE, THE AMERICAN LEGISLATIVE PROCESS 447-48 (2d ed. 1968); Marx, *Congressional Investigations: Significance for the Administrative Process*, 18 U. CHI. L. REV. 503, 512-14 (1951). *But see* M. KIRST, GOVERNMENT WITHOUT PASSING LAWS, 129-35, 138-52 (1962) (congressional review through the appropriations process).

93 *See* Pearce, *Congress Report/Senate Seeks to Expand GAO's Watchdog Capabilities*, 3 NAT'L J. 273 (1971).

94 *See* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 168-71 (1962); W. RHODE, COMMITTEE CLEARANCE OF ADMINISTRATIVE DECISIONS 67-71 (1959).

of sound public policy must largely depend upon the suitability and responsiveness of the other law-making institutions to which Congress has assigned responsibility for the elaboration and application of broad policy initiatives. Congress must become an expert in institutions, public and private, assessing their long-run capabilities and deciding which are best suited for various law-making tasks that Congress itself is incapable of discharging. Where the performance of a given institution to which a law-making task has been assigned falls short, Congress must modify or abolish existing organs and create new ones.

Congress, however, has given far too little attention to institutional capabilities and performance. Too often it has been prey to a sort of naïve instrumentalism which assumes all will be well if Congress gives its vague blessing to a program, creates a bureau, commission, or department to carry out the program, and appropriates funds.[95] Once created, the institutional housing of a program and its implications for the substantive policy produced are seldom subjected to searching reexamination.

Nowhere is this failure more glaring than in the case of the regulatory commissions, which have come under attack of late on the ground that they are unresponsive to the interests of consumers and have been dominated by the industries they are supposed to regulate.[96] The Ninety-second Congress sought to respond to these attacks, not by undertaking a searching reexamination of existing agency programs and their execution, but by the seemingly paradoxical solution of creating another administrative agency — a government bureaucracy that would intervene and represent "consumer interests" in proceedings before other agencies.[97] The proposal for a Consumer Protection Agency, which

95 *See* Landis, *The Study of Legislation in Law Schools, An Imaginary Inaugural Lecture*, 39 HARV. GRADUATES' MAG. 433, 439 (1931). Sometimes, however, the failure of a program may be deliberate in the sense that legislators may authorize a politically popular program, knowing that the funds needed to effectively implement it will not be appropriated.

96 *E.g.*, R. FELLMETH, THE INTERSTATE COMMERCE OMISSION (1970); Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869, 874-75, 883-85, 906-08 (1971).

97 H.R. 10835, 92d Cong., 1st Sess. (1971); S. 3470, 92d Cong., 2d Sess. (1972). The House and Senate Government Operations Committees proceeded upon the basic assumption that regulatory bodies are unable effectively to represent the interests they are charged with protecting, and that such interests need independent representation. S. REP. No. 1100, 92d Cong., 2d Sess. 5-14 (1972); H.R. REP. No. 542, 92d Cong., 1st Sess. 5-6, 8-12 (1971). The Committees failed to address the far reaching implications of this thesis for the entire theory of administrative regulation.

was eventually filibustered to death in the Senate,[98] seems fundamentally irresponsible. Instead of taking a hard look at why existing agencies were not performing satisfactorily, Congress resorted to its accustomed grab-bag of institutional repertoires by creating a new agency without facing up to some key issues: How could it be assumed that the new agency would prove responsive to consumer interests when others allegedly had not? What was the Consumer Protection Agency to do when the interests of various classes of "consumers" conflicted? Just how could such an agency be counted upon to change the performance of the "captured" commissions? Is the problem of so-called agency "failure" a unitary one that can be solved by more administrative intervention?

A more responsible approach by Congress would have been a case-by-case review of existing agencies and their performance. In some cases, such as regulation of transportation, the consumer and public interest might best be served by abolishing programs that have outlived whatever rationale they may have once had. In other instances, such as FTC regulation of deceptive trade practices, serious consideration should be given to transferring regulation to the courts through lawsuits initiated by consumers or competitors.[99] In still other instances, institutional modifications to provide for direct or indirect representation of consumers and other interests in agency decision making, such as providing a more balanced role for advisory committees,[100] or opening agency meetings to the public[101] should be considered further before resorting to a bureaucratic version of countervailing power.

The short-term political dividends which congressmen enjoy from creating a Consumer Protection Agency are obvious, while the immediate political payoff for the sort of institutional review and fine-tuning suggested here is slight.[102] This lack of incentive

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98 30 CONG. Q. 2475-76 (1972).

99 *See, e.g.*, Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 65-68 (1969).

100 *See* Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770; Comment, *The Federal Advisory Committee Act*, 10 HARV. J. LEGIS. 217 (1973).

101 S. 3881, 92d Cong., 2d Sess. (1972). The bill would also require, with limited exceptions, open meetings of congressional committees, and provides for citizen suits to enforce the bill's requirements. *See* 118 CONG. REC. S12794-95 (daily ed. Aug. 4, 1972).

102 Indeed, the author, in urging Congress to give more careful and systematic attention to the proper division of responsibilities among various law-making institutions, may be guilty of the same lapse of which he has accused others: assigning

for politicians makes it all the more important for lawyers, together with political scientists and other students of public administration, to play a more creative, disinterested, professional role as institutional critics and architects in the implementation of congressional programs.

We need to know, for example, far more than we do about the costs and benefits of judicial as compared to administrative means of making and enforcing law in various program areas, as well as the possibilities of more fruitful patterns of shared responsibilities between court and agency, such as that envisaged in the Hart-McGovern bill providing for citizens' suits in the environmental field.[103] The use of special incentives for program administrators[104] and the relation of such incentives to more traditional forms of control deserve investigation. Schemes for funding and encouraging "public interest" lawyers from the private bar to serve as spokesmen for otherwise formally unrepresented interests are still in a rudimentary stage of development, and alternative solutions need to be canvassed. Ernst Freund stated more than 50 years ago that we need far more study of "modalities of delegation and their effects."[105] That need remains unfulfilled.

IV. Conclusion

Obviously, this Foreword can do no more than raise issues, such as the impact of procedure on substance in the legislative context or the appropriate policy-making role of Congress, as topics potentially worthy of study by lawyers. The development of these and other themes must be left to more detailed, case by case study. The *Journal*'s survey of Congress provides a framework within which it is hoped such work will be encouraged and published. Moreover, as this Foreword has suggested, the contributions promised by the *Journal*'s survey should not be limited to advancing our understanding of the legislative process. It can also serve the important goal of stimulating awareness by lawyers of their roles as actors in the legislative process and their corresponding responsibilities as constructive critics and reformers.

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to the legislature functions which are inconsistent with the fundamental characteristics and constraints of the legislative process.

103 S. 1032, 92d Cong., 1st Sess. (1972).

104 *E.g.*, A. Rivlin, Systematic Thinking for Social Action 120-44 (1971).

105 Freund, *Prolegomena to a Science of Legislation* 13 Ill. L. Rev. 268, 287 (1918).

STATUTORY COMMENTS

UNDISCLOSED EARMARKING: VIOLATION OF THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

Introduction

The Federal Election Campaign Act of 1971[1] is the first major reform of campaign financing in 47 years. It was enacted because of the complete ineffectiveness of existing law, chiefly the Corrupt Practices Act of 1925.[2] The Act of 1925, often characterized as "more loophole than law,"[3] was so easily avoided that very little campaign spending was ever officially disclosed.[4] Campaign committees which operated only in one state and the District of Columbia were not required to file reports of contributions and expenditures.[5] Reports from committees or candidates on primary elections were not required.[6] Presidential campaigns were entirely excluded from coverage.[7] Since a candidate for Congress was only required to report contributions made or expenditures received "with his knowledge or consent," a candidate merely disavowed any knowledge of financial activity on his behalf.[8] The law limited campaign expenditures by candidates for senator to a maximum

1 Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.A. (Supp. July 1972)) [hereinafter cited as Act].

2 Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070 (codified in scattered sections of 2, 18 U.S.C.)

3 22 CONG. Q. ALMANAC 1248 (1966) (text of President Johnson's letter to Congress on proposed Election Reform Act of 1966); *See* Comment, *The Federal Election Campaign Act of 1971: Reform of the Political Process?*, 60 GEO. L.J. 1309, 1310-11 & nn. 9, 10 (1972); Note, *Campaign Finance Reform: Pollution Control for the Smoke-Filled Rooms?*, 23 CASE W. RES. L. REV. 631, 639-46 (1972).

4 *See Hearings on H.R. 8284 Before the Subcomm. on Elections of the Comm. on House Administration*, 92d Cong., 1st Sess. 68, 112 (1971) [hereinafter cited as *Hearings on H.R. 8284*].

5 *See* Federal Corrupt Practices Act of 1925, ch. 363, tit. III, §§ 302, 305, 43 Stat. 1070, 1071 (2 U.S.C. §§ 241, 244 (1970), repealed by Act § 405, 86 Stat. 20).

6 *See id.* at § 302(a), 43 Stat. 1070 (2 U.S.C. § 241(a) (1970), repealed by Act § 405, 86 Stat. 20).

7 *See id.* at § 302(b), 43 Stat. 1070 (2 U.S.C. § 241(b) (1970), repealed by Act § 405, 86 Stat. 20).

8 *See id.* at § 307(a), 43 Stat. 1072 (2 U.S.C. § 246(a) (1970), repealed by Act § 405, 86 Stat. 20); *Hearings on H. Res. 1031 Before the House Comm. on Standards of Official Conduct, Campaign Finances*, 91st Cong., 2d Sess. 41 (1970) [hereinafter cited as *Hearings on H. Res. 1031*].

of $25,000 and by candidates for representative to a maximum of $5,000.[9] These unrealistic ceilings were largely ignored.[10] That there were few prosecutions for violations of the Corrupt Practices Act in its entire 47 year history strongly suggests that the law was a dead letter.[11]

The spiraling cost of running for federal elective office provided a major impetus for revision of the Corrupt Practices Act.[12] Estimated spending for all political campaigns in 1968 was $300 million, a fifty percent increase over 1964. The estimate for 1972 campaigns is $400 million.[13] Expenditures on television and radio were a major factor in this increase.[14] The high cost of campaigning fostered the public opinion that Congress, particularly the

9 *See* Federal Corrupt Practices Act of 1925, ch. 368, tit. III, §309, 43 Stat. 1073 (2 U.S.C. § 248 (1970), repealed by Act § 405, 86 Stat. 20).

10 *Cf.* 29 CONG. Q. 1623-29 (1971); *Hearings on H. Res. 1031, supra* note 8, at 84, 153.

11 *See Hearings on H. Res. 1031, supra* note 8, at 43; *Hearings on H.R. 8284, supra* note 4, at 130. The only prosecutions were for violations of 18 U.S.C. § 610, which prohibits contributions by national banks, corporations, or labor unions. *See, e.g.*, United States v. First Nat'l Bank of Cincinnati, 329 F. Supp. 1251 (S.D. Ohio 1971); United States v. Boyle, 338 F. Supp. 1025 (D.D.C. 1971); United States v. Boyle, 338 F. Supp. 1028 (D.D.C. 1972). Section 610 of 18 U.S.C. originated in the Corrupt Practices Act of 1925, § 313, 86 Stat. 1074, though it was not part of the Corrupt Practices Act as repealed by § 405 of The Federal Election Campaign Act of 1971.

12 *See* Berry & Goldman, *Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971*, 10 HARV. J. LEGIS. 331, 334 (1973); Note, *Campaign Spending Regulation: Failure of the First Step*, 8 HARV. J. LEGIS. 640, 642-46 (1971).

A secondary impetus for election reform was a suit filed by Common Cause against the Democratic, Republican and Conservative Party National Committees seeking declaratory and injunctive relief to prevent circumvention of 18 U.S.C. §§ 608, 609 (1970). (Section 608 limited individual political contributions to an interstate committee or a candidate to an aggregate amount of $5000 a year. Section 609 limited to $3 million a year the amount an interstate committee or a branch of a national committee could receive in contributions or make in expenditures. Both provisions were repealed by the Federal Election Campaign Act of 1971. Act §§ 203, 204, 86 Stat. 9, 10.) *See* Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803 (D.D.C. 1971) (plaintiffs have standing, cause of action stated).

13 *See* 29 CONG. Q. 709 (1971). Despite the new law, spending in the 1972 presidential race set a new record. Even with reports that did not include the final 12 days before the election, a period of heavy spending, a record $61 million had been reported spent on the presidential election; this figure is bound to rise when the January post-election reports complete the picture. *See* N.Y. Times, Nov. 4, 1972, at 14, col. 1; N.Y. Times, Nov. 5, 1972, at 52, col. 1.

14 *See* 2 NAT'L J. 2135 (1970); Note, *Campaign Spending Regulation: Failure of the First Step*, 8 HARV. J. LEGIS. 640, 646-48 (1971); *Hearings on H. Res. 1031, supra* note 8, at 17-18; *Hearings on S. 1, S. 382, and S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 151 (1971) [hereinafter cited as *Hearings on S. 1*].

Senate, was a rich man's club, and that politicians frequently raised the money to meet spiraling campaign costs through deals with special interests.[15]

The Ninety-first Congress responded to the public concern in 1970 by passing S. 3637, which would have limited campaign spending on the broadcast media.[16] When President Nixon vetoed this bill on the ground it "plug[ged] only one hole in a sieve,"[17] the Ninety-second Congress responded by passing the Federal Election Campaign Act of 1971, a more comprehensive approach to reform.[18]

The Federal Election Campaign Act of 1971 has four main parts. Title I of the Act places a ceiling on the amount a candidate for federal elective office may spend on communications media[19] and

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15 *See* McGovern, *Campaign Contributions: A National Scandal*, 39 BROOKLYN L. REV. 157 (1972); H.R. REP. No. 564, 92d Cong., 1st Sess. 4 (1971); *Hearings on H.R. 8284, supra* note 4, at 67-68; *Hearings on S. 1, supra* note 14, at 631-32.

16 *See* Note, *Campaign Spending Regulation: Failure of the First Step*, 8 HARV. J. LEGIS. 640, 660-67 (1971).

17 *See* 6 WEEKLY COMP. PRES. DOC. 1367 (1970).

18 *See generally* Berry & Goldman, *Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971*, 10 HARV. J. LEGIS. 331 (1973).

Despite the traditional Republican financial advantage over Democrats, one writer has suggested the limitations on campaign spending will hurt Democrats more than Republicans. He argues that at any given level of spending, the marginal utility of a campaign dollar spent by Republicans is less than that of a campaign dollar spent by Democrats. Therefore, limiting expenditures of both parties will operate to the relative disadvantage of the Democrats. Fingerhut, *A Limit on Campaign Spending—Who Will Benefit?*, PUBLIC INTEREST, Fall 1971, at 3. However this conclusion does not follow if the expenditure limitation only forces one party to curtail spending, which appears to be the case at least with respect to broadcast media expenditures by presidential nominees. *See* note 19, *infra*. On the other hand, the spending curbs may hit Senate candidates from both parties equally. *See* N.Y. Times, May 12, 1971, at 20, col 4.

19 Communications media are defined to include "broadcasting stations, newspapers, magazines, outdoor advertising facilities, and telephones"; but telephone expenses exclude any costs of telephones incurred by a volunteer. Act § 102(1), 47 U.S.C.A. § 801(1) (Supp. July 1972).

For the base year 1971 the ceiling is set at (a) $50,000 or (b) 10 cents per resident of voting age (eighteen years or older) in the area of the election, whichever is greater. Act § 104(a), 47 U.S.C.A. § 803 (Supp. July 1972). The ceiling increases as the price level increases. Act § 104(a)(4), 47 U.S.C.A. § 803(a)(4) (Supp. July 1972). The actual ceiling for 1972 is $52,150 or 10.43 cents per resident of voting age, whichever is greater. Campaign spending limitations as adjusted by a 4.3 percent rate of inflation are tabulated in 37 Fed. Reg. 7470 (1972). Nine states in 1972 had voting age population less than 500,000 and therefore had a $52,150 ceiling: Alaska, Delaware, Idaho, Montana, Nevada, North Dakota, South Dakota, Vermont, and Wyoming.

Of the amount that a candidate can spend on communications media, only 60

reduces the prices that may legally be charged for use of broadcasting stations, newspapers, and magazines.[20] Title II limits expenditures by a candidate or his immediate family on his own

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percent can be spent on broadcast media. *Id.* Thus the 1972 spending ceiling on broadcast media is the larger of $31,290 and 6.258 cents multiplied by the voting age population of the election area. The allowable national total is $8,550,305. 37 Fed. Reg. 7470 (1972). This is to be contrasted with $12.7 million spent in 1968 on Richard Nixon's radio and television advertising and $6.1 million spent by Humphrey. N.Y. Times, May 12, 1971, at 20, col. 4.

The ceilings are enforced by a clever certification procedure: no person may charge for broadcast time or for the use of any newspaper, magazine, or outdoor advertising facility on behalf of a candidate unless the candidate certifies in writing such charge will not exceed the applicable expenditure ceiling. Act §§ 104(b), (c), 47 U.S.C.A. §§ 803(b), 315(c) to (g) (Supp. July 1972). When candidates place a joint advertisement in a communications medium requiring certification, this procedure also performs the function of allocating the total expenditure among the candidates incurring it. *See* 37 Fed. Reg. 5804 (1972). Amounts spent on communications media on behalf of a candidate are deemed to have been spent by the candidate and are chargeable against his expenditure ceilings. Act § 104(a)(6), 47 U.S.C.A. § 803(a)(6) (Supp. July 1972). Thus the certification provision gives the candidate a veto on access to communications media by his supporters, a result which raises first amendment questions. *See generally* Barrow, *Regulation of Campaign Funding and Spending for Federal Office*, 5 J.L. REF. 159 (1972); Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900 (1971); Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359 (1972); Comment, *A Constitutional Remedy for the High Cost of Broadcast and Newspaper Advertising in Political Campaigns*, 60 CALIF. L. REV. 1371 (1972); *Campaign Spending Controls Under the Federal Election Campaign Act of 1971*, 8 COLUM. J.L. & SOC. PROB. 285 (1972); Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 214 (1972). *See also* 117 CONG. REC. S12875 (daily ed. Aug. 2, 1971); 117 CONG. REC. S13016 (daily ed. Aug. 3, 1971).

Title I also contains appropriate enabling legislation for any state to adopt equal or lower expenditure ceilings for broadcasting stations and to require similar certification from state candidates. Act § 104(c), 47 U.S.C.A. § 315(d) (Supp. July 1972).

20 For 45 days preceding a primary election and 60 days preceding a general election, no broadcasting station may charge any candidate more than "the lowest unit charge of the station for the same class and amount of time for the same period." Act § 103(a)(1), 47 U.S.C.A. § 315(b) (Supp. July 1972). This provision applies to candidates for "any public office," not just to candidates for federal elective office. In addition, the Act requires stations to "allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." Act § 103(a)(2)(A), 47 U.S.C.A. § 312(a)(7) (Supp. July 1972). For regulations dealing with implementation of the amendments to the Communications Act of 1934, see 37 Fed. Reg. 5796 (1972) (FCC, *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, public notice of March 16, 1972).

During the rest of the year charges are limited to those made "for comparable use of the station by other users." Act § 103 (a)(1), 47 U.S.C.A. § 315(b) (Supp. July 1972). This provision was the law prior to the amendment. *See* 47 U.S.C. § 315(b) (1970).

Charges to candidates by newspapers and magazines during the same 45 and 60 day periods may not exceed the "charges made for comparable use of such space for other purposes." Act § 103(b), 47 U.S.C.A. § 802 (Supp. July 1972).

campaign[21] and amends the criminal code sections barring contributions by national banks, corporations, and labor unions[22] and by government contractors.[23] Title III deals with the disclosure of contributions and expenditures by candidates and campaign committees. Finally, title IV covers the extension of credit to candidates by federally regulated industries,[24] the relationship of the Act to state law, and the repeal of the Corrupt Practices Act.

This Comment will focus on §§ 304, 305, and 310 of title III. The discussion will consider the so-called earmarked funds loophole.[25] This loophole, it is alleged, allows an individual or political

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21 The limitation is set at $50,000 for candidates for president, $35,000 for candidates for senator, and $25,000 for candidates for representative. Act § 203, 18 U.S.C.A. § 608 (Supp. July 1972). This provision replaced a broader one which limited individual political contributions to an interstate committee or a candidate to an aggregate amount of $5000 a year. Act of June 25, 1948, ch. 645, § 608, 62 Stat. 723, *as amended*, Act § 203, 18 U.S.C.A. § 608 (Supp. July 1972). Section 203 has been challenged as an unconstitutional discrimination against a certain class of candidates and a violation of their right to freedom of speech. *See Campaign Spending Controls Under the Federal Election Campaign Act of 1971*, 8 COLUM. J.L. & SOC. PROB. 285, 308-09 (1972). But see Barrow, *Regulation of Campaign Funding and Spending for Federal Office*, 5 J.L. REF. 159, 173-74 (1972).

22 Act of June 25, 1948, ch. 645, § 610, 62 Stat. 723, *as amended*, Act, § 205, 18 U.S.C.A. § 610 (Supp. July 1972). The sponsor of the amendment declared he was merely codifying existing case law. *See* 117 CONG. REC. H11477 (daily ed. Nov. 30, 1971); 118 CONG. REC. H94 (daily ed. Jan. 19, 1972). This explanation has been challenged by others however. *See* 118 CONG. REC. H88-89 (daily ed. Jan. 19, 1972). Examination of the effect of the amendment is beyond the scope of this Comment, but the amendment is discussed briefly in Pipefitters Local 562 v. United States, 407 U.S. 385 (1972). That case is commented on in 13 B.C. IND. & COM. L. REV. 1532 (1972).

23 Section 611 of 18 U.S.C. bans contributions by government contractors. Section 206 of the Act amended 18 U.S.C. § 611 to "extend the prohibition against political contributions by corporations contracting with the government" and clarify the period of time during which contributions are prohibited. S. REP. No. 229, 92d Cong., 1st Sess. 66 (1971). Differing interpretations of the purpose of that amendment have surfaced. Representative Samuel Devine, claiming the extension of the ban to corporations and unions was a drafting mistake, 118 CONG. REC. H5191 (daily ed. June 1, 1972), introduced a bill, H.R. 15276, to further amend 18 U.S.C. § 611. The House passed the bill under suspension of the rules on Oct. 2, 1972. Washington Post, Oct. 3, 1972, at A1, col. 3. The Senate Rules Committee reported the bill on Oct. 4, 1972. N.Y. Times, Oct. 5, 1972, at 52, col. 1. Senate passage of the bill was blocked by a threatened filibuster in the last days of the Ninety-second Congress. *See* 30 CONG. Q. 2771 (1972).

24 This provision was motivated by the large campaign debts from the 1968 election still owed to industries regulated by the FCC, CAB, and ICC. *See* 117 CONG. REC. S12878, S12881 (daily ed. Aug. 2, 1971); 117 CONG. REC. S12997 (daily ed. Aug. 3, 1971). *See also* 117 CONG. REC. S13279 (daily ed. Aug. 5, 1971) (Congressional Research Service Memo on Deficits Incurred in National Elections, 1956-68).

25 The conventional wisdom is that the earmarked funds loophole does exist. One observer made this observation:

> It is still possible, however, for an individual contributor to conceal the

committee to make a contribution and yet avoid public disclosure by funneling money through an intermediary with a proviso that the funds be transferred by the intermediary to a particular candidate. This alleged loophole is very important because many contributors seeking anonymity and many candidates seeking secret contributions are expected to try to use it.[26] In fact, a single national committee has been reported as having handled in excess of $415,000 in earmarked funds.[27] This figure may well be merely the tip of an iceberg. This Comment argues that this loophole does not exist and that this practice violates the Act.

I. Title III: Full Disclosure Required

Title III of the Act is based on the concept of full disclosure. In the words of Justice Brandeis, "Publicity is justly commended as a remedy for social . . . diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[28] Disclosure accomplishes many desirable goals. It is "the antidote to partiality and favor."[29] It results in a better informed electorate. Perhaps most important, it raises public confidence in the integrity of government and politicians.[30] Disclosure is not a panacea for

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beneficiary of his support. The contributor could contribute money to a committee with the proviso that the funds be given to a particular candidate. The committee would have to report the contribution it passed on to the candidate as its own contribution. Thus, there would be no reported link between the candidate and the original contributor. Comment, *The Federal Election Campaign Act of 1971: Reform of the Political Process?*, 60 Geo. L.J. 1309, 1324 n. 72 (1972).

This view of the law is shared by a number of other commentators. *See* Comment, *A Constitutional Remedy for the High Cost of Broadcast and Newspaper Advertising in Political Campaigns*, 60 Calif. L. Rev. 1371, 1387 n. 120 (1972); 30 Cong. Q. 713 (1972); Polk, *Congressional Campaign Contributions: Harder to Conceal*, New Republic, April 22, 1972, at 18. *But see* Common Cause v. Jennings, Civil No. 2379-72 (D.D.C., filed Nov. 30, 1972) (suit seeking injunction compelling supervisory officers to issue regulations requiring disclosure by candidates and committees of identity of initial donors whenever funds are earmarked).

26 *See* Polk, *Congressional Campaign Contributions: Harder to Conceal*, New Republic, April 22, 1972, at 18.

27 Washington Post, Dec. 1, 1972, at A17, col. 2. The committee identified was the National Committee for the Re-election of a Democratic Congress.

28 L. Brandeis, Other People's Money 62 (1933 ed.).

29 People *ex rel.* Fordham M.R. Church v. Walsh. 244 N.Y. 280, 291, 155 N.E. 575, 578 (1927) (Cardozo, C.J.).

30 *See* McGovern, *Campaign Contributions: A National Scandal*, 39 Brooklyn L. Rev. 157, 159 (1972).

corruption in government, but it may significantly purify the electoral process.

A disclosure policy raises significant first amendment questions.[31] For example, a corporate executive may be deterred from contributing if he knows his boss may discover whom he is supporting.[32] A lawyer may not contribute out of fear he will lose clients when his contribution is disclosed.[33] But the analysis in this Comment proceeds from the starting point that Congress has already resolved these problems in favor of disclosure.

Section 304 sets forth the basic reporting responsibilities under title III. In particular, § 304(a) prescribes that reports be filed by each political committee[34] and candidate: "Each treasurer of a political committee supporting a candidate or candidates for election to Federal office, and each candidate for election to such office, shall file . . . reports of receipts and expenditures . . . ."[35] These reports must periodically disclose comprehensive information on the election finances of the reporting committee or candidate. In particular, the reports must identify in detail each contributor who gives an aggregate amount exceeding $100 in any calendar year (§ 304(b)(2)), each political committee or candidate who receives or makes transfers of funds in any amount (§ 304(b)(4)) and each person to whom expenditures aggregating over $100 have been made (§ 304(b)(9)). In addition the reports must disclose other information if required by the supervisory officer.[36] The details which the reports must contain are specified in § 304(b):

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31 *See* Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900, 924-32 (1971); Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359, 403-07 (1972).

32 *See* Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. LEGIS. 359, 405 (1972).

33 *Id.*

34 A "political committee" is a committee "which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1000." Act § 301(d), 2 U.S.C.A. § 431(d) (Supp. July 1972). Thus title III no longer exempts committees which operate in only one state and the District of Columbia from the reporting requirements. Each political committee is also required to register and file a statement of organization. Act § 303, 2 U.S.C.A. § 433 (Supp. July 1972).

35 Act § 304(a), 2 U.S.C.A. § 434(a) (Supp. July 1972).

36 Title III, which applies to all candidates for federal office, designates three "supervisory officers" to carry out the purposes of the title: the Comptroller General for presidential candidates, the Secretary of the Senate for Senate candidates, and the Clerk of the House for House candidates. Act § 301(g), 2 U.S.C.A. § 431(g) (Supp. July 1972).

(b) Each report under this section shall disclose—

. . . .

(2) [contributions] the full name and mailing address (occupation and the principal place of business, if any) of each person who has made one or more contributions to or for such committee or candidate . . . within the calendar year in an aggregate amount or value in excess of $100, together with the amount and date of such contributions;

. . . .

(4) [transfers] the name and address of each political committee or candidate from which the reporting committee or the candidate received, or to which that committee or candidate made, any transfer of funds, together with the amounts and dates of all transfers;

. . . .

(9) [expenditures] the full name and mailing address (occupation and the principal place of business, if any) of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made;

. . . . [and]

(13) [other information] such other information as shall be required by the supervisory officer.[37]

Section 305 provides for reports under certain circumstances by individuals and committees *not* considered "political committees":

> Every person (other than a political committee or candidate) who makes contributions or expenditures, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 within a calendar year shall file with the supervisory officer a statement containing the information required by section 304.[38]

This section is designed to require reports from every person who makes contributions or expenditures totaling over $100 to a person who is not himself required by § 304 to file a report. Thus § 305

37 Act § 304(b), 2 U.S.C.A. § 434(b) (Supp. July 1972).
38 Act § 305, 2 U.S.C.A. § 435 (Supp. July 1972).

covers two cases: where an individual contributes over $100 to a committee not defined as a "political committee" because it handles less than $1000, and where an individual makes contributions or expenditures aggregating over $100 to an individual who is not a candidate. In both cases the contributor must file a report.

Section 310 prohibits contributions from being made or knowingly accepted in the name of another: "No person shall make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another person."[39]

The penalty for violating any provision in title III is a fine of not more than $1000 or not more than one year in prison or both.[40] If only a fine is imposed, the conviction is deemed a misdemeanor conviction only.[41]

II. Closing the Alleged Loophole: Nine Hypothetical Cases

The operation of title III will be examined through nine hypothetical cases. In these cases the following abbreviations will be utilized:

A an individual
B another individual
C a multicandidate political committee[42]
D a multicandidate political committee formed by an interest group[43]
X a candidate (or a committee supporting only that one candidate).

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39 Act § 310, 2 U.S.C.A. § 440 (Supp. July 1972).
40 Act § 311(a), 2 U.S.C.A. § 441(a) (Supp. July 1972).
41 Act § 311(b), 2 U.S.C.A. § 441(b) (Supp. July 1972).
42 Four examples of multicandidate political committees of the type *C* represents are the Democratic Congressional Campaign Committee, the Republican Congressional Campaign Committee, the Democratic Senatorial Campaign Committee, and the Republican Senatorial Campaign Committee.
43 Examples of the committee *D* represents abound: BANKPAC (the Banking Profession Political Action Committee), COPE (AFL-CIO's Committee on Political Education), AMPAC (American Medical Political Action Committee), DRIVE (the Teamsters political committee), CITIGO (Ling-Temco-Vought's Citizens for Good Government), etc. *See generally* Pincus, *Silent Spenders in Politics—They Really Give at the Office*, New York, Jan. 31, 1972, at 37.

All contributions are assumed to exceed $100 in the nine cases.[44] Using these symbols the cases are as follows:

(1) *A* gives to *X* in *A*'s name.
(2) *A* gives to *X* in *B*'s name.
(3) *A* gives to *C* in *B*'s name with the proviso that the funds go to *X* in *C*'s name.
(4) *A* gives to *B* and *B* gives to *X* in *B*'s name.
(5) *A* gives to *B* and *B* gives to *C* in *B*'s name with the proviso that the funds go through *C* to *X* in *C*'s name.
(6) *A* gives a check to *C* made out to *X* and *C* passes the check on to *X*.
(7) *A* gives to *C* in *A*'s name and *C* gives to *X* in *C*'s name.
(8) *A* gives to *C* in *A*'s name with the proviso that *C* will give to *X* in *C*'s name.
(9) *A* gives unrestricted funds to *D* in *A*'s name, *D* gives to *C* in *D*'s name and adds the proviso that *C* will give the funds to *X* in *C*'s name.

Before applying the provisions of title III to these cases, it will be useful to catalog the similarities and differences in these fact situations. In each case a contribution goes from *A* to *X*, but the legal consequences of the route used vary considerably. Cases (3), (6), (7), and (8) are similar in that *A* gives to *C* and *C* gives to *X*. Cases (2) and (4) are exactly like cases (3) and (5) respectively, except that in (3) and (5) a political committee handles the funds. Case (9) is like case (8) except that in case (9) the funds are collected by an interest group before disbursement to *C* rather than going directly from *A* to *C*. Case (7) is identical to case (8) except for the proviso in (8) that *C* give to *X* in *C*'s name.

Case (1): A gives to X in A's name.

Case (1) presents the simplest case. *A* is not required to report anything because his contribution was to a candidate and therefore falls outside the scope of § 305. But §§ 304(a) and 304(b)(2) require *X* to report receipt of the contribution. Therefore in this case a public report will show that candidate *X* received money from individual *A*.

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44 This assumption is made because reporting requirements only arise when contributions exceed $100. Act §§ 304(b)(2), 305, 2 U.S.C.A. §§ 434(b)(2), 435 (Supp. July 1972).

Case (2): A gives to X in B's name.

Case (2) poses a violation of § 310. *A* has violated § 310 by identifying *B* as the contributor. In addition, if *X* accepted the contribution knowing it was not actually from *B*, *X* also violated § 310. *B* has not violated § 310, even if he knows his name is being used, because he has not made a contribution in the name of another person.

Case (3): A gives to C in B's name with the proviso that the funds go to X in C's name.

The result in case (3) parallels that in case (2). *A* would again be violating § 310 by identifying *B* as the contributor to *C*, and *C* would violate § 310 if it knowingly accepted the contribution in the name of *B*. Whether *X* would be violating § 310 would depend on whether the transfer from *C* was accepted with knowledge that the money actually came from *A* even though *C* reported it in *B*'s name. *X*'s violation of § 310 normally would be difficult to prove.

Case (4): A gives to B and B gives to X in B's name.

Case (4) indirectly accomplishes the same result as case (2), but in case (4) the contribution is actually turned over to *B* by *A* so that *B* can contribute to *X* for *A*. If case (4) is legal under § 310, that section would be completely ineffective, since an individual could evade its ban merely by getting a friend to make his contribution for him.[45]

A construction of § 310 which permits such an evasion would also fail to take account of the legislative history of the Act. The two congressional committees with jurisdiction over title III of the bill were the Committee on House Administration and the Senate Committee on Rules and Administration. Reports from these two committees emphasize the need for full disclosure to reform the electoral process. For example, the report of the Committee on House Administration spoke of "keeping the electorate

45 This indirect form of contributing is also used by corporations engaged in campaign financing. A corporation will raise an executive's income with the understanding that at least part of the increase will be contributed to the executive's favorite political candidate(s). *See* TIME, Oct. 23, 1972, at 26; *Hearings on H. Res. 1031, supra* note 8, at 62.

informed as to where political money comes from."[46] Eight of the nine Republican members of that committee wrote: "[T]he real crux of election reform is *full and complete disclosure* of campaign financing. If the voters know how much a candidate is spending *and the sources of his funds* they will be able to judge for themselves on the basis of these facts"[47] (emphasis added). The report contains no indication that Democratic members of the committee disagreed with the proposition that "full and complete disclosure" was a crucial element of reform.

The report of the Senate Committee on Rules and Administration, the other committee with jurisdiction over title III, placed even stronger emphasis on complete disclosure: "Disclosure, if it is to be effective, must mean total disclosure, and therefore the committee has sought to reach every kind of political activity."[48] In fact, the committee adopted an amendment[49] to S. 382 in order to "furnish maximum information to the public concerning campaign contributions and expenditures."[50] Senator Hugh Scott, Senate Minority Leader and a member of the Senate Committee on Rules and Administration, described the scope of the Act most succinctly when he said that the enforcement of the Act can "provide the public with accurate and timely information as to 'who is giving how much to whom and when.' "[51] In sum, with no

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46 H. REP. No. 564, 92d Cong., 1st Sess. 4 (1971).

47 *Id.* at 22 (additional views of Representatives Devine, Dickinson, Schwengel, Harvey, Hansen, Ware, Veysey, and Frenzel).

48 S. REP. No. 229, 92d Cong., 1st Sess. 57 (1971).

49 The amendment adopted appears as § 302(f)(1) in the Act:

> (f)(1) Any political committee shall include on the face or front page of all literature and advertisements soliciting funds the following notice: "A copy of our report filed with the appropriate supervisory officer is (or will be) available for purchase from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402." 2 U.S.C.A. § 432(f)(1) (Supp. July 1972).

50 S. REP. No. 229, 92d Cong., 1st Sess. 62 (1971).

51 *Id.* at 109 (additional views of Senator Scott). Other references to the full and complete disclosure required by the Act appear at 60 and 68. Senator Prouty, GOP floor manager of S. 382, said in Senate debate on the bill, "Under the new disclosure provisions contained in title II [sic], the public will know exactly how a candidate's campaign is financed." 117 CONG. REC. S12,895 (daily ed. Aug. 2, 1971). Senator Prouty clearly means title III rather than title II. The reason for the mistake is that as originally introduced, title II contained both criminal code amendments and disclosure provisions; but the Senate Committee on Rules and Administration moved the disclosure provisions into title III. *See* S. REP. No. 229, 92d Cong., 1st Sess. 55 (1971).

evidence to the contrary, it seems fair to conclude that Congress intended to make known the original sources of each candidate's campaign kitty.

In view of this legislative history of title III, what conduct is illegal in case (4)? *A* is violating § 310 because he is "mak[ing] a contribution in the name of another person,"[52] namely, *B*. *B*, however, is not violating § 310, though he is helping *A* conceal the identity of the real donor of the contribution, for *B* is not making a contribution in the name of another person.[53] *X* would violate § 310 only if he accepted the contribution in the name of *B* knowing that it was in fact a contribution by *A*. If *X* had this knowledge, he would be reporting something he knows is false (i.e., reporting a contribution actually made by *A* as a contribution by *B*).

Section 305 also applies to *A*'s activity in case (4). Since *A* contributed over $100 to a person other than a candidate or political committee, § 305 requires *A* to file his own report.[54] The fact, however, that § 305 requires *A* to report the contribution does not mean the contribution should be held legal under § 310. *A*'s report that he has contributed to *B* and *X*'s report that it has received a contribution from *B* do not necessarily tie *A*'s contribution to *X*. *A*'s tie to *X* can only be identified if *X* is the only committee to report a contribution from *B*; if more than one committee reported a contribution from *B*, it would be impossible to determine which committee got *A*'s contribution. This analysis does so much violence to the purpose of full disclosure that any attempt to use § 305's reporting requirements to argue against the suggested construction of § 310 must be rejected.

It is true, however, that there is an apparent inconsistency between § 305 and § 310. On the one hand, application of § 305 rests on the assumption that *A* made a contribution to *B;* on the other

52 Act § 310, 2 U.S.C.A. § 440 (Supp. July 1972).

53 Consideration of whether *B* could be reached by a prosecution under the federal conspiracy statute, 18 U.S.C. § 371, is beyond the scope of this Comment.

54 The Comptroller General's regulations interpret § 305 to require a report from *A* even if he makes an *indirect* contribution to *X*. Thus if *A* pays a printing or telephone bill directly to a company that was incurred for the benefit of *X*'s candidacy, *A* must file a report. 37 Fed. Reg. 6165 (1972) (to be codified as 11 C.F.R. § 15.1). This report, however, does not relieve *X* of the duty to report *A*'s payment as a contribution and expenditure. F. Wertheimer, The Common Cause Manual on Money and Politics 10, 39, March 1972.

hand, application of § 310 rests on the assumption that *A* made a contribution to *X*. This difficulty is merely superficial, however, because *A*'s contribution appears to be to *B* while in reality it is to *X*. *A* is liable for the consequences of both interpretations.

Case (5): A gives to B and B gives to C in B's name with the proviso that the funds go through C to X in C's name.

The foregoing discussion may be used to analyze case (5) as well. Case (5) accomplishes indirectly what was done in case (3). In case (5) *A* actually gives to *B* and *B* gives to *C* rather than *A* giving directly to *C* in *B*'s name. *A* in case (3) violated § 310; *A* in case (5) should not be treated differently merely because he has utilized less direct means to accomplish his purpose. Although it appears that *A* is not giving to *C* in another's name, in reality he is. To reach any other conclusion would be to disable § 310 in the way already rejected in case (4). If A can avoid § 310 merely by getting a friend to contribute for him, then § 310 is reduced to a trap for the unwary or friendless. Therefore, *A* is violating § 310. *C* is also violating § 310, if *C* accepts *B*'s contribution knowing it is really *A*'s contribution, but nevertheless reporting it as *B*'s. *A* also has to file the report required by § 305 as in case (4).

If *X* accepted a transfer from *C* knowing that it was a contribution "made by one person [*A*] in the name of another person [*B*]," this would also appear to violate § 310. The question arises whether the same conclusion would be reached if *X* reported both the apparent and the actual donor of the funds. This question is taken up after case (9).[55]

Case (6): A gives a check to C made out to X and C passes the check on to X.

Case (6) is really a very simple case. *C* would be treated as though it were merely an agent of *A*. All the Act requires is that *X* report receipt of a contribution from *A*; *C* need not report anything.[56] Of the six cases that involve *C*, this is the only instance where *C* is not required to report anything.

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55 See note 61 and accompanying text *infra*.

56 37 Fed. Reg. 11943 (1972) (question and answer booklet interpreting 37 Fed. Reg. 6156 (1972) (regulations issued by the Comptroller General)).

Case (7): A gives to C in A's name and C gives to X in C's name.

In case (7), under § 304 *C* must report a contribution from *A*, and in the same report or a subsequent one, depending on when the transfer occurs, *C* must also report a transfer of funds to *X*. *X* must report receipt of the funds from *C*. The public records required by the Act show a contribution from *A* to *C* and a transfer from *C* to *X*. Nowhere is it disclosed that *A* made a contribution to *X*. The case is still legal since *C* actually made the contribution to *X*. Adding a proviso that *C* distribute the funds to a *particular* candidate will appear highly attractive to those who would like to contribute to a candidate without revealing their tie to him. The legality of this procedure is considered in cases (8) and (9).

Case (8): A gives to C in A's name with the proviso that C will give to X in C's name.

Case (9): A gives unrestricted funds to D in A's name, D gives to C in D's name and adds the proviso that C will give the funds to X in C's name.[57]

Cases (8) and (9) present the two versions of the alleged earmarked funds loophole. As indicated earlier, to use the loophole there must be an intermediate multicandidate committee *C*. Then either an individual *A* as in case (8) or a committee *D* as in case (9) transfers funds to the multicandidate committee *C* with the understanding that *C* will transfer the funds to *X*. According to critics of the Act, the loophole keeps the public from knowing that *A* contributed to *X* in case (8) or *D* contributed to *X* in case (9).[58] Instead, *C*'s report shows a receipt of funds from *A* in one

57 Candidates, contributors, and committees have shown considerable ingenuity in devising proviso variations. The least subtle case is the formal or informal agreement by a multicandidate committee with a contributor to forward to a particular candidate the amount that a contributor has given to the committee. A more subtle version is "trading checks" with the contributor: *A* may deliver a contribution check to *C* and receive in return a check from *C* made out to the order of *X*. Under this method *A* even gets to deliver the check. An even more subtle procedure is trading checks with the candidate. *D* may call *X* to inform him of *D*'s decision to contribute $1500 to *C* and to invite him to deliver the check. The subtlety in this approach is that it is expected by *D* that *X* will not leave *C* until *X* gets a check from *C* in the amount of *D*'s contribution. *See* Polk, *Congressional Campaign Contributions: Harder to Conceal,* NEW REPUBLIC, April 22, 1972, at 18.

58 See note 25 *supra*.

case and from *D* in the other and transfers of funds to various candidates, one of whom happens to be *X*. *X* merely reports receiving funds from C.[59] If this loophole exists, it will seriously weaken title III of the Act. Consequently, cases (8) and (9) must be examined closely.

There are several major arguments against the existence of this loophole. First, § 310, especially as construed in case (4), made it illegal for *A* to give to *X* in *B*'s name, even if a report was filed by *A* indicating he had made a contribution to *B*. By analogy, applying § 310 to case (8), it would be illegal for *A* to give to *X* in *C*'s name, even if a report is filed by *C* indicating receipt of a contribution from *A*. *X* would also be subject to prosecution if he accepted the contribution knowing it came from *A*, but that *C* was reporting it in its own name.

In case (9) *A* has not violated § 310, because he was contributing unrestricted funds to the interest group's political committee. In this respect case (9) is identical to case (7). (However, *A* would have violated the Act if he had given funds to *D* with the *proviso* that *D* in turn give the funds to *C* earmarked for *X*.) It is illegal in case (9) for *D* to give to *X* in *C*'s name, even if *C* files a report disclosing that a contribution was received from *D*. *X* has violated § 310 only if he accepted the contribution knowing it came from *D*, but was being reported in *C*'s name. In both case (8) and (9), *C* may only be liable to prosecution under a conspiracy theory, if at all.[60]

The conclusion reached in case (4) that *A* could not avoid dis-

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59 An example of case (9) is the following account: "Mr. Glassford [executive director of the Banking Profession Political Action Committee — BANKPAC] also said that BANKPAC was more likely this year to route checks through Republican and Democratic party campaign committees rather than sending them directly to the candidates.

"This is a device used by many lobbies to disguise the source of campaign contributions — a procedure that is still legal under the new law which this year tightened somewhat reporting of financial gifts to political candidates.

. . . .

"Mr. Glassford stressed that the manner in which the payment is made will be decided by the candidate. It seems reasonable, however, to expect that, in view of the unfavorable publicity two years ago, many of the BANKPAC beneficiaries will request the checks be routed anonymously to them through the national party organization." 118 CONG. REC. H5265 (daily ed. June 5, 1972) (article reprinted from the American Banker).

60 See note 53 and accompanying text, *supra*.

closure by making his contribution to *X* through *B* was supported by two rationales: failure to disclose the identity of the real donor would violate the intent of the Act, and failing to report all that was actually known about the contribution would be a deliberate falsehood by recipient and donor. These two rationales are applicable to cases (8) and (9). If the tie between *A* and *X* is not revealed, then despite reports from *C* and *X* in case (8) and *D*, *C*, and *X* in case (9), the full disclosure intent of the Act is thwarted. And in both cases the intermediate multicandidate committee *C* deliberately reveals less than it knows.

That contributions to multicandidate committees to avoid disclosure are illegal does not mean that *all* contributions to multicandidate committees are contrary to the Act. Contributions to a multicandidate committee which gave the committee complete liberty to allocate the funds as it saw fit would still be legal. The key factor is the intent of the donor: if the donor intends to aid a slate of candidates, and that intent is disclosed by the committee's report (by reporting *A*'s contribution), then the law is not transgressed. Case (7) and *A*'s contribution to *D* in case (9) illustrate this. But if the donor intends to aid a particular candidate, and that intent is not revealed in the committee's report, then the law is transgressed. Case (8) and *D*'s contribution to *X* in case (9) illustrate this latter situation.

A borderline case could occur if *A* attached a negative proviso to the funds. Suppose, for example, *A* contributes to *C* with the proviso that the contribution not go to *X*. Does this violate § 310 which prohibits contributions in the name of another? The answer would turn on how many candidates *C* supports. If *C* supports two candidates (for example, *X* and *Y*), *A* has violated § 310. The negative proviso would be the functional equivalent of a proviso to contribute to *Y*. If *C* supports 33 Senate candidates, *A* has not violated § 310. Where to draw the line between two and thirty-three candidates is not indicated by the Act. In practice, only when the number of candidates approaches two will a possible violation of § 310 be a matter of concern. The negative proviso case turns then on the number of candidates supported by the multicandidate committee and the number of candidates blackballed by the contributor.

The results in cases (8) and (9) raise the question of whether § 310 would be violated if the earmarking were disclosed. Suppose in case (8), for example, that *X* reported receiving a contribution from *A* delivered by *C*. On this assumption *X* has not violated § 310, because when *A*'s contribution is reported as received in *A*'s name, there is no longer a "contribution made by one person in the name of another person."[61] Therefore, *A*, *C*, and *X* would not be violating § 310. Similarly, suppose *C* reported receiving a contribution from *A* and transferring it to *X* on *A*'s instructions. If *X* then reports the receipt from *C* of *A*'s contribution, no one has violated § 310. Even if *X* merely reports receipt of transferred funds from *C* without mentioning that *A* was the real contributor, § 310 is not violated. The contribution can be traced from donor to candidate, from *A* to *X*, and no essential information has been deliberately withheld.

Assume that section 304(b)(9) also requires that earmarking be reported. (The basis for this assumption is developed in the next paragraph.) Then the construction of § 310 to prohibit only undisclosed earmarking avoids a constitutional problem that might arise if § 310 were interpreted to prohibit all earmarking disclosed or undisclosed. Suppose *C*'s report in case (8) discloses a receipt from *A* and a transfer to *X*, but conceals the proviso. *C* is then indicted for violation of both § 304(b)(9) and § 310. *C* would then have a plausible fifth amendment argument that he cannot be prosecuted for violating § 304(b)(9), because to do so is to prosecute him for failing to report activity which is itself illegal.[62] This problem is avoided if § 310 only prohibits undisclosed earmarking.

Another argument that can be used to close the alleged earmarked funds loophole rests on a construction of § 304(b)(9), which requires reports of expenditures. Section 304(b)(9) is appli-

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61 Act § 310, 2 U.S.C.A. § 440 (Supp. July 1972).

62 *See* Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); and Leary v. United States, 395 U.S. 6 (1969). Even if § 310 did prohibit earmarking without qualification, the fifth amendment claim could be rejected on the authority of the "required records" doctrine. *See* Shapiro v. United States, 335 U.S. 1 (1948). The requirements for applying the doctrine are: "first, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents." Grosso v. United States, 390 U.S. 62, 67-68 (1968).

cable whenever an expenditure has been made. A transfer of funds is explicitly defined to be an expenditure by § 301(f).[63] Therefore when *C* transfers funds to *X* in case (8), it falls under § 304(b)(9). Likewise, both *D*'s transfer of funds to *C* and *C*'s transfer to *X* are expenditures which must be reported to comply with § 304(b)(9).

Section 304(b)(9) also requires the reporting committee to disclose the "purpose of each . . . expenditure" aggregating over $100. In case (8) when *C* transfers *A*'s contribution to *X*, the purpose of this expenditure is to carry out the agreement with *A* to deliver the funds to *X*. Consequently, § 304(b)(9) requires that this purpose be reported by *C* when it transfers the funds. In case (9) *D*'s purpose in transferring funds to *C* with the proviso that they are to go to *X* is to make a contribution to *X*, and § 304(b)(9) again requires *D* to disclose this purpose. When *C* transfers the funds to *X* to carry out *D*'s proviso this purpose must also be reported by *C*. Thus disclosure is compelled in both case (8) and case (9).

Even if *C* reports a link between *A* and *X* in case (8) and between *D* and *X* in case (9), the contribution as a practical matter may not really be disclosed. To learn who contributed to *X* an investigator would have to track down reports from all committees whose statements of registration indicated they supported *X*. One solution to this difficulty would be a cross-indexing system connecting any reported instances of earmarked funds with the candidate who got them. The effect of such a scheme would be the same as if *X* reported a contribution directly from *A*. Section 308(a)(3) prescribes that it shall be the duty of the supervisory officer "to develop a filing, coding, and cross-indexing system consonant with the purposes" of title III.[64] By using this authority a supervisory officer could make disclosure by the conduit committee as effective as disclosure by the candidate himself. One problem with this solution, however, is that it makes the reports in Washington usable and complete, but does nothing to make the copies filed with state officers more usable.[65]

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63 2 U.S.C.A. § 431(f) (Supp. July 1972).

64 Act § 308(a)(3), 2 U.S.C.A. § 438(a)(3) (Supp. July 1972). The supervisory officers considered requiring contributors' social security numbers to facilitate tracing. *See* Berry & Goldman, *Congress and Public Policy: A Study of the Federal Election Campaign Act of 1971*, 10 HARV. J. LEGIS. 331 (1973).

65 Section 309 requires each presidential candidate to file a copy of each statement required to be filed in Washington in each state where an expenditure is made

Section 304(b)(9) also requires that the report of an expenditure disclose "the name and address of, and office sought by, each candidate on whose behalf such expenditure was made." This phrase was added to § 304(b)(9) on the Senate floor on August 3 by adoption of an amendment proposed by Senator William Spong.[66] The Spong amendment will probably not produce additional information in case (8). Even without it, the language in § 304(b)(9) requires *C* to report the transfer to *X*. But *A* has no obligation to report in the first place,[67] and therefore § 304(b)(9) cannot compel *A* to disclose the beneficiary of his donation.

There is, however, one way in which § 304(b)(9) would produce additional information in case (8). The argument would depend on the conclusion that *A* is a "political committee" within the meaning of the Act. "Political committee" means "any committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000."[68] An *individual* may constitute a one man "committee, association, or organization" and fall within the definition of "political committee" if he makes expenditures exceeding $1000 in the aggregate. The individual would thereby incur the obligation to file a § 303 statement of registration and § 304 reports. The legislative history does not show whether anyone thought of this possibility. Such a construction is logical because otherwise *A* could zealously raise money for *X* or a slate of candidates and thus function precisely like a committee without the committee's responsibility to report. If an individual could constitute a committee, the Spong amendment to § 304(b)(9) would apply if he accepted contributions or made expenditures in excess of $1000.

In case (9) the Spong amendment does provide an obstacle to concealment through earmarking. When *D* transfers funds to *C*

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on behalf of his campaign. In addition each candidate for the Senate or House must file a copy of his reports in the state in which he seeks election. Act § 309(a), 2 U.S.C.A. § 439(a) (Supp. July 1972).

66 *See* 117 CONG. REC. S13020 (daily ed. Aug. 3, 1971).

67 *A* is contributing to a political committee, so § 305 does not require *A* to report. *A* is not a candidate, so § 304 only requires a report if *A* is held to be a "political committee." The argument at this point assumes that *A* would not be called a "political committee."

68 Act § 301(d), 2 U.S.C.A. § 431(d) (Supp. July 1972).

with the proviso that the funds be handed over to *X*, *D* is making an expenditure on behalf of candidate *X*. Thus the Spong amendment requires *D* to reveal this information in its report.

The objection may be raised that § 304(b)(9), as construed, renders § 304(b)(4) superfluous. Section 304(b)(4) specifically covers reporting requirements imposed on transfers of funds. This objection is not valid, however, for two reasons. First, § 304(b)(9) applies only when expenditures in the calendar year have been "in an aggregate amount or value in excess of $100," while § 304 (b)(4) requires disclosure of each transfer regardless of the amount of money involved. Second, § 304(b)(9) does not provide that a political committee must report the receipt of funds from a transferor committee, while § 304(b)(4) clearly does require such a report, provided only that the transferor committee qualifies as a political committee. Thus the suggested construction of § 304 (b)(9) does not make § 304(b)(4) redundant.

III. Closing the Alleged Loophole: Administrative Regulation

The supervisory officers charged with administration of title III are the Comptroller General for presidential candidates, the Secretary of the Senate for Senate candidates, and the Clerk of the House for House candidates.[69] The regulations issued by these supervisory officers for implementing title III support the above construction of § 304(b)(9) that the beneficiary of earmarked funds must be disclosed. Schedule C is the form prescribed by all three supervisory officers for compliance with § 304(b)(9). The instructions for preparing Schedule C read:

> In part 9, the . . . other expeditures that need be allocated in the appropriate space are those of multicandidate committees . . . which are transfers of funds to a candidate or candidates *or are specifically identifiable expeditures to or on behalf of a candidate or candidates*[70] (emphasis added).

69 Act § 301(g), 2 U.S.C.A. § 431(g) (Supp. July 1972).

70 GAO, Manual of Regulations and Instructions Relating to Disclosure of Federal Campaign Funds for Candidates for the Office of President or Vice President of the United States and Political Committees Supporting Such Candidates 32, March 1972. *See also* 118 Cong. Rec. S4785 (daily ed. March 24, 1972) (regulations of Secre-

The italicized portion of this instruction suggests the above construction of § 304(b)(9) is correct, at least as applied to *D* in case (9), because a transfer to *C* by *D* with *D*'s instructions to deliver to *X* is a "specifically identifiable expenditure to or on behalf" of *X*. The italicized portion is not so useful, however, in case (8), because there the problem is that *A* is not required to report. But if *A* is a "political committee," this instruction produces the same result as in case (9).[71]

Additional administrative support comes from the Comptroller General's question and answer booklet explaining his regulations:

> In case of expenditures for purposes other than for communications media, the expediture should be identified as on behalf of an individual candidate only if it is a transfer of funds directly to a candidate or to a one-candidate committee, *or is otherwise identifiable as an expenditure specifically for or in support of a particular candidate*[72] (emphasis added).

If § 310 and § 304(b)(9) do not close the alleged earmarked funds loophole, there is a remedy short of amendment of the Act by Congress. Section 304(b)(13) requires the reports to disclose "such other information as shall be required by the supervisory officer."[73] For the supervisory officer to require disclosure of the names of all contributors of $50 or more would undoubtedly exceed the authority granted in § 304(b)(13), because specific provisions of the Act set the maximum amount not requiring disclosure at $100.[74] However, a supervisory officer may execute his § 304(b)(13) authority to require disclosure by the conduit committee of the identities of the donor and the ultimate recipient in each case where the committee handles earmarked funds. In fact, § 308(a)(13) explicitly states it to be a duty of the supervisory officer "to prescribe suitable rules and regulations to carry out the provisions of this title."[75] Since earmarked funds may make meaningful reports impossible, the supervisory officers may be obligated

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tary of Senate); 118 CONG. REC. S5088 (daily ed. March 29, 1972) (forms and instructions for Senate candidates).

71 See text accompanying note 68 *supra*.

72 37 Fed. Reg. 11943 (1972).

73 Act § 304(b)(13), 2 U.S.C.A. § 434(b)(13) (Supp. July 1972).

74 The principal provision is § 304(b)(2). See text accompanying note 37 *supra*.

75 Act § 308(a)(13), 2 U.S.C.A. § 438(a)(13) (Supp. July 1972).

to issue regulations dealing with the problem or to amend current regulations.

IV. Conclusion

The purpose of title III of the Federal Election Campaign Act of 1971 was not merely to identify *A* as a benefactor and *X* as a beneficiary in the political financing system. Rather title III was to identify the real relationships and transactions *between* these participants. The legislative history of the Act supports this broader view of title III's purpose.

The earmarked funds loophole would cripple the 1971 Act just as the notorious loopholes in the Corrupt Practices Act made it ineffective. This Comment argues that such a loophole does not exist. First, § 310 proscribes undisclosed earmarking. Second, § 304 (b)(9) requires that the intermediate committee reveal the earmarking proviso. Finally, the supervisory officers have sufficient authority under § 304(b)(13) to prescribe suitable regulations to close the loophole if it actually exists.

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NUTRITION PROGRAM FOR THE ELDERLY: AMENDMENTS TO THE OLDER AMERICANS ACT OF 1965

Introduction

One in every ten Americans is aged 65 or over.[1] As life expectancy increases, the proportion of elderly in the population is steadily growing.[2] In the 1970's the number of persons aged 60 and over will grow at a rate of 20 percent while the population as a whole will increase by less than 15 percent.[3] As older Americans develop into an increasingly vocal and politically powerful segment of the society at large,[4] their demands for solutions to their problems become more difficult to avoid. In a period of general political realignment and discontent, the present mood of the elderly has been described in terms of rebellion[5] and outrage.[6] The discontent of the elderly seems chiefly to arise, first, from their economic plight and, second, from a sense of social alienation.

Economically, the condition of the elderly is characterized by fixed incomes which are being squeezed by inflation and rising property taxes. Over five million Americans aged 65 or over — one in four — live in poverty.[7] In the decade between 1959 and

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1 Department of Health, Education, and Welfare, Facts and Figures on Older Americans no. 1 (SRS-AoA Publication No. 181), at 3 (Mar. 1971).

2 Department of Health, Education, and Welfare, Facts and Figures on Older Americans no. 2 (SRS-AoA Publication No. 182), at 1 (1971). *See also Hearings on H.R. 12017 and Related Bills to Strengthen and Improve the Older Americans Act of 1965 Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 119 (1971) [hereinafter cited as *Hearings on H.R. 12017*].

3 *"Senior Power" — A Growing Force in Politics*, U.S. NEWS & WORLD REP., May 24, 1971, at 67

4 *See Hearings on S. 887, S. 1925, and S. 1163 Before the Subcomm. on Aging of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess., (1971) [hereinafter cited as *Hearings on S. 1163*]; *Hearings on H.R. 12017, supra* note 2; *Senior Power Breaks the Barriers*, HARVEST YEARS, Oct. 1970, at 6; Harger, *Aging: Ten Years of Progress or Procrastination?*, HARVEST YEARS, March 1971, at 18; *Senior Power: How Vital?*, HARVEST YEARS, Feb. 1972, at 47; Senior Citizens News, Dec. 1971, at 2, col. 1.

5 *"Senior Power" — A Growing Force in Politics*, U.S. NEWS & WORLD REPORT, May 24, 1971, at 66.

6 *Hearings on H.R. 12017, supra* note 2, at 120-21.

7 Department of Health, Education, and Welfare, Facts and Figures on Older Americans no. 1 (SRS-AoA Publication No. 181), at 3 (Mar. 1971); 117 CONG. REC.

1969, the proportion of elderly comprising the total number of the nation's poor increased from 15 percent to 20 percent.[8] Millions of elderly above the poverty line live in fear that they may join those below it because of economic events over which they have no control. Socially, the elderly see themselves as castoffs from the community at large.[9] Age disqualifies them from an economically productive role. The decline of the multigenerational family — grandparents living in the same household with children and grandchildren — has isolated them from younger members of society.[10] Among the elderly poor particularly, though far from exclusively, are found the loneliness, alienation, and sense of isolation which often lead to mental and physical deterioration.[11] Related to both inadequate income and the sense of social isolation is a high incidence of malnutrition among older Americans.[12] It is estimated that 8 million elderly live on diets insufficient for good health.[13]

At the national level the discontent of older Americans has been translated through the lobbying efforts of various senior citizens organizations into a demand for governmental action.[14] Two of the largest groups are the National Council of Senior Citizens and the American Association of Retired Persons/National Retired Teachers Associations, each claiming a membership of close to 3 million persons.[15] Their objective has been the assurance of adequate income for the aged through both liberalization of Social Security benefits[16] and the provision of broader social services by the government for the elderly.[17]

S19785 (daily ed. Nov. 30, 1971) (remarks of Senator Edward Kennedy, D.-Mass.). That figure may have been altered by the subsequent 20 percent rise in Social Security benefits. Pub. L. No. 92-336, tit. II, §§ 201-05, 86 Stat. 406.

8 Department of Health, Education, and Welfare, Facts and Figures on Older Americans no. 1 (SRS-AoA Publication No. 181), at 3 (Mar. 1971).

9 Interview with Frank J. Manning, President, Massachusetts Association of Older Americans, in Boston, Oct. 24, 1972.

10 8 WEEKLY COMP. OF PRES. DOCS. 647 (1972).

11 S. REP. No. 515, 92d Cong., 1st Sess. 4 (1971).

12 *Id.*

13 118 CONG. REC. S1231 (daily ed. Feb. 7, 1972) (remarks of Senator Frank Church, D.-Ida.).

14 *See Hearings on S. 1163, supra* note 4; *Hearings on H.R. 12017, supra* note 2.

15 *Hearings on S. 1163, supra* note 4, at 34, 211.

16 *Id., supra* note 4, at 38-39; *Hearings on H.R. 12017, supra* note 2, at 120-21.

17 *Hearings on S. 1163, supra* note 4, at 30-45, 227-33.

The discontent of the elderly and the political pressure of the lobbyists working on their behalf have been important factors in generating a sharply contested struggle between the Republican Administration and leading Democrats in Congress[18] for the allegiance of older voters. The President's attention to the elderly seems designed to attract the political support of the same economic and social groups from which Mr. Nixon is trying to build a new Republican coalition among the electorate as a whole. The President promises to protect the economic security of those who have worked hard all their lives to build that security.[19] The proposals of leading congressional Democrats coincide more closely with the objectives of the lobbyists. These Democrats promise not only to augment the incomes of older citizens but also to provide an increased share of governmental expenditures for direct social services to the elderly.[20] Democrats contrast the President's rhetoric with the three occasions in which the Democratic Congress passed legislation substantially exceeding the President's requested Social Security increases and cite Democratic-introduced legislation for expanded governmental services for the aged.[21] The stakes in this political contest are high; if either side can build a substantial bloc of support among older citizens, the effect on the national political balance would be significant.

In response to the problems of the elderly and to political pressure, two pieces of major legislation were enacted into law during the second session of the Ninety-second Congress: Public Law 92-336[22] increasing Social Security benefits by 20 percent and Public

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18 Among those who played prominent roles on the Democratic side of this political contest during the hearings and debate on NPE were: Senators Edward Kennedy (D.-Mass.), Thomas Eagleton (D.-Mo.), Frank Church (D.-Ida.), and Representatives John Brademas (D.-Ind.), and Claude Pepper (D.-Fla.). *See* 117 CONG. REC. S19781-93 (daily ed. Nov. 30, 1971); 118 CONG. REC. H773-84 (daily ed. Feb. 7, 1972); 118 CONG. REC. S3468-72 (daily ed. Mar. 7, 1972); *Hearings on S. 1163, supra* note 4; *Hearings on H.R. 17763 Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *Hearings on H.R. 17763*].

19 *See* 8 WEEKLY COMP. OF PRES. DOCS. 647 (1972); Washington Post., Dec. 3, 1971, at A10, col. 1.

20 *E.g.*, 118 CONG. REC. S1230-34 (daily ed. Feb. 7, 1972) (remarks of Senator Frank Church, D.-Ida.).

21 *Id.*; 118 CONG. REC. S15195 (daily ed. Sept. 19, 1972).

22 Pub. L. No. 92-336, tit. II, §§ 201-05, 86 Stat. 406.

Law 92-258[23] amending the Older Americans Act of 1965[24] by creating a Nutrition Program for the Elderly (NPE).

This Comment will examine the law establishing NPE with the purpose of analyzing how effectively the intent to create a broad social services program espoused by the congressional sponsors was drafted into the law. The comment will first describe the provisions of the legislative enactment, then contrast the theoretical approach to the problems of the elderly advocated by the congressional sponsors of NPE with the approach favored by the Administration, and finally examine three questions dealing with administrative implementation of the nutrition program in relation to the purpose of the law's sponsors.

I. Provisions of Pub. L. No. 92-258

Public Law Number 92-258 establishes NPE as a categorical grant program[25] with federal financing of up to 90 percent of the cost of projects providing low cost, nutritionally sound meals to individuals 60 years of age or over and their spouses. The law is the direct outgrowth of a research and development program of 31 separate nutrition projects[26] established in 1968 through title IV of the Older Americans Act of 1965.[27] Appropriations of $100 million for fiscal year 1973 and $150 million for fiscal year 1974 are authorized for distribution to the states on a 90-10 matching basis in proportion to each state's percentage of the nation's population aged 60 or over.[28] The states must designate a single

23 Pub. L. No. 92-258, 86 Stat. 88, *amending* 42 U.S.C. §§ 3001-55 (1970) (codified as 42 U.S.C.A. § 3045-45i (Supp. July 1972)) [hereinafter cited as Act].

24 42 U.S.C. § 3001-55 (1970).

25 Categorical grants to states for specific programs are also known as "formula grants." For a discussion of problems inherent in grant-in-aid programs, see Tomlinson & Mashaw, *Enforcement of Federal Standards in Grant-in-Aid Programs*, 58 VA. L. Rev. 600 (1972).

26 *See* Act § 701(a), 42 U.S.C.A. § 3045(a) (Supp. July 1972); *Hearings on S. 1163*, *supra* note 4, at 142.

27 42 U.S.C. §§ 3031-32 (1970).

28 The distribution of funds will not be exactly proportional to the distribution of citizens aged 60 and over because each state will receive at least one-half of one percent of the NPE appropriations no matter how small its number of elderly. Act § 703(a)(1), 42 U.S.C.A. § 3045b(a)(1) (Supp. July 1972). Furthermore, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands will each receive at least one-fourth of one percent of the NPE appropriations. *Id.* These areas, along with Puerto Rico and the District of Columbia, are included

state agency with responsibility for the program's administration.[29] The designated state agencies are to disperse NPE funds by grant or contract to public and private non-profit organizations which will establish nutrition projects.[30] In awarding grants and contracts, the state agencies are directed to give preference to projects serving primarily low income persons.[31] To the extent feasible, grants are also to be awarded to projects "operated by and serving the needs of minority, Indian, and limited English-speaking eligible individuals in proportion to their numbers in the State."[32]

Recipient organizations within the state must provide at least one hot meal per day five or more days a week to participating elderly citizens.[33] The organization is to provide a site for the provision of meals, and, where appropriate, furnish home delivered meals to shut-ins or transportation to the project site.[34] Schools, senior citizens centers, churches, and other public and private nonprofit locations may be used as sites.[35] Locations are to be accessible to, and preferably within walking distance of, a majority of elderly within the project area.[36] A charge, based on income ranges of the eligible individuals in the community, may be made for meals provided by the projects.[37] The project site must also provide a setting conducive to expansion of the program, and recrea-

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within the definition of "State" in the Older Americans Act of 1965. 42 U.S.C. § 3002(3) (1970). Puerto Rico and the District of Columbia are therefore entitled to their respective one-half of the one percent minimum appropriations along with the other "States."

29 Act § 705(a)(1), 42 U.S.C.A. § 3045d(a)(1) (Supp. July 1972).

30 Act § 705(a)(2)(A), 42 U.S.C.A. § 3045d(a)(2)(A) (Supp. July 1972). Unless a greater amount is approved by the Secretary of Health, Education, and Welfare, no more than 10 percent of the federal allotment may be used for administrative costs by the state agency. Act § 705(a)(2)(B), 42 U.S.C.A. § 3045d(a)(2)(B) (Supp. July 1972).

31 Act § 705(a)(4), 42 U.S.C.A. § 3045d(a)(4) (Supp. July 1972).

32 *Id.*

33 Act § 706(a)(1), 42 U.S.C.A. § 3045e(a)(1) (Supp. July 1972).

34 Act § 706(a)(3), 42 U.S.C.A. § 3045e(a)(3) (Supp. July 1972).

35 *Id. See also* 37 Fed. Reg. 16845 (1972) (to be codified as 45 C.F.R. § 909.1(b)).

36 Act § 706(a)(3), 42 U.S.C.A. § 3045e(a)(3) (Supp. July 1972).

37 Act § 705(a)(2)(A)(ii), 42 U.S.C.A. § 3045d(a)(2)(A)(ii) Supp. July 1972). *See also* 37 Fed. Reg. 16849 (1972) (to be codified as 45 C.F.R. § 909.44(c)).

Participants in the demonstration projects established under title IV of the Older Americans Act of 1965 usually paid 50 cents to 65 cents per meal. *S. Rep. No.* 515, 92d Cong., 1st Sess. 8 (1971).

Most participants in the title IV projects wanted to pay for their meals. Payment avoids the soup kitchen stigma of free meals. *Hearings on H.R. 17763, supra* note 18, at 252.

tional activities, and informational, health, and welfare counseling services are to be offered if these services are not otherwise available to participants.[38]

Drafting NPE as a categorical grant program assures that NPE will be national in scope.[39] Nothing compels a state to participate in the program, but as a practical matter it is unlikely that any state will not accept federal funds designated for the benefit of its residents. If a state should refuse its NPE allotment, the law authorizes HEW to distribute the state allotment on a 90-10 matching basis directly to organizations establishing nutrition projects within that state.[40]

Pub. L. No. 92-258 provided authorization for the funding of NPE in the fiscal years 1973 and 1974, but not the actual appropriations. Pursuant to a supplemental budgetary request from the President,[41] $100 million for NPE was incorporated in H.R. 15417,[42] a general appropriations bill for the Departments of Labor and Health, Education, and Welfare (HEW). That bill was vetoed by the President on August 16, 1972, for being in excess of his budget recommendations for the two departments.[43] The $100 million was again included in a second Labor and HEW appropriations bill, H.R. 16654,[44] which was pocket vetoed by the President on October 27, 1972.[45] The reason given for the second veto was again that the congressional appropriation exceeded his budget recommendation.[46] There is no indication that the funds for NPE were a factor influencing the President to veto the overall appropriation.[47] However, without an appropriation and as a new

38 Act § 706(a)(6), 42 U.S.C.A. § 3045e(a)(6) (Supp. July 1972).
39 *See* S. REP. No. 515, 92d Cong., 1st Sess. 3 (1971).
40 Act § 703(d), 42 U.S.C.A. § 3045b(d) (Supp. July 1972).
41 *See* 8 WEEKLY COMP. OF PRES. DOCS. 664 (1972).
42 H.R. 15417, 92d Cong., 2d Sess. (1972).
43 8 WEEKLY COMP. OF PRES. DOCS. 1240 (1972).
44 H.R. 16654, 92d Cong., 2d Sess. (1972).
45 N.Y. Times, Oct. 28, 1972, at 1, col. 1.
46 *Id.*
47 That the President may not have been displeased with the effect of the veto on NPE can perhaps be inferred from his statement accompanying his veto of H.R. 15647 a week later. H.R. 15647 would have provided additional social services for the elderly through several categorical funding programs. The President indicated that his veto stemmed in part from opposition to narrow categorical programs which could not be coordinated with his comprehensive program of delivery of services to the elderly. 8 WEEKLY COMP. OF PRES. DOCS. 1604 (1972).

project not covered by the continuing resolution for interim HEW funding, the present status of NPE is unclear. HEW has published regulations[48] and printed manuals for use by state agencies[49] but it appears likely that the program will lie dormant pending the appropriation of funds by the next Congress.[50]

II. Contrasting Approaches

Two contrasting approaches to the responsibility of the federal government for seeking solutions to the problems faced by older Americans have been advanced. One is a social services approach which calls for government sponsorship and subsidization of specific programs designed to overcome the social alienation and isolation of the aged. The other is an income maintenance approach which is based upon the assumption that guaranteeing sufficient economic resources to the elderly would enable them to solve their social problems for themselves. The social services approach has been advanced by the congressional sponsors and proponents of NPE,[51] while the President and the Administration have argued in favor of the income maintenance approach.[52]

A. *Provision of Social Services*

The sponsors of NPE have sought to broaden federal responsibility for the social welfare of elderly citizens.[53] Past federal pro-

48 37 Fed. Reg. 16844 (1972) (to be codified as 45 C.F.R. §§ 909.1-63).

49 Policies and Procedures for the Nutrition Program for the Aging, Sept. 25, 1972.

50 Interview with Ms. Dolli Cutler, Legislative Liaison, Office of the Commissioner on Aging, Dept. of Health, Education, and Welfare, by telephone, Nov. 3, 1972.

51 The principal sponsors of the legislation were Representative Claude Pepper (D.-Fla.) and Senator Kennedy (D.-Mass.). Others prominent in their support of the bill were Senator Thomas Eagleton (D.-Mo.), Chairman of the Senate Subcommittee on Aging; Senator Charles Percy (R.-Ill.); Senator Frank Church (D.-Ida.), Chairman of the Senate Select Committee on Aging; Representative John Brademas (D.-Ind.), Chairman of the House Select Subcommittee on Education. *See* 117 Cong. Rec. S19781-93 (daily ed. Nov. 30, 1971); 118 Cong. Rec. H773-84 (daily ed. Feb. 7, 1972); 118 Cong. Rec. S3468-72 (daily ed. Mar. 7, 1972); *Hearings on S. 1163, supra* note 4; *Hearings on H.R. 17763, supra* note 18.

52 *See* 8 Weekly Comp. of Pres. Docs. 651-52 (1972); *Hearings on H.R. 17763, supra* note 18, at 250-78; *Hearings on S. 1163, supra* note 4, at 245-80.

53 Act § 701(a), 42 U.S.C.A. § 3045(a) (Supp. July 1972); S. Rep. No. 515, 92d Cong., 1st Sess. 4 (1971).

grams — such as Social Security and Medicare — were rooted in the concept that the government should provide the means to acquire essential services beyond the limited incomes of the elderly. While vigorously supporting the guarantee of an adequate income position by means of these established programs,[54] the advocates of a social service approach view income maintenance by itself as an inadequate means of curing the problems faced by older citizens. The broader purpose they want for NPE is articulated in the Senate Committee Report:

> The nutrition program established by this bill is neither designed as, nor intended to be, an income maintenance program. In addition to providing nutritious meals for the elderly, it aims at overcoming the problems related to social isolation and bringing the elderly into contact with a wide variety of other social services which are already available but which many older persons lack the initiative and knowledge to draw upon. Accordingly, no income limitation is established in the bill.[55]

In the view of its congressional sponsors, NPE addresses problems which are not exclusively a function of inadequate income.[56] Even if every older citizen were assured an income above the poverty level, the problems related to social isolation would remain. NPE would provide an incentive for participants to get out of their homes and into a social setting at least once a day. With recreational and counseling services, the project sites could serve as a type of community center for the elderly, which would facilitate the re-integration of older citizens into the social and political life of the community at large.[57] The preference to be given to projects serving primarily low income individuals reflects the recognition that the problem of social alienation is particularly acute among the elderly poor, although in the view of its sponsors, NPE is not to be confined to serving the poor.[58]

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54 *See* 118 CONG. REC. S1231 (daily ed. Feb. 7, 1972) (remarks of Senator Church).

55 S. REP. No. 515, 92d Cong., 1st Sess. 10 (1971).

56 118 CONG. REC. S3471 (daily ed. Mar. 7, 1972) (remarks of Senator Eagleton).

57 *See Hearings on S. 1163, supra* note 4, at 201 (position paper of D. Holmes, Director, Center for Community Research, New York, New York).

58 S. REP. No. 515, 92d Cong., 1st Sess. 10 (1971).

B. *Income Maintenance*

Adherents of an income maintenance approach view most of the problems of the elderly as directly related to inadequate income.[59] If that is so, the most efficient means of alleviating those problems, and avoiding the administrative costs of social service programs, is for the government to guarantee adequate income to the aged. The Administration's reliance on income maintenance as the proper approach to the problem is illustrated by the following passage from the President's Congressional Message on Older Americans of March 23, 1972:

> I have long been convinced the *best* way to help people in need is not by having Government provide them with a vast array of bureaucratic services but by giving them money so that they can secure needed services for themselves. This understanding is fundamental to my approach to the problems of aging.[60]

The President suggests that the provision of bureaucratic services is incompatible with the preservation of independence, self-reliance, and dignity of the elderly.[61] Even if the provision of adequate income did not eliminate all of the social problems of the elderly, the President believes the deleterious effect of a social service approach on individual dignity and self-reliance would weigh heavily against its adoption.[62]

In spite of the President's distaste for the provision of governmental services, NPE is not necessarily incompatible with the Administration's commitment to an income maintenance approach. If NPE is administered as a means of providing meals for those elderly persons living below the poverty line, then the program can be construed as an interim measure serving an income

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59 *See Hearings on H.R. 17763, supra* note 18, at 252 (testimony of John B. Martin, Commissioner on Aging, HEW); *Hearings on S. 1163, supra* note 4, at 245 (testimony of Stephen Kurzman, Assistant Secretary for Legislation, HEW).

60 8 WEEKLY COMP. OF PRES. DOCS. 651 (1972). National lobbyists for the elderly have criticized the lack of vigor with which the Administration has pursued its income maintenance strategy. *See Hearings on S. 1163, supra* note 4, at 39.

61 *See* 8 WEEKLY COMP. OF PRES. DOCS. 647 *passim* (1972).

62 In an interview published two days after his re-election, the President expressed his concern that Americans not be made soft, spoiled, and weak by the government's social programs. N.Y. Times, Nov. 10, 1972, at 20, col. 1.

maintenance function until such time as the income of all older Americans is brought above the poverty level.

III. Purpose and Draftsmanship

The NPE enactment was introduced and guided through Congress by legislators who argued that the measure would provide a social service program with the broad purpose of overcoming the isolation of the aged.[63] The measure was signed into law by the President on March 22, 1972. On the following day, in a message to Congress on older Americans, he reaffirmed his commitment to income protection as the most important means of solving the problems of the aged.[64] On the floor of the House, the bill had been described as a first step in the President's program on behalf of older Americans.[65] The question arises: With which theoretical approach is NPE most consistent — income maintenance espoused by the President or the social services approach envisioned by the congressional sponsors? That question may be answered by considering the following specific questions related to the implementation of the law: (1) Who are the eligible individuals to be served at the nutrition project sites? (2) Where will the project sites be located? (3) To what extent will social services in addition to meals be provided at the project sites?

A. *Participant Eligibility*

The eligibility of elderly participants is described in § 706(a)(2) of the Act, which requires the state agencies to assure that recipients of NPE funds: "provide [nutrition projects] for individuals aged sixty or over who meet the specifications set forth in clauses (1), (2), (3), or (4) of section 701(a) and their spouses (referred to herein as eligible individuals)."[66] Those four clauses recite the congressional finding that many elderly persons do not eat adequately because:

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63 See note 51 *supra*.

64 8 Weekly Comp. of Pres. Docs. 647 (1972).

65 118 Cong. Rec. H778 (daily ed. Feb. 7, 1972) (remarks of Representative Ogden Reid, R.-N.Y.).

66 Act § 706(a)(2), 42 U.S.C.A. § 3045e(a)(2) (Supp. July 1972).

> (1) they cannot afford to do so;
> (2) they lack the skills to select and prepare nourishing and well-balanced meals;
> (3) they have limited mobility which may impair their capacity to shop and cook for themselves; and
> (4) they have feelings of rejection and loneliness which obliterate the incentive necessary to prepare and eat a meal alone.[67]

These four criteria were added to the Senate bill by the House Committee on Education and Labor.[68] The Senate version of the bill had defined eligible individuals just as persons aged 60 or over and their spouses[69] — anyone who met the age requirement, lived in the project area, and wanted to participate was eligible. Proponents of NPE in both the House and the Senate described these four additional criteria as merely descriptive of the class of persons for whom the program was designed and not obligatory standards of eligibility.[70] In this view eligibility remains the same as in the Senate version.[71]

That argument is difficult to square with the language of the statute. The law unambiguously refers to eligible individuals as those aged 60 or over "who meet" one of the four criteria;[72] a logical construction would require that persons over age 60 who do not meet at least one of the criteria are not "eligible individuals." The class of persons to be served by the program is described in § 701(a); the construction given by NPE proponents would make the House amendment of § 706(a)(2) a mere redundancy.

During Senate consideration of the amended House version of NPE, however, Senators Edward Kennedy (D.-Mass.) and Thomas Eagleton (D.-Mo.) argued further that the criteria were so general as to preclude their use as standards of qualification for participation.[73] They particularly emphasized the view that the House

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67 Act § 701(a), 42 U.S.C.A. § 3045(a) (Supp. July 1972).
68 H.R. Rep. No. 726, 92d Cong., 1st Sess. (1971).
69 S. Rep. No. 515, 92d Cong., 1st Sess. (1971).
70 118 Cong. Rec. H779 (daily ed. Feb. 7, 1972); 118 Cong. Rec. S3471 (daily ed. Mar. 7, 1972).
71 See 118 Cong. Rec. S3471 (daily ed. Mar. 7, 1972).
72 Act § 706(a)(2), 42 U.S.C.A. § 3045e(a)(2) (Supp. July 1972).
73 118 Cong. Rec. S3471-72 (daily ed. Mar. 7, 1972).

changes would not impose an income limitation or means test on participants.[74] Senator Eagleton announced that he had received assurances from HEW that no means test would be imposed.[75] Senator Kennedy argued that it was clear from the legislative history that no strict standards of eligibility would be devised which could frighten away individuals for whom the program was intended.[76]

These arguments, however, are again difficult to reconcile with the language of § 706(a)(2). The four criteria do not seem so general as to prevent their use as qualifications for eligibility. For example, even if the specification of clause (4) — that an individual have "feelings of rejection and loneliness which obliterate the incentive necessary to prepare and eat a meal alone"[77] — is not amenable to objective determination, an individual claiming eligibility under this clause might be asked to sign a verifying statement. Although Senator Kennedy's construction of the statute on this point is questionable, his view that use of these criteria as standards of eligibility would keep away from the program many of its intended beneficiaries seems accurate.[78] To require an admission by an individual that he suffers from feelings of alienation and loneliness or that he lacks the skill to select a nutritious meal could well cause him to avoid a program in which he might otherwise participate.

Notwithstanding the assurance of HEW that no income limitation would be applied,[79] a means test is made at least an element of the statutory definition of "eligible individuals" under clause (1). If an individual aged 60 or over does not meet one of the criteria of clauses (2), (3), or (4) — as determined by his own admission or otherwise — then he will fall within the eligibility requirements only if he can show that he cannot afford to eat adequately. A means test in one form or another is required if such a showing is to be judged objectively.

Another problem raised by these criteria of eligibility involves

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74 *Id.*
75 *Id.* at S3471.
76 *Id.* at S3472.
77 Act § 701(a), 42 U.S.C.A. § 3045(a) (Supp. July 1972).
78 118 CONG. REC. S3472 (daily ed. Mar. 7, 1972).
79 See text at note 75 *supra.*

priority of acceptance where there are more applicants than a project can serve. Under the version first passed by the Senate, acceptance of any applicant aged 60 or over on a first come, first served basis was implied.[80] Construing the law as passed, it would seem that even if the four criteria are not exclusive requirements of eligibility, then at least preference should be given to those applicants meeting the criteria. Additionally, since in the distribution of NPE funds preference is to be given sites serving primarily low income persons,[81] it is arguable that preference should also be given those applicants meeting the income test implied in clause (1) over applicants eligible under clauses (2), (3), or (4).

HEW regulations for NPE deal with the question of who is eligible for the program in the same terms as the statute.[82] "Eligible individuals" are again defined as persons who are aged 60 or over and who meet the four statutory criteria.[83] No means test is provided for in the regulations, although should an administrative decision later be made to narrow the scope of the program, the statute seems to provide HEW with the authority to institute such a limitation through added regulations.[84] Currently, the regulations make no explicit provision for priority in the selection of participants from among the eligible individuals within a project area.[85]

The intent behind the remarks of Senators Kennedy and Eagleton on the Senate floor[86] was clearly to protect the broader social purpose of the legislation from administrative erosion through the use of rigid eligibility standards. That they recognized the danger to the character of the program posed by the House additions to the eligibility requirements is apparent from the pains taken to argue the inconsequence of the amendment. However, the reliance of NPE sponsors on an expectation that legislative history (con-

80 See text at note 69 *supra.*

81 Act § 705(a)(4), 42 U.S.C.A. § 3045d(a)(4) (Supp. July 1972).

82 37 Fed. Reg. 16845 (1972) (to be codified as 45 C.F.R. § 909.3(a)).

83 *Id.*

84 Project site administrators must comply with standards prescribed by the Secretary of HEW through administrative regulations. Act § 706(a)(11), 42 U.S.C.A. § 3045e(a)(11) (Supp. July 1972).

85 *But see* 37 Fed. Reg. 16846-47 (1972) (to be codified as 45 C.F.R. § 909.22). This regulation ambiguously provides that projects are to "be designed to serve those target group individuals determined to be in the greatest need of such services." *Id.*

86 See text at note 73 *supra.*

sciously fortified in congressional debate) will outweigh statutory language in the implementation of the law appears both unnecessary and unwise. It was unnecessary because the proponents of NPE could probably have amended out the House definition of eligibility and still passed the bill in both chambers. The Senate had originally passed the bill 89 to 0;[87] the House vote was 250 to 23.[88] No outright opposition was expressed on the floor of either chamber. Reliance on the persuasiveness of legislative history seems unwise in light of the Administration's clear disfavor with the theoretical approach the congressional sponsors sought to implement. The question of who is eligible to participate is central to the character of the entire program and the answer to that question seems to be left to administrative interpretation.

There is no indication that the definitional change in eligibility was a significant factor in the Administration's switch from opposition to support of the legislation. The Administration was on record as opposed to the NPE bill at the time of Senate passage on November 30, 1971.[89] The amended version of the bill was reported out of the House Committee on December 9, 1971.[90] The President's support of the new bill was first announced in the week prior to House consideration on February 7, 1972.[91] Election year political considerations were probably the major determinants in the change,[92] but the amendments to § 706(a)(2) were a step toward an income maintenance approach and may have made the bill more palatable to the President.

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87 117 CONG. REC. S19803 (daily ed. Nov. 30, 1971).

88 118 CONG. REC. H784 (daily ed. Feb. 7, 1972).

89 *Hearings on S. 1163, supra* note 4, at 275; 118 CONG. REC. S1231 (daily ed. Feb. 7, 1972).

90 H.R. REP. No. 726, 92d Cong., 1st Sess. (1971).

91 118 CONG. REC. S1231 (daily ed. Feb. 7, 1972).

92 The Democratic leadership in the Senate had timed floor consideration of S. 1163 to coincide with the presence in Washington of 3500 delegates to the White House Conference on Aging. Sharp criticism of the President's opposition had been expressed by some delegates. Washington Post, December 1, 1971, at A3, col. 5.

Both major senior citizens organizations — the National Council of Senior Citizens and the American Association of Retired Persons/National Association of Retired Teachers — had lobbied for the bill. *Hearings on S. 1163, supra* note 4, at 32-33, 38-45, 222-33.

The overwhelming margin of approval in the Senate was an indication that House passage was probably inevitable. 117 CONG. REC. S19803 (daily ed. Nov. 30, 1971).

B. *Project Site Location*

The basis for the award of NPE grants — involving the question of which communities and neighborhoods will receive project sites — may be even more determinative of the character of the program than the question of eligibility. The legislative authorization of $250 million for a two-year period will, in the view of the congressional sponsors, merely allow the program to scratch the surface of the problem.[93] Without considering eligible non-poor individuals, if all 5.2 million elderly living in poverty at the time of the program's passage were served by NPE, the annual cost could exceed $3 billion. That figure is based on one meal a day, five days a week at a cost of $2.32 per meal.[94] If these figures are correct, then it is likely that the number of potential project sites will far exceed the number of grants that can be awarded from the funds available. The basis for selection of areas to receive nutrition project grants provided by the statute[95] seems likely to assure that NPE will at least initially perform primarily an income maintenance function by providing low cost meals to the elderly poor.

The procedures by which a state agency will select areas for the award of NPE grants will be included in the state plan approved by HEW.[96] The statute requires that the selection procedures give preference to projects serving primarily low-income individuals.[97] HEW regulations provide that each urban area selected will include major concentrations of elderly below the poverty level and that rural project areas contain a high proportion of low-

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93 *E.g.*, 117 CONG. REC. S19785 (daily ed. Nov. 30, 1971) (remarks of Senator Kennedy, D.-Mass.).

An Administration spokesman, Commissioner John B. Martin, Administration on Aging, speaking at a point when the President was opposed to the passage of NPE, estimated the appropriation would provide meals for 50,000 or 60,000 people. *Hearings on S. 1163*, *supra* note 4, at 261 (1971).

A campaign pamphlet, distributed after Pub. L. No. 92-258 had been signed into law, states that the "program will provide 250,000 hot meals a day for the elderly." The President Cares, a pamphlet paid for by the Finance Committee to Re-elect the President.

94 This per meal cost represents the average for urban projects under title IV of the Older Americans Act, including the costs of supportive services. *See* H.R. REP. No. 726, 92d Cong., 1st Sess. 7 (1971).

95 Act § 705(a)(4), 42 U.S.C.A. § 3045d(a)(4) (Supp. July 1972).

96 Act § 705, 42 U.S.C.A. § 3045d (Supp. July 1972).

97 Act § 705(a)(4), 42 U.S.C.A. § 3045d(a)(4) (Supp. July 1972).

income elderly.[98] Applications for projects in areas with lower concentrations of low-income elderly would receive no preference.

The statutory preference for projects in low-income areas may endanger the broader objective of overcoming the social isolation which afflicts the elderly non-poor as well as the elderly poor. Sponsors of the legislation viewed the initial authorization as providing for the institutionalization of a permanent and nationwide program that would expand to serve the social needs of millions of elderly persons, indeed, every older American who wanted to participate.[99] However, if in the process of expansion the program is to serve only the elderly poor up until sufficient funding is available to provide nutrition projects for the non-poor, two effects contrary to the sponsors intentions may result. First, the elderly non-poor are less likely to vigorously exercise their political influence for expansion of NPE to the broad scope the sponsors envision if their self-interest in the program will only be served at some undetermined future date after NPE has expanded sufficiently to serve all the low-income neighborhoods which receive preference. Second, if an income maintenance character is established for NPE — *i.e.*, a type of welfare program for feeding the elderly poor — then the non-poor elderly may become reluctant to be classed with welfare recipients.[100]

To avoid this danger, the low-income preference provision in the statute might have been drafted in such a way to assure that the program would primarily serve low-income participants but also assure that even in the initial stages of the program's operation the participants would not exclusively be the elderly poor. For example, the statutory provision might have been drafted to read: "(1) preference shall be given to projects serving primarily low-income individuals except that, (2) in recognition of the Federal Government's responsibility for developing solutions to the problem of social isolation among older citizens above

98 37 Fed. Reg. 16847 (1972) (to be codified as 45 C.F.R. § 909.23).

99 *See* 117 CONG. REC. S19785 (daily ed. Nov. 30, 1971); Washington Post, Feb. 8, 1972, at A7, col. 2. *See also* Act § 706(a)(6), 42 U.S.C.A. § 3045e(a)(6) (Supp. July 1972).

100 For an indication of the psychological importance of the participant's view of the character of the program, see note 37, *supra*. *See also Hearings on H.R. 12017*, *supra* note 2, at 142.

the poverty level, at least 10 percent of a State's allotment of funds shall be awarded to projects serving areas not qualified for preference under clause (1)." This type of preference provision would insure that in its initial stages NPE would more nearly reflect the intention of its sponsors — funding to provide NPE services to all those aged 60 and over who desire to participate, regardless of income.

C. *Supportive Services*

An important objective of NPE proponents was to provide participants with social services broader than simply the provision of one meal a day.[101] The statute requires as part of the project the inclusion of recreational activities, informational, health, and welfare counseling and referral services, where these services are not otherwise available.[102] These supportive social services are important to the development of the project site into a center of social contact for the elderly in the community.[103]

Yet the statute establishes no minimum level of funding for the provision of these supplemental services. HEW regulations require that not more than 20 percent of a state's allotment for a given fiscal year, excluding state administrative costs, shall be used for the provision of supporting services.[104] Included among the supporting services to which this 20 percent ceiling applies is the transportation of participants to and from the project sites.[105] In response to comments that the 20 percent limitation was too low, especially for rural projects with high transportation costs, HEW noted that the 20 percent limit covers the average for all projects within the state and that rural transportation expenses would be balanced by relatively lower costs in urban areas.[106] The maximum percentage of a project's funds available for recreational, informational, and counseling services may there-

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101 *See* Act § 701(a), 42 U.S.C.A. § 3045(a) (Supp. July 1972); S. REP. No. 515, 92d Cong., 1st Sess. 4 (1971).

102 Act § 706(a)(6), 42 U.S.C.A. § 3045e(a)(6) (Supp. July 1972).

103 *See Hearings on S.1163, supra* note 4, at 201 (position paper of D. Holmes).

104 37 Fed. Reg. 16848-49 (1972) (to be codified as 45 C.F.R. § 909.42).

105 37 Fed. Reg. 16848 (1972) (to be codified as 45 C.F.R. § 909.42(a)(1)).

106 37 Fed. Reg. 16844 (1972) (discussion of changes in proposed regulations published at 37 Fed. Reg. 11257 (1972)).

fore be significantly lower than 20 percent. The 20 percent limitation is a discretionary figure set by HEW.

With no minimum percentage of the funds earmarked for supporting services by the statute, HEW could virtually eliminate the use of federal funds for these services by setting a lower maximum. There is a strong indication that HEW will emphasize the nutritional aspects of the bill — *i.e.*, feeding the malnourished, particularly among the poor — over the social aspects aimed more directly at the isolation of the aged. The Department states that it has designed NPE regulations in order to encourage the use of non-federal resources for the provisions of supporting services in order that the maximum amount of NPE funds can be used for the provision of actual meals.[107] The result of that policy will be more project sites but fewer social services offered. Inclusion in the statute of a minimum percentage of each NPE project grant to be expended in supporting services would have served to protect the broader social objectives of the legislation.

IV. Conclusion

The sponsors of NPE based their approach on the view that the problems of older Americans are caused not only by inadequate income, but also by social isolation and that loneliness and alienation among the elderly are not necessarily functions of low income. They intended to broaden the concept of federal responsibility for the welfare of the aged by creating NPE as a social service program to address directly the problem of social isolation.

As the legislation is drafted, however, it is unlikely that NPE will function in the way its sponsors intended. The sponsors placed an over-reliance on the broad "findings and purpose" section of the enactment and on legislative history as ways of insuring that NPE would be established and developed in the manner they intended. Too little attention was paid to drafting the specific provisions of the law with reference to its purpose. Particularly in light of the Administration's commitment to an income maintenance approach the administrative discretion left

107 *Id.*

to HEW seems overbroad. At least in its initial stages, NPE will serve only the elderly poor, and for those who participate, HEW seems likely to concentrate on an income maintenance function — providing food they could not otherwise afford — rather than operating the program with the objective of eliminating isolation.

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THE FEDERAL ADVISORY COMMITTEE ACT

Introduction

During the past fifteen years, Congress has considered a succession of proposals to control federal advisory committees — bodies comprised in part or in whole of private persons and established by government to provide collective advice and recommendations to officers and agencies. In 1972 Congress passed the Federal Advisory Committee Act,[1] the first significant legislation concerning advisory bodies. The Act, which resulted from a compromise between supporters and detractors of the advisory committee process, officially recognizes these bodies and attempts both to provide more efficient management and to open their activities to the public.

Advisory committees have been characterized as the "fifth arm of the government existing alongside the executive, legislative, judicial, and regulatory arms."[2] Examples range from the much-publicized National Commission on the Causes and Prevention of Violence[3] to the Defense Department's influential Industry Advisory Council.[4] While advisory committees are operationally very diverse, they can usefully be divided into five categories:[5]

1) General advisory committees typically have a large membership encompassing divergent viewpoints. Their mandate is usually broad; for example, the Citizens' Advisory Committee on Environmental Quality[6] advises the President on virtually all matters concerning the environment.

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1 Pub. L. No. 92-463, 86 Stat. 770 [hereinafter referred to and cited as Act].

2 *Hearings on Advisory Committees Before the Legal and Monetary Affairs Subcomm. of the House Government Operations Comm.*, 92d Cong., 1st Sess. 1 (1971) (statement of Representative John S. Monagan) [hereafter cited as *1971 House Hearings*]. *See also* H.R. REP. No. 1731, 91st Cong., 2d Sess. 5.

3 Popularly known as the Eisenhower Commission, this body was established in 1968 by Exec. Order No. 11412, 3 C.F.R., 1966-70 Comp. 726.

4 For a discussion of the I.A.C., see *Hearings on Advisory Committees Before the Subcomm. on Intergovernmental Relations of the Senate Government Operations Comm.*, 92d Cong., 1st Sess., pt. 1, at 75, pt. 2, at 305-43 (1971) [hereafter cited as *1971 Senate Hearings*].

5 These five categories follow, with slight modifications, the classifications set out in Brown, *The Management of Advisory Committees*, 32 PUB. AD. REV. 334 (1972). For a complete listing of executive branch advisory committees as of August 1, 1971, see *1971 Senate Hearings, supra* note 4, pt. 2, at 702-36.

6 Established in 1969 by Exec. Order No. 11472, 3 C.F.R., 1966-70 Comp. 792, *as amended*, 42 U.S.C. § 4321 note (1970).

2) Scientific and technical advisory committees have narrower and somewhat more manageable assignments.[7] Through these committees, scientists and other professional persons give highly specialized advice to such executive departments as Defense, Agriculture, and Health, Education and Welfare.

3) Specific task advisory committees are similar in membership to technical committees, but the former have specific quasi-operational functions. Among the most important of these are the grant review committees of the National Institute of Health.[8]

4) The research committees are perhaps the most well-known advisory groups. These include, but are not limited to, presidentially appointed national study commissions. While these bodies frequently expend large sums, their reports are often more useful for their academic value than for their impact upon decision-making.[9]

5) Finally, there are industry advisory committees, which consist of representatives of industries regulated or affected by a particular agency. They sometimes become directly involved in regulation, and are among the most criticized advisory bodies.[10] An example is the Primary Aluminum Industry Liaison Committee of the Environmental Protection Agency, which reviews air pollution problems related to the aluminum industry.[11]

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7 While these bodies may represent advisory committees at their best, their membership may not be representative of all points of view in the area concerned. For an analysis of U.S. Office of Education Advisory Committees, see *Hearings on Presidential Advisory Committees Before the Special Studies Subcomm. of the House Government Operations Comm.*, 91st Cong., 2d Sess., pt. 1, at 185-98 (statement of Thomas Cronin) [hereafter cited as *1970 House Hearings*]. For a discussion of advisory committee functions with respect to Environmental Protection Agency actions concerning the pesticide 2,4,5-T, see *1971 Senate Hearings, supra* note 4, pt. 3, at 764-806; Wade, *Decision on 2,4,5-T: Leaked Reports Compel Regulatory Responsibility*, 173 SCI. 610 (1971).

8 By statute, *e.g.*, 42 U.S.C. § 241(d) (1970), certain grants can only be made upon an advisory committee's recommendation. The problems such groups can generate are discussed in H.R. REP. No. 800, 90th Cong., 2d Sess. 61-62 (1968).

9 For example, the Commission on Obscenity and Pornography, created by Act of October 3, 1967, Pub. L. No. 90-100, 81 Stat. 253, spent about $1,800,000 in federal funds, but its report was disavowed by the White House prior to its submission. H.R. REP. No. 1731, *supra* note 2, at 12.

10 *See, e.g., 1971 Senate Hearings, supra* note 4, pt. 3, at 983-1008 (testimony of Ralph Nader); Dietsch, *The Invisible Bureaucracy*, 164 NEW REPUBLIC 19 (1971); Turner, *Advisory Committees: The Fifth Branch of Government*, 1 BUREAUCRAT 142 (1972).

11 *1971 Senate Hearings, supra* note 4, pt. 3, at 867.

Advisory committees exhibit two common problems. First, Congressmen and academicians have criticized advisory committees as being inefficient and wasteful of resources.[12] A 1970 House report estimated that more than 1800 advisory committees were in existence, with an annual maintenance cost of $75 million, and suggested that a number of committees manifested serious organizational inadequacies, leading among other things to duplication of effort and perpetuation of groups beyond a useful period.[13]

Second, critics contend that often where these groups do have an impact the result runs counter to the public interest.[14] The most common criticism of this kind concerns the alleged improper influence exerted by some industry advisory groups on their regulators., The further danger exists that such committees will permit conduct in closed meetings by industry leaders that might lead to antitrust violations.[15]

Part I of this Comment describes briefly the efforts before 1970 to regulate advisory committees. Part II concerns actions beginning in 1970 which led to the passage of the Federal Advisory Committee Act. Part III contains an analysis of the Act's major provisions.

I. Early Regulation of Advisory Committees

Until World War II, advisory groups were "relatively few in number and did not constitute a significant factor in the formulation of administrative policy."[16] The early laws affecting these groups merely sought to control their expenditures.[17] The New

12 *See, e.g., id.*, pt. 1, at 5-14 (testimony of Representative Monagan); Brown, *The Citizen Committee: Advice or Consent?*, 4 GW, The Geo. Wash. U. Mag. 15 (1967).

13 H.R. Rep. No. 1731, *supra* note 2, at 14-17. The $75 million figure is disputed by OMB, which claims that $68 million of that figure reflects the inclusion of certain operating agencies, such as the Equal Employment Opportunity Commission. *1971 House Hearings*, *supra* note 2, at 79-80.

14 *See, e.g.*, authorities cited in note 10 *supra*; Sierra Club v. Morton, 405 U.S. 727, 745-47, n.6 (1972) (Douglas, J., dissenting).

15 See text at note 18 *infra*.

16 H.R. Rep. No. 576, 85th Cong., 1st Sess. 2 (1957).

17 An 1842 statute prohibited the disbursement of funds to pay the expenses of any "commission or inquiry" unless special appropriations had been passed to pay the charges. 31 U.S.C. § 672 (1970). A 1909 enactment forbade the use of public funds to pay the expenses of any council unless the body was authorized by law. 31 U.S.C. § 673 (1970).

Deal emphasis on administrative mechanisms, and the requirements of World War II and of cold war materiel management, have led to a proliferation of advisory groups. The growth in the number of such bodies is one reason for increasing concern in both Congress and the executive branch over their proper rule.

The initial post-War interest in advisory bodies focused on the potential of these groups for encouraging antitrust violations by allowing industry leaders to meet under official aegis. Thus, in 1950 the Justice Department promulgated requirements to be followed by executive agencies to minimize the risk of such violations.[18] The basic thrust of the Justice guidelines was to ensure that formation and utilization of advisory bodies occurred at government initiative. In 1951 the Justice Department indicated further that membership on industry committees should be limited to "persons who are actively engaged in the operation of business enterprises which are constituent units of the industry in which the advisory committee was formed" and thus should not include employees of industry trade associations.[19]

These guidelines typified the executive branch's preference for self-policing rather that legislative regulation of advisory committees. They did not have the force of statutory law and were in fact ignored by many committees and agencies.[20] Furthermore, they represented only a minimum standard of propriety; that is, compliance would not immunize from prosecution industry members who used a committee improperly.[21]

In spite of their weaknesses, these guidelines did influence

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18 The guidelines contained five requirements: (1) There must be either statutory authority for the use of such a committee, or an administrative finding that use of such a committee is necessary in order to perform certain statutory duties; (2) The committee's agenda must be initiated and formulated by the government; (3) Meetings must be called and chaired by full-time government officials; (4) Complete minutes must be kept of each meeting; and (5) The committee must be purely advisory; that is, government officials must determine the actions to be taken on the committee's recommendations. *Hearings on WOC's [Without Compensation Government Employees] and Government Advisory Groups Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 1st Sess., pt. 1, at 586-87 (1955).

19 Letter from the Assistant Attorney General for Antitrust, Oct. 8, 1951, reproduced in *id.* at 591-92.

20 *Hearings on Experts and Consultants Before the House Government Operations Comm.*, 84th Cong., 2d Sess. 140 (1956) (testimony of Stanley Barnes, Assistant Attorney General for Antitrust).

21 *Hearings on WOC's, supra* note 18.

subsequent congressional and executive actions. A 1957 House bill would have required that all advisory groups conform to the guidelines.[22] The House passed the bill,[23] but the Senate Government Operations Committee did not report the bill out, apparently in the belief "that administrative action was possible and that legislation could be avoided."[24]

Executive action did indeed follow. Upon request by the Senate committee, the Bureau of the Budget issued a 1959 directive on the utilization of advisory committees which "essentially incorporated" the guidelines recommended by the House.[25] Three years later Executive Order 11007 was issued, which basically applied the 1950 Justice guidelines to all advisory groups.[26] The order allowed an exception for non-industry groups upon a finding by the agency head that exempting the group would serve the public interest. E.O. 11007 further prohibited trade association employees from being members of industry advisory committees, and required that verbatim transcripts of their meetings be kept. These provisions could be waived, however, if the agency head determined they would interfere with the effective functioning of the group. The order also prohibited the collection of information regarding the current or future activities of identified enterprises. Finally, it required each committee to terminate after two years unless specifically renewed for another two year period. Supervision of the order apparently was left to the agency heads.

II. Developments in the Ninety-first and Ninety-second Congresses

There were no major congressional or administrative developments concerning advisory committees from 1962 until 1970. In

22 This bill was a "clean" version of H.R. 3378, 85th Cong., 1st Sess. (1957). It is reproduced in *1970 House Hearings, supra* note 7, pt. 1, at 20.

23 103 Cong. Rec. 11251-66 (1957).

24 108 Cong. Rec. 3588 (1962) (statement of Representative Fascell).

25 *1970 House Hearings, supra* note 7, pt. 1, at 29 (prepared remarks of Representative Fascell).

26 3 C.F.R., 1959-63 Comp. 573, 5 U.S.C. § 901 note (1970). Coverage of Exec. Order No. 11007 included, under § 2(a), an advisory group "not formed by a department or an agency, but only during any period when it is being utilized by a department or agency in the same manner as a Government-formed advisory committee."

1970 both the House and Senate Government Operations Committees began investigations into the operations of advisory committees. The House Subcommittee on Special Studies initially concentrated its inquiry on the alleged duplicativeness, wasteful expenditures, and limited impact of Presidential Advisory Committees.[27] The Senate Subcommittee on Intergovernmental Relations focused its 1970 hearings on one particular group, the Advisory Council on Federal Reports (ACFR) of the Office of Management and Budget.[28] Both subcommittees later expanded their studies to encompass the entire subject of advisory committees generally.

As a result of its investigation, the House subcommittee issued a comprehensive report[29] containing 20 recommendations to improve the "effectiveness" of the advisory committee process.[30] On February 2, 1971, the Committee Chairman Monagan (D.-Conn.), introduced H.R. 4383, which incorporated many of the report's recommendations. This bill, as amended, ultimately became the Federal Advisory Committee Act.

In the Senate, three bills concerning advisory groups were introduced in 1971: S. 1637, the "Open Advisory Committee Act," by Sen. Metcalf (D.-Mont.); S. 1964, identical to H.R. 4383, by Sen. Roth (R.-Del.); and S. 2064, by Sen. Percy (R.-Ill.).[31] Only the Metcalf bill would have radically changed the nature of advisory committees. It required that one-third of each committee's members be "public," non-industry representatives; that all advisory committee meetings be open to the public; and that citizens be able judicially to challenge agency actions related to matters considered by an advisory committee not in conformance with the bill's standards. The Roth and Percy bills, on the other hand, did not contain mandatory openness provisions and were more concerned with management of committees.

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27 *1970 House Hearings, supra* note 7, pts. 1-2.

28 *See Hearings on Advisory Committees Before the Subcomm. on Intergovernmental Relations of the Senate Government Operations Comm.*, 91st Cong., 2d Sess., pts. 1-3 (1970) [hereafter cited as *1970 Senate Hearings*].

29 H.R. REP. No. 1731, *supra* note 2.

30 *Id.* at 20-24. Although the subcommittee was originally quite critical of the committee process, one observer deemed its final report "more helpful than censorious." Brown, *supra* note 5, at 334.

31 The Senate bills and their authors' introductory remarks are reproduced in *1971 Senate Hearings, supra* note 4, pt. 1, at 73-125.

Although there were additional Senate and House hearings in 1971, Congress did not take final action until the following year. On April 25, 1972, the House Committee reported out a revised version of H.R. 4383.[32] Perhaps the most important revision was the addition of an "openness" provision specifically making all committees' records and files subject to public access under the Freedom of Information Act.[33] The House passed the bill on May 9, 1972, by a vote of 357 to 9.[34]

Meanwhile on April 25, 1972 Senators Metcalf, Roth, Percy, and nine others introduced a compromise bill, S. 3529. Its provisions concerning the formation, termination, and management of advisory committees were similar to those of previous bills. S. 3529's major significance was its compromise between making public participation and openness mandatory, as advocated by Sen. Metcalf, and making them optional, as favored by other Senators. The bill dropped any standards for broad representation, but included requirements for greater public access to committee meetings and records, subject to the exceptions to required disclosure contained in the Freedom of Information Act.[35]

Throughout the period of enactment there was considerable executive effort to forestall congressional action. Apparently in response to the legislative hearings mentioned earlier, OMB indicated in April 1970 that new regulations concerning advisory committees would be forthcoming.[36] OMB consistently maintained the familiar position, ultimately rejected by Congress, that "improved committee management can be achieved without Congressional action."[37] While no regulations were issued for over two years, OMB did claim a number of improvements in its supervision and

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32 H.R. REP. No. 1017, 92d Cong., 2d Sess. (1972).

33 5 U.S.C. § 552 (1970). Insofar as advisory committees are considered "agencies" within the meaning of the FOI Act, as defined by 5 U.S.C. § 551(1), or their documents are retained by the sponsoring agencies, their records are already covered by that Act. *See* Chvotkin & Cernitz, *The Unseen Hands of Power*, 1 BUREAUCRAT 150 (1972) [hereinafter cited as Chvotkin]; *Hearings on U.S. Government Information Policies and Practices Before the Subcomm. on Foreign Operations and Government Information of the House Government Operations Comm.*, 92d Cong., 2d Sess., pt. 9, at 3422, 3427 (1972).

34 118 CONG. REC. H4285 (daily ed. May 9, 1972).

35 5 U.S.C. § 552(b) (1970).

36 *See* chronology of OMB statements, H.R. REP. No. 1017, *supra* note 32, at 7-8.

37 Letter from OMB Associate Director Arnold Weber to the House Government Operations Committee, June 10, 1971, reproduced in *id.* at 12-13.

review of advisory committees, as well as reductions in the number of citizen advisory committees.[38]

In June 1972 after the House had passed its bill and the Senate subcommittee had reported S. 3529 to the full Government Operations Committee,[39] the Administration issued Executive Order 11671.[40] The new order retained the anti-trust provisions of the earlier order with the exception of the much waived requirement for transcripts of industry committee meetings. It placed upon OMB the responsibility of overseeing agency advisory committee management as well as publishing an annual advisory committee roster. More importantly, the new order contained several openness provisions; it required open meetings and advance notice thereof, subject to the subject matter exceptions contained in the Freedom of Information Act,[41] and provided for some public participation in committee meetings.

This attempt to discourage congressional action failed, however. The Senate sponsors of reform were not satisfied with the scope of the new order's standards and felt that standards were also needed to govern creation of congressional advisory boards.[42] As a result, the Senate Government Operations Committee reported out S. 3529 on September 7, 1972,[43] and the Senate passed its version of H.R. 4383 on September 12.[44] The conference report on H.R. 4383[45] was agreed to in the Senate on September 19[46] and in the House on September 20.[47] On October 6, 1972, the President signed the Federal Advisory Committee Act (FACA)

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38 *1971 House Hearings, supra* note 2, at 73 (testimony of OMB Associate Director Frank Carlucci).

39 S. REP. No. 1098, 92d Cong., 2d Sess. 4 (1972).

40 37 Fed. Reg. 11307 (1972).

41 A draft of this Executive Order, sent by OMB to agencies for comment in the fall of 1971, reproduced in *1971 House Hearings, supra* note 2, at 68, does not refer to the Freedom of Information Act 5 U.S.C. § 552(b) for its exemptions. Rather, it lists four specific classes of excepted committee meetings, none of which include the § 552(b)(5) reference to intra-agency communications. Hence, it is quite possible that OMB picked up the language from S. 3529.

42 *See* 118 CONG. REC. S14653 (daily ed. Sept. 12, 1972) (statement of Senator Metcalf); table, *id.*, at S14650.

43 S. REP. No. 1098, *supra* note 39.

44 118 CONG. REC. S14655 (daily ed. Sept. 12, 1972).

45 H.R. REP. No. 1403, 92d Cong., 2d Sess. (1972).

46 118 CONG. REC. S15285-86 (daily ed. Sept. 19, 1972).

47 118 CONG. REC. H8610-11 (daily ed. Sept. 20, 1972).

into law; the following day he issued E.O. 11686,[48] revoking E.O. 11671 as of the effective date of the Act.

III. An Analysis of the FACA

The FACA exhibits a dichotomous attitude toward advisory groups. It initially seeks to improve the efficiency and effectiveness of citizen committees by eliminating useless ones and by strengthening the independence of those remaining. At the same time it attempts to prevent such groups from becoming too powerful, exercising undue influence over agency heads, and providing unrepresentative or self-serving advice to such officials.

This dualism results from the compromise achieved during enactment between proponents and opponents of the advisory committee process.[49] The findings and purposes section of the Act recognizes the usefulness of advisory committees in providing the federal government with expert advice and diverse opinions.[50] Yet the same section also states the need to insure that advisory committees remain advisory only. The rest of the Act tries to satisfy these potentially conflicting findings and purposes.

A. *Coverage*

The Act covers all groups established by statute or reorganization plan or established or utilized either by the President or by one or more agencies, in the interest of obtaining advice or recommendations.[51] The major exception is for committees composed wholly of federal employees.[52] Whether the Act covers advisory groups established by private initiative but used in an advisory capacity by an agency is unclear. The phrase "or utilized by [an agency]" appears to cover such groups. The House report interprets "established" to include committees which were organized before their advice was sought by a government agency.[53] The Senate report also indicates that the definition of advisory com-

48 37 Fed. Reg. 21421 (1972).
49 S. Rep. No. 1098, *supra* note 39, at 6, 16.
50 Act § 2(a).
51 Act § 3(2).
52 Act § 3(2)(C)(iii).
53 H.R. Rep. No. 1017, *supra* note 32, at 4.

mittee should be interpreted broadly, and specifically mentions for inclusion committees of the national academies when they are utilized and officially recognized as advising federal agencies.[54] Inexplicably, the conference report stated that the Act does not apply to advisory committees not directly created "by or for such agencies."[55] But in view of the specific language of the statute and of the intention of Congress expressed by the separate committee reports, it would appear improper for OMB, in formulating guidelines, to rely on the conference report to exclude from the Act's coverage independently established groups that advise the government.

The Act does, however, close a loophole in the 1972 Executive Order which excluded from its coverage committees in existence for less than one year.[56] Since the Act makes no mention of a time limitation, agencies cannot evade regulation of their advisory committees by appointing a series of ad hoc groups. In sum, the Act's coverage provisions if properly interpreted should provide little opportunity for a committee to evade regulation under the Act.

B. *Advisory Committee Management and Efficiency*

Through its management provisions the Act seeks to eliminate useless or redundant committees and to enhance the efficiency of those remaining. One provision states that all committees, except those whose enabling statutes provide otherwise, terminate at the end of two years unless renewed by their creating authority.[57] The Act also delineates specific responsibilities of OMB, Congress, the President, and the agencies themselves.[58]

Primary responsibility for management is given to OMB, which must continually review the advisory committee process and oversee the agencies' implementation of advisory committee regulations. Additionally, OMB must submit an annual report to the President for transmittal to Congress with the names of advisory

54 S. REP. No. 1098, *supra* note 39, at 8.
55 H.R. REP. No. 1403, *supra* note 45, at 10.
56 Exec. Order No. 11671, §§ 1(6)(A), 1(8).
57 Act § 14.
58 Act §§ 7, 5, 6, 8, respectively.

committees and the composition of their membership.[59] At the very least the required reports should increase awareness of advisory committees in government.[60] Of course, such continuing processes are not self-executing; much will depend on the resources committed by OMB to executing its responsibilities under the Act.[61] It may well develop that OMB will not consider advisory committees important enough to justify substantial efforts to supervise their use.

The Act also directs each standing committee of Congress to review the creation and operation of advisory committees under its jurisdiction.[62] Presumably congressional committees have not needed a specific mandate to oversee advisory committees under their jurisdiction. Thus if past experience is any guide, the already hard-pressed committee staffs will continue to defer to the agencies, or perhaps to OMB.[63]

The only direct provision affecting the relationship between a committee and its sponsor is the requirement that the President or his delegate, within a year of the submission of the recommendation of a Presidential advisory committee, transmit to Congress an analysis of the recommendations setting forth proposals for action or reasons for inaction.[64] While this requirement insures that someone in the executive branch will look at the committee's report, the fact that the President himself need not sign the analysis may lead to a situation in which the consideration of the counterreport will be confined to junior officials. Thus, where there may now be one unread report, in the future there may be two, the committee report and an agency response.[65]

Under the Act, authorities creating advisory committees must

59 Act § 6(c) places this responsibility on the President, and Exec. Order No. 11686, § 2(2), delegates it to OMB.

60 Such a purpose was specifically set forth in the Senate report on S. 3529, S. REP. No. 1098, *supra* note 39, at 13, 20.

61 *See, e.g.*, H.R. REP. No. 1731, *supra* note 2, at 4, for a perspective on periodic "committee flushing" operations having little long-run significance; *1971 House Hearings*, *supra* note 2, at 78 (statement by Representative Fascell regarding agency foot-dragging with regard to advisory committees).

62 Act § 5(a).

63 *See, e.g.*, H.R. REP. No. 1731, *supra* note 2, at 6-7.

64 Act §§ 6(a), 6(b).

65 For an indication of what such an agency evaluation might be like, see U.S. PRESIDENT, FEDERAL EXECUTIVE BRANCH REVIEW OF THE RECOMMENDATIONS OF THE 1971 WHITE HOUSE CONFERENCE ON YOUTH (1972), a 414-page volume.

provide each group with "adequate" staff, quarters, and funds.[66] Congress was concerned with instances in which committees were dependent upon agencies for the continuation of financial support, particularly with respect to the publication of reports, and were deterred from reaching recommendations critical of the creating authority.[67] However, an agency head may easily set "adequate" support at a marginal level, thus requiring the committee to seek further funds. Additionally, since the Act does not require a committee's funds to be segregated from the parent agency's management system, the agency head may be able to withhold funds designated for committee use. Hence it is unlikely that these provisions will substantially alter the relationships between advisory committees and their parent agencies.

C. *Preventing Abuses of the Committee Process*

1. Committee Membership

The potential abuses of advisory committees, including antitrust violations and the use of self-serving recommendations, have already been mentioned.[68] One method that has been suggested to prevent such abuses is the broadening of the membership of committees. Greater diversity of viewpoints, it is thought, will make it harder for committee members to collude among themselves or to misuse their close access to government decision-makers.[69]

The Act deals with advisory committee membership only in a very limited fashion. It might have set specific guide-lines for broadening membership; for example, S. 1637 proposed that one-third of each committee's membership be "public". However, as part of the compromise mentioned earlier,[70] Congress deleted from the Act any specific standards. Instead, the Act merely requires that advisory committees be "fairly balanced in terms of

66 Act §§ 5(b)(4), 5(b)(5), 7(e).

67 *See, e.g.*, 118 CONG. REC. H4276 (daily ed. May 9, 1972) (remarks of Representative Horton (R.-N.Y.)); H.R. REP. NO. 1731, *supra*, note 2, at 19.

68 See text at notes 14-15 *supra*.

69 *See* remarks of Senator Metcalf on introducing S. 1637, reproduced in *1971 Senate Hearings*, *supra* note 4, pt. 1, at 73.

70 See text at note 35 *supra*.

the points of view represented and functions to be performed."[71] And this mandate does not apply to existing groups; it covers only those created in the future.

The meaning of this mandate is somewhat unclear. While the language and history of the provision reject mandatory "public" membership on advisory committees, they do seem to reflect the congressional desire for some broadening of membership.[72] Read literally, the provision requires a "fair balance" both of viewpoints and of functions. However, because the concept of a "fair balance of functions" is elusive, the Act is likely to be applied as if it read "a fair balance of viewpoints given the functions to be performed." Under this reading an agency might justify homogeneous committee membership by a correspondingly narrow definition of a committee's functions. In short, the Act provides no meaningful standards by which to evaluate the "fairness" of committee membership. Any changes, therefore, in selection procedures will depend upon the good faith of OMB and the agencies.

The inclusion in the Act of only vague language regarding fair representation, coupled with the lack of a mechanism for implementing such a requirement, is wholly inadequate in terms of the goal sought: to reduce the influence of "special interests" on advisory committees. The Act's failure to recognize industry committees as a distinct entity and to place them under stricter regulation than other advisory panels is a particularly glaring omission. The balancing of interests in establishing standards for advisory committee membership requires difficult choices. If the Senate and House Government Operations Committees were unable to formulate specific guidelines for making these decisions, it is unlikely that other committees will develop them. And in view of past executive branch resistance to reforms in the structure of the committee process itself,[73] it is unlikely that

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71 Act §§ 5(b)(2), 5(c). The Act's requirements for balance are not absolute; they are, rather, guidelines to be followed in the creation of committees by statute or executive action.

72 118 CONG. REC. H4275-76 (daily ed. May 9, 1972) (statement of Representative Monagan); H.R. REP. No. 1017, *supra* note 32, at 6.

73 *1971 House Hearings*, *supra* note 2, at 18 (statement of Senator Metcalf).

OMB or the agencies will take significant steps to broaden committee membership.

2. Advisory Committee Procedure and Openness

Opening advisory committees to public scrutiny and participation is another possible means of safeguarding against abuses in the committee process.[74] It has been vigorously contended, however, that openness will reduce the effectiveness of advisory committees by inhibiting both frank disclosure of personal opinions and discussion of controversial or sensitive subjects.[75] Whether this claimed disadvantage of openness has real significance, and in particular whether it outweighs the tendency of openness to prevent abuses, is questionable. The wisdom of creating a special channel for private interests to say privately what they would not say publicly is itself doubtful.

However, it should be noted that openness is not a panacea for the problems of the committee process. Even if all meetings were required to be open to the public, committee members could transact the committee's "real business" at informal meetings or over the phone.[76] Prohibitions against such activities would be virtually unenforceable.

In evaluating these arguments, Congress apparently agreed, at least in principle, with the proponents of openness. The Act initially provides that each advisory committee meeting shall be open to the public.[77] Further, interested persons may file statements with or appear before an advisory group, subject to reasonable OMB regulations.[78] However, these requirements are waived[79] when the supervising federal official determines in writing that a meeting will concern subject matters exempted from public access under the Freedom of Information Act.

The inclusion by reference of the Freedom of Information Act

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74 S. REP. NO. 1098, *supra* note 39, at 16.

75 *See, e.g., 1971 Senate Hearings, supra* note 4, pt. 2, at 390-93.

76 *See, e.g.*, minutes of the OMB Committee on Petroleum and Gas (part of its Advisory Council on Federal Reports), Nov. 21, 1968, reproduced in *1970 Senate Hearings, supra* note 28, pt. 2, at 178, indicating that the committee transacted all its business in 1968 by phone and letter and held no meetings.

77 Act § 10(a)(1).

78 Act § 10(a)(3).

79 Act § 10(d).

(FOIA) exemptions[80] may be criticized on several grounds. First whatever inadequacies now exist in the FOIA are extended into a new area.[81] For example, while the FOIA gives the appearance of providing public access to government information, it is capable of manipulation by uncooperative agencies.[82]

More importantly, the FOIA's standards and subsequent case law concern the public right to inspect extant documents, rather than the right to attend future meetings. Congress apparently chose these standards as a matter of convenience because the FOIA exceptions had had "the most thorough scrutiny and consideration by the Congress in this sensitive area between public disclosure and privileged information. Further, they seemed to meet most of the objections raised as to openness during the hearings."[83] However, one exemption, in particular that for interagency or intra-agency memorandums or letters,[84] may open a substantial loophole in the Advisory Committee Act's openness provisions.

A recent case described this exemption's rationale as the encouragement of frank discussions within the government by shielding from public view internal communications "consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy making processes. . . ."[85] Applying this exemption to advisory committees implicitly recognizes the right of these groups to receive in closed session information regarding internal agency thinking not available to the public, regardless of the subject matter. Further, that case suggests that this exemption may be applicable to the "opinions and recommendations of temporary consultants."[86]

An agency might therefore be tempted to close virtually any advisory committee meeting by stating that the group's recom-

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80 5. U.S.C. § 552(b) (1970).

81 For a critical evaluation of agency practices under 5 U.S.C. § 552, see Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261 (1970).

82 *See, e.g.*, Chvotkin, *supra* note 33.

83 S. REP. No. 1098, *supra* note 39, at 16-17.

84 5 U.S.C. § 552(b)(5) (1970). For a discussion of this exemption, see Note, *Freedom of Information Act—Internal Memoranda*, 50 TEX. L. REV. 1006 (1972).

85 Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971).

86 *Id.* at 1078, n.44.

mendations and discussions on those recommendations would be part of its internal decision-making processes. Such an interpretation would, however, run contrary to the congressional intention to reduce privileged communications between interest groups and agencies and to open to public view committee deliberations except those concerning specific topics such as national security information or medical records.[87] Hopefully, courts will find the internal memoranda exemption inapplicable to the deliberations of committee members, who, unlike consultants, are not considered federal employees.[88] Nevertheless, the Act's inclusion by reference of the internal memoranda exemption provides a further opportunity for a recalcitrant agency to block public access to meetings.[89]

With respect to the openness of advisory committees, two additional omissions of the Act are particularly noteworthy. One is its failure to delineate judicial remedies for improper closure of a meeting.[90] The other is its failure to specify the status of meetings at which only part of the agenda concerns exempted matters. Logically such a meeting should be conducted on a split session basis, but the statute is silent. These omissions increase the potential for an uncooperative committee to close its meeting and to leave it to the interested public to try to seek redress.

The deficiencies of the openness provisions cast doubt on the ability of the public to monitor effectively a committee which wishes its activities to remain private. Additionally, the success of the openness provisions is contingent upon the existence of

87 S. REP. No. 1098, *supra* note 39, at 16.

88 For an analysis of the legal distinction between a consultant and a member of an advisory panel who represents outside interests, see letter from the Deputy Attorney General to an Assistant Secretary of the Interior, Aug. 11, 1962, reproduced in *1971 Senate Hearings, supra* note 4, pt. 2, at 504; Memorandum of the President, Feb. 9, 1962, 3 C.F.R., 1959-63 Comp. 818, 824-25.

89 The National Endowment for the Arts recently closed advisory committee meetings held for the purpose of considering and formulating advice, which "if reduced to writing would be exempt as internal memoranda." 37 Fed. Reg. 25075, 25076 (1972).

90 However, it can be argued that a person denied access to an advisory committee meeting may challenge the decision of the agency ordering it closed, as he is "arguably within the zone of interests to be protected" by the Advisory Committee Act and so has standing to sue under the general judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. Ass'n of Data Processing Organizations v. Camp, 397 U.S. 150, 153 (1970). *See also* K. DAVIS, Administrative Law Treatise § 3A.10 (Supp. 1970).

large numbers of individuals willing to act as advisory committee "watchdogs"; the supply of such persons should not be taken for granted. Congress should have given greater consideration to providing more openness in this Act than the FOIA allows,[91] rather than merely adopting the latter's standards.

3. Antitrust provisions

The requirements in the Federal Advisory Committee Act for the attendance at each meeting of a government employee and for the approval of the agenda and the calling of meetings by such an employee are outgrowths of the early antitrust concern.[92] Their primary purpose is to prevent illegal interactions between committee members themselves, rather than to prevent abuses in the relationships between committee members and agency officials.

While adopting these provisions, the Act actually decreases regulation in two areas of direct antitrust concern. First, it contains no prohibition against the compilation of the current or projected activities of identified enterprises.[93] Second, the Act makes no reference to the presence of trade association employees as members of advisory committees.[94] Thus since E.O. 11671, which contained these restrictions, was revoked by E.O. 11686,[95] there are no current regulations in these two areas.

The dropping of these provisions may not have significant impact on the willingness of industrial committees to engage in activities susceptible to antitrust violation. The Justice Department could prosecute such activities if a violation arose, whether or not the activity was the subject of an advisory committee guideline. Also potential antitrust violations may be discouraged by the policy of some agencies, such as the Department of Com-

91 In fact, according to a survey taken prior to the passage of the FACA, the FOIA was cited as the authority for the closing of over 300 out of 933 advisory committee meetings. Chvotkin, *supra* note 33, at 154.

92 See text at note 18 *supra*.

93 S. 3529 contained such a provision, but it was dropped in the conference committee.

94 During debate on the conference report, Senator Muskie specifically stated that he knew of no provision in the Act which could be construed to prevent trade association staff membership on, or participation in, advisory committees. 118 CONG. REC. S15286 (daily ed. Sept. 19, 1972).

95 See text at note 48 *supra*.

merce, to assign attorneys with antitrust background to attend advisory committee meetings.[96] Further, it should be noted that trade association members have in the past participated on committees. For example, the 1970 chairman of OMB's Advisory Council on Federal Reports was a full-time official of a trade association.[97] Nevertheless, it is ironic that an act having the announced purpose of decreasing undue influence of special interests should weaken existing regulations applicable to industry committees.

IV. Conclusions

The Federal Advisory Committee Act does perform a service by recognizing advisory committees as a distinct institutional adjunct to the federal decision-making process. It also provides some tools for controlling the number of advisory committees and for insuring that they are operated on an efficient basis. However, the Act falls far short of revising the nature of the advisory committee process itself, as it offers no new guidelines for committee operations beyond those formulated by the Department of Justice 22 years ago. In part, this is the result of Senate compromise which sought to avoid the hard job of specifying operational relationships opening the actions of each committee to public inspection.

The weakness of the Act in curbing abuses, however, has roots running deeper than the language of specific provisions. Once the Act's sponsors made the fundamental decision to accept the legality of interest-oriented panels and to leave appointment of committee members completely in the discretion of agency heads, they reduced the Act's ability to control "illegitimate" committee activities.

It may be unfair, however, to criticize this Act for failure to transform significantly the federal decision-making process. As long as that process is structured so that federal executives are motivated to pay special attention to the views of particular

96 *1971 Senate Hearings, supra* note 4, pt. 3, at 910 (testimony of M. Butler, Assistant General Counsel, Dep't of Commerce).

97 Letter from ACFR Chairman Stewart to Senator Muskie, Oct. 22, 1970, reproduced in *1970 Senate Hearings, supra* note 28, pt. 1, at 36.

interest groups, pressure will exist to separate these opinions from those of the public at large, if not through advisory committees then by other means.[98]

In sum, the Federal Advisory Committee Act, accomplishes several reforms by focusing public and official attention on the problems of advisory committees, creating a committee management mechanism, and establishing openness as the norm for committee operations. But if the past experience is any guide, it will take more than this Act to change significantly the influence of various interests upon government policy.‡

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98 *See* Cowan, *Secrecy in High Places*, N.Y. Times, Oct. 29, 1972, § 3, at 9, col. 1, concerning closed government official-industry leader meetings of the Business Council, which apparently became an "independent" organization after the issuance of Exec. Order No. 11007 in 1962.

‡ Subsequent to the time this Comment went to the printer, OMB and the Dep't of Justice published a joint draft memorandum which utilized some of the ambiguities of the FACA criticized above. 38 Fed. Reg. 2306 (1973).

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THE AEC AMENDMENT: TEMPORARY LICENSING OF NUCLEAR REACTORS

> One of the more important sources of the retardation or regression of civilization is man's tendency to use new inventions indiscriminately or too hurriedly without adequate reflection of long-range consequences. . . .
>
> —Felix Frankfurter, *RCA v. United States*, 341 U.S. 412, 425 (1951) (*dubitante*)

Introduction

On June 2, 1972, President Nixon signed into law an amendment[1] to the Atomic Energy Act of 1954,[2] which grants the Atomic Energy Commission additional authority to issue temporary operating licenses for nuclear power reactors. This amendment provides certain conditions under which reactor operation may begin before environmental impact studies pertinent to the full-term operation have been completed. The Commission is directed to hold a public hearing before granting a temporary license. The hearing is to be conducted with such "expedited procedures as the Commission may . . . deem appropriate for a full disclosure of material facts on all substantial issues raised in connection with the proposed temporary operating license."[3] In setting up this mechanism for expedited reactor licensing, Congress gave its first formal response to difficulties imposed on many executive agencies by strict court interpretations of the National Environmental Policy Act of 1969 (NEPA).[4]

The subject of interim licensing in general had been examined at length during congressional committee hearings in March, 1972.[5] At those hearings, AEC spokesmen insisted that new

1 Act of June 2, 1972, Pub. L. No. 92-307, 86 Stat. 191 (codified at 42 U.S.C.A. § 2242 (Supp. Oct. 1972)).

2 42 U.S.C. §§ 2011-2282 (1970) [hereinafter cited as Atomic Energy Act].

3 42 U.S.C.A. § 2242(a) (Supp. Oct. 1972).

4 42 U.S.C. §§ 4321-47 (1970). Sections 102(2)(A)-(D) establish procedures which agencies are instructed to follow in considering the environmental impact of their actions. These procedures include utilization of a "systematic, interdisciplinary approach" (§ 102(2)(A)), preparation of a detailed environmental impact statement (§ 102(2)(C)), and the study, development, and description of alternatives to any proposal (§ 102(2)(D)).

5 *Hearings on H.R. 13752 Before the Subcomm. on Fisheries and Wildlife Con-*

authority was needed to provide "flexibility" for meeting the workload created by NEPA at a time when anticipated electrical power shortages made speedy licensing of new facilities highly desirable. AEC Chairman James Schlesinger warned that during peak power needs in the summer of 1972 and the following winter 13 fully-constructed nuclear power plants might stand idle unless the agency received new emergency authority to by-pass permanent licensing hearings presently stalled over environmental controversies.[6]

The claim of urgency evidently was persuasive. After only brief debate interim licensing passed both houses handily. Yet the summer was almost over when on September 15, 1972, the first temporary license was granted under the amendment to the 500-megawatt Vermont Yankee reactor in relatively cool New England.[7] Less than two months later the hearings on *permanent* licensing of Vermont Yankee ended to the AEC's satisfaction with the expectation that full power operation would begin shortly.[8] As of late November no other interim licenses have been granted under the new law. Because reactor start-up and preliminary tests require eight weeks or more before full power can be reached,[9] the winter of 1972-73 will be well advanced before significant additional power from reactors licensed under the Act can be provided.

What then is the significance of this new law, conceived by its supporters as a much-needed emergency measure but evidently not being invoked in time to apply to the emergency it was intended to meet? Unless the law is extended beyond its present expiration date of October 30, 1973, it may not have much impact, although prompt pressure from the AEC for more licensing could still change this conclusion. But as the first explicit congressional reaction aimed at restricting environment-oriented intervention in the affairs of an administrative agency, this law may have an exemplary significance greater than its immediate

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servation of the House Comm. on Merchant Marine and Fisheries, 92d Cong., 2d Sess. (1972) [hereinafter cited as *Hearings*].

6 *Id.* at 9.

7 37 Fed. Reg. 18765 (1972).

8 Boston Globe, Oct. 28, 1972, at 4, col. 4.

9 *Hearings*, *supra* note 5, at 20.

practical consequences. First, it sharply illustrates a characteristic AEC defensive reaction in the context of an issue broader than reactor licensing — namely, the conflict between the AEC and public interest groups over the proper balance between promotion and regulation of the nuclear industry. Second, the Amendment presents to all federal agencies with functions affecting the environment a prototype for undermining NEPA, particularly if the AEC's interpretation of certain crucial language in the amendment is allowed to prevail.

I. The AEC's Environmental Responsibilities

NEPA worked a particular hardship on the AEC because it caught a number of reactors at a stage where they were nearly ready to begin operation by pre-NEPA standards — at least insofar as having AEC approval. *Calvert Cliffs' Coordinating Committee v. AEC*[10] held that the AEC was now required under NEPA to re-do its evaluation before issuing a permanent license, taking into account in addition to the usual safety and design considerations a wide variety of environmental questions. The evaluation had to include a balancing of environmental costs and expected economic benefits based on an analysis "to the fullest extent possible"[11] of the effect on the environment of the proposed reactor operation.[12] In addition to including environmental considerations in its own in-house determinations, the AEC was required under *Calvert Cliffs'* to issue a detailed environmental impact statement. The *Quad Cities* decision[13] confirmed that an impact statement was necessary even for the issuance of an interim operating license.

The situation has been evolving rapidly since *Calvert Cliffs'* was decided in July 1971. Faced with substantial delays while environmental studies were being performed and with a broadened scope of issues for intervenors to contest, the AEC sought

10 449 F.2d 1109 (D.C. Cir. 1971).

11 NEPA § 102, 42 U.S.C. § 4332 (1970).

12 The court specifically included ". . . water quality — perhaps the most significant impact of nuclear power plants," among the environmental issues to which the AEC had to give full consideration. 449 F.2d 1109, 1122.

13 Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971).

relief in the kind of flexible authority granted by Congress through the interim licensing amendment passed in June 1972.

Even before this Amendment could begin to influence the AEC's evaluation of environmental issues, the passage of new water pollution legislation substantially reduced the AEC's direct responsibility for environmental protection. Under the Federal Water Pollution Control Act Amendments,[14] the AEC is required to accept without further review the certification by the Administrator of EPA regarding the impact on water quality of the proposed temporary reactor operation. Thus the AEC has been given what it argued for vainly in *Calvert Cliffs'*: relief from having to make its own investigation of the water quality issue. Since environmental impact apart from water quality is likely to involve primarily the effect of the reactor siting on the landscape (escape of radioactive effluents into the air being really of no significance barring an accident of major proportions), there appear to be no significant environmental issues left to be argued before the Commission at the time of temporary or permanent licensing. Safety issues, on the other hand, are rapidly becoming prominent.[15] Even at the time of the interim licensing hearings opponents were suggesting that the AEC really wanted more "flexibility" in licensing procedures in order to muffle a coming outcry over safety problems.[16] How much new capability for suppressing criticism the Commission has achieved through the new legislation, should it so choose to employ its augmented powers, will emerge from a review of the Amendment's provisions and the AEC's implementing regulations.

II. The Temporary Licensing Amendment

A. *Satisfying "Applicable Requirements of NEPA"*

Despite the emergency nature of the problem the Amendment was designed to meet, it sets up several formal requirements which must be met before a temporary license may be issued. In particu-

14 Pub. L. No. 92-500, § 511(c)(2), 86 Stat. 893 (1972).

15 Gillette, *Nuclear Safety*, 177 Sci. 771, 867, 970, 1080 (1972).

16 *Hearings, supra* note 5, at 232 (Testimony of Myron M. Cherry, attorney on behalf of a number of public interest groups, including the Sierra Club and the Union of Concerned Scientists).

lar, an applicant may petition for a temporary operating license following the filing of the report of the Advisory Committee on Reactor Safeguards (ACRS), the safety evaluation by the AEC regulatory staff, and the regulatory staff's final detailed environmental impact statement required under NEPA for permanent licensing.[17] So far these requirements are no different from the conditions for granting a permanent license. An exception is allowed, however, if the application for a permanent license was filed before September 9, 1971.[18] Reactors meeting this deadline may receive a temporary license without prior filing of the permanent license impact statement, but "the Commission must satisfy the applicable requirements of the National Environmental Policy Act prior to issuing any temporary operating license. . . ."[19]

The congressional intent behind this clause seems to be that a limited statement describing the environmental impact of the proposed temporary operation must be filed pursuant to NEPA.[20] An earlier, unaccepted proposal for amending the Atomic Energy Act would have authorized interim licensing "notwithstanding . . . any other provision of laws."[21] Thus the substitution of language explicitly providing for satisfaction of the applicable requirements of NEPA indicates an intent to demand maximum compliance with NEPA rather than to authorize an exemption from one of its provisions. Furthermore, the House and Senate reports on the final bill suggested that in the absence of the full NEPA review a "limited review" should be conducted, and emphasized that "nothing in this paragraph is intended to denigrate in any way the applicable requirements of environmental laws. . . ."[22] Debate on the House floor also supported the interpretation that a formal impact statement is required.[23] This

17 42 U.S.C.A. § 2242(a) (Supp. Oct. 1972).

18 On this date the AEC issued revised licensing regulations implementing NEPA requirements in accordance with the *Calvert Cliffs'* decision. 36 Fed. Reg. 18071 (1971). At that time 41 applications for permanent operating licenses were pending, 13 of which were identified by the Federal Power Commission as "critical to power needs." *Hearings, supra* note 5, at 9.

19 42 U.S.C.A. § 2242(a) (Supp. Oct. 1972).

20 *See* NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).

21 H.R. 13731, 92d Cong., 2d Sess. (1972).

22 REPORT BY THE JOINT COMMITTEE ON ATOMIC ENERGY, H.R. REP. No. 1027, 92d Cong., 2d Sess. 8 (1972); S. REP. No. 787, 92d Cong., 2d Sess. 8 (1972).

23 "In order to have one of these temporary interim licenses issued, there must be

requirement is not inconsistent with the stated emergency purpose of the Amendment, since assessing the impact of a few months of reactor operation will obviously be much quicker than evaluating effects of a 40-year operation under a permanent license. Viewed in this light, the AEC Amendment provides a means of getting reactors "on line" in an emergency without compromising the principles or even the specific provisions of NEPA. The AEC, however, does not view the Amendment as requiring strict compliance with NEPA and claims the right to issue temporary licenses without formal impact statements.[24]

B. *Expedited Public Hearing Requirements*

Following single publication in the Federal Register announcing an application for a temporary license, the Commission is required to hold a public hearing after 10 days' notice (compared to 30 days for a permanent license hearing). "The hearing . . . shall be conducted with expedited procedures as the Commission may . . . deem appropriate for a full disclosure of material facts on all substantial issues raised in connection with the proposed temporary operating license."[25]

This authorization to use "expedited procedures" is the heart of the new authority which the AEC wanted from Congress and is the main feature distinguishing this amendment from alternative measures[26] and from temporary licensing authority previously asserted by the AEC.[27] Yet the amendment gives no definition of "expedited procedures," and investigation of con-

a NEPA report." 118 CONG. REC. H4038 (daily ed. May 3, 1972) (remarks of Representative Hosmer (R.-Cal.), a member of the Joint Committee on Atomic Energy and co-sponsor of H.R. 14655). Senator Pastore (Dem.-R.I.), Chairman of the Joint Committee on Atomic Energy, noted that H.R. 14655 (and the identical bill, S. 3543) ". . . still contains the responsibility of the Commission . . . to file . . . a 'mini-environmental' report if the final detailed environmental statement is not yet available." *Id.* at S8050 (daily ed. May 17, 1972).

24 See Part III B *infra*; 37 Fed. Reg. 11874 (1972).

25 42 U.S.C.A. § 2242(a) (Supp. Oct. 1972).

26 Three other bills, H.R. 13731, H.R. 13732, and H.R. 14065, 92d Cong., 2d Sess. (1972), which were not reported out of committee, would have greatly reduced the obligation of the AEC to conduct public hearings on licensing and construction of reactors.

27 10 C.F.R. pt. 50, app. D, ¶ D(2) (1971). This section authorized the AEC to issue temporary licenses for purposes of testing at less than 20 percent of full operating power.

gressional intent reveals sharply divided opinions on what they are supposed to be. The House and Senate reports declared that the hearing need not be a trial-type hearing, and that the Commission was to have a free hand to "prescribe appropriate expedited procedures for the resolution of petitions."[28] On the House floor Representative Price, Vice-Chairman of the JCAE, stressed his intent to have the AEC "tailor the prescribed procedure and the conduct of the hearing to meet the actual practical exigencies of individual situations. . . ."[29] This view was amplified by Representative Hosmer, a member of the JCAE and co-sponsor of the bill, who suggested: "[R]arely, if ever, will extensive cross-examination as such be either needed or allowed. . . . [W]hat is basically intended is a non-trial type hearing. . . ."[30] Likewise, on the Senate floor Senator Anderson argued that the hearings should not be judicial in nature.[31] This view was opposed by Senator Baker (R.-Tenn.) and his supporters. In his remarks in the Senate report on the bill, Senator Baker asserted that the hearings were to be subject to the Administrative Procedure Act and therefore would provide for discovery and cross-examination. The Commission's discretion would be limited to preventing abuse of these techniques.[32] Senator Baker's interpretation deserves special weight because he was responsible for inserting the hearings provision in the bill[33] in place of prior proposals which would have exempted the expedited hearings from compliance with the APA.[34] Congressional assent to the elimination of these provisions would indicate an intent to incorporate at least minimal procedural safeguards in the expedited hearings.

C. *Other Requirements for Temporary Licensing*

The findings which the Commission must make before granting the temporary license fall into three categories.[35] First, the

28 H.R. REP. NO. 1027, 92d Cong., 2d Sess. 8 (1972); S. REP. No. 787, 92d Cong., 2d Sess. 8 (1972).

29 118 CONG. REC. H4035 (daily ed. May 3, 1972).

30 *Id.* at H4038.

31 *Id.* at S8052 (daily ed. May 17, 1972).

32 S. REP. No. 787, 92d Cong., 2d Sess. 14-15 (1972).

33 This role was attributed to Senator Baker by Barfield, *Environmental Report*, 4 NAT'L J. 1025 (1972).

34 118 CONG. REC. S8053 (daily ed. May 17, 1972). Senator Baker observed that "[t]he earlier bills [H.R. 13731 and H.R. 14065] would have extinguished the right of citizens to challenge an application. . . ." *Id.*

35 42 U.S.C.A. § 2242(b) (Supp. Oct. 1972)

temporary operation must be safe, as determined by a finding that the provisions of § 185 of the Atomic Energy Act[36] have been met. Essentially, the Commission must find that "the final design provides reasonable assurance that the health and safety of the public will not be endangered by operation of the facility. . . ."[37] Second, the temporary operation must provide adequate protection for the environment. Like the safety finding above, this determination is likely to be perfunctory, particularly if a full NEPA impact statement exists, unless intervenors introduce "substantial issues" or new evidence not already considered by the AEC. Finally, there must be some kind of emergency justification for the temporary operation. The inclusion of this required finding was obligatory since the justification given for the bill was the need to cope with a "power crisis"; nevertheless the nature of the "emergency" is not made definite in the Amendment. The Amendment speaks of assuring the "adequacy and reliability of the power supply" and the "possible endangerment to the public health and safety in the event of power shortages," relying for assessment of the situation on "data from appropriate Federal and State governmental bodies which have official responsibility to assure an adequate and reliable power supply."[38] In evaluating the need for temporary operation the Amendment requires consideration of the availability of alternative sources.[39] The possibility of reducing demand is not explicitly considered but in principle could be taken into account, since the Amendment states that the enumerated factors are not exclusive.

Further provisions provide some assurance that the temporary operation will not be allowed to become a permanent operation by default.[40] It is specified that the licensee may not "retire or dismantle" any pre-existing facilities on the ground of availability of the new power supply. Also, the Amendment contains the re-

36 42 U.S.C. § 2235 (1970).

37 10 C.F.R. § 50.35(c)(2)(1972).

38 42 U.S.C.A. § 2242(b) (Supp. July 1972). The AEC appears to rely primarily on the Federal Power Commission to evaluate power needs. The FPC has concluded that reserve margins in several areas are likely to fall well below the "customarily accepted" reserve level of 20 percent during periods of peak power demand in 1972 and 1973. 92 U.S. CODE CONG. & AD. NEWS 2084 (1972). It is not clear, however, that a drop in reserves below this level is an "emergency" in the sense that public health and safety — as distinct from public convenience — are likely to be affected.

39 42 U.S.C.A. § 2242(b)(3) (Supp. Oct. 1972).

40 *Id.* at § 2242(b).

quirement that the application for the permanent license be prosecuted with "due diligence," subject to vacation of the temporary license.[41] In view of the close working relationship between the AEC and the nuclear power industry, it appears unlikely that a conflict would develop over diligence in pursuit of a license, so this provision is of little practical importance.

Of greater potential importance with respect to controlling possible abuse of temporary licensing is the provision for judicial review pursuant to the Act of December 29, 1950.[42] Under this statute power to set aside an AEC final order[43] granting a temporary license is reserved to the exclusive jurisdiction of the U.S. Court of Appeals. While congressional proponents of the amendment made much of this judicial review provision, its value to environmental-interest groups may be limited by practical considerations of litigation expense.[44]

III. AEC Regulations Based on the New Amendment

A. *Undermining APA Hearing Procedures*

The new licensing regulations[45] leave no doubt that what the AEC wanted most from the new legislation was "expedited procedures." The phrase appears in the second sentence of the regulations and repeatedly thereafter. The new rules for temporary license hearings switch the status of many important intervention tactics from rights (in trial-type hearings) to privileges granted at the discretion of the presiding officer. For example, the regulations state that if the affidavits and pleadings submitted by participants "do not raise a substantial issue of material fact which, in the judgment of the presiding officer, must be considered for the purposes of the findings in subsection 192b of the Act, there would be no need for the presentation of evidence or the asking of ques-

41 *Id.* at § 2242(c).

42 28 U.S.C. §§ 2341-42 (1970).

43 A decision of the Atomic Safety Licensing Board (ASLB) may be appealed to the ASLB Appeal Board, a three-man board sitting in Washington. Normally the decision of this appeal board constitutes an AEC final order, although the Commission has the option to overturn such a decision. *Hearings, supra* note 5, at 225.

44 *See* Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612 (1970).

45 37 Fed. Reg. 11871-76 (1972).

tions."[46] And later: "No requests for interrogatories, depositions, or discovery shall be entertained in the absence of extraordinary circumstances as determined by the presiding officer."[47] The parties will be limited to oral argument unless the presiding officer finds presentation of evidence or asking of questions is necessary for full disclosure of material facts relative to substantial issues.[48] When questioning is permitted, it is not the free-wheeling type usually associated with cross-examination. "A party intending to question a witness sponsored by another party shall give notice to all other parties of the subject matter . . ." at least 24 hours before the questioning.[49]

The ability of intervenors to influence the outcome of temporary licensing hearings will depend on how the presiding officer exercises the enormous discretion granted under these new regulations. The possibility that this discretion will be abused depends in turn upon whether the AEC wanted "expedited procedures" at least partly as a means to suppress opposition; if so, the AEC can impose a narrow interpretation on what constitutes a substantial issue. Thus the real significance of "expedited procedures" lies in the motivations of the Commission.

Recent AEC behavior unfortunately raises suspicion about the AEC's motives for wanting "expedited procedures." Daniel Ford and Henry Kendall,[50] members of the Union of Concerned Scientists,[51] report that in January 1972, participants in hearings on emergency core cooling systems (ECCS) were denied both subpoena power and discovery. Pressed by threat of suit under the Freedom of Information Act,[52] the AEC made a "token" release of 60 documents, which revealed widespread dissension within the

46 *Id.* at 11872-73. The hearing is held before the ASLB, which consists of three Commission appointees. Two of these must be technically qualified, and the third, the presiding officer, must be a lawyer trained in administrative procedures. As a practical matter, the presiding officer is likely to defer on technical issues to the other two members. *See Hearings, supra* note 5, at 225.

47 37 Fed. Reg. 11875 (1972) (to be codified as a new subpart F added to 10 C.F.R. part 2, § 2.605(a)).

48 37 Fed. Reg. 11875 (1972) (to be codified as 10 C.F.R. § 2.605(b)(1)).

49 37 Fed. Reg. 11875 (1972) (to be codified as 10 C.F.R. § 2.605(c)(3)).

50 Ford & Kendall, *Nuclear Safety*, ENVIRONMENT, Sept. 1972, at 2.

51 Founded in 1969, the Union of Concerned Scientists is a Boston-area group of scientists, engineers, and other professionals active in areas related to the impact of technology on society.

52 5 U.S.C. § 552 (1970).

AEC itself concerning the safety of the emergency systems.[53] A memo dated June 1, 1971, from Dr. Morris Rosen, then Chief of the Systems Performance Branch of the Division of Reactor Standards, stated his belief that "the system performance cannot be designed with sufficient assurance to provide a clear basis for licensing."[54] Yet almost every power reactor presently operating in the United States[55] (and therefore approved as "safe" by the AEC) and a large number of those likely to be licensed in the near future depend on this questionable ECCS to avert the extremely dangerous situation that might result from a loss-of-coolant incident.[56]

The example of the ECCS hearing, not conducted under the new expedited procedures, illustrates the difficulty facing an intervenor trying to expose important safety or environmental questions in a non-trial-type hearing. Even given trial-type procedures, there is no way for an intervenor to raise a vital safety issue like ECCS adequacy in a particular reactor without at least some inkling that the issue in fact exists — and to have this inkling requires considerable familiarity with reactor technology. Use of discovery in a licensing hearing (assuming it was granted) would not produce Dr. Rosen's memo, since that document pertained to general AEC

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53 Ford & Kendall, *supra* note 50, at 4.

54 *Id.* at 6.

55 The AEC has reported that as of September 30, 1972, 28 nuclear power plants were operating in the United States and producing a total of 13,261 MWe. Under construction are 52 more units with a total planned output of 45,330 MWe. NUCLEAR NEWS, Nov. 1972, at 131. Total United States installed capacity was 360,000 MWe in 1970. STATISTICAL ABSTRACT 497 (1971).

56 In a water-moderated reactor — the type presently in use in almost all United States nuclear power plants — the water in the reactor core serves a dual purpose: it slows down fission-produced neutrons so they will induce additional fission reactions, and it cools the core, carrying away heat for use in steam-generation. If a major rupture should occur in the cooling system, resulting in loss of water from the reactor core, the reactor would automatically shut itself down, because the neutron-slowing function of the missing water is essential to sustain the energy-producing fission reaction. However, the high concentration of radioactive fission products built up in the core during continuous reactor operation produces heat even after the fission reaction ceases. Unless an emergency cooling system functions promptly and efficiently to carry away this heat, the reactor core will melt. The resulting mass of molten radioactive material will eventually melt its way through the reactor pressure vessel. Rupture of this container will release radioactive materials into the atmosphere in such quantities that under relatively common atmospheric conditions thousands of people might receive a fatal radiation dose. The possibility of such an incident — rather than fear of a nuclear explosion — is the source of concern for the adequacy of the emergency core cooling systems (ECCS). *See* Gillette, *supra* note 15.

in-house research and would not appear in the data relating to a particular facility. Suspecting a safety issue or environmental impact problem, the intervenor can hope to develop the point in a licensing hearing by a probing cross-examination of AEC or industry experts testifying in support of the reactor.[57] Yet under the new expedited procedures it appears likely that the presiding officer would rule such cross-examination out of order unless the intervenor already had enough knowledge of the problem to establish it as a "substantial issue."

Since both the intent of Congress and the language of the Amendment require that the hearing procedures be "appropriate for a full disclosure of material facts," too blatant a departure from trial-type procedures could subject contested hearings and their results to legal challenge on two grounds. First, prior to initiation of the hearings, intervenors could challenge the presiding officer's adverse discretionary findings concerning substantial issues of fact presented in affidavits. Court review has been permitted if such an intermediate order has the effect of finality by virtue of an immediate injury to a party to the proceeding and the impossibility of further agency review.[58] The AEC's expedited procedures offer no further review of a presiding officer's decision to exclude certain issues as insubstantial. If pre-hearing discretion is exercised to exclude environmental or safety issues crucial to the AEC's public opposition, the courts could review the decision and order consideration of the excluded issues.

Second, intervenors could challenge the results of concluded hearings in which trial-type procedures were unjustifiably denied. Sensitive to this possibility, the AEC supported its predilection for non-evidentiary hearings by citing several cases,[59] among them *Marine Space Enclosures, Inc. v. Federal Maritime Commission.*[60] In this case the court held that the Maritime Commission was re-

57 The environmental problem of tritium concentration in biological organisms was brought out by cross-examination during hearings on the Calvert Cliff's reactor in an interesting illustration of how important this technique is to intervenors. *See* Bronstein, *The AEC Decision-Making Process and the Environment—A Case Study of the Calvert Cliffs' Nuclear Plant*, 1 ECOL. L. Q. 689, 715 (1971).

58 Environmental Defense Fund, Inc. v. HEW, 428 F.2d 1083 (D.C. Cir. 1970); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

59 37 Fed. Reg. 11873 (1972).

60 420 F.2d 577 (D.C. Cir. 1969).

quired to conduct a hearing before awarding a contract for construction and maintenance of a new maritime passenger terminal, but added that "we refrain from specifying that our remand order requires an evidentiary hearing. . . . The requirement of a hearing in a proceeding before an administrative agency may be satisfied by something less time-consuming than courtroom drama."[61]

Whether this dicta in *Marine Space Enclosures* applies to administrative proceedings such as temporary licensing hearings depends on a somewhat closer look at administrative law. As to the question of when an evidentiary hearing is required, Professor Davis observes: "The basic principle is that trial procedure is required for — and only for — issues of fact, not for issues of law, policy, or discretion."[62] Moreover, the trial-procedure requirement is generally limited to issues of so-called adjudicative fact, not legislative fact. The distinction between these two categories was made in *Powelton Civic Home Owners Association v. Department of Housing and Urban Development.*[63] Adjudicative fact involves "factual findings on the particular status of a particular individual," while legislative fact embraces "more general findings requiring analysis and evaluation of factors not uniquely related to any specific individual."[64]

Extrapolating this language to nuclear reactor hearings suggests that general investigations — for example, hearings on the adequacy of a widely-used standard design like ECCS — might be considered more legislative than adjudicative, although even then such hearings might involve "the kind of judgment that benefits from ventilation at a formal hearing."[65] Intervenors could argue, on the other hand, that temporary licensing procedures concern the particular status of a particular reactor and therefore involve adjudicative fact. For such hearings the AEC should thus be required to allow trial-type procedures, although reasonable time limits might be imposed in the interests of expedition.

Injurious limitations on discovery, submission of evidence, and

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61 *Id.* at 590.
62 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.01 (Supp. 1970).
63 284 F. Supp. 809 (E.D. Pa. 1968).
64 *Id.* at 829.
65 Marine Space Enclosures v. Federal Maritime Comm'n, 420 F.2d 577, 589 (D.C. Cir. 1969).

cross-examination could be attacked as violations of the Administrative Procedures Act, from which the expedited hearings were not exempted. It is true that the APA allows presiding officers broad discretion,[66] which the courts have upheld.[67] Nevertheless, the courts have also outlined minimum acceptable procedures for hearings by holding that the right to a fair hearing includes the rights to introduce evidence and cross-examine witnesses.[68]

The element of expediency would have to be considered by the courts in determining how much to insist on trial-type procedures. *Goldberg v. Kelly*[69] is an interesting and often-cited case which suggests that the courts are reluctant to give up trial-type procedures even in the face of strong needs for efficiency. Residents of New York City challenged the adequacy of agency procedures for notice and hearing in connection with termination of welfare benefits. While clearly the analogy cannot be stretched too far, there are important similarities between the recipient-agency relation in *Goldberg* and the intervenor-AEC relation. In both cases the conflict is between the weak and (relatively) uninformed against a strong, organized agency believing it represents a compelling public interest. And considering that there are more than nine million welfare recipients in the United States, there is an obvious need for expedited procedures to keep contested termination hearings from imposing an intolerable burden on relief agencies. Nevertheless, the *Goldberg* decision affirmed that due process guaranteed the welfare-recipient a personal appearance before the reviewing officer for oral presentation of evidence and cross-examination of adverse witnesses. Just how far the courts would be willing to stand by these broadly expressed principles in a case generically similar but involving an entirely different scale of public and industrial interests in an open question. Almost certainly, should a specific temporary licensing dispute come before a court on a procedural question, the decision would depend heavily on

66 5 U.S.C. § 556 (1970).

67 *See* Nat'l Airlines v. CAB, 321 F.2d 380 (D.C. Cir. 1963) (discretion to restrict evidence upheld).

68 *See* Giant Foods v. FTC, 322 F.2d 977 (D.C. Cir.), *cert. denied*, 376 U.S. 967 (1963); Nat'l Trailer Convoy v. United States, 293 F. Supp. 634 (N.D. Okla. 1968).

69 397 U.S. 254 (1970).

the "emergency" presented as justification for invoking the new authority.[70]

B. *Undermining NEPA*

At the time of its consideration by Congress, the Amendment was only one of a number of bills designed specifically to grant federal agencies exemptions from NEPA under emergency circumstances.[71] The AEC measure received more attention and was ultimately successful primarily because the power and prestige of its congressional committee, coupled with adroit use of the power shortage threat, brought the Commission the most immediate and powerful congressional audience.

Thus the AEC Amendment represents in one form a general congressional effort to mitigate the courts' strict enforcement of NEPA's procedural requirements against all the federal agencies. An unsuccessful bill directly amending NEPA on behalf of the AEC[72] would have directed the courts to begin applying NEPA "as the flexible and adaptable instrument of national policy that was intended when it was enacted, rather than as an autocratic voice from the past. . . ."[73] The failure to alter NEPA directly, however, should not obscure more subtle forms of erosion. Unfortunately for environmentalists, an explicit amendment to NEPA is not necessary to exempt specific agencies from its provisions. An amendment to agency authorization legislation (*e.g.*, the AEC Amendment) is sufficient to supersede the application of previous statutes to a particular activity of a particular agency.

As explained earlier, the congressional intent behind the AEC Amendment would seem to require some sort of "mini" NEPA impact statement before granting a temporary permit. However, the AEC has interpreted this provision as requiring no statement at all,[74] a position agencies gaining similarly ambiguous relief from NEPA could be expected to adopt. The new regulations re-

70 A spectacular example of AEC non-compliance with a statutory mandate that was tolerated because of an "emergency" was the Cannikin underground nuclear test affair. *See* Comm. for Nuclear Responsibility v. Schlesinger, 404 U.S. 917 (1971).

71 *See* Barfield, *supra* note 33, at 1030.

72 H.R. 13752, 92d Cong., 2d Sess. (1972).

73 H.R. REP. No. 991, 92d Cong., 2d Sess. 4 (1972).

74 37 Fed. Reg. 11874 (1972) (to be codified as amendment to 10 C.F.R. part 50, app. D, ¶ D).

quire only a "*finding* that the proposed licensing action will not have a significant, adverse impact on the quality of the environment,"[75] and "consideration" of environmental impacts, should any be found.[76] The practical effect of this regulation is to release the AEC from the burden of preparing and circulating even a small-scale impact statement. The absence of a formal document revealing the precise environmental factors analyzed would then restrict the depth of the review which the courts or anyone else could make of an agency's final "emergency" decision.

The AEC's amended regulations also fail to provide for an appropriately tailored study, development, and description of alternatives, as required by NEPA[77] and not explicitly superseded by the AEC Amendment. Arguably, NEPA requires consideration of alternatives bearing specifically on the need for emergency operation of a particular nuclear facility. The viable alternatives to emergency, short-term agency actions, such as temporary operation of a nuclear plant, may be substantially different from alternatives considered from a long-term perspective, such as nuclear power examined in the context of long-range energy planning.[78] When a proposed emergency agency action is opposed by environmentalists, the proposal itself becomes one of what NEPA terms "unresolved conflicts concerning alternative uses of available resources,"[79] which require a full-scale examination of alternatives. Any agency's self-limitation to mere "consideration of . . . alternative sources of supply," with no reproducible record of that "consideration" required, would not meet NEPA's standards of examination.[80]

The AEC's regulations for "expedited hearings" make possible a second, less direct assault on NEPA. While superficially unre-

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75 37 Fed. Reg. 11874 (1972) (to be codified as amendment to 10 C.F.R. part 50, app. D, ¶ D(3)(i)) (emphasis added).

76 *Id.* at ¶ D(3)(ii).

77 NEPA § 102(2)(D), 42 U.S.C. § 4332(2)(D) (1970).

78 Specific to short-term operation, for example, would be the alternatives of operating below a 20 percent reserve power capacity, a vital issue which would call into question the very existence of an alleged power crisis.

79 NEPA § 102(2)(D), 42 U.S.C. § 4332(2)(D) (1970).

80 This failure is even sharper in light of the Council on Environmental Quality's guidelines for implementing NEPA: "A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential." 36 Fed. Reg. 7725 (1971).

lated to NEPA, these regulations furnish an indirect exemption from certain court interpretations of NEPA's procedural requirements. In *Calvert Cliffs'*, the court emphasized an agency obligation under NEPA to seriously consider environmental issues at the hearing stage, even when adverse parties did not introduce the issues, and even though compliance would be time-consuming.[81] To the extent that an agency is able to use expedited hearings to restrict consideration of environmental issues, the NEPA mandate, as applied by the courts to the hearing stage of agency decision making, would be undermined.

IV. Suggested Improvements

Accepting for the moment the idea that abbreviating the reactor licensing process is a good way to cope with temporary power emergencies, one can find ways to make the present amendment more responsive to this particular problem. Certainly the language should be sharpened and clarified. Vague terms like "possible endangerment to public health and safety" can be replaced by specific descriptions of the type of power crisis anticipated. These descriptions should make it clear that the licensing measure is aimed at *acute, local* electricity shortages over *limited time periods* of the order of a few months. It might be reasonable to impose by statute strict numerical standards on power availability as a measure of the degree of emergency. Such standards would have to be worked out by Congress with the cooperation of the Federal Power Commission and would involve careful scrutiny of the "customary" 20 percent reserve requirement.

Moreover, alternative responses such as emergency methods to *reduce demand* for electricity should be given explicit consideration before a temporary license is issued. A statement should precede the issuance of the license listing explicitly the alternative action which was considered and explaining why it was rejected.

If the Amendment is restricted to its advertised emergency purpose, it would be reasonable to dispense with the present mandatory "expedited" public hearing. Abandoning this fiction would be a minimal loss for intervenors in view of the overwhelming

81 Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

restriction the expedited procedures presently in force are likely to impose. An amendment stripped of this ill-defined procedural "safeguard," which creates the illusion but not the substance of public participation, would at least be a candid response to pressures for licensing already-constructed reactors. Such a streamlined amendment would both reduce the opportunities for court challenge of AEC emergency actions and eliminate the emergence of expedited hearings as a precedent for evading NEPA requirements.

In a real power emergency, temporary licensing should be available on a truly expeditious basis on the strength of the AEC's evaluation of safety and environmental impact. Philosophically this is objectionable since presumably serious questions about safety and/or environmental impact remain unresolved; otherwise the permanent license could be awarded (unless the delay stems solely from the unavailability of a final impact statement). As a practical matter, however, the temporary operation of a reactor for a few months involves only a slight risk of catastrophic accident in view of the fact that no accidents have ever occurred involving the adequacy of ECCS.[82] As for environmental damage caused by nuclear power reactors, the principal kind involves water pollution — both thermal pollution[83] and low-level radioactive effluents. These issues are now largely out of the AEC's hands,[84] and such pollution is not likely to produce irreparable environmental damage unless sustained over a period of years.[85] Brief operation of a reactor during a genuine, carefully-defined emergency simply does not pose a serious threat to the interests most intervenors are defending, unless the temporary operation is viewed as a precedent for lowering the standards required for permanent operation.[86]

82 Gillette, *supra* note 15.

83 *See* JOINT COMMITTEE ON ATOMIC ENERGY, SELECTED MATERIALS ON ENVIRONMENTAL EFFECTS OF PRODUCING NUCLEAR POWER (1969).

84 See note 22 *supra*.

85 Effects which might have a short-term impact are the tritium concentration problem (*supra* note 57) and fish kills by entrainment (*see* NUCLEAR NEWS, Nov. 1972, at 41). Such damage might be severe while the reactor was in operation, but environmental recovery should be possible afterward, provided that the operation is not sustained for several years (long enough, for example, to reduce the fish population below levels required for breeding).

86 Political realities suggest that, whether or not its proponents had the conscious

CONCLUSION

The significance of the Amendment and the threat in it, if there is one, lie in the attitude it represents. Felix Frankfurter's remark in *RCA v. United States* doubting the wisdom of hasty commitment to a new color television method applies today with greater seriousness to the attitude which presses for swift commitment to nuclear power. The philosophy of temporary licensing as it emerges through study of the AEC's arguments is that these reactors should be put into operation as fast as physically possible, that reflection on long-range consequences cannot be afforded in an emergency. This "power crisis" justification, however, is only part of the motivation for expedited licensing. What the proponents of the Amendment clearly felt and came just short of saying publicly was simply that a lot of money had been spent building these reactors and therefore they should be put to work without wasting any more time. Honestly acknowledged, this motive has a compelling appearance of practical realism about it — and of course it is a political reality that the already-constructed reactors almost certainly will be operated sooner or later. But the eagerness to begin start-up really rests on an unproved belief that no valid reason exists for delay in the issuance of permanent licenses. Strong arguments that this belief itself is unrealistic are emerging, at last with some documentation, from the continuing agency-citizen confrontations.

The trial-type hearing procedures used in permanent licensing have indeed allowed obstructionism. But hindsight now shows that intransigent intervenors may well have been intuitively right about threats to the environment and possible dangers in reactor operations, even though they were unable at the time to support their intuitions with scientific data hidden away in AEC and nu-

intention to lower licensing standards, temporary licensing may in fact have that effect. This conclusion survives congressional protestations to the contrary because of a curious omission in preliminary hearings and discussions. Neither in committee nor on the floor of Congress did proponents confront the question of what action was likely to be taken when the "emergency" was over. Would a reactor operating at full power and feeding electricity into the power grid actually be shut down if the permanent licensing dispute remained unsettled? Representative Flood (D.-Pa.) probably gave the answer when he asked rhetorically, "What is more permanent in Washington than a temporary building . . . or a temporary license?" 30 CONG. Q. 917 (1972).

clear industry documents. At first obstructionism was the only tactic intervenors could employ while they sought to build up financial and technical resources for a more direct and substantial challenge to over-hasty employment of nuclear power. In conflicts between laymen and experts procedural safeguards are weapons of the weak, and they have been zealously employed. "Expedited procedures" are the obvious response for closing the procedural avenues that have made the AEC and other agencies vulnerable, particularly under NEPA.

It seems probable that successful court challenges can be made against the new procedures, provided that the challenges are not brought at a time of genuine and acute power shortages. The outcome of such actions may determine whether or not a relative handful of reactors are licensed sooner rather than later. But major safety and environmental decisions will not come out of temporary licensing contests, for the center of conflict between the public and the AEC over the role of nuclear power is shifting. Plant-by-plant disputes are losing importance relative to industry-wide reviews such as the ECCS controversy and the impending clashes over high-level radioactive waste disposal. This shift has been made possible by the growing experience and capability of the intervenors as scientists have joined their ranks and as the public has become more sensitive to abuse of technology. The change is welcome, for it should lead to a more rational identification of the really significant safety and environmental issues.

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INTERPRETING THE ANTI-BUSING PROVISIONS OF THE EDUCATION AMENDMENTS OF 1972

Introduction

Ever since the decision in *Swann v. Charlotte-Mecklenburg Board of Education*,[1] which approved the use of transportation of students as "one tool of school desegregation," a legislative confrontation with the issue of court ordered busing of elementary and secondary school children has been inevitable. Major federal court decisions throughout the country in 1971 and 1972[2] ordering transportation of students to achieve desegregation served to heighten the political tension. Thus, in the second session of the Ninety-second Congress, during an election year, an attack on busing was launched from the floors of the House and Senate in the form of amendments to the Education Amendments of 1972.[3] The result was title VIII of the Education Amendments.[4]

Title VIII is a bad statute. It is an emotional and thoughtless response to the difficult issue of how constitutionally required desegregation of public school systems can be carried out. While the statute conveys congressional disapproval of the transportation of children to achieve desegregation, it fails dramatically to provide guidance to courts and agencies as to how the law should be implemented.

Nevertheless the executive and the judiciary have to implement and enforce even bad statutes while they are on the books. This Comment does not attempt to arrive at a solution to the underly-

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1 402 U.S. 1 (1971) [hereinafter referred to in the text as *Swann*].

2 Denver, Colorado: Keyes v. School District No. One, 303 F. Supp. 279 (D. Colo. 1969), *preliminary injunction modified*, 303 F. Supp. 289, *tried on merits enforcing court order*, 313 F. Supp. 61, 313 F. Supp. 90, *rev'd in part*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 92 S. Ct. 707 (1972) [hereinafter referred to as *Keyes*].

Indianapolis, Indiana: United States v. Board of School Commissioners, 332 F. Supp. 655 (S.D. Ind. 1971).

Detroit, Michigan: Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970), *denial of preliminary injunction aff'd*, 438 F.2d 945 (6th Cir. 1971), deferral of motion to join contiguous suburban school districts, 338 F. Supp. 582 (E.D. Mich. 1971) enforcing court desegregation plan, 345 F. Supp. 914 (E.D. Mich. 1972).

Richmond, Virginia: Bradley v. School Board of the City of Richmond, 338 F. Supp. 67 (E.D. Va. 1972), *order stayed in part*, 456 F.2d 6 (4th Cir. 1972).

3 Pub. L. No. 92-318 (codified at scattered sections of 20 U.S.C.A.).

4 Pub. L. No. 92-318, tit. VIII, §§ 801-806, 20 U.S.C.A. §§ 1651-1656 (Supp. Oct. 1972) [hereinafter cited as Title VIII].

ing problems of policy presented by the statute. Rather, it attempts to thread a way through the two most muddled sections of the statute, §§ 802 and 803.[5]

Sections 802 and 803, with the rest of title VIII, do not attempt to prohibit busing in all circumstances.[6] Rather they attempt to discourage the use of it as a judicial remedy and to prolong desegregation litigation. Section 802 attempts to prohibit the use of federal funds for busing programs where the goal of such programs is to overcome racial imbalance or to desegregate schools. Similarly, the section prohibits federal officers from pressuring state officials into using state and local funds for similar purposes. Section 803 provides for automatic staying of any federal court order which requires transportation of students in order to achieve racial balance until all appeals have been exhausted.

I. Section 802 Funding of Busing Programs

Section 802 of title VIII purports to curtail the funding of racially motivated transportation programs. Subsection (a) prohibits the use of federal funds,[7] appropriated for general education programs,

> for the transportation of students or teachers. . . in order to overcome racial imbalance in any school or school system, or. . . in order to carry out a plan of racial desegregation of

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5 Title VIII, §§ 802, 803, 20 U.S.C.A. §§ 1652, 1653 (Supp. Oct. 1972). While title VIII's other provisions raise related questions of policy, they do not present problems of interpretation other than those raised in §§ 802 and 803 and therefore are not discussed in this Comment.

6 Section 804 permits a parent of a child transported to a public school in accordance with a court order to re-open or intervene in further implementation of the order if the time or distance is detrimental to the child's health or education. Title VIII § 804, 20 U.S.C.A. § 1654 (Supp. Oct. 1972). This proviso, which is in § 802, is dealt with in Part I C *infra*. Section 805 provides that the rules of evidence required to be used to prove racial discrimination in school assignments shall be uniform throughout the United States. Title VIII, § 805, 20 U.S.C.A. § 1655 (Supp. Oct. 1972). Section 806 provides that the powers given to the Attorney General of the United States to sue for desegregation under § 407(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000(c)6(A) (1970), are to be applied uniformly everywhere in the United States. Title VIII, § 806, 20 U.S.C.A. § 1656 (Supp. Oct. 1972).

7 Subsection 802(c) indicates that § 802 pertains to any "program in which the General Education Provisions Act applies." Title VIII, § 802(c), 20 U.S.C.A. § 1652(c) (Supp. Oct. 1972).

> any school or school system, except on the *express written voluntary request* of appropriate local school officials.[8]

Subsection (b) provides that no federal officer, agent, or employee may

> (1) urge, persuade, induce or require any local educational agency . . . to use any funds derived from State or local sources for any purpose, *unless constitutionally required,* for which Federal funds . . . may not be used, as provided. . . [in subsection (a)], or (2) condition the receipt of Federal funds under any Federal program upon any action by any state and local public officer or employee which would be prohibited by clause (1) on the part of a Federal officer or employee.[9]

Further, despite the voluntariness exception to 802(a) and the "constitutionally required" exception to 802(b), the use of federal funds or federal pressure is absolutely prohibited where a transportation plan involves travel times or distances long enough to endanger a child's health or education.[10] Plans which would send children to schools "substantially inferior" to those that they would otherwise be assigned to on a nondiscriminatory geographic basis are likewise totally prohibited.[11]

A. *802(a): The "Voluntary Request" Exception*

The provision in § 802(a)[12] allowing the use of federal funds for transportation programs upon an "express written voluntary request" is apparently aimed at continuing the funding of transportation programs desired by local communities while prohibiting the funding of programs imposed on communities by federal courts or administrative agencies. If the words are taken literally, however, the request itself could always be considered voluntary, since normally a court will not order that a request for funds be made. Rather it will order transportation of students or teachers; local school officials will then request federal funds in order to replenish local revenues which pay for court ordered transporta-

8 Title VIII, § 802(a), 20 U.S.C.A. § 1652(a) (Supp. Oct. 1972) (emphasis added).
9 Title VIII, § 802(b), 20 U.S.C.A. § 1652(b) (Supp. Oct. 1972) (emphasis added).
10 Title VIII, §§ 802(a), (b) 20 U.S.C.A. §§ 1652 (a), (b) (Supp. Oct. 1972).
11 *Id.*
12 Title VIII, § 802(a), 20 U.S.C.A. § 1652(a) (Supp. Oct. 1972).

tion programs.[13] To call such action "voluntary" is to emasculate the prohibitions of the statute.

Another interpretation is more reasonable. Any request for funds to implement a court ordered transportation program designed to implement a desegregation or racial balance order which was opposed by the requesting agency should be considered involuntary. True, a federal court will not order a request for funds, but its order may require a costly implementation program. Given limited state resources, such a program may not be absorbed easily by the state. For all practical purposes, the state has no choice but to seek federal assistance. It is this indirect coercion which prompts the request, and the request should not therefore be deemed voluntary.

Under this interpretation, the only programs which would qualify under the voluntariness exception would be normal, nonracially motivated, school busing programs. There are a few cases in which the state itself through administrative action or statute has decided to institute transportation programs for racial balance or desegregation purposes.[14] Such cases would also be covered by the exception, for it is reasonable to allow federal funding where a state, by its own political process, can rectify the decision if its residents disapprove.

B. *Section 802(b): The "Unless Constitutionally Required" Exception*

The "unless constitutionally required" exception[15] to the general prohibition of federal pressure on state officials to use local funds for transportation programs is the most obscure phrase in the entire title, as it leaves unanswered two important questions: What is constitutionally required? Who is to make this determination?

1. What Is Constitutionally Required?

The traditional learning is that if a particular remedy is ever constitutionally required it would be only where a constitutional

13 *See* 118 CONG. REC. S2875 (daily ed. Feb. 29, 1972).

14 *See, e.g., In re* Vetere v. Allen, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77 (1965).

15 Title VIII, § 802(b), 20 U.S.C.A. 1652(b) (Supp. Oct. 1972).

right is being violated and the remedy is necessary to rectify it.[16] It follows that if a transportation program is to be "constitutionally required," unconstitutional segregation must exist and the remedy of transporting children must be necessary to rectify the situation.

The Supreme Court has not fully dealt with either the right or the remedy issue. The Court has held that segregation imposed by state law is unconstitutional.[17] Moreover, lower courts have held that less direct forms of state involvement than overt state laws, such as selective school siting and zoning, can lead to constitutional violations.[18] Finally, it is possible, though not probable given the tenor of *Swann*,[19] that the Supreme Court could hold certain instances of de facto segregation unconstitutional. *Swann* has not ruled out such a holding. The issues of whether de facto segregation or indirect state involvement in segregation are unconstitutional are presently before the Court.[20] Thus, exactly what constitutes a constitutional violation is still uncertain.

The remedy issue is equally unclear. *Swann* indicated that a district court, faced with a constitutional violation and a failure of local authorities to remedy it on their own, has broad discretion

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16 *See generally* H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. 4 (1953). *But see*, Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 258, 259 (1971). Professor Cox suggests that remedies of constitutional violations should be solely in the discretion of Congress as specific remedies are not part of the Constitution.

17 *E.g.*, Brown v. Board of Education, 347 U.S. 483 (1954).

18 *See, e.g.*, Bradley v. Milliken, 443 F.2d 897 (6th Cir. 1970), *denial of preliminary injunction aff'd*, 438 F.2d 945 (6th Cir. 1971), *deferral of motion to join contiguous suburban school districts*, 338 F. Supp. 582 (E.D. Mich. 1971), *enforcing court desegregation plan*, 345 F. Supp. 914 (E.D. Mich. 1971), and Bradley v. School Board of the City of Richmond, 338 F. Supp. 67 (E.D. Va. 1972), *order stayed in part*, 456 F.2d 6 (4th Cir. 1972).

19 "This case and those argued with it arose in states having a long history of maintaining two sets of schools in a single system deliberately operated to carry out a governmental policy to separate pupils in schools soley on the basis of race. That was what Brown v. Board of Education [347 U.S. 483 (1954)] was all about." 402 U.S. at 5-6. "It does not follow that the communities [in which dual school systems have been broken down] will remain demographically stable . . . but in the absence of a showing that either the school authorities or some other agency of the state has deliberately attempted to fix or alter demographic patterns to affect the racial composition of schools further intervention by a district court should not be necessary." 402 U.S. at 31-32.

20 Keyes v. School District No. One. 303 F. Supp. 279 (D. Colo. 1969), *preliminary injunction modified*, 303 F. Supp. 289, *tried on merits enforcing court order*, 313 F. Supp. 61, 313 F. Supp. 90, *rev'd in part*, 445 F.2d 990 (10th Cir. 1971), *cert. granted*, 92 S. Ct. 707 (1972).

in fashioning equitable remedies.[21] Specifically approved were the transportation of students,[22] temporary racial quotas or guidelines[23] and alternative attendance zones.[24] The *Swann* court ordered desegregation forthwith, but no particular remedy was specified.[25]

The only Supreme Court ruling on the power of a legislature to limit this broad discretion is in *North Carolina State Board of Education v. Swann*[26] where the Court struck down a state statute[27] prohibiting school assignments based on race, or for the purpose of creating a racial balance or ratio in the schools, and involuntary busing of students for these purposes. The Court held that such flat prohibitions were unconstitutional since they would ". . . hamper the ability of local authorities to effectively remedy constitutional violations."[28] Thus the Court left open the possibility of finding situations where busing or racially motivated assignments would be necessary to remedy a constitutional violation, and therefore constitutionally required.

It follows that Congress cannot absolutely prohibit a court from issuing transportation orders for desegregation. It does not follow that Congress cannot declare transportation programs the least desirable solution and call upon courts to use them only as a last resort.[29] Thus, Congress may have found transportation of students for racial reasons so repulsive that it deemed it constitutionally required only where a constitutional violation exists and where no other remedy or combination of remedies will rectify it forthwith. And while it did not order courts to follow this procedure, it expressed its feeling in Section 802(b). This then is the interpretation which should be given to "constitutionally required" in § 802(b). It is a workable one, and if any sense is to be made out of § 802(b), it should be an interpretation that is both workable

21 402 U.S. 1, 15 (1971).
22 *Id.* at 29-31.
23 *Id.* at 22-25.
24 *Id.* at 27-29.
25 *Id.* at 14.
26 402 U.S. 43 (1971).
27 The North Carolina statutory provisions at issue in the case were N.C. GEN. STAT. §§ 115-176.1 (Supp. 1969).
28 402 U.S. at 46.
29 *See* Note, *The Nixon Busing Bills and Congressional Power*, 81 YALE L.J. 1542 (1972).

and consistent with judicial precedent and the statute's broad policies.

2. Who Determines What is Constitutionally Required?

Arguably, § 802(b) means that HEW cannot pressure state authorities to institute transportation programs until and unless a federal court rules on the constitutional issues.[30] This interpretation of § 802(b) may be inferred from the layman's notion that courts decide constitutional questions. Furthermore, if Congress was trying in § 802(b) to limit the discretion of HEW under title VI of the Civil Rights Act of 1964,[31] it may have intended to do so by requiring HEW to defer to the courts' determination of what rights and remedies are constitutionally required.

The difficulties with this interpretation are three-fold and suggest that the agencies concerned, as well as the courts, are free to decide when transportation is constitutionally required. First, without a decision by a federal court, HEW would be frozen from exercising its mandate under title VI of the Civil Rights Act of 1964 to "effectuate the provisions of [the Act] . . . by . . . termination of or refusal to grant or continue [education funds] . . . ."[32] Congress did not change this mandate explicitly in title VIII of the Education Amendments if at all. Second, while courts must decide whether a constitutional violation exists before it orders a remedy, it does not follow that a particular transportation remedy ordered by a court is also "constitutionally required" since *Swann* gave courts broad discretion in fashioning remedies.[33] Third, HEW is competent to determine constitutional violations and

30 An even more restrictive reading is that § 802(b) halts all action by the federal government in a given case involving involuntary transportation of students until the case has been resolved by the highest court which will hear it. This contention could be argued starting from the premise that § 803's policy of not upsetting the status quo until all appeals have been taken, may help define the phrase "unless constitutionally required" in § 802(b). The arguments which follow in the text reject this contention as well as the more plausible hypothesis that HEW cannot act to bring about busing programs in the absence of a judicial decision.

31 28 U.S.C. § 1447(d); 42 U.S.C. §§ 1971, 1975(a)-(d), 2000(a)-(h) (1970). While the Civil Rights Act of 1964 applies to all federal agencies this Comment focuses on its application to HEW.

32 42 U.S.C. § 2000(d)(1) (1970).

33 See text at notes 21-25 *supra*.

remedies under the Civil Rights Act of 1964, which gave HEW and other federal agencies the authority to review local situations and determine whether discrimination exists and whether satisfactory action has been taken to remedy it.[34] If satisfactory action has not been taken, HEW has the power to terminate or suspend federal education funds.[35] The review machinery provides notice to the recipient of the funds, a hearing and a finding that voluntary compliance will not occur before funds are cut off.[36] All decisions by the hearing officer are subject to judicial review.[37] Furthermore, there is language in *Swann* which indicates that the standards for determining whether discrimination exists for purposes of title VI of the Civil Rights Act of 1964 are no narrower than those used by federal courts in determining whether unconstitutional segregation exists,[38] and HEW has judicial decisions to guide it. Thus a determination of constitutional violation and of the need for transportation is within HEW's present statutory discretion. Judicial review will be available to rectify misapplication of constitutional principles.

It is therefore concluded that HEW itself can make the "constitutionally required" determination. A comment during the debate on 802(b) by Senator Hugh R. Scott (R.-Pa.), a co-sponsor of this provision, supports this conclusion:

> The phrase unless "constitutionally required" preserves the federal role in enforcing the 14th Amendment, while clarifying that *federal agencies* are not permitted to go beyond constitutional requirements in implementing Title VI of the Civil Rights Act. (emphasis added)[39]

3. Possible Consequences of HEW Determining What Is Constitutionally Required

In carrying out its responsibilities, HEW can face three situations vis-à-vis the federal courts. First, it might receive a request

34 42 U.S.C. § 2000(d)(1) (1970). *See also* 45 C.F.R. §§ 80.1-80.13 (Supp. 1972).
35 42 U.S.C. § 2000(d)(1) (1970).
36 *Id.*
37 42 U.S.C. § 2000(d)(2) (1970).
38 *See* 402 U.S. 1, 17-18 (1971).
39 118 CONG. REC. S. 2541 (daily ed. Feb. 24, 1972).

for funds from a state agency whose district or districts have not been the subject of court action with respect to segregation. In such a case § 802(b) seems to require that HEW carry out its title VI responsibilities by determining whether a consitutional violation exists based on its own interpretation of the facts and judicial precedent and by deciding whether a transportation program is the only viable way to remedy the violation forthwith.

Second, if HEW faces a request for funds from a state agency which is under a transportation order from a court, the issue is whether HEW is bound to consider that order as "constitutionally required." Since HEW was not a party to the action and is determining a different issue involving funding, it should not be bound by a federal court's finding that a given set of facts constitutes a constitutional violation or that transportation is the only viable remedy.[40] Where a court has fashioned a remedy which includes transportation, it does not necessarily decide that the transportation itself is "constitutionally required," since *Swann* declares that a federal court's broad discretion to fashion remedies is part of its equity powers.[41] Thus the agency should be allowed to decide both the violation and remedy questions itself and indeed must if the court has not decided that the remedy is the only viable one. If HEW makes a finding different from the court, a situation is created where a school district is under a federal court order to bus, while the school district has an HEW grant of federal funds without conditions that state funds be used to implement the court order.[42]

A third situation HEW can face is that in which a federal court has either ruled that a constitutional violation does not exist or

40 While HEW is likely to give careful consideration to any court opinion that may effect it, a federal agency is not necessarily bound by a court conclusion on an issue where the agency was not a party. *Cf., e.g.*, Harold S. Divine, 59 T.C. — No. 15 (Oct. 25, 1962) (In a tax case where the Internal Revenue Service was a party, it was not necessarily bound by a court's interpretation of a statute, and could relitigate the issue).

41 402 U.S. at 15-16 (1971).

42 Both decisions could be affirmed on appeal since they are not inconsistent. The decision by HEW deals with the granting of general education funds; the decision by the district court deals with a busing order to rectify what it considers a constitutional violation. In such a situation local school officials might be cited for contempt for not implementing the order, but they would not be required to use state funds to support the transportation programs, under a threat of losing federal general education funds.

has not ordered transportation to rectify a violation. Again, if HEW was not a party in the case where the court order was issued, it should not be bound by the finding that no constitutional violation exists. Hence, HEW could theoretically require a state to use state funds for busing, even though a court has not ordered such a remedy or even found a constitutional violation.

The final issue is whether HEW must condition funds on the institution of a transportation program if it finds the transportation remedy "constitutionally required" in a given case. Section 802(b) says only it may not condition funds unless such transportation is constitutionally required.[43] Since 802(b) does not cover this situation, HEW is still bound under title VI of the Civil Rights Act of 1964 to use its funding power to effectuate that Act, that is, to condition, terminate or suspend funds as required under the circumstances.[44]

C. *802(a) and (b): Health and Education Exceptions*

Even where the use of federal funds or coercion is otherwise lawful, §§ 802(a) and (b) both contain two very vague additional provisos. The first prohibits such funding or coercion where the time or distance involved in the proposed transportation plan is "so great as to risk the health of the children or significantly impinge on their education."[45] The second prohibits federal funding or coercion where the proposed transportation plan involves transferring children to "substantially inferior" schools.[46]

1. The "Time or Distance" Limitation

The "time or distance" limitation reflects congressional awareness of dictum in *Swann* which states, "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."[47]

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43 Title VIII, § 802(b) U.S.C.A. § 1652(b) (Supp. Oct. 1972).

44 42 U.S.C. § 2000(d)(1) (1970).

45 Title VIII, § 802(a), (b), 20 U.S.C.A. 1651(a), (b) (Supp. Oct. 1972).

46 *Id.*

47 402 U.S. 1, 30-1 (1971).

As written into title VIII this limitation presents at least three problems. First, the "time or distance" limitation under § 802(a) appears to authorize HEW interference with state policy decisions. As discussed above,[48] § 802(a) permits federal education funds to be applied to transportation programs only if such funds are voluntarily requested by a state. Presumably, if a state of its own accord institutes a busing program, it has already weighed in its policy decision any adverse effects on health and education, and it has determined either that there are no adverse effects or that they are outweighed by the need for the program. But under § 802(a), must HEW make its own independent determination as to the health and education effects of the state's voluntary busing program? While health and education have traditionally been thought of as state concerns, this provision seems to authorize HEW to undertake an independent review, given the tenor of the statute and the fact that federal funds are involved.

Second, the time or distance limitation in 802(b) may be superfluous. Such pressure is prohibited anyway unless transportation is "constitutionally required." *Swann* indicates that busing ought not be so required where the health or education is endangered, and the statute does no more than restate as law this Supreme Court dictum.

Third, although the statute incorporates the *Swann* dictum, it does not provide any standards for determining when "time or distance" significantly impinges on students.[49] It would have been appropriate and responsive for Congress to set such standards and to authorize a federal agency to elaborate these standards. In the absence of congressional guidance, these questions will be resolved on an ad hoc basis. Ironically, during the title VIII debates Con-

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48 See text at Part I A *supra*.

49 In Hart v. County School Board of Arlington County, Va., 329 F. Supp. 953, 955 (E.D. Va. 1971) the district court held that an average busing time from home to school of twenty-two minutes, where the maximum was not more than twenty-nine minutes was permissible under the *Swann* test. By comparison, the district court in Calhoun v. Cook, 332 F. Supp. 804, 808 (N.D. Ga. 1971), stated that the "remedy of mass bussing [sic] . . . [was not] deemed required under Swann" where as here, "distance alone would require 40 minutes or more for each child transported. . . ." *See also* Winston-Salem/Forsyth County Board of Education v. Scott, 404 U.S. 1221, 1226 (1971).

gress frequently criticized judicial and administrative abuse of discretion in this area.[50]

2. The Educational Quality Limitation

Section 802 also prohibits federal funding or coercion to institute transportation programs where

> the educational opportunities available at the school to which it is proposed that any . . . student be transported will be substantially inferior to those opportunities offered at the school to which such student would otherwise be assigned under a nondiscriminatory system of school assignments based on geographic zones established without discrimination. . . .[51]

This language was drafted to calm the concern of parents whose children are currently attending "good" schools and might be bused to "poor" schools. Again the failure of Congress to establish guidelines or standards will result in confusing determinations which are not uniform. Unquestionably there are serious problems in setting such standards due to the difficulties of measuring the "quality" of schools.[52] Even given some elaborate quantification of all relevant factors, no one formula for deciding overall quality is adequate. Yet Congress has even failed to list those factors it deems appropriate for HEW to take into account. Traditional tools of measuring quality, while not accepted as determinative, at least would give a court or agency some guidance as to which kind of data it should give weight to in making the determination. If for example, Congress wanted teacher salary and experience, physical facilities, achievement test or the like to be used as yardsticks it should have said so.[53]

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50 *See, e.g.*, 118 CONG. REC. S2865 (daily ed. Feb. 29, 1972) (remarks of Senator Allen, D-Ala.); 117 CONG. REC. H10,424 (daily ed. Nov. 4, 1971) (remarks of Representative William Steiger, R.-Mich.).

51 Title VIII, § 802, 20 U.S.C.A. § 1652 (Supp. Oct. 1972).

52 The Coleman Report, for example, used school facilities, achievement tests, social class, integration, environment, teacher education and several other factors to determine the "quality" of schools. None of these criteria provided usable correlations with "quality" educational systems. *See* Mosteller & Moynihan, *A Pathbreaking Report*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 1 (Mosteller & Moynihan eds. 1972).

53 Some legislative consideration has been given to defining equality of educational opportunities. *See, e.g.*, H.R. 16484, 91st Cong., 2d Sess. (1970); 118 CONG. REC. S2553 (daily ed. Feb. 24, 1972). Some such standards ought to have been used in defining "substantially inferior" in title VIII.

A second, operational problem is that of determining what school should serve as the basis for comparison in applying § 802. According to the language of the section the school to which a student is to be bused is to be compared with that school "to which [the] student would otherwise be assigned under a nondiscriminatory system of school assignments based in geographic zones established without discrimination on account of race. . . ."[54] Where de jure segregation has been found, as it has in all court-ordered busing cases to date,[55] the standard may not be the school the student is currently attending, since, by definition, that school assignment has been made in a discriminatory manner.[56] Hence a court must not only compare schools, but also determine which school the student would have been assigned to had the discrimination not been present.

First a court would determine whether the school the student is presently attending (*A*) is the school to which a student would be assigned (*B*) under a non-discriminatory school system. If it is, the court must simply compare the school to which the student is proposed to be transported (*C*) with *A*. If not, the court must compare *C* not with *A*, but with *B*. If *C* is worse than *B* then the statute prohibits busing from *A* to *C*. But in many cases *C* is the same as *B* so busing from *A* to *C* would be permitted under a literal reading of the statute even though *C* may be worse than *A*. Likewise, if *C* is better than *B*, but worse than *A*, the words again allow busing from *A* to *C*. These literal interpretations however, undermine the intent of the law to allow only busing to better schools.

It is quite likely that courts will avoid these semantic problems and just decide whether *C* is "substantially inferior" to *A* and only permit busing to what the court deems a better school.

Senator Stennis (D.-Miss.) thought that such "one-way busing" to better schools would result in "the busing of black children but not of white" and felt it would be a "flagrant violation of the equal protection clause and would not last two minutes before the

54 Title VIII, §§ 802(a), (b), 20 U.S.C.A. § 1652(a), (b), (Supp. Oct. 1972).

55 *See* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 29-32 (1971).

56 *See, e.g.*, Green v. County School Board, 391 U.S. 430 (1968).

Supreme Court."[57] There is a serious question as to whether the one-way busing remedy, when it places the "burdens" of a racially motivated transportation scheme disproportionately on one group, is constitutional. While this remedy has been permitted by lower courts, it has not been considered by the Supreme Court. In *Norwalk CORE* v. *Norwalk Board of Education*,[58] the District Court for Connecticut held that the "burdens", if any, of such a plan "actually stem[med] from a valid administrative decision against the continued location and building of educational facilities in areas of underprivileged minority group concentration because of the detrimental effects on quality education which might result."[59] Although there was some indication that the result in *Norwalk CORE* was due in part to the failure of plaintiffs' attornies to introduce adequate evidence concerning the alleged psychological effects which busing and attendance at a non-neighborhood school may have had upon the minority group children,[60] the same holding has been reached elsewhere.[61] It seems likely that the remedy of "one way" busing would be approved by the Supreme Court if the school officials were able to demonstrate that improvement in the quality of the children's education was achieved and that the plan moved the school system toward desegregation. It would follow that if such a remedy is not unconstitutional, federal funding of only "one way" busing programs would likewise be upheld.

II. Section 803 Stays of Busing Orders

Section 803, the "Broomfield Amendment,"[62] provides that the effectiveness of any court order "which requires the transfer or transportation of any student or students . . . for the *purposes of*

57 118 Cong. Rec. S2871 (daily ed. Feb. 29, 1972).

58 298 F. Supp. 213 (D. Conn. 1969).

59 *Id.* at 223. The court further stated: "Since, on its face, the action of the Norwalk Board of Education appeared to involve a racial classification which might be said to be 'constitutionally suspect', the Court has given the Board's justification the 'most rigid scrutiny'; and subjected it to 'a far heavier burden of justification' ", citing Hunter v. Erickson, 393 U.S. 385, 392 (1969). 298 F. Supp. 213, 223 (D. Conn. 1969).

60 *See* 5 Harv. Civ. Rights-Civ. L. Rev. 488, 489 (1970).

61 Green v. School Board of City of Roanoke, 330 F. Supp. 674 (W.D. Va. 1971).

62 Representative William S. Broomfield (R.-Mich.) played a prominent role in the passage of § 803.

achieving a balance among students with respect to race . . . shall be postponed until all appeals in connection with such order have been exhausted."[63] This provision was intended by sponsors to solve two problems which result from the current treatment of federal district court busing orders. First, there is a threat of serious disruptions caused by reorganizing school attendance zones pursuant to busing orders coupled with the possibility that these disruptions might be multiplied by the reversal or modification of the orders at the appellate level.[64] Second, because of the present practice of discretionary granting of stays by individual judges, a lack of national uniformity in the treatment of busing has arisen, which some feel takes the form of an anti-South bias.[65]

A. *The Ambiguity Presented by Section 803*

Section 803 presents a problem of how to interpret the phrase "for the purpose of achieving a balance among students with respect to race. . . ."[66] In *Swann*, the Supreme Court stated that "the constitutional mandate to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[67] Nevertheless, the Court noted that the use of mathematical ratios "as a starting point in the process of shaping a remedy" for unconstitutional segregation is "within the equitable remedial discretion" of a federal court.[68] Thus the Court distinguished between racial balance as a goal and as a remedy of desegregation. The specific question, therefore, raised by § 803 is whether a stay may be granted under the section in both de facto segregation cases where racial balance is a goal and de jure segregation cases where racial balance or the appearance of racial balance is a tool in obtaining desegregation,

63 Title VIII, § 803, 20 U.S.C.A. § 1653 (Supp. Oct. 1972) (emphasis added).

64 Senator Stennis referred to the implementation of desegregation plans in Jackson, Mississippi, where "the refusal to grant a stay caused the local school board to retransfer actually hundreds of its students two different times in a single year as one desegregation plan after another was first approved by the district court and then reversed by the court of appeals and yet another plan substituted for it." 118 CONG. REC. S2463 (daily ed. Feb. 24, 1972).

65 118 CONG. REC. S2463 (daily ed. Feb. 24, 1972) (remarks of Senator Stennis).

66 Title VIII, § 803, 20 U.S.C.A. § 1653 (Supp. Oct. 1972).

67 402 U.S. at 24 (1971).

68 *Id.* at 25.

or stated more simply, whether the stay provision reaches all desegregation transportation orders.

If there were not vernacular developing which applies a much broader meaning to "racial balance" than *Swann* did, there would be no need to look beyond the words themselves. But "busing to achieve racial balance" has become a popular expression for any busing order to achieve desegregation. The U.S. District Court for the Eastern District of Tennessee, has observed "[I]t would be to ignore the current use of the English language if the Court were not to acknowledge that the term 'racial balance' has become a popular descriptive appellation applied to all desegregation orders wherein transportation of students is involved as a part of the plan."[69]

The legislative history in the House suggests that the broader meaning was intended. During the House debate over a motion to send to conference the "Education Amendments of 1972" with § 803 included, Representative Broomfield suggested the broadest interpretation. In response to a question concerning whether § 803 would be "equally applicable not only to orders involving forced busing but to desegregation cases generally?", Representative Broomfield answered, "Yes, it would be, in both cases."[70] The broader interpretation was also suggested in the House debate of the conference report. Representative Carl D. Perkins (D.-Ky.), the chairman of the conference committee said that it was his understanding that § 803 "covers district court orders which require the transfer or transportation of students for racial purposes whether the court order is framed in terms of correcting unconstitutional segregation or whether it is framed in terms of 'achieving a balance among students with respect to race.' "[71]

A narrow interpretation, on the other hand, is possible. During Senate debate of the conference report, Senator Javits (R.-N.Y.), said, "I hope that the courts will be persuaded by their own decisions that [the automatic stay provision of § 803] does not extend to court ordered desegregation based upon violations of constitu-

69 Mapp v. Board of Education of Chattanooga, Civ. Action No. 3564, at 3 (E.D. Tenn. Aug. 12, 1972), quoted in Petitioner's Supplemental Brief for Certiori at 8, Drummond v. Acree, No. 72-167 (Sup. Ct. Sept. 8, 1972).

70 118 CONG. REC. H1853 (daily ed. March 8, 1972).

71 118 CONG. REC. H5416 (daily ed. June 8, 1972).

tional rights. . . ."[72] It is true that this statement was made by an opponent of § 803, and there is a traditional reluctance by the courts to give weight to opponents' comments during debate based on fear that opponents will exaggerate the meaning of a statute's provisions in order to persuade others to oppose the bill.[73] However, it should be emphasized that all of the busing amendments to title VIII were floor amendments. The bill has no formal declaration of intent and is generally ambiguous. Given these facts, the legislator's awareness that the phrase was ambiguous should be noticed.

Furthermore, initial judicial holdings under the section indicate that the narrower interpretation, limiting the stay power to de facto cases, may become the accepted view. Three applications for stays under § 803 have been denied by Justices Rehnquist, Douglas and Powell on Circuit. Only Justice Powell has issued an opinion.

B. *Drummond v. Acree*

In *Drummond v. Acree*[74] Justice Powell concluded that § 803 is limited to those busing orders which seek to "achieve a racial balance" as that phrase was used in *Swann*. According to Mr. Justice Powell, § 803 is not applicable to general desegregation orders issued in de jure cases pursuant to *Swann*. Mr. Justice Powell remarked: "[I]f Congress had desired to stay all [busing] orders it could have used clear and explicit language appropriate to that result."[75] Referring to the broad coverage of § 802(a), he stated:

> It is clear from the juxtaposition and the language of these two sections that Congress intended to proscribe the use of federal funds for the transportation of students under *any* desegregation plan but limited the stay provisions of § 803 to desegregation plans that seek to achieve racial balance.[76]

Since the lower courts had held that the order was entered to ac-

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72 118 CONG. REC. S8375 (daily ed. May 24, 1972).

73 *See, e.g.*, Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951).

74 No. A-250 (*In re* Case No. 72-167), Sept. 1, 1972 (Mr. Justice Powell, Circuit Justice), *cert. denied*, 41 U.S.L.W. 3270 (Nov. 13, 1972) [hereinafter referred to in text as *Drummond*].

75 *Id.* at 2.

76 *Id.* (emphasis in original).

complish desegregation in accordance with the mandate of *Swann* and not for the purpose of achieving a racial balance. Mr. Justice Powell held that this case did not come within the limits of the statute and that therefore no stay could be granted pursuant to it.[77]

The applicants in *Drummond* argued that since title VIII was composed of separate floor amendments, none should be construed in connection with other sections of the Education Amendments.[78] But Justice Powell is correct. Congress knew how to say "busing to achieve desegregation" when it wanted to.

The applicants in *Drummond* also maintained that the restrictive interpretation is wrong since it attributes to Congress "the enactment of meaningless and futile legislation."[79] The applicants claimed that the restrictive interpretation would make § 803 applicable only to cases of de facto segregation and that the Court in *Swann* stated clearly that there was no judicial authority for ordering busing in such cases.[80] Mr. Justice Powell gave the section a plausible reading by replying that "Congress may have intended to postpone the effectiveness of transportation orders in 'de facto' cases and in cases in which district court judges have misused their remedial powers."[81] The second reply is not helpful since that allegation can be pinned to any appeal. The first reply needs amplification.

The correct response to applicants' contentions begins with refuting their interpretation of *Swann*. *Swann* did not, as contended, say that federal courts could not or should not order busing in de facto segregation cases. It said that a federal court had no authority to order any desegregation remedies except "as the basis of a constitutional violation. . . ."[82] It did not state that de facto segregation did not constitute a constitutional violation. The Court's only statement limiting a federal court's authority to order busing applied where a state policy alone dictates a racial balance program.[83]

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77 *Id.* at 4.

78 Petitioner's Supplemental Brief for Certiori at 22, Drummond v. Acree, No. 72-167 (Sup. Ct. Sept. 8, 1972).

79 *Id.* at 59.

80 *Id.* at 60.

81 Drummond v. Acree, No. A-250 (*In re* Case No. 72-167) Sept. 1, 1972 (Mr. Justice Powell, Circuit Justice), 3, *cert. denied*, 41 U.S.L.W. 3270 (Nov. 13, 1972).

82 402 U.S. 1, 16 (1971).

83 *Id.* at 16.

This dictum might suggest that the reference in § 803 to "racial balance" refers to instances where states have determined that a mixing of the races is desirable. Such a meaning must be dismissed, however, since as the applicants for a stay suggested in *Drummond*, if the power to issue a stay applies only in instances where the courts have no power to order busing, the section is meaningless and futile.

The more probable meaning of the section is that Congress meant to refer in § 803 to busing which seeks to achieve racial balance in de facto segregation cases, as Justice Powell suggests. Since *Swann* did not rule on whether de facto segregation violates the Constitution, the section can be viewed as an attempt to prevent busing orders in de facto cases where a district court orders a busing remedy. Thus, Congress can be seen as intending to stay these orders until the Supreme Court reaches the de facto issue. Congress could also have had in mind cases such as *Bradley v. Milliken*[84] where new use is made of the term "de jure segregation."

Conclusion

This Comment provides some guidance to courts and agencies in interpreting title VIII of the Educational Amendments. It gives a workable interpretation to the vague expression "unless constitutionally required" which mitigates the effort to limit HEW's use of funding power for civil rights enforcement. It also explains the "voluntary request" exception to the prohibition of using federal funds for busing, and argues for a limited interpretation of the term "racial balance" in the stay provision. Finally, it points out the uselessness of statutory expressions such as "substantially inferior schools" without giving some set of standards to be used in evaluating educational quality.

It is hope that title VIII will be repealed, as it is badly written piecemeal law. If busing legislation is enacted, the Congress owes it to the executive and judiciary to set reasonable and workable

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84 433 F.2d 897 (6th Cir. 1970), *denial of preliminary injunction aff'd*, 438 F.2d 945 (6th Cir. 1971), *deferral of motion to join contiguous suburban school districts*, 338 F. Supp. 582 (E.D. Mich. 1971), *enforcing court desegregation plan*, 345 F. Supp. 914 (E.D. Mich. 1972).

limits on rules as to when busing is to be permitted and when prohibited, facing directly any constitutional problems which come up.

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THE REVENUE SHARING ACT OF 1972: UNTIED AND UNTRACEABLE DOLLARS FROM WASHINGTON

Introduction

Reacting to the Administration's proposal of untied general revenue sharing grants to state and local governments,[1] Wilbur Mills noted, "I have never known the Congress to give money to anybody without retaining some control over the money."[2] Not surprisingly, therefore, the general revenue sharing legislation[3] passed by Congress in October 1972 restricted the uses of shared revenues and required certain minimum standards of fiscal administration[4] of recipient governments. Local governments may only use their revenue entitlements under the Revenue Sharing Act for specified "priority" expenditures.[5] State governments cannot use their entitlements to supplant their current aid efforts out of their own sources to their local governments.[6] Neither local nor state governments may use their entitlements towards the matching local share in federal categorical grant programs.[7] While these conditions are modest compared to the "boilerplate" in other federal grants to state and local governments, they represent at least a minimum expression of congressional control over shared revenues, in service of a federal fiscal interest in how those revenues are spent.

This Comment describes and analyzes the restrictions and administrative controls in the Revenue Sharing Act on the ex-

1 S. 680, H.R. 4187, 92d Cong., 1st Sess. (1971).

2 *Hearings on the Subject of General Revenue Sharing Before the House Comm. on Ways and Means*, 92d Cong., 1st Sess. 169 (1971) [hereinafter cited as *Hearings*].

3 An Act to Provide Fiscal Assistance to State and Local Governments, to Authorize Federal Collection of State Individual Income Taxes and for Other Purposes, Pub. L. No. 92-512, 86 Stat. 919 (1972). Title I, "Fiscal Assistance to State and Local Governments," establishes general revenue sharing and is the sole focus of this Comment. It will be referred to hereinafter as Revenue Sharing Act. Title II, "Federal Collection of State Individual Income Taxes," authorizes state income tax "piggybacking." Title III, "Limitation of Grants for Social Services Under Public Assistance Programs," places a ceiling on federal grants for state public assistance programs under the Social Security Act, 42 U.S.C. §§ 1301-96 (1970).

4 Revenue Sharing Act §§ 121, 123.

5 *Id.* at § 103.

6 *Id.* at § 107(b).

7 *Id.* at § 104.

penditure of general revenue sharing funds by state and local governments. After examining the background of the legislation and the rationale for revenue sharing, this Comment describes the purposes of the conditions placed on the expenditure of shared revenues, the ways in which conditions can be circumvented, the difficulty of detecting circumventions, and the sanctions for violations of the conditions. The Comment concludes that the ineffectiveness of the conditions on the expenditure of shared revenues indicates that revenue sharing is less a fiscal tool for achieving congressionally specified fiscal objectives, than a political instrument for decentralizing governmental power and enhancing local control over government expenditures.

I. Background of the Revenue Sharing Act of 1972

A. *Rationale*

When Walter Heller, head of the Council of Economic Advisors, proposed a comprehensive general revenue sharing plan in the early 1960's,[8] he viewed it primarily as a fiscal tool to dispose of anticipated federal budget surpluses. Unlike tax cuts, general revenue sharing would expend the federal budget surpluses without reducing the size of the public sector, by transferring them to fiscally strapped state and local governments to spend.[9] The initial Heller plan placed no restrictions on the spending of shared revenues, except civil rights and reporting requirements.[10] The details of the revenue sharing plan were not crucial to Heller,[11] as long as the federal surplus was used to "redress the fiscal balance under peacetime conditions."[12]

However, the Vietnam escalation eliminated the anticipated federal surplus. In fact, 1964, the year in which Heller made his plan public, saw a budget deficit of $5.9 billion, and every year

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8 Heilbroner, *The Share-the-Tax Revenue Plan*, N.Y. Times, Dec. 27, 1964, § 6 (Magazine), at 8. The details of the plan were set forth at length in W. Heller, New Dimensions of Political Economy (1967).

9 Heller, *supra* note 8, at 152.

10 *Id.* at 147.

11 *Id.* at 170-71.

12 *Id.* at 118.

but one thereafter produced a deficit.[13] Thus, when President Nixon proposed revenue sharing to Congress as a means of correcting " 'fiscal' mismatch between potential [federal] surpluses and local deficits," in August 1969,[14] he met with little enthusiasm. After a fiscal 1968 budget deficit of $25.2 billion,[15] Congress felt there was simply no revenue to share. The Administration bills[16] died in committee without hearings.[17]

Improved fiscal prospects for state and local governments further weakened the "fiscal mismatch" rationale for revenue sharing.[18] Although a gap between state and local revenues and expenditures was still forecast, economists estimated that it could be closed by a 5 percent increase in state and local tax rates.[19] Professor Musgrave concluded in 1971 that the "basic hypothesis of generalized imbalance — federal excess with state and local deficiency — is invalid."[20]

When President Nixon again proposed revenue sharing to Congress in 1971,[21] therefore, he largely abandoned the original fiscal rationale. Gone were earlier references to "fiscal mismatch" or fiscal disparities among state and local governments. Instead, he presented revenue sharing as a political instrument for strengthening local control over government expenditures. Now the primary theme was a "New American Revolution"[22] which would turn government resources and power back to the people. State and local governments would receive more money from Washington without the myriad strings and red tape which threatened to

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13 BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 373 (1971). On the "disappearance" of the federal budget surplus, see C. SCHULTZE, E. FRIED, A. RIVLIN, & N. TEETERS, SETTING NATIONAL PRIORITIES: THE 1973 BUDGET 394 *passim* (1972).

14 TAX-SHARING PROPOSAL — MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. No. 148, 91st Cong., 1st Sess. (1969).

15 BUREAU OF THE CENSUS, *supra* note 13, at 373.

16 S. 2948, H.R. 13982, 91st Cong., 1st Sess. (1969).

17 Bonafede, *Revenue Sharing Report/The Nixon Plan's Premise: America's Federal System Is Not Working*, 3 NAT'L J. 703, 704 (1971).

18 Musgrave & Polinsky, *Revenue Sharing: A Critical View*, 8 HARV. J. LEGIS. 197, 201 (1971).

19 *Id.*

20 *Id.* at 204.

21 117 CONG. REC. 165, 167 (1971) (State of the Union Address of President Richard Nixon).

22 *Id.* at 168.

choke the governments participating in federal categorical grant programs.[23]

Despite the shift in emphasis from the primarily fiscal to the decentralization rationale, the 1971 Administration proposal[24] appeared to have no better chance of reaching the floor of Congress for a vote than the 1969 proposal. Wilbur Mills, Chairman of the House Ways and Means Committee which would be responsible for reporting the Administration bills, was opposed to the concept of revenue sharing.[25] He reasoned that general revenue sharing would have to be financed with program cuts or tax increases, the burden of which would fall disproportionately on the large urban states.[26] In addition, Representative Mills was unwilling to see the responsibility for raising revenues separated from the responsibility for spending them.[27]

But three factors combined to overcome Representative Mills' opposition. First, despite the disappearance of the federal budget surplus, a new imbalance argument was increasingly stressed by economists.[28] Wide disparities between state and local revenue capacities and revenue needs characterized the state and local fiscal system.[29] Revenue sharing was a means for reducing these disparities by intercommunity transfers of income.[30] Second, state and local governments mounted an active lobbying campaign for shared revenues,[31] with telling effect on a Congress approaching the 1972 election. Third, this lobbying effort came to a head just as Representative Mills began testing the viability of his own presidential candidacy, making him more responsive than ever before to some form of revenue sharing.[32]

As a result, the Ways and Means Committee reported a new

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23 *Id.* at 167.

24 S. 680, H.R. 4187, 92d Cong., 1st Sess. (1971).

25 117 CONG. REC. 508 (1971).

26 *Id.* at 503-04.

27 *Id.* at 505.

28 Musgrave & Polinsky, *supra* note 18, at 204.

29 Thorow, *Aid to State and Local Governments*, 23 NAT'L TAX J. 23 (1970).

30 Musgrave, *Economics of Fiscal Federalism*, 10 NEB. J. ECON. & BUS. 2, 9 (1971).

31 Cottin, *Revenue Sharing Report/Governors and Legislators Campaign for More Help From Washington*, 3 NAT'L J. 761 (1971).

32 Glass, *Mills' Panel Devising Alternative to Nixon's Revenue-Sharing Plan*, 3 NAT'L J. 1460 (1971).

revenue sharing bill, H.R. 14370,[33] on April 26, 1972, with its chairman's endorsement. The bill passed the House by a vote of 274 to 122,[34] over the strenuous objections of Representative Mahon, Chairman of the Appropriations Committee, who had been by-passed in the revenue sharing appropriation process.[35] It was then referred to the Senate Finance Committee which changed the formula by which the funds were to be distributed[36] and eliminated a House restriction of shared revenues to certain "high priority" expenditures.[37] On September 12, 1972, the Senate passed the modified bill by a vote of 63 to 20.[38] A conference committee resolved the differences in distribution formulas by letting each state choose the formula by which it received the largest amount[39] and restored an expanded list of priority expenditures to which state and local governments are restricted.[40] The amended bill was passed by Congress on October 13, 1972,[41] and signed into law by the President one week later.[42]

The provisions of the Revenue Sharing Act indicate only a qualified acceptance by Congress of the decentralization rationale for revenue sharing. Thus Congress has retained control over the financing of revenue sharing under the Revenue Sharing Act. The Administration proposal would have financed revenue sharing by a fixed percentage of federal individual income tax revenues,[43] taking revenue sharing permanently out of congressional control, and providing regular and automatic increases of shared revenues as long as federal income tax collections increased. Instead, $30,226,840,000 is now appropriated[44] for payments to state and local governments in seven "entitlement periods" between January 1, 1972, and December 31, 1976.[45] Congress will have an op-

33 H.R. 14370, 92d Cong., 2d Sess. (1972).
34 118 CONG. REC. H5988-89 (daily ed. June 22, 1972).
35 118 CONG. REC. H5607-08 (daily ed. June 14, 1972).
36 S. REP. NO. 1050, 92d Cong., 2d Sess., pt. 1, at 12-13 (1972).
37 *Id.* at 16.
38 118 CONG. REC. S14372 (daily ed. Sept. 12, 1972).
39 H.R. REP. NO. 1450, 92d Cong., 2d Sess., pt. 1, at 23-24 (1972).
40 *Id.* at 21-22.
41 118 CONG. REC. S18025 (daily ed. Oct. 13, 1972).
42 N.Y. Times, Oct. 21, 1972, at 1, col. 4.
43 S. 680, § 301, 92d Cong., 1st Sess. (1971).
44 Revenue Sharing Act § 105(b).
45 *Id.* at § 141(b).

portunity to reconsider revenue sharing in 1976, when the appropriations are exhausted.

The funds are distributed among the states by a complicated five-part formula,[46] originated by the House, or a three-part formula,[47] originated by the Senate, whichever gives a state the higher amount. The House formula allocates the funds on the basis of population, relative income, general tax effort, urbanized population, and state income tax effort,[48] while the Senate formula only takes the first three factors into consideration.[49] Of the total allocated each state, one-third is kept by state government[50] and the remainder goes to local governments.[51] Separate distribution formulas govern the distribution of the latter among county governments and local governments within each county.[52] The complexity of the formulas is probably more a reflection of Congress' intense concern with the dollar figure next to each state and congressional district than of any empirical effort to "equalize" the fiscal circumstances of state and local governments.[53] But at least now that the formulas are fixed, the funds will be distributed mechanically, and the distribution has been removed from the political arena.

It is the restrictive provisions of the Revenue Sharing Act which

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46 *Id.* at § 106(b)(3).
47 *Id.* at § 106(b)(2).
48 *Id.* at § 106(b)(3).
49 *Id.* at § 106(b)(2).
50 *Id.* at § 107(a).
51 *Id.* at § 108(a). The intrastate distribution formula, allocating one-third of a state's entitlement to state government corresponds roughly to the average state government share of state and local government expenditures: 37 percent. BUREAU OF CENSUS, DEP'T OF COMMERCE, GOVERNMENT FINANCES IN 1969-70, at 21 (1971). But this average disguises a wide variation among the states in the percentage of direct state and local government expenditures accounted for by state governments. State government accounted for only 23 percent of such expenditures in New York in 1969-70, while accounting for 50 percent or more in 14 states, ranging to a high of nearly 80 percent in Hawaii. *Id.* Thus, the one-third-two-third allocation within each state under the Revenue Sharing Act in many instances bears no relationship to the existing allocation of expenditure responsibilities. The result is that local governments in many states will receive a relative windfall, at the expense of state governments burdened with the bulk of non-federal expenditure responsibilities.
52 Revenue Sharing Act § 108.
53 Ways and Means Committee member James Corman, describing how the House formula was reached, explained, "We finally quit, not because we hit on a rational formula, but because we were exhausted. And we finally got one that almost none of us could understand at the moment. We were told that the statistics were not available to run the print on it. So we adopted it. . . ." 118 CONG. REC. H5849 (daily ed. June 22, 1972).

best demonstrate Congress' qualified acceptance of the decentralization rationale for revenue sharing. Local governments may not use their entitlements as they please; they are restricted to operating and maintenance expenditures for "priorities" and ordinary and necessary capital expenditures.[54] The Revenue Sharing Act also prohibits the use of shared revenues as matching funds in other programs.[55] Just as Congress was unwilling to establish a program which would increase in size automatically with the growth of federal income tax revenues, so it has endeavored to insure that appropriated funds will not be used by state and local governments to obtain more federal funds via matching grant programs. Finally, states may not use shared revenues to supplant their own assistance efforts to their local governments.[56] These three fiscal restrictions will be policed by minimum reporting,[57] accounting, and auditing requirements of state and local governments,[58] and enforced with funding cut-off sanctions for detected violations.[59] The remainder of this Comment will analyze these restrictive provisions, and show that they do not provide effective control over the uses of shared revenues.

II. Restrictions on the Uses of Shared Revenues

A. *Priority Expenditures Restriction*

The restriction of shared revenues to priority expenditures evolved from H.R. 14370's stipulation that shared revenues be expended only for "vital needs which could be clearly and without question demonstrated to be of the highest priority in terms of national objectives. . . ."[60] The list of priorities omitted certain national objectives "because there are other more specific ways of dealing with these expenditures. . . ."[61] Education and welfare, for example, were omitted from the list, and the House Report

54 Revenue Sharing Act § 103(a). See Part II.A *infra.*
55 *Id.* at § 104. See Part II.B *infra.*
56 *Id.* at § 107(b). See Part II.C *infra.*
57 *Id.* at §§ 121, 123(a). See Part III *infra.*
58 *Id.* at § 123(c). See Part III *infra.*
59 *Id.* at § 123(b). See Part IV *infra.*
60 H.R. Rep. No. 1018, 92d Cong., 2d Sess., pt. 1, at 11-12 (1972).
61 *Id.* at 12.

on the Revenue Sharing Act specifically cited the welfare reform bill[62] as an example of another way of dealing with welfare priorities.[63]

The House apparently felt such controls were necessary to insure that state and local expenditures of shared revenues coincided with national priorities. Furthermore, if assistance under the Revenue Sharing Act was to have any appreciable impact on the provision of these federally preferred goods and services, then it would have to be concentrated on a relatively small number of such goods and services.[64]

There was also apparent concern that Congress could not constitutionally delegate untied spending powers to local governments.[65] Attorney General John Mitchell sought to eliminate such doubts by rendering an opinion[66] that the Administration bills, S. 680 and H.R. 4187, were well within the power of Congress to spend for the "general welfare"[67] and not an improper delegation of power to the states. Despite this opinion and historical precedent for revenue sharing programs,[68] the Ways and Means Committee

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

63 H.R. REP. No. 1018, 92d Cong., 2d Sess., pt. 1, at 12 (1972).

64 *Id.*

65 *Hearings, supra* note 2, at 1180 (exchange of remarks between Representative Adams and Representative Carey).

66 *Hearings, supra* note 2, at 57-59 (Opinion of Att'y Gen., June 21, 1971, to J.B. Connally on the General Revenue Sharing Act of 1971).

67 For a discussion of the constitutional foundations of federal grants to state and local governments, see F. MICHELMAN & T. SANDALOW, GOVERNMENT IN URBAN AREAS 971-84 (1970).

68 The federal budget surplus achieved from public land sales and tariff receipts was distributed to the states on the basis of their representation in Congress by An Act to Regulate the Deposites of the Public Money, ch. 115, § 13, 5 Stat. 52 (1836). Although the distribution was in the form of a loan, it was never intended to be repaid. The state's use of the funds was not restricted; however, use for internal improvements and education was encouraged. D. ELAZAR, THE AMERICAN PARTNERSHIP 204 (1962).

An early example of special purpose grants is the Morrill Act, 7 U.S.C. §§ 301-49 (1970) (land grant colleges). As of 1964, 17 federal statutes authorized the sharing of federal revenues from public lands with the states in which the lands were located. The largest fiscal 1962 payment to the states totaled $47.1 million, under the Mineral Leasing Act, 30 U.S.C. § 191 (1970) and leases of potash deposits, 30 U.S.C. § 285 (1970). U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, IMPACT OF FEDERAL URBAN DEVELOPMENT PROGRAMS ON LOCAL ORGANIZATION AND PLANNING 182-84 (1964).

There is also precedent for revenue sharing at the state level. In 1970, 20 states shared their revenues with their local governments, distributing approximately two billion dollars in revenue sharing grants. *Hearings, supra* note 2, at 204-10.

still seemed to feel that the legislation should specify the purposes for which shared revenues could be spent in order to forestall constitutional challenges to the Revenue Sharing Act.[69]

The Senate rejected these arguments for restricting the uses to which shared revenues could be put. Like the Administration, it sought to grant complete flexibility in the expenditure of the new aid funds to state and local governments, to allow them to set the "optimum expenditure pattern."[70] It expressly cited the impracticality of enforcing use restrictions on recipient units in support of its "no strings" position.[71]

The conference committee resolved this conflict by expanding the list of "high priority expenditures." The House bill had limited high priority expenditures to maintenance and operating expenses for public safety, environmental protection, and public transportation, and capital expenditures for sewage collection and treatment, refuse disposal systems, and public transportation.[72] The Revenue Sharing Act's present definition of "priority expenditures" allows in addition maintenance and operating expenses for health, recreation, libraries, social services for the poor or aged, and financial administration, and all ordinary and necessary capital expenditures "authorized by law."[73]

Not only is the purpose of the priorities restriction now vitiated by the scope of the list of eligible uses, but the restrictive provision itself is largely unenforceable. State and local governments can effectively avoid the restrictive provision by commingling the federal revenue sharing funds with their own revenues. Although § 123(a)(1) provides for the deposit of all shared revenues in a locally established trust fund, funds are commingled in use, no matter how the books are kept.[74] For example, the Revenue Shar-

69 *Id.* at 1180.

70 S. REP. No. 1050, 92d Cong., 2d Sess., pt. 1, at 16 (1972).

71 *Id.*

72 H.R. 14370 § 102(a), 92d Cong., 2d Sess. (1972) (as passed by the House, June 22, 1972).

73 Revenue Sharing Act § 103(a).

74 Walter Heller recognized that the funds would be commingled in his testimony to the House Ways and Means Committee during the hearings on revenue sharing: "These monies will not be marked with radio-active tracers. They will enter the state and local fiscal pot and be commingled with well over $100 billion of revenues raised from state and local sources. They will lose their characteristics as federal funds. . . ." *Hearings, supra* note 2, at 1031.

ing Act does not prevent a local government from cutting back the funding out of its own sources of a current "priority" expenditure (like police or sanitation), substituting shared revenues in the "priority" budget, and using the local funds thus saved for non-priority uses.[75]

Although tax reduction is not one of the authorized "priorities" of § 103, it is already clear that many cities and towns will use much or all of their entitlement for just that.[76] Of course, the distribution formulas theoretically discourage such tax cuts by rewarding tax effort.[77] However, since tax effort is only one variable in the distribution formula, its impact on the uses of local funds will be partially diluted. No unit will lose funding on a dollar-for-dollar basis as it uses its entitlement to reduce local taxes, so it may well elect to forego a fraction of its future entitlement to use a much larger fraction of its current entitlement for tax reduction. The Revenue Sharing Act limits the amount allocated to any local government to a maximum of 50 percent of its adjusted revenues plus intergovernmental transfers.[78] However, the current appropriation is less than five percent of the state and local governments' self-generated revenues. Therefore, few, if any, units will be affected by the 50 percent limitation.

The apparent unenforceability of the priorities restriction prompts a reassessment of congressional purposes in writing them into the Revenue Sharing Act. The Senate Finance Committee at least had no illusions about the enforceability of the restriction, terming them "at best, illusory" in its report on the bill.[79] The Administration's initial revenue sharing bill[80] contained no similar provisions, and subsequent Administration pronounce-

75 The use of federal grants to supplant local funding when they are intended to supplement such funding is hardly unprecedented. For example, funds provided to states under the Elementary and Secondary School Education Act, 20 U.S.C. §§ 236-44 (1970), were conditioned on the prohibition of supplanting, 20 U.S.C. § 241(e)(a)(3)(B)(ii) (1970), but subsequent investigations of uses of funds suggested that this condition was frequently violated. Comment, *Federal Aid to Education: Title I at the Operational Level*, 1971 L. & SOCIAL ORDER 324, 337. Generally it proved impossible to discover and prove specific violations without examining all school expenditures of receiving units over the funding period. *Id.* at 339. See Part III *infra*.

76 N.Y. Times, Oct. 18, 1972, at 1, col. 4.

77 Revenue Sharing Act §§ 106(b)(2), 106(b)(3)(d), 106(b)(3)(e).

78 *Id.* at § 108(a)(6)(C).

79 S. REP. No. 1050, 92d Cong., 2d Sess., pt. 1, at 16 (1972).

80 S. 680, H.R. 4187, 92d Cong., 1st Sess. (1971).

ments not only contemplated use of shared revenues to reduce local taxes, but invited such use. For example, presidential advisor John Erlichman, when asked what was to prevent a city from substituting shared revenues for its normal financing of the police force, and using the money thus saved to cut taxes, replied, "Nothing. That is fine. If that is the highest priority in that community, to get real estate taxes down, and if the city council politically can make that fly, that is up to them. . . ."[81] In signing the final bill, President Nixon also stated his hope that shared revenues would be used not only to finance better public services, but also "to stop the alarming escalation" of state and local taxes.[82] Obviously, Administration sentiment cannot be read into congressional intent, but in view of the Senate Finance Committee's prior awareness of the illusory nature of the use restrictions and the Administration's complete disregard of them, it is reasonable to conclude that the most they represent is recommended guidelines.

B. *Matching Funds Restriction*

The Revenue Sharing Act prohibits state or local governments from using any of its shared funds "as a contribution for the purpose of obtaining Federal funds under any law of the United States which requires such government to make a contribution in order to receive Federal funds."[83] Through this provision, Congress attempted to prevent the expansion of total federal assistance to state and local governments which could result from the "leveraging" of shared revenues. Without this matching funds restriction, the temptation for hard pressed state and local governments to distort local priorities in favor of available federal categorical grant funds might be overwhelming.

The attention given in the Revenue Sharing Act to repayments of amounts used by state and local governments in violation of the matching funds restriction[84] suggests that this restriction was more seriously intended than the priorities restriction. Yet the matching funds restriction suffers from the same problems of en-

81 Burby, *Revenue-Sharing Report/Democrats Seek Alternatives to Neutralize Sharing as Political Issue*, 3 NAT'L J. 719, 730 (1971).
82 N.Y. Times, Oct. 21, 1972, at 1, col. 4.
83 Revenue Sharing Act §104.
84 *Id.* at § 104(b).

forceability that vitiate the priorities restriction. There is nothing to prevent a receiving unit of government from substituting shared funds for its own resources in priority expenditures, and using the savings to match federal funds in federal matching grant programs.

Moreover, § 104(c) provides a loophole in the matching funds restriction which can progressively emasculate the control. This subsection releases shared revenues from the restriction to the extent that the net revenues from the grantee's own sources exceed the net revenues from its own sources received during fiscal year 1972. Since state and local revenues have been growing steadily at a rate of five percent per year,[85] this provision may well release all of a unit's entitlement from the matching funds restriction in a very short time. Inflation alone will undermine the matching funds rule, since the provision is tied to fiscal 1972 dollars. Of course, if a unit uses its entitlement to cut taxes significantly, § 104(c) may provide less relief from the matching funds restriction. But the impact of such tax cuts on the amounts of revenue collected could be largely offset by the natural increase of the state and local tax base inherent in economic expansion.

C. *Maintenance of State Support to Local Governments*

Congress conditioned assistance to the states on maintenance of state effort in assisting local government.[86] State and local governments had long feuded over who, in the first instance, should receive federal funds. Fearing state indifference to urban problems, cities have insisted on direct assistance. The requirement of § 107 (a) that at least two-thirds of each state's entitlement be allocated to local government units, can be viewed as a compromise of the state and city feud. Section 107(b) recognizes that such a "pass through" affords little assurance to local governments if a state can reduce its assistance by an amount corresponding to the pass through, shifting its assistance responsibilities to the federal government.[87]

85 *See* Musgrave & Polinsky, *Revenue Sharing: A Critical View*, 8 HARV. J. LEGIS. 197, 201 (1971).

86 *Id.* at § 107(b).

87 H.R. REP. No. 1018, 92d Cong., 2d Sess., pt. 1, at 14 (1972).

Much as growth in state and local revenues will erode the matching funds restriction, growth of state and local expenditures will erode the maintenance of effort restriction. Section 107(b) requires each state to transfer out of its own tax revenues an amount such that the average transfer for the entitlement period and the preceding period are greater than the amount transferred in fiscal 1972. Since the maintenance of effort standard is measured by the absolute level of transfers to local governments a state can still effectively cut back its relative effort as its total expenditures mount. Moreover, no single local government unit is assured of receiving even the same absolute level of state assistance. It is the average of the aggregate transfers to local governments which must be maintained, not the individual transfer to a particular unit of local government. Thus the provision in no way ties the hands of state officials in distributing their own funds to particular local governments. The latter are in essentially the same bargaining position as they were before revenue sharing. Their marginally reduced need for state funds may, if anything, undercut their position vis-à-vis the state.

III. Reporting and Auditing Requirements: Detecting Violations

Although former Treasury Secretary Connally made it clear in the hearings that a central purpose of revenue sharing was to cut the "restrictive cords" on federal assistance and the traditional red tape typified by hundreds of pages of "boilerplate" in categorical grant applications and contracts,[88] Congress nonetheless insisted on controls which would assure at least minimum standards of fiscal administration. Some reporting and auditing requirements were perhaps an inevitable concession to the argument that state and local governments are too incompetent and/or venal to administer revenue sharing.[89] These provisions may also have helped to reduce the anxieties of representatives disturbed by the five-year

88 *Hearings, supra* note 2, at 166. Some of the more onerous conditions are listed in Council of State Governments, Federal Grants-in-Aid Requirements Impeding State Administration (1966).

89 *See, e.g.*, M. Reagan, The New Federalism 111-14 (1972).

appropriation period and the by-passing of the Appropriations Committee.[90] In addition to these accountability considerations, Congress conditioned use of the funds upon compliance with basic federal policies in the areas of civil rights and construction wage rates.[91]

Reporting requirements are also one method of monitoring compliance with the fiscal restrictions discussed in the three preceding sections. The chief executive of local government units must prepare a certificate of compliance with the priorities and matching funds restrictions for the Secretary of the Treasury,[92] and the state governor must similarly certify compliance with the matching funds restriction.[93] In addition, both state and local governments must issue reports in each entitlement period on how the entitlement of the prior period has been spent[94] and on planned uses of funds for the next entitlement period.[95] Such reports are to be published in a local paper of general circulation, and local news media must be advised of the publication.[96]

These certification and compliance requirements are unlikely to establish real accountability either to the federal government or to the local populace. The "commingling of funds" problem which vitiates the fiscal restrictions themselves, is no less destructive of the reporting requirement. For example, shared revenues which are used to supplant current local priority expenditures, releasing local funds for matching grants or ineligible uses, could speciously be reported as used on priority expenditures.

In addition, the history of state and local certifications and reporting in accordance with federal conditions is not encouraging. Nearly every state promised not to discriminate in its welfare programs, in conformance with Title VI of the 1964 Civil Rights

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90 See text accompanying note 35 *supra*.

91 Section 122 of the Revenue Sharing Act requires compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), and § 123(a)(6) requires that construction wages 25 percent or more of which are paid with shared revenues be paid in accordance with the Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-5 (1970).

92 Revenue Sharing Act §§ 103(b), 104(e).

93 *Id.* at § 104(e).

94 *Id.* at § 121(a).

95 *Id.* at § 121(b).

96 *Id.* at § 121(c).

Act, for example, while continuing discriminatory practices.[97] Although grant applications and reports under the Elementary and Secondary Education Act (ESEA) revealed few violations,[98] former HEW Secretary Cohen has since estimated that 25 percent of the funds provided thereunder were misused.[99] Local public urban renewal agencies' reports on relocations have also been notoriously unreliable.[100] It is hardly reasonable to expect that state and local government units will report their own violations if such reports set in motion an enforcement process that threatens their future entitlements.

Accounting and audit procedures provide another method of detecting violations of fiscal restrictions. Each recipient governmental unit is required to establish a trust fund for its entitlement,[101] which theoretically isolates the funds from other unit revenues. The Revenue Sharing Act also authorizes such accounting, auditing, and evaluation procedures as the Secretary of Treasury may require.[102] The Secretary may accept state or local audits of their own expenditures where he determines that the self-audit procedures are reliable.[103]

The sheer number of receiving units of government, estimated at 35,903[104] precludes the federal government from undertaking many audits itself and dictates heavy reliance on state and local self-audits.[105] But such reliance entails the same commingling

97 Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 972 (1968).

98 Comment, *Federal Aid to Education: Title I at the Operational Level*, 1971 L. & SOCIAL ORDER 324, 352.

99 *Hearings, supra* note 2, at 1216.

100 Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. PENN. L. REV. 183, 194 (1968). Housing expert Chester Hartman has questioned whether even well-intentioned and essentially honest local authorities can afford to report the results of their relocation efforts accurately. "In effect, the local agency may have no choice but to issue extremely positive relocation reports; anything less than this might produce legal, political, and ethical conflicts and could slow up or curtail the entire rebuilding effort, which is the principal goal of the authority and its program." Hartman, *The Housing of Relocated Families*, 30 J. AM. INST. PLANNERS 266, 280 (1964).

101 Revenue Sharing Act § 123(a)(1).

102 *Id.* at § 123(c).

103 *Id.* at § 123(c)(1).

104 Boston Evening Globe, Dec. 7, 1972, at 16, col. 1.

105 *Hearings, supra* note 2, at 1237 (testimony of Comptroller General Elmer Staats).

problems which plague the fiscal restrictions generally and make reporting requirements unsatisfactory. In addition, state and local audits have traditionally been entirely factual and non-evaluative, and frequently inadequate by federal standards.[106] Comptroller General Elmer Staats, testifying before the House Ways and Means Committee, expressed little confidence in the quality of state and local audits or in the assistance they will be to the federal government in monitoring uses of shared revenues.[107] The problem is more one of competency than of corruption, since there is no firm evidence that corruption is more of a problem at the state and local levels than at the federal levels.[108] On the other hand, state governments have generally been slow to professionalize[109] and this may be reflected in their auditing capability.

The experience under the Law Enforcement Administration Act,[110] which provides block grants to state governments and has been termed a model for special revenue sharing,[111] may be prophetic. The Law Enforcement Assistance Administration (LEAA) relied heavily on state auditing and indeed announced that "our philosophical objective is to aid states in [auditing their expenditures]."[112] Widespread payroll irregularities, inadequate accounting, and some improper spending resulted. Alabama, for example, spent some of its funds for scholarships for sons of police chiefs and for 1000 McDonald's hamburgers to be used at a governor's conference on narcotics. The LEAA had to review the Alabama expenditures and disallowed some $600,000, demanding repay-

106 *Id.*

107 *Id.*

108 "Sure, every now and then somebody gets their hand in the cookie jar. But that hasn't been done just at the state and local levels of government, I might add." Connally, *A Cabinet Member's Viewpoint on Fiscal Federalism*, 24 NAT'L TAX J. 303, 305 (1971). Some analysts have suggested that the impression of greater corruption at the state and local levels of government is simply a function of the nature of the corruption. It takes simple and obvious forms at state and local levels in contrast to more "genteel" influence-peddling and corruption among federal officials in Washington. *Hearings, supra* note 2, at 1068 (statement of Prof. Daniel J. Elazar).

109 Adrian, *State and Local Government Participation in the Design and Administration of Intergovernmental Programs*, 359 ANNALS 35, 40 (1965).

110 42 U.S.C. §§ 3701-95 (1970).

111 Frank, *Justice Report/LEAA Moves to Improve Its Performance as a Pioneer in Revenue Sharing Techniques*, 4 NAT'L J. 181 (1972).

112 *Id.* at 183.

ment in that amount.[113] The LEAA eventually found it necessary to institute a training program for 210 state auditors to insure proper accounting for funds in the future.[114] No funds are set aside in the Revenue Sharing Act for such training, nor do the House Hearings suggest that the need for such training was ever foreseen.

Notwithstanding the primary reliance on state and local audits, the federal government itself can audit a substantial fraction of the total revenue sharing funds by focusing solely on a small number of units receiving the largest amounts of aid. But again, the problem of commingling may make this spot audit a Herculean task, because a serious inquiry cannot practically be limited to just the money in the trust funds. To determine if adept bookkeeping is circumventing the priorities or matching funds restrictions, for example, auditors might have to examine all major expenditures of the unit in question. Such extensive audits would certainly work a revolution in the fiscal relationships of federalism, even if revenue sharing alone did not, as it would involve the federal government more deeply in state and local government financial transactions that ever before.[115] In his early opposition to revenue sharing, Representative Mills voiced just this concern: "[Revenue sharing] is more in the nature of a Trojan horse from which at the appropriate time will spring new rules and strictures on the activities of those very governmental bodies who are being wooed by this gift from Troy [sic]."[116]

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113 *Id.*

114 *Id.*

115 The civil rights provision of the Revenue Sharing Act, § 122, also increases potential for greater federal involvement in state and local governmental programs. Representative Corman of the House Ways and Means Committee commented during the hearings that because commingling extended the civil rights clause to virtually all state and local government expenditures, the Revenue Sharing Act ". . . is probably the most extensive civil rights legislation we have seen since 1964. . . ." *Hearings, supra* note 2, at 1228. This probably exaggerates the likely effect of the civil rights provision in the Revenue Sharing Act, however, since the Treasury Department, which has no extensive experience or historical interest in civil rights law enforcement, is charged with determining non-compliance. The reach of the civil rights provision also depends on whether the Treasury Department will actually look beyond the fraction of state and local expenditures which receiving units of government contend is financed with shared revenues.

116 H. REP. No. 1018, 92d Cong., 2d Sess., pt. 1, at 91 (1972).

IV. Sanctions Against Non-Compliance

The federal government has two major sanctions to apply if a violation of the restrictions is detected. Upon violation of the priorities restriction by local government,[117] the maintenance of effort restriction by state government,[118] or the matching funds restriction by either state or local government,[119] the Secretary of the Treasury can insist upon repayment or offsetting reductions of future entitlements, in the amount of the violation. Alternatively, he is authorized to withhold all payments 1) for non-compliance with his regulations governing reporting, auditing, accounting and evaluations; 2) for failure of receiving units to comply with their own laws and procedures governing expenditures of their own revenues; or 3) in the case of local governments, for failure to use funds for priority uses.[120] He may also withhold payments equal in amount to those shared revenues used in violation of the matching funds rule, and not repaid by the violating government.[121] Before payments may be withheld, the chief executive of the affected government must be notified and given a hearing, followed by a 60-day notice of intent to withhold to allow the unit to take corrective action.[122] A reduction of state entitlements or a withholding of payments to state or local governments is subject also to the review of a United States Court of Appeals, on petition by the affected unit.[123] The court has jurisdiction to affirm, modify, or set aside the Secretary's action.[124] The court's decision is reviewable by the Supreme Court on certiorari or certification.[125]

The existence of such strong compliance sanctions does not mean that they will ever be used, however. The power to withhold funds or recover illegally spent funds is basic to most federal

117 Revenue Sharing Act §§ 103(a), 123(a)(3).
118 *Id.* at § 107(b)(1).
119 *Id.* at § 104(a)-(b).
120 *Id.* at § 123(b).
121 *Id.* at § 104(b).
122 *Id.* at § 123(b).
123 *Id.* at § 143.
124 *Id.* at § 143(c).
125 *Id.* at § 143(d).

grants, but is infrequently exercised.[126] HEW auditors often recommended that the Office of Education recover illegally spent funds under the ESEA, for example, without success.[127] Errant state personnel practices in violation of the merit civil service requirements of social service assistance under the 1939 Social Security Act have never been corrected by an actual stoppage of aid funds.[128]

The major reason for this historical reluctance to apply the ultimate sanction for non-compliance with grant conditions has usually been the fear of jeopardizing the future funding of the entire grant itself.[129] The resort to the withholding or reduction remedy is likely to cause a major scandal, drawing the close and zealous attention of all those who have opposed the program from the beginning. There is no shortage of opponents to revenue sharing in Congress, and the powerful Chairman of the House Appropriations Committee, still smarting from being by-passed in the revenue sharing appropriation process and opposed in principle to the legislation, is actively seeking evidence of fund misuse to kill revenue sharing at the earliest possible time.[130]

Another reason for the infrequency of reducing or withholding federal aid funds is simply that these remedies may be too severe. A former assistant secretary of HUD explained his unwillingness to employ similar sanctions: "We are roughly in the position of fighting a brush war when all we have is atom bombs. The only choice we have is whether to total the city out or not."[131] Since revenue sharing has been billed as the fiscal salvation of financially imperiled state and local governments, providing desperately

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126 Skoler, Lynch & Axilbund, *Legal and Quasi-Legal Considerations in New Federal Aid Programs*, 56 GEO. L.J. 1144, 1161 (1968).

127 Comment, *Federal Aid to Education: Title I at the Operational Level*, 1971 L. & SOCIAL ORDER 324, 350.

128 Reynolds, *Merit Controls, the Hatch Acts, and Personnel Standards in Intergovernmental Relations*, 359 ANNALS 81, 92 (1965).

129 Comment, *Federal Aid to Education: Title I at the Operational Level*, 1971 L. & SOCIAL ORDER 324, 350, 51.

130 *Federalism Report/Revenue Sharing Bill Authorizes Sweeping Innovation in Federal Aid System*, 4 NAT'L J. 1553, 1559-62 (1972). *See also* letter from John J. Gunther, Executive Director of U.S. Conference of Mayors, to mayors, Sept. 18, 1972, at 2, on file at *Harvard Journal on Legislation*.

131 Cahn, *The New Sovereign Immunity*, 81 HARV. L. REV. 929, 960 (1968).

needed assistance for vital "priority" needs, a decision to "total the city out" is particularly improbable.

Moreover, recent experience suggests that few such decisions would "stick." When education funds for Chicago were deferred (not withheld) by HEW pending city assurances of compliance with school desegregation requirements, funds quickly became available again after Mayor Daley called President Johnson, and Senator Everett Dirksen threatened a Senate investigation.[132] Obviously, not every city has a Richard Daley at the helm, but the incident does suggest that any attempted reduction or withholding of funds would result in immediate political pressure on the Treasury Department and in Congress. In fact, Elazar found in his historical survey of federal-state cooperation that in almost every case where such sanctions were applied, they "have been overruled in Congress or suitable compromises have been negotiated with Congressional help. . . . Congress will not often allow the drastic solutions and the federal bureaucrats know this."[133]

V. Conclusion

The fiscal disparities in the public sector which originally motivated revenue sharing proposals in the 1960's had largely disappeared by 1971, when the Administration offered its second revenue sharing plan to the Congress. The new plan was primarily justified as an instrument of decentralization, rather than a tool for correcting fiscal disparities in the public sector. Nevertheless, Congress was unwilling to transfer control over the spending of federal funds to state and local governments without some restrictive conditions, including the priorities, matching fund, and maintenance of effort restrictions described in this Comment.

These restrictive conditions, however, are ineffective. The practical impossibility of distinguishing federal from state and local dollars makes it easy for state and local governments to circumvent the restrictions. If they are circumvented, it will be difficult for

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132 Comment, *Title VI of the Civil Rights Act of 1964 — Implementation and Impact*, 36 Geo. Wash. L. Rev. 824, 925-26 (1968).

133 Elazar, *Federal-State Collaboration in Nineteenth Century United States*, 79 Pol. Sci. Q. 248-79 (1964).

federal authorities to detect the circumventions. Even if circumventions are detected, the sanctions provided by the Revenue Sharing Act for violations of the restrictions may be politically infeasible. What remains of the conditions which Congress placed on the decentralization of spending power is only a minimum recourse against gross misuses of funds which might undermine favorable public opinion towards revenue sharing if unpenalized.

If revenue sharing is primarily the decentralization of spending power, then any effort of Congress to restrict the uses of shared revenues was misplaced. Control of decentralized public spending must come from below. Thus the Revenue Sharing Act must ultimately be judged by the effectiveness of local control over shared revenues, not by state and local compliance with the restrictions analyzed here. How representative are state and local governments? How responsive are state and local governments to minority groups in society? How much protection do state and local laws afford the citizen from arbitrary administrative expenditure decisions? How open is such decision making to public view and criticism? These are the immediate issues in revenue sharing, issues to which neither Congress, the Administration, nor analysts of revenue sharing have yet given enough serious consideration.

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CONGRESSIONAL OVERSIGHT: THE NINETY-SECOND CONGRESS AND THE FEDERAL COMMUNICATIONS COMMISSION

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Introduction

Federal regulatory agencies are creatures of Congress, although they are staffed at their highest levels by White House appointees; subject at any moment to judicial review,[1] and faced with daily pressures from the industries they regulate, other branches of government, and the public.[2] Often viewed as independent entities, they are actually controlled and supervised by Congress. Recently, the President's Advisory Council on Executive Organization (popularly known as the Ash Council) concluded that congressional participation in agency regulation was even more necessary today than ever before ". . . because of the increasing interdependence of national economic policies which emerge from budget and fiscal action, economic regulation, and industry promotion by government."[3] The process of congressional oversight, consequently, is worthy of more attention than it generally receives. A study of this relationship between Congress and the agencies it oversees not only reveals how our agency system of administration

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1 *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

2 For a more extensive discussion of executive, industry, and public pressures exerted on administrative agencies, see E. KRASNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION (1973), and W. CARY, POLITICS AND THE REGULATORY AGENCIES (1967).

3 THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK, REPORT ON SELECTED INDEPENDENT AGENCIES 15 (1971).

operates, but also pinpoints the flaws and failures that must be corrected if the system is to remain viable.

The very nature of the legislative-administrative relationship makes effective oversight crucial to the operation of our government. Congress as a whole has neither the capacity nor the inclination to become enmeshed in the multitude of details that must be considered in overseeing the various industries subject to regulation by these agencies. Rather, Congress must be able to enact laws that dictate policy but that are, in many cases, broad and flexible. On the other hand, administrative agencies, involved and knowledgeable in the areas to be regulated, must construe these statutes according to congressional intent and then apply them to the industry. With this type of divided responsibility — one body mandating the policy, the other carrying it out — effective oversight is necessary to assure consistency.

In order to meaningfully analyze the oversight process, this Article examines the Ninety-second Congress' relationship with the Federal Communications Commission (FCC). Historically, Congress enthusiastically embraced the task of overseeing and directing broadcast regulatory policies. In enacting the Communications Act of 1934,[4] Congress made the FCC responsible for the regulation of electronic communications and established the general regulatory framework within which to oversee that agency.

Congress' power over the Commission is both pervasive and multifaceted. Since the FCC has neither the political protection of the executive branch nor an effective means of appealing for popular support, congressmen have little fear of political reprisal when dealing with the Commission or any of the other independent agencies.[5] Newton Minow tells about the day shortly after his appointment to the Commission when he called upon House Speaker Sam Rayburn. Mr. Sam put his arm around the new FCC Chairman and said, "Just remember one thing, son. Your agency is an arm of the Congress. You belong to us. Remember that, and you'll be all right."[6] The Speaker went on to warn him to expect a lot of trouble and pressure, but, as Minow recalls, "What he

4 47 U.S.C. §§ 151 *et seq.* (1970).

5 R. NOLL, REFORMING REGULATION 35 (1971).

6 Minow, Book Review, 68 COLUM. L. REV. 383-84 (1968).

did not tell me was that most of the pressure would come from the Congress itself."[7]

This close relationship between Congress and the FCC has not been trouble-free. One report, for instance, notes that Congress has been subject to recurring criticism for "its failure to provide guides and standards for the Commission to follow, and for its frequent and often premature interference in the Commission's rare attempts to formulate policy on its own."[8] While frequently dissatisfied with the FCC's regulation of the communications industry, Congress has been reluctant to express its criticisms in the form of legislative guidelines.[9]

Despite such problems, Congress is actively involved in overseeing the regulation of broadcast communication. This article will examine this involvement in order to uncover the various ways in which congressional oversight is accomplished. This article begins by suggesting the four primary goals of the oversight process. It then considers each of the methods used by Congress in overseeing the FCC and evaluates recent congressional performance in light of these goals. Finally some practical proposals for improving the process are suggested.

I. The Goals of Congressional Oversight

A. *Compliance with Legislative Intent*

The primary purpose of legislative oversight is to insure that congressional intent is carried out by the agencies in their administration of the laws enacted by Congress. To achieve this purpose, both the agencies and Congress must meet several obligations. The agencies have the obligation to see that Congress is kept effectively informed as to how the laws are being administered, and Congress must see that the agencies have adequate staff and funds to meet their administrative responsibilities. Moreover, the

7 N. Minow, Equal Time 35 (1964).

8 R. McMahon, 85th Cong., 2d Sess., The Regulation of Broadcasting viii, Study on H. Res. 99 made for the House Comm. on Interstate and Foreign Commerce (Comm. Print 1958).

9 "Throughout the FCC's long stormy struggle to formulate policy it has never received the slightest positive guidance from Congress, only an occasional critical negative." Jaffe, *supra* note 1, at 49.

agencies have the obligation to ask for, and Congress to provide, additional statutory guidance where necessary.

It is important, however, to maintain the separation between Congress and agency. While Congress has the duty to enact policy guidelines and to provide funds and manpower to assist in carrying them out, it should not interfere with administrative actions which are consistent with statutory guidelines and procedures.[10] Within the policy standards and procedural machinery fixed by the laws it has enacted, Congress should assure each agency the opportunity to utilize its own administrative expertise.

B. *Representation of the Public Interest*

Congress should insure a constant interchange with the administrative agencies to see that the general concerns of the public are brought to the attention of the agencies and are reflected in their regulatory policies. In the oversight process members of Congress possess a multitude of opportunities to express and urge the protection of various facets of the public interest. Espousing the public interest is, in fact, what Congress can do best during the process of overseeing. It is the agencies, not Congress, which are designed to develop the expertise and specialization necessary to regulate whole industries. Congress, with its many diverse functions, cannot effectively handle detailed administration. Rather, it can best function as a critical challenger of agency policies and actions. These challenges should be grounded in the broad public interest Congress is designed to represent.

C. *Safeguarding the Administrative Process*

Congress should pay close attention to the internal process by which the administrative agencies operate. Although limited somewhat by judicial review,[11] the administrative process still allows each agency a certain degree of independence. And while much of

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10 Professor Davis has pointed to the need for studies of legislative supervision, made from the standpoint of administrators. In particular, he calls for consideration of whether the legislative inquiries and pressures help or hinder good administration, how much agency time is thereby diverted from their main functions, and how far the legislators seem to abuse their powers. K. DAVIS, DISCRETIONARY JUSTICE 147 (1969).

11 *See generally* E. KRASNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION 41-44 (1973).

this independence is essential for effective, flexible agency action, it can be abused. Congress should prevent such abuse by investigating agency activity. While its investigations should be directed at major problems, such as checking biased or overzealous actions or sparking action in a neglected area, they should not inhibit agency autonomy. Congress should be especially watchful where the agency is operating under a broad legislative mandate, for it is in that undefined situation that judicial review of administrative action is least protective. In instances where Congress has chosen to dictate only broad guidelines, it should bear the responsibility of seeing that its statutes are applied fairly and consistently.

D. *Checking Dishonesty and Waste*

Congressional oversight, finally, should include the "watchdog" element. It is the duty of Congress to assure the public that the laws of the nation are being administered fairly and impartially by honest men and that its regulatory agencies are not reaching into the pocket of the public treasury in a wasteful manner. Oversight should assure that the agencies are not only functioning, but also, more importantly, that they are functioning properly.

It is, of course, relatively simple to itemize and describe the desired goals of congressional oversight of administrative agencies. It is much more difficult, if not impossible, to achieve those goals through the complex and highly politicized process of oversight. The next section of this article examines specific methods of oversight, focusing on the supervision of the FCC by the Ninety-second Congress, with emphasis on broadcast regulations in an attempt to show the extent to which the goals of ideal congressional oversight are achieved.

II. The Process of Congressional Oversight

A. *Who in Congress Oversees*

At the outset, it should be made clear that when we refer to Congress' role in the regulation of broadcasting, we are not talking about Congress as a whole, for power is distributed quite unevenly in Congress, especially in a specialized area such as broadcast regulation. The groups in Congress that are largely responsible

for overseeing broadcast regulation are the House and Senate Commerce Committees, and often primarily their chairmen. A "highly placed [FCC] staff member" has said that the word of Senator Warren Magnuson, Chairman of the Senate Commerce Committee and a ranking member of the Senate Appropriations Committee, is "almost law to the Commission. They bow and scrape for him. He doesn't have to ask for anything. The commission does what it thinks he wants it to do."[12] The same was true of Oren Harris, former Chairman of the House Interstate and Foreign Commerce Committee. "He cracked the whip lots of times down here."[13] Other committees, especially the Appropriations Committees, take occasional interest in broadcasting and regulatory issues; but the two Commerce Committees are the center of congressional interest and activity in the field of electronic communications.

Sometimes the Senate Commerce Committee takes the lead (*e.g.*, the hearings on violence on television in 1971-72[14]); at other times, congressional activity comes mainly from the House Commerce Committee (*e.g.*, the hearings on staged television news and documentaries[15]). In addition, individual congressmen or committee chairmen may be principal actors in particular areas. Congressional interest is frequently limited to only a few congressmen whose impact in the FCC policy-making process stems from their standing on one of the subcommittees on communications.[16] As a result, "the administrator must . . . sensitize his decision making to the wishes and predilections of committee chairmen primarily and legislators generally."[17]

In reality, only a limited number of congressmen, representing

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12 L. KOHLMEIER, THE REGULATORS 67 (1969).

13 *Id.*

14 *Hearings on Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior Before the Subcomm. on Communications of the Senate Comm. on Commerce,* 92d Cong., 2d Sess. (1972).

15 *Hearings on News Documentaries Before the Special Investigations Subcomm. of the House Interstate and Foreign Commerce Comm.,* 92d Cong., 1st Sess. (1971).

16 The Landis Report on Regulatory Agencies to President-elect Kennedy in December 1960 commented that the FCC "has been subservient, far too subservient, to the subcommittees on communications of the Congress and their members." J. LANDIS, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 53 (Comm. Print 1960).

17 W. BOYER, BUREAUCRACY ON TRIAL 46 (1964).

only certain particularized interests, take any part in supervising communications regulation. As well as espousing the interests of their constituency, many members of Congress who participate in the oversight process act as advocates of the broadcasting industry. This community of views between members of Congress and the broadcasting industry is often attributed to the financial interests of congressmen in broadcasting. However, direct or family-related investments of congressmen in broadcasting are actually not as extensive as often thought. In the Ninety-second Congress, only six senators and nine representatives had broadcast interests.[18] Congressional support of the broadcast industry viewpoint is perhaps more the result of individual legislators' desires to satisfy the demands of important, prestigious, and useful constituents. That the industry regards these efforts as important was indicated by Paul E. Comstock, former Vice President and General Counsel of the National Association of Broadcasters, when he remarked: "Most of our work is done with congressional committees. We concentrate on Congress. We firmly believe that the FCC will do whatever Congress tells it to do, and will not do anything Congress tells it not to do."[19]

This relationship between the industry and Congress has been described as a two-way umbilical cord.[20] An estimated 70 percent of the senators and 60 percent of the representatives regularly use free time offered by broadcast stations in their home state.[21] Such free time assists politicians in their efforts to get re-elected, while broadcasters benefit at license renewal time from having carried "public affairs" programming. Since political exposure over the airwaves is practically *sine qua non* of election to Congress, the politicians who dare criticize the media are national leaders, such as Vice President Spiro Agnew, who are too prominent for the media to ignore.[22] By contrast, a congressman may be reluctant to criticize

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18 *Station-Ownership Ties in the 92d Congress,* BROADCASTING, May 24, 1971, at 58.

19 Thorp, *Washington Pressures,* 2 NAT'L J. 1807, 1809 (1970).

20 R. MACNEIL, THE PEOPLE MACHINE 243 (1968).

21 *Id.* at 246.

22 Members of Congress often find that they can exploit the natural differences between affiliates and networks, making floor speeches that are critical of national programming or news coverage while simultaneously finding the local broadcaster's

broadcasters — let alone vote against their interests — if his re-election depends to some extent on the amount and tone of the exposure he receives from his local television station.

The Congress that oversees the FCC then, is not the Congress in its entirety. It is a few select committees and often just a few individuals. As a result, the second goal for oversight — representation of the public interest — is not achieved through the functioning of Congress as a whole. Rather than advocating a broad spectrum of public interests, congressmen often feel pressed to treat broadcasters gently. The overall quality of congressional oversight, therefore, depends in part on who in Congress actually participates in the oversight process.

B. *The Means by Which Congress Oversees*

Congress has various methods of overseeing, including control by statute, appropriations, investigations, the power to confirm or reject nominations, the continuing watchfulness of standing committees, multiple supervision by other committees, pressure by individual congressmen and their staffs, and congressional control by legislative inaction. This article will examine each of these forms of influencing broadcast policy making first in general terms and then with illustrations from the Ninety-second Congress.

1. Control by Statute

Statutory control, the most obvious congressional activity, is noteworthy for its relative unimportance in broadcast regulation. In fact, Congress rarely chooses to influence the administration or formulation of FCC policy with specific legislation. The principal statute affecting the FCC, the Communications Act of 1934,[23] provides the Commission with little more in the way of specifics as to its goals, duties, or policies than a vague reference to the "public interest."[24]

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efforts praiseworthy. Similarly, Vice President Agnew has primarily criticized the networks rather than individual stations.

23 47 U.S.C. §§ 151 *et seq.* (1970).

24 Congress did not uniformly use the phrase "public interest" in the Communications Act and its amendments. For example, the standard of "public interest" is specified in 47 U.S.C. §§ 201(b), 215(a), 221(a), 222(c)(1), 319(c), and 315(a) (1970); "public interest, convenience and necessity" is specified in 47 U.S.C. §§ 307(d), 309(a), 316(a), and 319(a) (1970); and "public interest, convenience or necessity" is "specified

Indeed, Congress' frequent refusal to legislate substantive guidelines for FCC policy making makes the Commission all the more vulnerable to other forms of congressional influence. As Professor Jaffe observed, the continuing threat of congressional investigation is virtually inevitable "where the regulatory area is a jungle without statutory directives."[25] Thus, nonstatutory controls are of primary importance in Congress' overseeing of the FCC. Such a situation is not unusual, however, nor is it even undesirable when constructively applied in an area of regulation as diverse and complex as communications. In order to effectively regulate such a field, policy mandates must be broad and flexible, providing the agency with enough freedom to apply its expertise whenever needed. It is frequently preferable that the oversight methods utilized by Congress are not as fixed or inflexible as specific legislative directives.

The major new law affecting the FCC enacted during the Ninety-second Congress clearly continued the congressional pattern of not legislating substantive regulatory guidelines. The complicated Federal Election Campaign Act of 1971[26] represented the first comprehensive attempt by Congress in nearly 50 years to revise the laws by which campaigns of candidates for federal office are governed. While much of the law establishes improved reporting and disclosure provisions, title I limits the amount that candidates for president, vice president, senator, and representative can spend on broadcast advertising. It establishes a media spending ceiling based on 10 cents times the voting age population.[27] However, no more than 60 percent of that amount can be spent by a candidate for use of the broadcast media.[28]

The question of enforcing the new law became an immediate problem. While the Comptroller General is charged with monitoring broadcast expenditures[29] and reporting rules[30] in presidential

in 47 U.S.C. §§ 307(d), 311(b), and 311(c)(3) (1970). These phrases have provided "the battleground for broadcasting's regulatory debate." MINOW, *supra* note 7, at 9.

25 JAFFE, *supra* note 1, at 48.

26 Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.A.).

27. 47 U.S.C.A. § 803(a)(1)(A)(i) (Supp. July 1972).

28 *Id.* at § 803(a)(1)(B).

29 *Id.* at § 804.

30 *Id.* at § 431(g).

campaigns and the Clerk of the House and the Secretary of the Senate are charged with the enforcement of the reporting rules in congressional campaigns,[31] Congress empowered the FCC to adopt rules and regulations for broadcast licensees. Because broadcasters are subject to considerable civil and criminal penalties for violations of the Act,[32] the FCC has taken its responsibility especially seriously. Numerous complicated guidelines are still being developed by the Commission. Here, though, is an example of a situation in which Congress has ordered the FCC to fulfill an additional responsibility, yet has failed to give it the necessary substantive guidance.

A particularly perplexing provision of the Campaign Finance Act, for instance, states that willful or repeated failure by a licensee to provide "reasonable access" to a candidate for federal office may result in a loss of license.[33] The law does not define "reasonable access," and, consequently, the Commission is having difficulty in promulgating specific guidelines. The FCC's problem is compounded by the section of the Act which requires broadcasters to charge a candidate for federal elective office no more than the lowest unit rate for the period of time being utilized.[34] Thus, it is the FCC's responsibility to make certain that a licensee does not sell time to a candidate which exceeds that candidate's broadcast limit, that each station affords "reasonable access" to candidates, and that each licensee charges a candidate no more than the required rate (which varies from station to station and from market to market).

Because of the complications of enforcement and the FCC's hesitation to act in such an uncharted area, many licensees have decided to abandon the sale of time to political candidates and have been experimenting with making free time available to candidates, thereby avoiding the sanctions of the new law.[35] The FCC, on the other hand, for all its caution, knows that it must develop

31 *Id.*
32 *Id.* at § 315(e).
33 *Id.* at § 312(a)(7).
34 *Id.* at § 315(b)(1).
35 BROADCASTING, Oct. 9, 1972; at 28; *id.*, May 1, 1972, at 53; *id.*, April 10, 1972 at 28.

detailed guidelines before it is subjected to another round of oversight hearings during the Ninety-third Congress.

In a field such as communications where the interests of powerful industry forces frequently collide, nothing is more unsettling to many lawmakers on Capitol Hill than the prospect of making a law. Thus, rather than enact new laws or amend the Communications Act to provide specific guidelines for the FCC, the Ninety-second Congress, like its predecessors, preferred to use a variety of informal techniques in directing and overseeing the activities of the Commission. Such informal controls are naturally more pervasive since they are not subject to review by the whole Congress and are more politically viable since they enable individual congressmen to advance personal or constituent interests without the need for a full-scale political battle.[36] Moreover, the integrity of Congress as an institution and the *raison d'être* of regulatory agencies which it created would be undermined if detailed statutes were to be substituted for broad policy guidelines to such agencies.[37] Indeed, the initial grant of a broad mandate to the FCC by the Congress was motivated by the fact that vague legislation required less depth of knowledge about the problems of regulation of a new technology and effectively passed the political problems that Congress was unable or unwilling to resolve on to the administrative agency.[38] While such delegation of responsibility to the agency often allows more effective regulation to take place, it illustrates that control by statute has to date not been an important mode of congressional oversight.

2. Control by Power of the Purse

Legislative appropriations take on special importance for the FCC, for Congress has absolute discretion not only over the amount of money allocated to the Commission but also over the purposes for which such funds are to be used.[39] This "power of

36 *See* J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 9 (1966).

37 DAVIS, *supra* note 10, at 217.

38 NOLL, *supra* note 5, at 101.

39 For excellent studies of the appropriations process, see R. FENNO, THE POWER OF THE PURSE (1966); S. HORN, UNUSED POWER (1970); A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (1964).

the purse" resides primarily at the subcommittee level of the Appropriations Committee of each house of Congress.[40] Both the Senate and House subcommittees hold hearings each year to examine the FCC's budget requests and to question the commissioners and top-level staff. Many opportunities exist, both at the hearings and elsewhere, for the subcommittees to scrutinize FCC behavior and to communicate legislative desires to the officials involved. The suggestions, admonitions, and directions conveyed to the FCC in committee reports accompanying appropriations bills are another mode by which congressional influence is accomplished. Although the reports are not law, the Appropriations Committees expect that they will be regarded almost as seriously as if they were[41] — an expectation which the Commission usually fulfills.

Perhaps more vividly than any other type of influence, the appropriations process reveals the fallacy of the FCC's alleged "independent" status. William Cary has aptly described the FCC and other "independent" agencies as "stepchildren whose custody is contested by both Congress and the Executive, but without very much affection from either one."[42] These stepchildren often suffer from malnutrition, subsisting on crumbs from the federal budget.[43] As a result, the FCC finds itself beholden to the source of its sustenance, namely Congress.

In the Ninety-second Congress a new aspect of fiscal control was considered in public hearings for the first time. The Subcommittee on Intergovernmental Relations of the Senate Government Operations Committee held three days of hearings on legislation pro-

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40 "It is not Congress, not the House or Senate, not even the appropriations committee as a whole that should be thought of as abstractions, set against administration. The reality is a handful of men from particular states or districts, working with a particular committee clerk on a multitude of details." MacMahon, *Congressional Oversight of Administration: The Power of the Purse I*, 58 POL. SCI. Q. 161, 181 (1943).

41 FENNO, *supra* note 39, at 18.

42 CARY, *supra* note 2, at 4.

43 "[T]he FAA spends as much on *communications research* as the FCC's total annual budget; the Navy spends five times the FCC's annual budget doing cost-effectiveness studies of the communications system on one ship type; [and] Bell Labs has a budget over 15 times that of the FCC." Speech of Nicholas Johnson before the Federal Communications Bar Association, in Washington, D.C., May 10, 1968, at 9.

posed by Senator Lee Metcalf (D.-Mont.) which would have required the FCC and six other regulatory agencies to submit their original budget requests directly to Congress, instead of, first, to the Office of Management and Budget (OMB) in the White House.[44] This proposal would have upset a half-century of tradition. Since 1921, when Congress passed the Budget and Accounting Act,[45] the executive branch has had a role in budget making for the various federal agencies and departments. While removing the seven regulatory agencies from OMB's purview would mean the loss of only a relatively small portion of actual budgetary control, it would greatly strengthen the hand of Congress over the regulatory process.

In reality, however, Congress would not be asserting any new power, for under the present system the Appropriations Committees already have the power to add to or subtract from the budget at will, regardless of what OMB has recommended. Members of Congress, however, were concerned about the possible shielding of agency budget requests as a result of the initial review by OMB. In all probability, the hearings were intended more as a reminder to the executive and the agencies involved that Congress does control the purse strings and might be willing to tighten them if provoked. This explanation seems especially appropriate since the hearings came shortly after FCC Chairman Dean Burch had publicly decried the Commission's lack of adequate manpower to handle Phase II of the American Telephone and Telegraph rate proceeding.[46] In a classic example of "political" understatement designed to avoid taking an unpopular stand, Chairman Burch said that ". . . in short, we can live under either system, and we leave it up for Congress to decide which procedure, on balance, would be most helpful to it in the exercise of its appropriations function."[47]

The concern about where budget requests originate is not nearly so important as the manner in which Congress handles

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44 117 CONG. REC. S512 (daily ed. Jan. 29, 1971).
45 31 U.S.C. §§ 1 *et seq.* (1970).
46 TELEVISION DIGEST, Jan. 17, 1972, at 5.
47 *Hearings on S. 448 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 92d Cong., 2d Sess. 91 (1972) (statement of Chairman Dean Burch).

these requests when they are made. Most appropriations hearings are held in executive session and are closed to the general public.[48] Thus, during the Ninety-second Congress, the Appropriations Committees often did not have testimony from interested parties whose views on the FCC's budget differed from those of the commissioners. The public interest was not independently represented. In addition, no attempt was made by the Appropriations Committees to bring in outside experts to evaluate the material supplied by the FCC. As in other Congresses, there was little interchange of information between the Appropriations Committees and the other committees responsible for overseeing agencies involved in communications regulation. Nor was there a comprehensive attempt to define the different roles of the FCC, the Commerce Department, and the Executive Office of Telecommunications Policy.[49]

Although the Appropriations Committees devoted substantial amounts of time during the Ninety-second Congress to the study of the FCC budget, therefore, they did so without the benefit of outside experts, contrasting views of other parties, and an evaluation of the proper role of the various governmental agencies dealing with communications. Consequently, their decisions were dependent upon the figures and suggestions provided by the FCC itself. Without independent evaluations by outside experts or without a coordinated report on the substantive programs of all agencies regulating the communications industry, little could be done by these committees to uncover and check either waste or duplication.

3. Control by Investigations

Probably no other federal agency has been the object of as much criticism and as much prolonged investigation by Congress as the FCC.[50] From its inception, the Commission has almost always been under congressional investigation or the threat of one, and has been "viewed by its progenitors on Capitol Hill as a delinquent

48 *See* 30 CONG. Q. 2976 (1972).

49 *See Hearings on H.R. 9392 Before the Senate Comm. on Appropriations,* 92d Cong., 1st Sess. 491-533 (1971).

50 W. EMERY, BROADCASTING AND GOVERNMENT 395 (1971). Emery believes that too many investigations have been "of a destructive nature, designed to serve special interests in and outside of Congress." *Id.* at 400.

creature, not to be trusted, and requiring frequent discipline."[51] The "punitive and often inquisitional character [of these investigations] over a long period of time has created in the public mind an image of depravity with respect to the FCC that severely handicaps the agency in the exercise of its function."[52] Often, the entire operation of the FCC has been dissected and criticized in hearings by hostile committees. One such investigation, which received a great deal of public attention, was initiated and conducted in the early 1940's by Representative Eugene Cox of Georgia, one-time supporter but then a bitter critic of the FCC. Representative Cox authored a resolution calling for the establishment of a select committee to scrutinize the organization, personnel, and activities of the Commission.[53]

During the Ninety-second Congress, the FCC was forced to deal with the issue of staged news and documentaries on television.[54] The FCC's action was largely provoked by the flurry of congressional investigations, especially those of a CBS documentary entitled "The Selling of the Pentagon."[55] Congressional concern about staged news programs and documentaries was not new. During the Ninety-first Congress, CBS was the target of investigations[56] because of a program on pot smoking and a planned documentary on an invasion of Haiti which never occurred. These investigations made the FCC aware of congressional concern over staged news and documentaries. But the need to deal with this issue was not evident until CBS televised "The Selling of the Pentagon" in the spring of 1971.

The outcry was angry and loud. Critics attacked the program on two levels. Staunch defenders of the military, such as House Armed

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51 *Id.* at 395-96.

52 *Id.* at 400.

53 H.R. Res. 21, 78th Cong., 1st Sess., 89 CONG. REC. 26 (1943).

54 "Staging" news refers to the practice of creating or recreating a news event for the television cameras. The difficulty arises when the resulting footage is aired without any such indication or, more seriously, when what took place is changed substantially in the process of editing.

55 Information for this section is taken from *Hearings Before the Special Investigations Subcomm. of the House Interstate and Foreign Commerce Comm.*, 92d Cong., 1st Sess. (1971), and PROCEEDING AGAINST FRANK STANTON AND CBS, INC., H.R. DOC. No. 349, 92d Cong., 1st Sess. (1971).

56 These investigations had been conducted by the staff of the Special Investigations Subcommittee of the House Interstate and Foreign Commerce Committee.

Services Committee Chairman F. Edward Hébert, charged CBS with slanting the news, using the documentary as a vehicle to portray only one point of view under the guise of objectivity.[57] Others, including some of those who appeared in the documentary, claimed that interviews had been distorted in the process of editing.[58] It soon became clear that the FCC needed to determine what, if any, remedial action was warranted.

Outraged members of Congress demanded that the FCC investigate CBS. The FCC hesitated and, instead, determined initially that CBS had not violated the fairness doctrine, which essentially requires that a licensee provide ample opportunity for the presentation of all reasonable points of view on a controversial topic of public importance.[59] Chairman Burch, in a letter to Representative Harley Staggers (D.-W.Va.), Chairman of the House Commerce Committee and of its Special Investigations Subcommittee, said that the Commission "cannot conclude that CBS failed to comply with the requirements of the fairness doctrine."[60]

Some of the pressure on the FCC over "The Selling of the Pentagon" was relieved as a result of Chairman Staggers' all-out effort to obtain the out-takes (unused film) from CBS so that his committee could judge whether the network had distorted the comments of those interviewed in the documentary. CBS argued that the out-takes were analogous to a reporter's private notes and protected by the first amendment. The battle over a contempt citation, resulting from CBS President Frank Stanton's refusal to obey a congressional subpoena, was ultimately fought in the House largely on the constitutional issue. But a fear was also voiced by some congressmen that the power of television (especially the networks) had gone unchecked for too long.[61] The Commerce Committee resolution citing Stanton for contempt was effectively

57 117 CONG. REC. 5401 (1971) (extension of remarks of Representative F. Edward Hébert).

58 *Id.*

59. The "fairness doctrine" is basically a non-legislative doctrine evolving from the requirements set out in 47 U.S.C. § 315 (1970). It deals with the necessity for balanced presentation of significant controversial issues of public importance.

60 FCC Doc. No. 71-643, June 16, 1971, at 2.

61 *See generally* 117 CONG. REC. H6639-69 (daily ed. July 13, 1971).

rejected when the House, by a vote of 226 to 181, recommitted it to the Commerce Committee.[62]

The issue of staged news has still not been resolved, and it continues to be a source of concern for the FCC. On May 7, 1972, the Investigations Subcommittee launched another round of hearings and again asked the Commission for firm guidelines on the issue. But it was not until October, just prior to the adjournment of the Ninety-second Congress, that the FCC formally responded to congressional concern. In effect, the Commission refused to set down its own guidelines and, instead, implied that the networks' own codes, if strictly adhered to and enforced, were more than sufficient to deal with the problem of staged news.[63]

Unlike investigations by previous Congresses which had aimed at exposing the internal workings of the Commission and which had frequently been conducted in an antagonistic atmosphere before hostile committees, the investigations concerning staged news during the Ninety-second Congress were constructive. By helping to keep the FCC responsive and attuned to the wishes and expectations of segments of the public, as expressed through Congress, they illustrated just how effective properly conducted investigations could be in achieving some of the goals of congressional oversight of regulatory agencies. The FCC's failure to take more vigorous action was due both to the difficult first amendment issues posed by detailed guidelines and its recognition that Congress was divided on this issue.

4. Control by Advice and Consent

The statutory limitation on the tenure of commissioners[64] and the statutory requirement that the Senate confirm all appointments to the Commission[65] provide Congress with another way of controlling the FCC.[66] Senator Edwin C. Johnson, former Chairman of the Senate Commerce Committee, was of the view that

62 *Id.*
63 Letter from Dean Burch to Chairman Staggers, Jan. 27, 1972.
64 47 U.S.C. § 154(c) (1970).
65 *Id.* at § 154(a).
66 For a penetrating study of the confirmation process, see J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE (1968).

"the existing system of giving the Executive the appointive power to the commissions which are arms of Congress is basically unsound" since "[i]t is only natural that those who owe their jobs to the Executive would be reluctant to oppose Executive policy and suggestions." He suggested that the appointive power be vested in the Speaker of the House and the confirmation requirement remain with the Senate.[67] Although this was not adopted, it is indicative of congressional suspicion of executive appointments.

Even with the seven-year terms of commissioners (staggered so that the term of one commissioner expires each year),[68] the need for confirmation by the Senate continues to be an important means of congressional control for several reasons. First, before the President makes any nomination requiring senatorial approval, he follows the custom of consulting a senator who is from the nominee's state. Second, if some powerful senator has strong objections to a nomination, he has opportunities to delay or block the appointment.[69] Third, since every presidential appointment and reappointment to the FCC is first passed upon by the Senate Commerce Committee, the opinions on communications matters expressed by individual senators at confirmation hearings are likely to receive careful consideration by new commissioners.

The give and take between Congress and the executive and the impact of this procedure on the FCC was reflected in the nominations to the Commission made during the Ninety-second Congress. In 1971, there was to be a Republican vacancy on the FCC, and it was rumored that the position would go to a party stalwart, Sherman Unger. Before the nomination of Unger was ever formally presented to the Senate for confirmation, enterprising journalists (prodded by congressional staffers) reported that Unger, then an aide to Secretary of Housing and Urban Development George Romney, was the target of a possible tax audit by the

67. Johnson, *Carrying Coals to Newcastle,* 10 FED. COM. B.J. 181, 183 (1949).

68 47 U.S.C. § 154(c) (1970).

69 Senator Tobey of New Hampshire launched a one-man crusade against a favorable report on the renomination of Colonel Thad H. Brown in 1940 and used the hearings to condemn Brown for his handling of monopoly charges against the networks. Commissioner Brown's renomination was rejected by the Senate. Friedrich & Sternberg, *Congress and the Control of Radio-Broadcasting,* 38 AM. POL. SCI. REV. 806-07 (1943).

Internal Revenue Service.[70] Especially since the incident immediately followed the President's confrontations with the Senate on the Haynsworth and Carswell nominations to the Supreme Court, the White House was extremely sensitive and, to avoid another prolonged fight, it acted quickly to substitute the name of Representative Charlotte Reid (R.-Ill.)[71] for that of Unger when the nomination was sent to the Senate. The Senate held confirmation hearings shortly thereafter, and Representative Reid's nomination was approved with unusual speed and without opposition.[72] When one of "their own" is the nominee, Congress will usually not impede confirmation with philosophical inquiries into the individual's views on the relationship between Congress and the regulatory agencies — perhaps because it can be assumed the nominee is only too aware of what that relationship is and of the importance of maintaining it.

Before the year was out, another Republican vacancy on the Commission arose. Commissioner Robert Wells resigned to return to his home state of Kansas, where he was contemplating a campaign for the governorship. Since Congress had adjourned for the year before the President could select a nominee for this vacancy, no confirmation hearings on any nominee would have been possible before January 1972 at the earliest. The President, however, exercised his power to make interim appointments under such circumstances and nominated FCC General Counsel Richard Wiley to serve the remainder of Wells' term. Senate Communications Subcommittee Chairman John Pastore of Rhode Island expressed his displeasure that the President had not nominated a black to fill the vacancy.[73] It was rumored that several prominent blacks were under consideration,[74] and it seemed imperative in light of minor-

70 BROADCASTING, Sept. 14, 1970, at 38.

71 Representative Reid was serving at the time on the House Appropriations Committee. She was assigned to the Subcommittee on Foreign Operations and the Subcommittee on Labor and HEW. She had no particular background in broadcasting, although she had been at one time an entertainer on a network radio program.

72 *Senate Confirms Reid Appointment*, BROADCASTING, Aug. 2, 1971, at 27.

73 *Hooks, Ledbetter, Ortique?*, BROADCASTING, March 6, 1972, at 18.

74 *Id.*

ity activism in FCC proceedings and congressional hearings[75] that a minority representative be appointed to serve on the FCC.

This insistence by Senator Pastore on a black nominee and the initial reluctance on the part of the White House to comply combined to hold up the confirmation of Wiley by the Senate Commerce Committee for over six months, until the next vacancy occurred. A commitment by the White House to nominate black Tennessee Judge Benjamin Hooks, a Democrat, to fill this new vacancy resulted in Senator Pastore's announcement that he would consider[76] both the Wiley and Hooks confirmations at the same hearings.[77] It is noteworthy that Hooks' candidacy was actively pushed by Republican Senator Howard Baker of Tennessee, the ranking minority member on Senator Pastore's subcommittee. That the views of key senators are given great weight in the President's selection of a nominee is indicated in Senator Baker's responses to questions posed at the confirmation hearings of Judge Hooks. Senator Baker said the idea of naming a black originated with Senator Pastore, and that the two of them later found a "sympathetic ear" for the proposal at the White House. Senator Baker looked for a candidate in Tennessee, one who was not a Republican (the FCC had its full statutory complement of four Republicans) and who would not be "a special-interest commissioner." He selected Judge Hooks, whom he had known for a long time, and discussed his nomination with Senator Pastore and then with the White House.[78]

Thus, Congress directly influenced President Nixon's selection of nominees for FCC Commissioner. While during the Ninety-second Congress such congressional influence was apparently exerted on behalf of recognized sectors of the public — women and blacks — it frequently happens that pressure is exerted by legislators who advocate the appointment of important constituents or friends. To date, however, the Senate Commerce Committee as a group has waited until the President has nominated an individual before taking an active role in supporting or opposing the nomina-

75 *See* Pudden, *The Emerging Role of Citizens' Groups in Broadcast Regulation*, 25 FED. COM. B.J. 82 (1972).

76 *Judge Hooks Finally Gets the Job*, BROADCASTING, April 17, 1972, at 22-23.

77 *Meet Senator Pastore*, BROADCASTING, May 15, 1972, at 42.

78 *Road Looks Clear for Hooks, Wiley*, BROADCASTING, May 29, 1972, at 28-29.

tion. No attempt has been made by Congress to articulate standards for the President to follow in deciding upon nominees.

5. Control by Continuing Watchfulness of Standing Committees

Section 136 of the Legislative Reorganization Act of 1946[79] directs each standing committee of the Senate and the House to exercise continuous watchfulness over the administration and execution of any law within its jurisdiction. The House Committee on Interstate and Foreign Commerce and the Senate Committee on Commerce are charged with making continuing studies of problems in the communications industry, and these committees have prime responsibility for the initiation and consideration of legislation affecting the regulation of the communications industry by the FCC. One of the potential advantages of such continuous contact between an agency and a standing committee is that the members and staff of the congressional committee acquire some of the substantive knowledge necessary to challenge the agency's handling of complex problems. As a result of this continuing relationship, there does develop, in some instances, "a healthy, mutual respect between the committee and administrator, both of whom have a common objective, and, in substantial measure, a common fund of information."[80] Too often, however, the contacts between congressman and administrator are sporadic and basically uninformed.

The history of congressional supervision of the FCC is replete with examples of commission policies shaped by a single committee or its chairman.[81] Yet standing committees are frequently able to have a major impact on agency decisions merely by holding hear-

79 2 U.S.C. § 190d (1970).

80 Nathanson, *Some Comments on the Administrative Procedure Act,* 41 Nw. U.L. Rev. 421-22 (1946).

81 Professor Davis makes the following defense for situations where the policy of the FCC is formulated by a congressional committee rather than by the entire Congress: "When major policy under a statute containing no meaningful guides on the question is worked out through cooperation between a legislative committee and an agency, the governmental machinery may be operating as it should. Even when lobbyists are influencing the committee to oppose the agency's effort to protect the public interest as the agency sees it, the system may be sound; to condemn responsiveness of administrative policies to the strongest pressure would in some circumstances mean condemning the heart of democratic government. That policies are sometimes determined by segments of Congress rather than by the whole Congress is not always objectionable." DAVIS, *supra* note 4, at 148.

ings. During these hearings, committee members have an opportunity to communicate their views to a captive audience of FCC commissioners, who are usually intent on portraying themselves as flexible, hard-working members of a public-spirited agency.[82]

In recent years the Commerce Committees have held general oversight hearings at the beginning of each session. During 1971 and 1972, these hearings covered a wide range of topics and constituted the major opportunities for Congress to keep abreast of Commission activities. For example, Chairman Burch, five other Commissioners (the seventh was out of the country), and key Commission staff members appeared on April 29, 1971, before the House Subcommittee on Communications and Power. The discussion covered spectrum management, diversification of ownership, broadcast service to meet community needs, children's programming, the fairness doctrine, political broadcasting, cable television, domestic satellites, common carrier activities, and public broadcasting.[83] While hearings such as these cover too broad a range of subjects in a very short period of time to be substantively useful, they do provide an excellent opportunity for the FCC to orient Congress as to its wide range of activities, and allow congressmen the chance to make their views heard on a variety of subjects.

Some members of Congress have been particularly active in overseeing the FCC's handling of the issue of television violence. The legislator primarily responsible for this continuing congressional interest is Senator Pastore, who is Chairman of the Senate Communications Subcommittee and, for most of the Ninety-second Congress, was Chairman of the Senate Appropriations Subcommittee responsible for the FCC's budget. In 1969, Senator Pastore asked the Secretary of Health, Education, and Welfare to direct the Surgeon General to conduct a study on television violence and report his findings to the Pastore Subcommittee for implementation by the FCC.[84] Pastore proposed to allocate $1 million for such a study. As a result of the Pastore letter and of hearings before the

82 W. MORROW, CONGRESSIONAL COMMITTEES 162 (1969).

83 *Hearings on the Jurisdiction and Activities of the Federal Communications Commission Before the Subcomm. on Communications and Power of the Interstate and Foreign Commerce Comm.*, 92d Cong., 1st Sess. (1971).

84 Letter from Senator Pastore to Robert Finch, Secretary of Health, Education, and Welfare, March 5, 1969.

Communications Subcommittee, the Surgeon General's Advisory Committee on Television and Social Behavior was created.[85]

On September 28, 1971, Senator Pastore held hearings to review the Advisory Committee's progress. Chairman Burch appeared at those hearings to reassure Senator Pastore that the FCC was very concerned and was eagerly awaiting the Advisory Committee's final report. On March 21, 1972, the Advisory Committee delivered its report to Senator Pastore. Their basic findings were interpreted both by Senator Pastore and by some members of the Advisory Committee as showing a causal link between violence on television and social behavior among children.[86] Now fully aware of Congress' viewpoint on violence on television, FCC Chairman Burch stated: "Our concern and firm intention to make a significant contribution (leading, possibly, to Commission rule making) remains as before. As for the time, my best estimate now is late September — with the academic year underway and also the new television season."[87]Then in October 1972, the Commission held three days of public hearings on children's television.[88] The Ninety-second Congress adjourned, however, before the Commission could actually take any definitive action.

The oversight process during the Ninety-second Congress sparked congressional concern for another area of children's television. During FCC oversight hearings, House Communications Subcommittee Chairman Macdonald suggested that the Commission establish a permanent Children's Television Bureau to deal with programming and advertising aimed at young people.[89] In a letter to Chairman Burch on May 11, 1971, which transformed the suggestion into a recommendation, Representative Macdonald referred to children's television as "a terribly overlooked area" and asked Chairman Burch to consider retaining specialists to work on the problem.[90] After several months of private discussions on the matter, Chairman Burch announced on September 14, 1971, that the Commission had decided to establish such an office and planned

85 N.Y. Times, March 6, 1969, at 85, col. 3.
86 *Hearings on Surgeon General's Report, supra* note 14.
87 Letter from Dean Burch to Senator Pastore, July 19, 1972.
88 N.Y. Times, Oct. 3, 1972, at 90, col. 5.
89 *Hearings, supra* note 83.
90 Letter from Representative Macdonald to Dean Burch, May 11, 1971.

to staff it with experts in the field who would be permanently involved in advising the Commission on children's programming.[91] There is little doubt that both Senator Pastore and Congressman Macdonald will dwell at some length on television violence and children's television during the annual oversight hearings in 1973.

6. Control by Multiple Committee Supervision

William Cary, who served four years as Chairman of the Securities and Exchange Commission, has commented that congressional supervision of agency policies "is sometimes wearing, almost unendurable, but is an integral part of the system."[92] During the past decade, the number of congressional committees which have assumed an oversight function has increased significantly.[93] Such supervision by multiple committees allows more members of Congress, representing more interests, to have a voice in agency policies; but it has also led to duplicative and overlapping legislative review. For instance, when the Communications Satellite Act of 1962[94] was under consideration, FCC Commissioners testified before nine committees and subcommittees.[95] There continued to be a proliferation of oversight responsibility in the area of communications during the Ninety-second Congress.

Committees which had not been active in communications matters in the past became involved in the Ninety-second Congress as a result of legislation referred to them. Two such committees were the Senate Agriculture and Forestry Committee, which held hearings on a bill to create a rural telephone bank,[96] and the House Merchant Marine and Fisheries Committee, which considered the Vessel Bridge-to-Bridge Radiotelephone Act.[97] Even in front of these committees, the FCC was represented either through the actual appearance of the FCC Chairman or another commissioner, or by written testimony.

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91 Speech by Dean Burch before the International Radio and Television Society, in New York City, Sept. 13, 1971.

92 CARY, *supra* note 2, at 137.

93 Krasnow, *The Ninety-first Congress and the Federal Communications Commission*, 24 FED. COM. B.J. 97, 109-76 (1970-71).

94 47 U.S.C. §§ 701 *et seq.* (1970).

95 28 CONG. Q. ALMANAC 551-55 (1963).

96 Pub. L. No. 92-12, 85 Stat. 29 (codified in scattered sections of 7, 31 U.S.C.).

97 33 U.S.C.A. §§ 1201-08 (Supp. Nov. 1971).

7. Control by Pressures Exerted by Individual Congressmen or Staff Members

Although it is difficult to measure their impact, individual members of Congress are frequently influential in shaping the course and direction of FCC policy.[98] Newton Minow pointed out that "it is easy — very easy — to confuse the voice of one Congressman, or one Congressional committee, with the voice of Congress."[99] Professor Davis contends that the day-to-day influence of members of Congress may be even more important to agencies than committee hearings, and that these individual influences seldom come to public attention. He cites as an example private meetings between the Chairman of the House Commerce Committee and the Chairman of the FCC for the purpose of "working over" CATV regulations prior to their being issued by the Commission.[100]

In the Ninety-second Congress there was pressure applied on the FCC from both sides of Capitol Hill concerning the Commission's decision, late in 1971, to discontinue the second phase of rate-making hearings for American Telephone and Telegraph.[101] The decision was attacked publicly in many quarters, but perhaps most loudly by Senator Fred Harris (D.-Okla.). Senator Harris charged the Commission with failing in its responsibility to the public and announced his intention of introducing legislation to compel the FCC to complete its investigation.[102] On January 13, 1972, Chairman Burch sent a lengthy letter to key figures in Congress defending and explaining the Commission's action.[103] But on the

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98 For a critical description of the undue use of power of certain members of Congress in dealing with the FCC, see KOHLMEIER, *supra* note 9. However, care must be taken not to overstate the impact of pressure exerted by individual congressmen. Judge Friendly has commented: "What are compendiously called 'pressures' on administrative agencies are, in fact, of many different types. Sometimes they come from elements in the industry; sometimes from legislators, governors, mayors, or other local interests; sometimes they appear to come from the latter but are, in fact, generated by the former. Sometimes, and this is a form that needs a good deal more study, pressure comes from the agency staff — and here again this may be either spontaneous and sincere or simulated and synthetic." Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 438 (1960).

99 MINOW, *supra* note 7, at 35.

100 DAVIS, *supra* note 10, at 148.

101 Thorp, *Communications Report / FCC's Ability to Regulate AT&T Faces Test in Upcoming Investigations*, 4 NAT'L J. 432, 433 (1972).

102 *Id.*

103 Letter from Dean Burch to Senator Pastore, Jan. 11, 1972.

first day of the new session of Congress, Senator Harris held a news conference at which he once again publicly prodded the Commission to act.[104] Six days later Harris introduced legislation which would provide the Commission additional staff and up to $2 million in increased funding in order to resume the formal inquiry.[105] Later that week, the Commission announced that it was reinstating the second phase of formal hearings.

The influence of congressional staff members in the oversight process should not be overlooked.[106] The staffs of the relevant congressional committees maintain a close liaison with the FCC and impart the views and expectations of members of the committee to the commissioners, to personnel of the FCC's Legislation Division, and to other Commission staff members. Although they usually have low visibility, such committee staff members play a crucial role both in shaping the body of laws and in overseeing the activities of regulatory agencies.[107]

During the Ninety-second Congress the Congressional Black Caucus added another dimension to the ways in which pressure can be exerted on the FCC by individual congressmen. The Caucus had its genesis in 1970 when black members of the House boycotted President Nixon's State of the Union message,[108] and during the Ninety-second Congress began to function as an entity. Early in 1972, Black Caucus Chairman Louis Stokes (D.-Ohio) announced the creation of a Task Force on the Media to be headed by Representative William Clay (D.-Mo.).[109] Later in the year, after public hearings, the Task Force issued a position paper which, among other things, recommended that the FCC adopt rules guaranteeing blacks an equal share of the ownership of TV and

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104 N.Y. Times, Jan. 19, 1972, at 22, col. 5.

105 118 CONG. REC. S285-86 (daily ed. Jan. 24, 1972).

106 *See* Zeidenberg, *The Great Washington Fumbling Act*, TELEVISION, Aug. 1967, at 46 (a description of the efforts of staff members of a congressional committee to arouse the opposition of key senators to the proposed ABC-ITT merger).

107 For a discussion of the role and function of congressional staff lawyers, see Krasnow & Kurzman, *Lawyers for the Lawmakers*, 51 A.B.A.J. 1191 (1965). For a colorful discussion of the role of the staff investigator in uncovering abuses by the FCC, see B. SCHWARTZ, THE PROFESSOR AND THE COMMISSIONS (1959).

108 26 CONG. Q. ALMANAC 690 (1971).

109 The Task Force on the Media held hearings on March 6-7, 1972, resulting in the Task Force's position paper issued later that year. *See* CONGRESSIONAL BLACK CAUCUS, A POSITION ON THE MASS COMMUNICATIONS MEDIA (1972).

radio stations. The FCC was also urged to pay special attention, when considering renewal applications, to whether or not, and how well, the applicant has served the local black community, and to apply the fairness doctrine so as to ensure that the black viewpoint is presented on important issues.[110] The impact of the Black Caucus is a relatively new source of pressure and influence and must be considered along with the more traditional sources of legislative influence.

8. Control by Legislative Inaction

Inaction by Congress may have as great an impact on the Commission and its policy making as action. Professor Jaffe contends that where Congress is unable to determine policy on issues which demand congressional expression, its failure to act should be viewed as an abdication of its legislative authority and as a delegation of power over these issues to the agency involved.[111] Jaffe points out that it is not unusual for a problem to be left to administrative determination "because the issue is politically so acute, so much a matter of conflict in the community that Congress is unable to formulate a policy."[112] Such initial irresolution, however, has not prevented Congress from later responding to a Commission interpretation with hostility. Even when Congress has been willing to delegate important decisions to the Commission, it has reserved the right to criticize and oppose them. One of the tasks of the FCC, then, is to make crucial decisions when the wishes of Congress are quite unclear, but when its presence and power to criticize are quite apparent.

In a concurring opinion to the Supreme Court's decision in *United States v. Midwest Video Corp.*, Chief Justice Burger indicated that he felt congressional action with regard to cable television (CATV) was imperative. He noted that "[t]he almost explosive development of CATV suggests the need of a comprehensive reexamination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress

110 *Id.*

111 JAFFE, *supra* note 1, at 41-44.

112 *Id.* at 41. Jaffe believes the phenomenon of congressional control arises more pointedly in connection with presently functioning delegations than new ones.

and not left entirely to the Commission and the courts."[113] However, despite pleas by the courts and the FCC for congressional guidelines, Congress — by inaction — has allowed the FCC to set the standards for cable development.

In March 1971 the Commission held an unprecedented series of public hearings at which the subject of CATV was discussed thoroughly, with an opportunity for every major interest group, including individual congressmen and senators, to present their views.[114] For nearly a year the Commission deliberated possible CATV rules. In the course of these deliberations, the FCC frequently had to appear before various congressional committees. The questions the commissioners were asked about their progress ranged in tone from friendly to antagonistic.[115] Finally, Chairman Burch sent a letter to Senator Pastore and Representative Macdonald outlining the FCC's proposed rules.[116] It thus informed Congress of its intentions well before it finally promulgated new CATV rules in February 1972.[117] Although both the House and Senate Commerce Committees were afforded the opportunity to review the rules before they went into effect, no such action was taken.

Thus, in areas involving the clash of many interests, such as the regulation of cable television, Congress has been able to avoid debilitating political battles by remaining inactive, thus passing on the policy-making authority to the agency itself. Then, through the use of more informal and less politically dangerous means of overseeing, such as committee hearings and personal communications, Congress is still able to influence the agency's policy formation and application.

III. Improving Congressional Oversight

As the above discussion suggests, congressional oversight of the FCC, in practice, has only approached the four goals of a properly

113 406 U.S. 649, 676 (1972).

114 Panel discussions and oral presentations were held before the FCC en banc. For the orders establishing the proceedings for these panel discussions and oral presentations, see 27 F.C.C.2d 303, 932 (1971).

115 *See Hearings, supra* note 83, at 21, 29.

116 Commission proposals for regulation of cable television, 31 F.C.C.2d 115-47 (1971).

117 37 Fed. Reg. 3252-57 (1972).

functioning oversight process. Congress has not, in fact, been able to supervise the FCC's activities effectively in order to insure that their legislative intent has been consistently applied, or that agency action has been taken where needed, or that agency spending has not been wasteful or duplicative.

The basic problem seems to be that Congress has been forced, by practicalities, to do its overseeing primarily on a crisis basis only. The crisis may be local, involving an important constituent, as well as national. The regulatory agencies are generally left unsupervised until one of their policies or actions stirs up disapproval loud enough to reach congressional ears. The reasons for Congress' inability to maintain constant surveillance are many. As communications technology has expanded tremendously, jurisdiction over its regulation has splintered. Many committees have oversight responsibilities, but each has them in a narrowly-defined area only. Congress in general, and the committees specifically, lack the staff and funds necessary to effectively supervise the regulation of an entire industry. Congress lacks any well-developed standards by which to measure agency performance and independent sources of information upon which to formulate judgments of its own on matters ranging from the size of agency budgets to actual substantive policy. Instead, it is forced to rely almost entirely on figures and assessments produced by the agency itself.

The above criticism must be tempered with the realization that a problem as complex as fashioning a successful oversight process has no easy solution. Indeed, it might be questioned whether it has a workable solution at all. For Congress is, above all else, political. Its capabilities and capacities are, and forever will be, limited by political considerations. For instance, one possible improvement of the oversight process — consolidating jurisdiction into one or two committees so that they will be able to develop expertise in the field to be regulated and will be able to maintain constant and knowledgable surveillance — makes little sense politically. It is quite unlikely that individual congressmen or committees could ever be persuaded to surrender their jurisdiction, however small, over important, influential industries such as communications.[118]

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118 HORN, *supra* note 39, at 217.

There are, however, other less extreme solutions to the oversight problem which are politically feasible. As already explained, Congress cannot be an effective "watchdog" over agency spending and programming because it lacks the economists and engineers needed to independently analyze and evaluate the constant, complex issues posed by new communications technologies. It follows that Congress should appropriate more money for itself and should hire more staff with expertise in the area of communications. While it is certainly not suggested that Congress begin to amass an army of technocrats, it is imperative that Congress provide itself with an independent evaluative capability so that it, and not the agency it oversees, can pass judgment on agency policy and actions.

The Ninety-second Congress took a step toward adopting this suggestion when it approved legislation creating an Office of Technology Assessment to provide Congress with expertise in a number of highly complicated areas.[119] Studies by the Office should assist Congress in developing its own initiatives in such complex matters as communications satellite systems, common carrier reorganization, and regulation of cable television. A move by Congress to hire its own experts is not without some political difficulties. The public, unless properly attuned to the oversight problem, will most likely act negatively to legislators spending more money on themselves. But the need for Congress to have its own experts exists, public attitude notwithstanding.

Consider one example which is typical of congressional staff problems. The House Committee on Interstate and Foreign Commerce, the largest legislative committee in Congress and a committee with extensive jurisdictional concerns, has only four professional staff members, who must be available to both majority and minority members of the Committee. Staffing for the Republican members of the Committee has long been a point of contention within the Committee as it has been throughout the Congress. Recent internal reforms in the Commerce Committee resulted in more minority staff but created a serious imbalance affecting the Democrats since the minority staff is responsible only to Republi-

119 Pub. L. No. 92-484, 86 Stat. 797 (1972). *See generally* Hopkins, *Congressional Reform and the Ninety-second Congress*, 59 A.B.A.J. 33 (1973).

can members. To offset this imbalance as well as to relieve the regular professional staff of some of their legislative responsibilities, the four subcommittee chairmen are now each allowed to hire a single staff member to work solely in the areas of their subcommittees' jurisdiction. However, as a result of the lack of proper office space, most of these staffers work out of the congressional office of the subcommittee chairman and, as a result, are largely unavailable to other members of the subcommittee.

It is ironic that Congress, with its "power of the purse," has been so miserly with itself. In many instances, good staff personnel are lost to the lure of bigger money with trade associations or large law firms. It is clear that in order to attract and retain competent people on its staffs, Congress must offer more money.

Not only does Congress lack sufficient numbers of experts on its staffs to independently analyze all agency actions, but it also lacks sufficient access to the facts it needs to make these analyses. Committees often find themselves depending on the very people who have prepared the program they are considering to supply the facts and figures needed to evaluate it critically. During the Ninety-second Congress, a modern computerized data retrieval system was installed to provide informational support for the House of Representatives.[120] This computer system could be utilized to retain and quickly recall agency statistics. Moreover, Congress could obtain useful information and, thus, improve the effectiveness of its overseeing by requiring the FCC, and the other agencies it supervises, to file reports with Congress, pinpointing areas of problem and progress. Such reports would then be made available to all committees having jurisdiction over a particular agency.

Rather than just appropriating itself more money and staff, Congress should also insure that the regulatory agencies themselves have sufficient funding and personnel to carry out the tasks assigned to them. Congress clearly does not fulfill its oversight responsibility by merely ordering an agency to take certain actions; it must also, as much as practicable, provide that agency with the necessary resources. To do this, Congress' appropriation process

120 31 U.S.C. § 1151 (1970). Thus far it has been used only for payroll and other housekeeping matters. M. GREEN, J. FALLOWS, & D. ZWICK, WHO RUNS CONGRESS? 129 (1972).

must be improved. It is in the appropriation process that experts on congressional staffs would be especially useful. Their rebutting of agency testimony or, perhaps more importantly, their supporting of agency budget requests would be invaluable in helping the appropriations committees make complex, yet independent, determinations. Certainly, their concurring with an agency's assessments might help the committee overcome its initial suspicion of anyone coming to them for more money.

Furthermore, there should be increased communication between the appropriations committees and the various legislative committees responsible for overseeing a particular agency and its industry. Such an exchange of information would not only avoid duplication and waste of funds, but would also help insure that the agency was receiving sufficient monies to pursue the mandate given it by Congress. In addition, legislative committees should be required to inform the appropriations committees of the impact of new laws on the financial and personnel needs of each agency. This information could be included as a part of the committee reports which accompany bills to the floor of Congress for consideration.

Congress could also improve the oversight process by developing meaningful standards of agency performance and transmitting them to the agencies. The process of developing guidelines would itself be quite useful, for it would force Congress to express and itemize exactly what it considers important in industry regulation. Once the objective criteria were formulated, Congress would then use them in appraising and criticizing the activities it oversees. Representative Macdonald has already asked the General Accounting Office to develop a set of standards by which his subcommittee can measure the performance of the Federal Communications Commission and the Federal Power Commission. In a letter to the Comptroller General, Representative Macdonald explained the weakness of the current oversight procedure:

> While this procedure is informative, I am not certain that it goes far enough in doing what the rules of the House require us to do, namely to analyze, appraise, and evaluate

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121 Letter from Representative Macdonald to Elmer Staats, July 18, 1972.

> application, administration, and execution by these agencies of the laws for which they are responsible . . . Unless we in the Congress with your assistance make a start in the direction of developing appropriate yardsticks, Congressional legislative review of agency performance may remain a matter of form rather than substance.[121]

Armed with its own guidelines, Congress would then be able to undertake more frequent oversight hearings. It could then progress beyond the stage at which the agency is merely introducing it to its many activities and could begin meaningful supervision. Moreover, the hearings themselves could be conducted in a manner aimed at assisting the oversight process. Rather than considering a multitude of diverse issues, they could, instead, focus mainly on those problems and areas that require legislative guidance.

IV. Conclusion

Burdened by its own traditions, threatened by encroachment by the executive branch, and faced with rapidly expanding technologies, Congress may be falling behind in meaningfully charting the direction of the FCC and other regulatory agencies. The Ninety-second Congress, however, seems to have recognized the seriousness of the problem. It has begun to take some initial steps to counter the trend of legislative vacillation and indecision. It is hoped that these steps will lead to a new style of congressional oversight — one characterized by greater congressional guidance and an increased dialogue between Congress and the agencies it oversees.

CONGRESS AND PUBLIC POLICY: A STUDY OF THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

JEFFREY M. BERRY* & JERRY GOLDMAN**

Introduction

With the passage of the Federal Election Campaign Act of 1971[1] Congress finally came to grips with one of the most vexing domestic problems of recent years.[2] The Act is relatively comprehensive, providing both for spending limitations and identification and disclosure of campaign contributions. By viewing events surrounding the passage of this bill in the Ninety-second Congress, some unusual insights into congressional decision making can be gained.

It is not solely this legislative process which will be examined here, however. As Austin Ranney has noted, post-World War II research in political science has focused primarily on the processes by which public policy is made at the expense of the policy content.[3] Lewis Froman has offered an alternative framework; he argues that the policy content of legislation should be considered as the instrument for effecting changes in the political process.[4] The 1964 Civil Rights Act, for example, was drafted to permit review by the Senate Commerce Committee and the House Ju-

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1 Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.A.) [hereinafter cited as Act].

2 *See, e.g.*, D. ADAMANY, CAMPAIGN FINANCE IN AMERICA (1972); H. ALEXANDER, MONEY IN POLITICS (1972); A. HEARD, THE COSTS OF DEMOCRACY (1960); M. MCCARTHY, ELECTIONS FOR SALE (1972).

3 Ranney, *The Study of Policy Content: A Framework for Choice*, in POLITICAL SCIENCE AND PUBLIC POLICY 3 (Ranney ed. 1968).

4 Froman, *The Categorization of Policy Contents*, in POLITICAL SCIENCE AND PUBLIC POLICY 41 (Ranney ed. 1968).

diciary Committee and not by committees controlled by Southern Democrats opposed to the legislation.[5]

Froman's approach seems plausible since the policy content of campaign finance reform definitely structured certain aspects of the legislative process. This policy also had a peculiar impact on the behavior of the political protagonists. In adopting Froman's framework, however, one risks obscuring the institutional factors which shaped campaign finance reform policy. Hence, this article focuses on the interrelationship of process and policy in the campaign finance reform efforts in the Ninety-second Congress. This article will also emphasize political analysis — matters of power and policy, prudence, and partisanship — not "legal" scholarship.[6]

Laws enacted by Congress are seldom made ready for enforcement by the mere stroke of the presidential pen. While the general intent of the framers of the Federal Election Campaign Act was clear, many of the important details were left to the administrators. Therefore, the development of the administrative regulations and the implementation of the law will also be examined.

I. The Antecedents of Campaign Finance Legislation

Money has always played a central role in politics, but it was not until the early part of this century that the issue of campaign finance reform arose. To understand the forces which shaped the Federal Election Campaign Act, one must go back to the Federal Corrupt Practices Act of 1925.[7] This statute was an outgrowth of the years of muckraking which exposed the extent of the influence of money in politics. Ostensibly, the law attacked the influence

5 L. Froman, The Congressional Process: Strategies, Rules, and Procedures 36-37 (1967).

6 *Compare* Note, *Campaign Spending Regulation: Failure of the First Step*, 8 Harv. J. Legis. 640 (1971) (an example of legal scholarship relating to campaign finance reform) *with* R. Peabody, J. Berry, W. Frasure, & J. Goldman, To Enact a Law: Congress and Campaign Financing (1972).

Much of our information was gleaned from interviews with congressmen, staff assistants, lobbyists, administrative personnel, and media consultants. Thirty-four interviews were conducted from March 1971 to June 1972. The average interview lasted 45 minutes, but some were as long as two and a half hours. Interviews were granted on the condition that remarks were not for attribution. [Hereinafter cited as interview with campaign finance reform participant.]

7 18 U.S.C. §§ 591, 597, 599, 609, 610; 2 U.S.C. §§ 241-56 (1970).

of big business and the very rich in the electoral process by requiring disclosure of receipts and expenditures by candidates for the House and Senate and political committees and by imposing spending limitations. In reality, however, the Corrupt Practices Act was a sham, as the limitations on spending and contributions were thwarted by the presence of numerous loopholes. More important, however, was the fact that the law was flagrantly violated in election after election and that violators were not prosecuted.[8] In nearly half a century, there has not been a single conviction for campaign misdeeds under this statute.[9] This history has created a special problem for the implementation of the new Federal Election Campaign Act by leaving the impression that this type of law can be evaded or ignored.

Congress, of course, could have acted at any time to close the loopholes in the Corrupt Practices Act and to encourage stricter enforcement of the law. Reform efforts, however, were only sporadic. The Hatch Act in 1940 imposed certain limits on individual contributions and committee expenditures.[10] In addition, the War Labor Disputes Act of 1943,[11] later reenacted in the Taft-Hartley Act of 1947,[12] barred political gifts by labor unions and corporations. None of this legislation, however, had a significant effect on abuses in the area of campaign finance. For the next 20 years campaign finance reform made little headway.[13]

There are a number of reasons why members of the House and the Senate opposed disclosure of contributors and limitations on spending. First, and most significant, full disclosure might be politically embarrassing as opposing candidates would undoubtedly publicize contributions from certain individuals or special interests. Second, a potential contributor, knowing that his name,

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8 For a brief history of the Federal Corrupt Practices Act and the problem of its enforcement, see DOLLAR POLITICS 15-18 (R. Diamond ed. 1971).

9 N.Y. Times, Nov. 12, 1972, § 1, at 42, col. 1.

10 Act of July 9, 1940, ch. 640, 54 Stat. 767 (codified in scattered sections of 1, 5, 18 U.S.C.).

11 Act of June 25, 1943, ch. 144, § 9, 57 Stat. 167.

12 18 U.S.C. § 610 (1970).

13 Individual legislators worked for reform, and post-war presidents expressed concern about the problem. John Kennedy appointed a commission to make a study, but its report did not spark successful legislative efforts. COMMISSION ON CAMPAIGN COSTS, FINANCING PRESIDENTIAL CAMPAIGNS (1972).

occupation, and donation would be public information, might contribute less or not at all. Third, while media spending limitations would ostensibly favor the better known incumbents, many candidates would prefer to spend as much as they felt necessary for a given race. Some congressmen, in addition, might have resisted reform proposals simply because new regulations would mean excessive paperwork for their campaign staffs.[14]

On the other hand, important factors facilitated the enactment of legislation. Unlike many other national problems (*e.g.*, housing and air pollution) campaign finance problems could, in large part, be solved by practical legislation. In addition, campaign finance reform, like ecology, was something one could not oppose, at least in principle. This seriously hampered the efforts of legislators who would like to have killed or crippled the recent legislation, but who did not wish openly to oppose campaign finance reform.

Congress was finally stimulated to give serious consideration to election finance reform after the 1968 elections. Two forces had the major catalytic effect. First, campaign spending increased enormously.[15] The fact that total campaign spending in the country increased from $200 million in 1964 to $300 million in 1968 is indicative of the severity of the problem.[16] There were also glaring individual abuses.[17]

While the sharp rise in campaign expenditures was all too evident, the second major catalytic factor was much less visible outside Congress. The National Committee for an Effective Congress, a small, public interest group whose major function is to raise

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14 The law requires that every political committee keep an account of all gifts over $10 including full identification by name, address, occupation, and place of business. Committees do not have to disclose this information unless a contributor's gifts in aggregate are over $100. Act §§ 302-04, 2 U.S.C.A. §§ 432-34 (Supp. July 1972).

15 The Citizens Research Foundation of Princeton, N.J., has been the primary source for statistics on campaign expenditures and contributions. *See* H. ALEXANDER, FINANCING THE 1968 ELECTION (1971); H. ALEXANDER, MONEY IN POLITICS (1972).

16 *Hearings on H.R. 8627, H.R. 8628 (and Related Bills) Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 58 (1971) (Citizens Research Foundation data) [hereinafter cited as *Hearings*].

17 For example, Representative Richard Ottinger spent over $1,900,000, almost all of which came from his own family, in the 1970 Democratic senatorial primary in New York. *Hearings on the Federal Election Campaign Act of 1971 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 500 (1971).

campaign funds mainly for liberal Democratic congressional candidates, played a central role in the development of campaign finance legislation passed by the Ninety-first Congress only to be vetoed by President Nixon.[18] After thoroughly researching the subject, NCEC representatives Russell Hemenway and Susan Bennett King[19] contacted over 100 congressmen early in the Ninety-first Congress. NCEC was primarily responsible for the drafting of the initial bill[20] and the enlistment of sponsors for it. The NCEC's efforts in the Ninety-first Congress are significant in this analysis of the reforms of the Ninety-second Congress because it was the NCEC's original bill and extensive work which stimulated the passage of S. 3637, the Political Broadcast Act of 1970.[21] And, it was this Act, vetoed by President Nixon,[22] which served as a basis for the endeavors of the Ninety-second Congress.

President Nixon vetoed the legislation for a number of reasons. He stated that the bill which limited spending for television and radio "would only force the candidate to spend more by requiring him to use more expensive techniques."[23] He pointed out that a limit on broadcast spending rather than on actual broadcasting time was discriminatory because media prices varied widely from one market to another. He also accused the legislation of favoring incumbents because the broadcast restrictions would work to the advantage of the better known officeholders. Finally, he criticized the provision that required stations to charge their lowest unit rate for political advertising as rate-setting by statute.[24]

The President's criticism was also important because of what it left unsaid about S. 3637. He made no mention of the repeal of the equal-time requirement of the Communications Act of 1934,[25] although he was to be strongly opposed to such repeal during the Ninety-second Congress. It is conceivable that repeal of § 315(a)

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18 For a detailed study of campaign finance legislation in the Ninety-first Congress, see PEABODY, *supra* note 6.

19 Mr. Hemenway is the Executive Director of the NCEC; Ms. King is the Committee's Washington representative.

20 S. 2876 & H.R. 13721, 91st Cong., 1st Sess. (1969).

21 S. 3637, 91st Cong., 2d Sess. (1970).

22 6 WEEKLY COMP. OF PRES. DOCS. 1367 (1970).

23 *Id.*

24 *Id.* at 1368.

25 47 U.S.C. § 315(a) (1970).

was one of the principal reasons for the veto. The President's veto made campaign finance reform even more of a political issue, and Democratic congressmen and many commentators in the press accused him of vetoing the Political Broadcast Act out of partisan considerations.[26]

A key factor in the defeat of the attempt to override the President's veto was a letter from President Nixon to Senate Minority Leader Hugh Scott of Pennsylvania in which he stated that the Administration would work closely with Congress in an effort to enact "comprehensive" reform. President Nixon called for a bill "which will deal with all problems of political campaigning, including spending limitations."[27] With this promise of new, far-reaching legislation the veto was upheld by the Senate, 58 to 34, four votes short of the necessary two-thirds. The break down of the vote is evidence of the partisanship involved. The Democrats voted to override the veto 49 to six, while the Republicans cast only nine in favor with 28 against.[28]

After the failure to override the veto, it was inevitable that a major effort on campaign finance reform would be made in the Ninety-second Congress. If the Democrats could not have a law, then they would at least have the issue of Republican opposition to reform in the upcoming elections. Furthermore, the Democratic Party was in terrible financial straits, still in debt over nine million dollars from the 1968 election.[29] It desperately needed reform legislation which would diminish the financial advantage of the Republicans. It was also significant that key congressmen had become deeply committed to campaign finance reform. Representative Torbert Macdonald of Massachusetts and Senator John Pastore of Rhode Island chaired the key subcommittees, and they were not going to let their strenuous efforts in the Ninety-first Congress go to waste. The issue was now before the public and could not be disposed of easily.

The White House began to re-examine its strategy after sensing that campaign finance reform would be hard to stop. In December

26 26 CONG. Q. ALMANAC 863 (1971).
27 Letter from President Richard M. Nixon to Senator Hugh Scott. 116 CONG. REC. 38518 (1970).
28 116 CONG. REC. 38536 (1970).
29 NEWSWEEK, Dec. 13, 1971, at 23-32.

1970, Nixon aide Eugene Cowen asked Susan King of NCEC to meet secretly with him at the White House. Cowen and King agreed that full disclosure should be part of any legislation. Cowen was under the impression that the Democrats in Congress wanted spending limitations but were unenthusiastic about disclosure. The White House was hopeful that the NCEC could negotiate full disclosure in return for no spending limitations in forthcoming legislation. The NCEC, however, knew that spending limitations would be part of bills soon to be introduced by the Democrats and that it could not eliminate such limitations even if it wished to do so. Perhaps most important about the meeting was that Cowen specified what the Nixon Administration would find objectionable in new legislation since he must have known that King would communicate this information to the Democrats in Congress. The White House had now resigned itself to the fact that reform legislation had a good chance of passing, and the Administration was ready to bargain.

II. Developments in the Ninety-Second Congress

A. *The Senate: Republican Cues on a Democratic Stage*

The Senate was the first to act in part because of the leadership of Senator Pastore, Chairman of the Subcommittee on Communications of the Commerce Committee. Senator Pastore's strength in the Senate was the result of his 22-year tenure, his attention to detail, his fiery oratory, and his caustic wit. Other factors were at work as well, not the least of which was the emergence of bi-partisan support for comprehensive reform from the majority and minority leaders and from other senators, both conservative and liberal. The NCEC was still strongly committed to reform, and it would once again monitor developments and lobby for support.

Alaska Democrat Mike Gravel, with the support of 13 co-sponsors, introduced the first comprehensive campaign reform proposal in the Senate early in the Ninety-second Congress.[30] Three days later, Majority Leader Mike Mansfield introduced S. 382.[31] This

30 S. 1, 92d Cong., 1st Sess. (1971). This bill sought implementation of a proposal made by the Twentieth Century Fund's Commission on Campaign Costs in the Electronic Era. *See* Twentieth Century Fund, Voters' Time (1969).

31 S. 382, 92d Cong., 1st Sess. (1971). This bill was almost identical to S. 4607,

bill, co-sponsored by Senators Pastore and Howard Cannon (D.-Nev.), was to become the chief vehicle for campaign reform. Senators Scott and Charles Mathias (R.-Md.) introduced their own comprehensive legislation a month later.[32]

The three bills covered the three broad areas of campaign reform — communications, finance, and disclosure — and transcended the jurisdiction of any one committee. The proposals, therefore, came within the ambits of the Committees on Commerce, Rules and Administration, Finance, and the Post Office. The progress of campaign finance legislation illustrates to some degree the complications that result when more than one committee is required to consider a bill. In order to insure that each committee considering the bills would report within a reasonable length of time, the Senate leadership passed a special unanimous consent agreement which provided that if action were taken by one of the committees involved, then a 45-day deadline would be imposed on the other committees considering the legislation.

The Scott-Mathias bill was the Republican alternative to the Democratic measures. Although all three bills had similar features one key provision was absent from the Republican measure — spending limitations.[33] The Republicans emphasized disclosure provisions, even though the President had approved of spending limits in his letter to Senator Scott during the veto-override attempt. Some newspapers reported White House support for the Republican proposals,[34] and Senator Scott himself said that it was his "personal feeling that 85 to 90 percent of this bill is probably satisfactory to the administration."[35] This proposal served to warn the Democrats that spending limitations would not be acceptable to the President despite his letter to Senator Scott.[36]

91st Cong., 2d Sess. (1970), which had been introduced by Senator Mansfield. 116 CONG. REC. 44129 (1970).

32 S. 956, 92d Cong., 1st Sess. (1971).

33 The Republicans have had greater success at raising campaign funds, and spending limitations would reduce this advantage. The Democrats, who have had considerably less success at raising campaign funds, strongly supported spending limitations. The Republicans may have supported the idea of disclosure simply because it was the lesser of two evils, but it is equally plausible that disclosure provisions would hurt the Republicans no more, or even less, than the Democrats.

34 N.Y. Times, Feb. 22, 1971, at 18, col. 6.

35 *Hearings*, *supra* note 16, at 335.

36 One of President Nixon's assistants, Eugene S. Cowen, paid a visit to Rep-

Senator Pastore's Subcommittee on Communications conducted four days of hearings in early March on the repeal of § 315(a), a reduction in rates charged political candidates for radio and television time, and a spending limitation for broadcast media. On March 11, the Subcommittee met in executive session and agreed to send S. 382 to the full Commerce Committee. Then on March 19, Senator Pastore received a letter from five Republicans on the Committee, requesting that hearings be reopened.[37]

On the evening of March 22, President Nixon sent a further signal to Congress (and to his fellow Republicans) on campaign finance reform. In response to a question from news commentator Howard K. Smith during an exclusive interview, he said:

> We do favor a limitation on expenses. There is no question about that. The point is how can we have one that will do two things: One, it must be comprehensive, and the other point that I should make is that it must not give an advantage to incumbents.[38]

Senator Scott certainly was surprised by the President's support of spending limitations. The President's statement was an embarrassment of sorts for the Republican leadership that had touted its bill as almost entirely approved.

On March 23, less than 24 hours after the President's surprise statement, Deputy Attorney General Richard Kleindienst requested that the Justice Department present its views on the measures before the Commerce Committee. Senator Pastore reluctantly scheduled hearings for the end of March, commenting, "I hope they won't come up here and read 'Gone With The Wind.' "[39] A month's delay was expected.[40]

Kleindienst's testimony revealed the Administration's broader

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resentative John Anderson (R.-Ill.) in early March. Representative Anderson had introduced a comprehensive campaign reform bill in the House that would set limits on spending and that would establish strict disclosure provisions. Cowen made his point clear: dump the Anderson bill and support the Scott-Mathias plan. This was another indication of White House opposition to spending limits. *See* Wall Street Journal, Mar. 16, 1971, at 1, col. 6.

37 117 CONG. REC. S12872 (daily ed. Aug. 2, 1971).

38 White House Conversation: The President and Howard K. Smith, March 22, 1971, at 16.

39 N.Y. Times, March 26, 1971, at 26, col. 1.

40 Washington Post, March 24, 1971, at A1, col. 6.

plans: to repeal § 315(a) for all federal offices;[41] to establish an overall ceiling on broadcast and non-broadcast media spending, letting the candidate determine where the money was to be spent within the categories; to lower rates for political candidates for broadcast time and non-broadcast space; and to provide for disclosure of the sources of campaign funds and how these funds were spent. Some thought the Administration had joined the reform bandwagon. Others were more skeptical and tended to endorse Russell Hemenway's analysis: "More likely the Administration will be forced to publicly support reform while seeking behind the scenes to render any prospective legislation either toothless or so riddled with controversial provisions as to defy Congressional passage."[42]

The Democrats' bill, S. 382, called for an overall spending limitation based on a formula of 10 cents per eligible voter, half of which could be spent on broadcasting. This formula would apply for all federal elective offices, with a $60,000 alternative ceiling for congressional races.[43] For presidential and vice presidential races, this formula would establish a limit of some $13.9 million.[44] The $7 million broadcast spending limit for presidential races was far below the 1968 Republican presidential campaign broadcast spending of $12.6 million. The Democrats, who had been strapped for funds, had spent only $6.1 million on radio and television for the Humphrey-Muskie campaign.[45]

During the mark-up on April 22, the Republicans twice tried to increase the broadcast and non-broadcast spending formulas, first to seven cents per eligible voter for each category and then to six cents. Both amendments were defeated in partisan votes. The Republicans then tried to remove the 50 percent broadcast sub-ceiling from the 10 cents per eligible voter limit, but that attempt was also blocked.[46] Republicans on the Commerce Com-

41 All the proposals, Republican and Democratic, that had been introduced called only for repeal of § 315(a) for presidential and vice presidential candidates.

42 N.Y. Times, April 1, 1971, at 21, col. 8.

43 N.Y. Times, April 22, 1971, at 19, col. 1.

44 S. Rep. No. 96, 92d Cong., 1st Sess. 76 (1971).

45 Federal Communications Commission, Survey of Political Broadcasting tables 3, 9, 20 (1968).

46 S. Rep. No. 96, 92d Cong., 1st Sess. 72-73 (1971).

mittee had urged that an independent electoral commission be established to supervise the administration of the legislation. In contrast, the Democrats' proposal retained the Clerk of the House and the Secretary of the Senate for such supervisory tasks.[47] The Republican plan was tabled by the Democrats in another partisan vote,[48] but the report accompanying the bill urged that the issue be considered by the Senate's Committee on Rules and Administration.[49] The Republicans also tried to extend repeal of § 315(a) for all federal elective offices but the amendment was defeated.[50] The bill as reported limited repeal only to presidential and vice presidential candidates.

Other features of the reported measure included: (1) a $5000 a year limitation on individual contributions to a candidate for federal office, which had been approved over Republican opposition; (2) strong disclosure provisions including the names and addresses of persons contributing $100 or more to a campaign; and, (3) an income tax deduction of up to $100 or a tax credit of $20, whichever saved the taxpayer more, for political campaign gifts.

Under the requirements of the Senate's unanimous consent agreement, the Committee on Rules and Administration was mandated to report S. 382 within 45 days following the Commerce Committee report of May 6, 1971. On June 21, the Rules and Administration Committee issued its report with further modifications of S. 382.[51] The final result was a bill more closely in line with the views of the Nixon Administration.[52]

Various amendments altered the bill's key provisions. First, it would repeal § 315(a) for all federal elective offices;[53] the White

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47 N.Y. Times, April 22, 1971, at 19, col. 1. The Clerk of the House and the Secretary of the Senate both serve at the will of each chamber; each is elected by the majority party at the start of each Congress.

48 S. REP. No. 96, 92d Cong., 1st Sess. 73 (1971).

49 *Id.* at 23.

50 *Id.* at 71.

51 S. REP. No. 229, 92d Cong., 1st Sess. (1971); N.Y. Times, June 4, 1971, at 14, col. 1; Washington Post, June 4, 1971, at A1, col. 7.

52 S. REP. No. 229, 92d Cong., 1st Sess. 3-54 (1971).

53 Administration objections to repeal of § 315(a) for presidential and vice presidential candidates is not surprising. The limited repeal was part of the vetoed S. 3637; and, although the President's veto message said nothing about this feature of the legislation, few would assert that it was not a factor in his decision to veto.

House was emerging: repeal § 315(a) for everybody or do not repeal it at all. Second, the modified bill would have the Comptroller General, not the Clerk of the House and the Secretary of the Senate, administer the campaign finance reforms.[54] The bill would also eliminate the limitation on individual campaign contributions. Opposition to the limitation had been voiced by the Deputy Attorney General, the Chairmen of the Democratic and Republican National Committees, and both senatorial campaign committees.[55] Perhaps the most important of the amendments adopted by the Rules Committee, however, was the removal of the broadcast media spending sub-ceiling to permit the full 10 cents to be used on radio and television.[56] When two Democrats were absent, the Republicans adopted the change by a four to three vote.

Senator Pastore, however, was not prepared to accept the Rules Committee changes. When S. 382 reached the floor for debate, he offered an amendment in the nature of a substitute, which sought a return to the stricter five cents per voter limit on broadcast media and would repeal § 315(a) for presidential and vice presidential races only. The Pastore amendment would also remove the tax incentive title in its entirety from the reform package.[57]

In addition, the President did not want openly to oppose partial repeal because this would only add fuel to the Democrats' fires. The best strategy was to prevent any change in the current law by making any White House approved revision so far reaching and therefore unagreeable to the Congress that no change would result. *See* PEABODY, *supra* note 6, at 188.

54 The Republicans had needed just one vote to add an independent electoral commission to the bill, but not a single Democrat could be swayed. Republican staff members had even contacted Americans for Democratic Action, Common Cause, and the NCEC to enlist their help, but to no avail. Interview with campaign finance reform participant, June 5, 1972.

55 S. REP. No. 229, 92d Cong., 1st Sess. 60 (1971). Washington Post, May 25, 1971, at A4, col. 1. Some smoke signals were sent by the White House to bolster opposition to this provision on first amendment grounds. N.Y. Times, April 28, 1971, at 20, col. 2.

56 It must have bothered Senator Pastore that these changes were made in the title of the bill that was clearly within the province of his subcommittee. Senator Pastore had been clear to mark off his own territory and had not tread in another committee's bailiwick. *See* notes 47-49 and accompanying text *supra*; N.Y. Times, June 4, 1971, at 14, col. 1.

57 This title was to be resurrected in a carefully laid out Democratic plan to seek public financing of the 1972 presidential election. PEABODY, *supra* note 6, at 211-15; Oberdorfer, *Political Poker with a $1 Bill*, Washington Post, Dec. 13, 1971,

The Senate began debate on S. 382 on July 21, 1971.[58] During the debate, 31 amendments to the Pastore amendment were proposed[59] and 20 were adopted. Many were designed to perfect the language of the bill and to remove ambiguities, but a few effected substantive changes in the proposal.

Vermont Republican Winston Prouty offered an amendment to repeal § 315(a) for all federal elective offices.[60] By this time, the White House message had become crystal clear: if the Democrats wanted a bill they had to accept total repeal or no repeal at all. The Prouty amendment was approved, 71 to 21. All 44 Republicans present were joined by 27 Democrats in support of the amendment. All the nays were cast by Democrats.[61]

Another amendment which passed provided for an independent federal elections commission that would bring to an end the direct congressional control over the supervision of the campaign finance laws,[62] a relationship "tantamount to putting the fox in charge of the chicken coop."[63] The establishment of a commission would remove this barrier to effective enforcement of the campaign laws. With public attention focused on the Senate, the amendment was adopted, 89 to 2.[64]

While Senator Pastore's amendment would reinstate the five cents per eligible voter sub-ceiling on broadcast spending, Senator Prouty sought to return to an overall limit of 10 cents per eligible voter to be spent as the candidate desired. The spirit of compro-

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at A1, col. 1; Oberdorfer, *Checkmating the Checkoff*, Washington Post, Dec. 14, 1971, at A1, col. 1.

58 Debate was to be limited and parliamentary rules of procedures were to be restricted when the Senate considered S. 382. 117 CONG. REC. S11729-30 (daily ed. July 21, 1971).

59 One amendment was ruled out of order because the special unanimous consent agreement required that all amendments be germane. This amendment sought to reincorporate the tax incentive title. 117 CONG. REC. S13136-40 (daily ed. Aug. 4, 1971).

60 117 CONG. REC. S13000 (daily ed. Aug. 3, 1971).

61 *Id.* at S13005.

62 A Justice Department policy, initiated by then Attorney General Herbert Brownell, delegated to the Clerk and the Secretary the decision as to whether or not the Justice Department should start criminal proceedings. This policy has been continued by all succeeding Attorneys General. Washington Post, Feb. 9, 1972, at A2, col. 1.

63 117 CONG. REC. H11473 (daily ed. Nov. 30, 1971) (remarks of Representative William E. Frenzel).

64 *Id.* at S12996 (daily ed. Aug. 3, 1971).

mise became apparent on the Senate floor when Senator Pastore, addressing Senator Prouty, offered to increase the sub-ceiling to six cents per eligible voter. The Vermont Republican agreed, and the Senate adopted the plan by a voice vote.[65] Although the Democrats won on the issue of complete interchangeability, the big fight never really developed; both sides had compromised.

On August 5, the revised Pastore amendment was adopted by a voice vote.[66] After months of effort, compromise, and signal calling by Democrats and Republicans in and out of Congress, a major hurdle had been cleared in the effort to reform campaign practices. S. 382, as amended, was overwhelmingly endorsed by the Senate, 88 to 2, on August 5, 1971.[67]

B. *The House of Representatives: The Ambivalence of Leadership*

The House of Representatives began its consideration of campaign reform proposals almost two months before Senate passage of S. 382. House hearings were scheduled before the Senate's bill could be reviewed in order to assure House action in the first session of the Ninety-second Congress. The longer the delay, the closer the 1972 election, and the more difficult it would be to pass strong legislation.

Hearings were held on numerous proposals before Massachusetts Democrat Torbert Macdonald's Subcommittee on Communications and Power in June.[68] Representative Macdonald, an affable, nine-term congressman, had led the House drive for the enactment of the vetoed S. 3637. He now sought to answer the President's complaint that the previous legislation "plugged only one hole in a sieve."[69] A number of bills before the Subcommittee had been co-sponsored by a bi-partisan group of more than 60

65 *Id.* at S13014 (daily ed. Aug. 3, 1971).

66 *Id.* at S13301-02 (daily ed. Aug. 5, 1971).

67 The negative votes were cast by two of the most conservative members of the Senate: Arizona Republicans Paul Fannin and Barry Goldwater. *Id.* at S13302 (daily ed. Aug. 5, 1971).

68 *Hearings, supra* note 16.

69 *Id.* at 1.

House members,[70] but Chairman Macdonald's bill occupied the center ring.[71]

On May 11, Representatives Wayne Hays (D.-Ohio) and Watkins Abbitt (D.-Va.) introduced their own campaign reform bill.[72] Representative Hays (Chairman of the Committee on House Administration) and Representative Abbitt (Chairman of its Elections Subcommittee) were in extremely powerful positions in the House, and their bill was a serious challenge to the Macdonald measure. It was almost certain that their bill would be reported; if two conflicting bills on the same complex subject emerged from different committees it was unclear which would be considered by the House. Representative Macdonald had the experience of managing S. 3637; Representative Hays had the power as chairman of a key House committee in addition to a temperamental disposition which made him a hard man with whom to deal.

The Democratic leadership — Speaker Carl Albert, Majority Leader Hale Boggs, and Majority Whip Thomas P. O'Neill — did not take a definite position, although their ability to establish legislative priorities is far greater than that of their Senate counterparts.[73] Representative Macdonald was under the understanding from the Speaker that whichever bill reached the floor first would be considered first.[74]

Institutional differences between the House and the Senate make it more difficult for comprehensive legislation to emerge relatively quickly from the House. The rules of the House require that a bill be referred to just one committee; and the jurisdiction of that committee establishes, within certain limits, the scope of the committee's review.[75] If legislation is to be introduced covering the jurisdiction of more than one committee, two or more bills must be written and referred to the committees involved.

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70 H.R. 5090, H.R. 5091, H.R. 5092, H.R. 6112, & H.R. 7911, 92d Cong., 1st Sess. (1971). The bi-partisan force was led by Representatives Morris Udall (D.-Ariz.) and John Anderson (R.-Ill.).

71 H.R. 8628, 92d Cong., 1st Sess. (1971).

72 H.R. 8284, 92d Cong., 1st Sess. (1971).

73 FROMAN, *supra* note 5, at 104.

74 Interview with campaign finance reform participant, June 5, 1972.

75 Rules of the House of Representatives, rule XI, H.R. Doc. No. 439, 91st Cong., 2d Sess. 335 (1971).

The bills, if reported, are then considered separately on the House floor, producing a piecemeal legislative effort; more rarely, the bills are joined together.

On July 7, the Macdonald subcommittee approved H.R. 8628 without altering the formulas limiting broadcast and non-broadcast spending each to five cents per eligible voter and repealing § 315(a) only for presidential and vice presidential candidates. The vote was strictly partisan, five Democrats to four Republicans.[76] Representative Macdonald expected that the full committee could begin its mark-up of the bill as early as the end of July, and the House leadership had included it among a list of measures that might come to the floor before the August recess. He appeared to be winning his race against Representative Hays. The Macdonald bill, however, was not considered by the full committee until September.

The most plausible explanations for the delay involve the Chairman of the Interstate and Foreign Commerce Committee, Harley Staggers of West Virginia. Representative Staggers set the agenda for his committee and to a large extent determined the measures to be considered. One reason for his delay can perhaps be gleaned from his position on another broadcasting issue before his committee during the summer of 1971. He had led the Commerce Committee in an attempt to issue a contempt citation to Dr. Frank Stanton, President of CBS, for his refusal to honor a subpoena for materials related to the controversial news program, "The Selling of the Pentagon." Representative Staggers had placed his prestige on the line when he brought the motion to the floor with the support of the leadership, but he was rebuked by a majority of his colleagues and the leadership when the votes were cast. Since the Macdonald bill contained a partial repeal of § 315(a), which change was strongly supported by the broadcasting industry, Representative Staggers may have hesitated to side with the broadcasters so soon after his confrontation with the industry. Even though Representative Macdonald had supported Representative Staggers on the CBS issue and hoped for committee consideration in September, immediately after the August recess, it

76 Washington Post, July 8, 1971, at A2, col. 1.

was not until much later that the bill finally reached the agenda. Then, the battle broke wide open.

When H.R. 8628 came up for full committee consideration, Representative Louis Frey (R.-Fla.) offered an amendment establishing an overall 10 cents per eligible voter limit with no subceiling on broadcast spending.[77] The Frey amendment was adopted, in large measure because most of the Republicans were present at the mark-up session and the Democrats were caught off guard.

Torbert Macdonald was not prepared to give up the fight. He had, of course, voted against the Frey amendment, but wanted to have the amendment reconsidered. Since a motion to reconsider can only be made by a member who voted for the proposal,[78] Representative Macdonald switched his nay vote to yea, so, at the next committee meeting, he could move to reconsider. During the intervening week, Susan King and Russell Hemenway of the NCEC worked hard to get assurances from the Democrats on the Committee that the Frey amendment would be expunged. On October 5, the motion to reconsider carried, 17 to 15.[79] But, by the time the amendment came up for a vote the second time, enough Republicans had appeared to readopt the amendment by a vote of 21 to 19.[80]

Facing the loss of a crucial part of the reform effort, the NCEC located the absent members who would oppose the Frey plan and urged them to attend the final session on the bill, set for October 6. When the committee met for its final session, Representative Macdonald offered an amendment in the nature of a substitute which would replace the entire bill, including the Frey changes, with the original Macdonald bill. When the Macdonald amendment came to a vote, all 43 committee members were present. The vote was 23 to 20 in favor of adopting the Macdonald amendment. All the Republicans and two Democrats voted against the Macdonald plan.[81]

Representative Macdonald's race with Representative Hays to

77 Washington Post, Sept. 28, 1971, at A1, col. 4.
78 SENATE MANUAL, rule XIII, S. Doc. No. 1, 92d Cong., 1st Sess. 14 (1971).
79 Washington Post, Oct. 6, 1971, at A2, col. 1.
80 *Id.* Two of the three absent Democrats were on a junket in Italy. All three reportedly would have voted against the Frey amendment.
81 Washington Post, Oct. 7, 1971, at A5, col. 1.

get to the floor ended in a tie for the Hays Committee had approved his campaign reform measure on October 4,[82] and both bills would be reported on October 13.[83] The Hays bill as reported would, among other things, impose a six cents per eligible voter overall spending limit for presidential candidates. For House and Senate candidates, an alternative limit of $50,000 would apply. The bill also provided for public disclosure of contributions and expenditures before and after an election, and it imposed a limit on contributions to candidates or to their committees.

On the morning of October 8, a secret meeting was called by a number of high-ranking Republican staff members from the White House, the Justice Department, and the Congress. Russell Hemenway of the NCEC was also invited to attend what turned out to be an information trading session. The NCEC had apparently been chosen as the pipeline to reform supporters in the House because of its visibility as a prime force behind the reform effort. The NCEC's reluctance to be caught playing both sides of the street would assure relative secrecy.

The Republican coterie then identified the unacceptable and acceptable provisions of the Hays and Macdonald bills, now both headed toward the House floor. For example, media limits in the Macdonald bill were acceptable to the Administration, but limits on contributions to candidates covered by the Hays bill were not. The Republicans were not rigid on any bargaining point except that the Hays bill should not be considered on the House floor. Everyone agreed that they could not pull an end-run on Wayne Hays and that the best way to avoid the Hays bill would be through a compromise substitute, such as the bill passed by the Senate.

With the two bills emerging at the same time, some decision would have to be made as to how the measures would be considered on the floor, as the leadership's "take-the-bills-as-they-come" approach had not worked out. Certainly, to take up one

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82 Washington Post, Oct. 5, 1971, at A2, col. 3. The Committee agreed to introduce a clean bill, H.R. 11060, in lieu of H.R. 8284. 117 CONG. REC. D983 (daily ed. Oct. 4, 1971). Both the Committee on House Administration report, H.R. REP. No. 564, 92d Cong., 1st Sess. (1971), and the Commerce Committee Report, H.R. REP. No. 565, 92d Cong., 1st Sess. (1971), were filed on October 13, 1971.

83 117 CONG. REC. H9555 (daily ed. Oct. 13, 1971).

bill before the other would give the first bill certain advantages, but to legislate such fundamental reform in a piecemeal fashion was unacceptable. A meeting was held in the Speaker's office to resolve the impasse. Present were Speaker Albert, Majority Leader Boggs, Majority Whip O'Neill, Representatives Hays, Staggers, and Macdonald, and Senators Mansfield and Pastore. After a number of hours and some heated arguments between Representatives Macdonald and Hays, a decision was reached. The two bills would be welded together, which was no easy task given the dissimilarity of the two measures, by a complicated rule which would have to emerge from the House Rules Committee.[84]

On October 28, the House Rules Committee met to consider a rule for the campaign reform measures before the House,[85] and on November 4 the committee finally made its report. The rule was complex: it provided that immediately following two hours of general debate:

> (1) Representative Macdonald's bill would be offered as a title I to the Hays bill. Amendments would be permitted to the Macdonald bill, and then a vote would be taken on attaching it to the Hays bill.
>
> (2) The next order of business would be consideration of the Senate bill (the Brown-Frenzel bill) as a substitute for the Hays-Macdonald package. Amendments would be in order, and then a vote would be taken on substituting it for the Hays-Macdonald bill.
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> (3) If the Brown-Frenzel bill were accepted, then the House would proceed to final passage. If the Brown-Frenzel bill were rejected, then the House would begin reading the Hays-Macdonald bill for amendment and passage.

It is not surprising that those who did not like the idea of reform took advantage of the turmoil resulting from the complicated

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84 Usually, important legislation will reach the floor from the House Calendar, one of five legislative calendars in the House. The rule or special order is reported from the Rules Committee and introduced as a simple resolution. If adopted, it permits the item on the House Calendar to be taken up for consideration out of chronological order; and, it alters the procedural rules that would otherwise encumber consideration. A rule will often set a limit on debate, provide for or prevent amendments, and establish other procedural changes.

85 For an account of this meeting, see Oberdorfer, *As Time Goes By . . .*, Washington Post, Oct. 31, 1971, at C7, col. 1, and Baltimore Sun, Oct. 31, 1971, at A11, col. 1.

state of affairs. On Thursday, November 18, the House adopted the rule by a voice vote after less than an hour of disorganized debate.[86] Consideration of the campaign finance reform package began late in the afternoon. The two hours of general debate provided by the rule were completed, but the crucial amendment and substitution stages were put off by Speaker Albert until after the Thanksgiving recess. The House had been plagued by numerous quorum calls throughout the day, causing an NCEC spokesman to comment that the decision to delay action was "a temporary victory for the enemies of reform" who sought to undermine a growing bi-partisan coalition.[87]

Consideration of campaign reform began again on November 29, when Representative Macdonald's bill was offered as a new title I in the Hays measure. Representative Frey, who had almost succeeded in gutting the Macdonald bill in committee, arrived at a compromise with Representative Macdonald on the House floor: the broadcast spending limit would be increased from five to six cents per eligible voter, making the spending limits equivalent to the Senate bill. The Frey amendment was passed in a voice vote.[88]

A compromise on § 315(a) was offered, repealing the equal-time requirement for races for all federal offices except the House. Representatives Udall and Anderson threw their support to this compromise, but the amendment was defeated.[89] Shortly thereafter, an attempt to repeal § 315(a) for all federal offices was soundly defeated, 95 to 277.[90] Rather than jeopardize the other provisions, Representatives Udall and Anderson then supported an amendment to leave § 315(a) unaffected. Representative Udall's appeal was laced with pragmatic politics:

> I believe the thing to do is take 315 out of the debate entirely. It does not amount to a hill of beans. I urge those who want a

86 117 CONG. REC. H11244-50 (daily ed. Nov. 18, 1971).

87 Washington Post, Nov. 19, 1971, at A4, col. 1. Before the resumption of debate, the bi-partisan Udall-Anderson coalition circulated a memorandum to all House members detailing the effects of a possible compromise on each member's re-election campaign. The compromise would take the form of the Brown-Frenzel substitute to the Hays bill.

88 117 CONG. REC. H11412-13 (daily ed. Nov. 29, 1971).

89 *Id.* at H11413-21.

90 *Id.* at H11434-36.

> bill this year, who want to get at the reporting, at the disclosure, and to do something about TV blitzes, to vote for this amendment and take this whole thing out of contention.[91]

The NCEC with Kenneth Young of the AFL-CIO, persuaded Frank Thompson of New Jersey, a leading spokesman among House liberals, to seek Representative Macdonald's support for dumping the repeal of § 315(a). He was successful, and Representative Macdonald urged the House not to tamper with the highly politicized issue.[92] The effort to reform § 315(a) ended with a voice vote.[93] The floor activity on November 29 closed with the adoption of the Macdonald bill as a new title I to the Hays measure.[94]

When the House reconvened on November 30, the first order of business was the consideration of the Brown-Frenzel bill (identical to the one passed in the Senate) as a substitute for the Hays measure. Representative Macdonald amended the Brown-Frenzel bill to conform to the changes made the previous day. Representatives Hays and Thompson rose to offer amendments, and because of his higher committee ranking, Wayne Hays was recognized first. He sought to substitute the Secretary of the Senate, the Clerk of the House, and the Comptroller General for the independent electoral commission in the Brown-Frenzel bill. The issue of who should enforce the disclosure and spending limit provisions struck at the heart of the reform effort. When the rhetoric subsided, a majority of the House members present chose to adopt the Hays amendment rather than give the enforcement power to a commission that was beyond their control.[95] A number of other amendments to the Brown-Frenzel substitute were offered, and, after the last one was considered, the substitute was adopted by a voice vote. Finally, the entire package was passed, 373 to 23.[96]

The Senate and the House versions of campaign finance reform legislation contained significant differences which would have to

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91 *Id.* at H11438.
92 *Id.* at H11437.
93 *Id.* at H11436-38.
94 *Id.* at H11443.
95 *Id.* at H11471-76.
96 *Id.* at H11509-10.

be resolved by a conference committee composed of the managers of the bills in the two chambers.

C. *Conference Committee and Passage — Reforms Re-formed*

Conference committee action on S. 382 was a complicated affair,[97] not merely because of the complexities of the bills (comparisons of which ran to 59 pages) but also because of the heated nature of the debate. Furthermore, the fact of multiple committee jurisdiction brought 20 conferees together, with each of the four committees involved in the legislative effort sending representatives. To make matters more complicated, the House conferees divided jurisdiction over the bill. Members of the Interstate and Foreign Commerce Committee were responsible for titles I and II, with members of the House Administration Committee responsible for the rest. The Senate conferees were under no such jurisdictional limitation. In addition, the protagonists had their share of personal idiosyncrasies. Senator Pastore had acted petulantly at the conference on S. 3637 18 months before[98] and now faced the same members who had incurred his wrath. Representative Hays had become known for his cantankerous and often unpredictable behavior. Senator Scott was known as a strong-willed partisan. Now these men and their 17 colleagues would bicker for six hours over what had taken years to produce.

Usually, conferences are held on neutral territory such as room EF-100, which straddles the House and the Senate wings of the Capitol. Representative Hays, however, let it be known privately that he was not very enthusiastic about the campaign finance reform measure, so, in order to placate him, Senator Pastore offered to hold the meetings in a House Administration Committee hearing room in the House wing of the Capitol.

The first session was scheduled for December 9. The Senate delegation arrived first and took their seats on one side of the

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97 Conference committee meetings are usually shrouded in secrecy. No transcripts are taken, and only one report is filed. Minority views may not be attached to the conference document. This discussion of the inner workings of this conference owes much to the detailed reporting of Don Oberdorfer. *See* Oberdorfer, *Chronicle of Compromise*, Washington Post, Dec. 26, 1971, at C1, col. 4.

98 PEABODY, *supra* note 6, at 160.

long committee table. Then Representative Hays entered the room followed by the members from his committee. Representative Staggers and his committee members arrived but could not sit together because the Hays group occupied the center of the House side of the table. Communication between the Staggers delegation was to be impeded by the physical barrier of Wayne Hays and his associates.

The first major item on the trading block was § 315(a). Representative Staggers remained adamant for the House position of no repeal at all. Soon it became clear that Senator Scott passed along the word from the White House to his fellow Republicans: total repeal of § 315(a) or no repeal at all. The impasse ended with the Senate agreeing to no repeal of § 315(a).[99] Senator Pastore was now in a position to extract a concession from the House conferees, and the Senate's lowest-unit-charge provision was agreed to in place of the milder House requirement. The meeting ended after three hours with major issues still unresolved.

The conference was to continue the following day, but the scheduled meeting did not take place. Representative Hays was also a conferee on a foreign aid bill. Senator Mansfield, a conferee on the same measure, had insisted that the House be allowed to vote on his Senate-approved anti-war amendment. Representative Hays, irked by the Senator's demand, hinted that the campaign conferees would not meet again until some settlement was reached on the foreign aid bill.[100] Representative Hays finally relented and the campaign reform conferees reconvened on Monday, December 13.

The session began with the consideration of a House provision to include mass telephone banks and mass mailings in the spend-

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99 Repeal of § 315(a) was not dead. Senator Pastore talked privately with Representatives Staggers and Macdonald about putting an acceptable arrangement on § 315(a) in a separate bill. Representatives Staggers and Macdonald went along. A bill limiting repeal to presidential and vice presidential candidates was introduced by Senator Pastore on February 16, 1972. S. 3178, 92d Cong., 2d Sess. (1972). It passed the Senate on March 23, 1972. 118 CONG. REC. S4744-52 (daily ed. March 23, 1972).

100 Washington Post, Dec. 10, 1971, at A4, col. 4. Representative Hays was later to add another reason for delay. He said he had received indications that the President would pocket veto the campaign reform bill while the Congress was recessed for Christmas. Therefore, there was no need for swift conference action. *But see* Oberdorfer, *supra* note 97.

ing limit. The White House and Republicans from both chambers were opposed to inclusion, but Representatives Hays and Staggers insisted on the House provision. After much haggling, a compromise appeared near which would eliminate the mailings section but retain the telephone section in the spending limit. Before a vote could be taken, Representative Hays gathered the House Democrats together for a quiet caucus in a corner of the hearing room. A few moments later, they returned to the table and agreed to delete the mass mailing section if the Senate would agree to delete the Federal Election Commission in favor of the supervisory officers approved by the House.

The Senate conferees were stunned by the offer. The move by Representative Hays had been expected, but not at so high a price.[101] A Senate compromise was suggested, making the Comptroller General the administrator of the reporting laws, but Representative Hays refused to budge, making it clear that he would never accept anything but the House plan. Representative Hays held the bill hostage, holding out against any compromises even at the cost of having no legislation at all. He had said privately that he "didn't give a damn" about the bill, and now he threatened to "get up and walk out." Senator Scott, who had voiced strong support for the commission idea, "wilted like a flower" and, with a majority of the Senate conferees, reluctantly agreed to the Hays demand.[102] Thus, Congress was not to let anyone outside of its sphere have any power over its members in the sensitive area of campaign financing. As has been common in the field of legislative ethics generally, this legislature was hesitant to let outsiders into what it felt were its internal affairs.

The rest of the conference proceeded rapidly, and, by the end of this second meeting, S. 382 was ready for final passage in each chamber. The following day, December 14, Senator Pastore

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101 Interview with campaign finance reform participant, June 12, 1972.

102 Some participants felt that Representatives Macdonald and Staggers went along with Representative Hays because they did not want to ruffle his feathers. Another thought that Representative Hays was just calling in the credit on Representatives Macdonald and Staggers, since he had joined with them on the lowest unit charge provision. Interviews with campaign finance reform participants, May-June, 1972.

brought the conference report[103] to the Senate floor for final approval.[104] Early in the debate, Republican Peter Dominick of Colorado started to discuss substantive features that had been approved by the Senate in August. This was apparently motivated by his interests as Chairman of the National Republican Senatorial Committee which had recently announced a $1000-a-plate fund-raising dinner for early March. House and Senate Democrats had also scheduled a $500-a-plate dinner for February 3. If S. 382 were enacted before the Christmas recess, these contributors to the Republican and Democratic war-chests would lose their anonymity. Senator Dominick relented only after he was assured that Representative Hays would not call up the conference report in the House until mid-January.[105] By that time the provisions of the bill would not affect the fund raising dinners nor the first five presidential primaries. The Senate proceeded quickly to final approval of S. 382.

A surprising eleventh-hour lobbying effort against the bill was launched in January by the National Association of Broadcasters. Vincent Wasilewski, the Association's president, sent letters to every House member on January 3 in which he indicated the organization's unhappiness with certain provisions in S. 382. The NAB suggested that the House vote to eliminate from the conference report the allegedly discriminatory rate provision. It seemed very late in the game for the NAB to be seeking any such change since conference reports are not subject to alteration and can only be approved or disapproved in their entirety.[106] A possible explanation of the NAB effort may be that it had been pressured by local broadcasters at the last moment. The national organization might have realized that its efforts at this point would be futile, but its "constituents" would still see that it was working for their interests.

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103 S. REP. No. 580, 92d Cong., 1st Sess. (1971). Conference reports are matters of high privilege and can be taken to the floor almost immediately. SENATE MANUAL §§ 161-73, S. Doc. No. 1, 92d Cong., 1st Sess. 154-56 (1971).

104 117 CONG. REC. S21633-41 (daily ed. Dec. 14, 1971).

105 *Id.* at H12476 (remarks of Representative Wayne Hays).

106 SENATE MANUAL § 177, S. Doc. No. 1, 92d Cong., 1st Sess. 157 (1971).

Representative Hays called up the conference report[107] on January 19, 1972, more than a month after final Senate approval. The debate proceeded routinely, except for some remarks concerning the motives behind the AFL-CIO's lobbying effort in November.[108] On the final vote the conference report was approved, 334 to 20.[109]

President Nixon signed S. 382 into law without ceremony on February 7, the last day for him to approve or disapprove the measure. He described the Federal Election Campaign Act of 1971 as "realistic and enforceable."[110] Realistic legislation it was — an embodiment of compromise and principle. Enforceable legislation it was yet to be — as administrative regulations remained to be promulgated.

For the first time since 1925, the rules of the campaign finance game were fundamentally altered. Almost immediately, some members of Congress began to question the wisdom of what they had wrought.[111]

III. Administration and Implementation

A. *The Administrative Regulations*

One of the most neglected areas of public policy research is the study of the process by which acts of Congress are transformed into administrative procedures and regulations. It is this relationship between congressional mandate and administrative regulation which has long been criticized by scholars who have examined the role of administrative agencies in the political process,[112] and the proper character of this relationship remains a debated question.[113]

107 H.R. Rep. No. 752, 92d Cong., 1st Sess. (1971).

108 118 Cong. Rec. H88-90 (daily ed. Jan. 19, 1972) (remarks of Representative Philip Crane).

109 *Id.* at H99.

110 8 Weekly Comp. of Pres. Docs. 213 (1972).

111 *See, e.g.*, H.R. 14054, 92d Cong., 2d Sess. (1972). This bill would repeal the entire Federal Election Campaign Act of 1971.

112 For a criticism of Congress for giving administrative agencies the task of perceiving and defining the public interest, see M. Bernstein, Regulating Business by Independent Commission (1955).

113 Theodore Lowi argues that Congress must provide agencies with clear standards of implementation of congressional enactments. He also suggests that there be a five to ten year limit to the life of every organic act. This would, for Lowi, lead to more effective agency evaluation. T. Lowi, The End of Liberalism (1969). While his overall plan is logical and appealing, it is dependent upon a revitalized Congress.

The Federal Election Campaign Act of 1971 is one more law passed without clearly formulated standards for administration and implementation. What is unusual about it, however, is that Congress delegated to itself the authority to develop and enforce regulations through its own officers — the Clerk of the House, the Secretary of the Senate, and the Comptroller General. The Office of Federal Elections of the General Accounting Office (GAO) administers the law in presidential races. While the GAO is an arm of the Congress, it has a great deal of independence.

Effective enforcement of this legislation will ultimately depend on the three supervisory offices. Section 308 of the Act instructs the supervisory officers to report "apparent" violations of the law to the Criminal Division of the Justice Department.[114] In addition, if a citizen files a specific complaint under the new law, the supervisory officer must determine if there is "substantial" reason to believe that there has been a violation. If he thinks so, the matter is sent to the Justice Department for possible action.[115] Only experience will determine how strictly the law is enforced in cases involving incumbents. There is a significant difference between telling a congressman that he or one of his committees has made a technical violation that needs to be corrected and asking the Justice Department to make a criminal investigation of that officeholder's campaign finances.

The current supervisory officers — Senate Secretary Francis Valeo, House Clerk Pat Jennings, and Comptroller General Elmer Staats — directed formulation of the regulations promulgated in March, although almost all of the bargaining and negotiating among the three offices was carried out at the staff level. Orlando Potter from the Senate Secretary's office and Paul Wohl from the House Clerk's office were in charge of drafting the regulations.

Being more of a bureaucracy, the GAO was slow to respond to the initial proposals of the two congressional offices. Since the staff of the Office of Federal Elections, under the leadership of its Acting Director, L. Fred Thompson,[116] was not operating under

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114 Act §§ 308(a)(12), 308(d)(1), 2 U.S.C.A. §§ 438(a)(12), 438(d)(1) (Supp. July 1972).

115 Act § 308(d)(1), 2 U.S.C.A. § 438(d)(1) (Supp. July 1972).

116 The current Director is Philip S. Hughes.

the same political constraints as the congressional offices, it drafted many strong sections which ultimately had to be eliminated. The original GAO regulations, for example, declared that if a candidate's campaign treasurer were unable to gather all the necessary identifying information about contributors who had given more than $500, the money would have to be returned. The adopted regulations state only that "the treasurer shall use his best efforts to obtain the required information, and he shall keep a complete record of his efforts to do so."[117]

Disagreements were eventually settled by a slow and painstaking process of haggling and negotiating among the staff members. One significant decision was to omit the use of social security numbers for identification purposes under the disclosure provisions of the new law. The use of social security numbers would have made it possible to determine quickly the total campaign contributions of any individual donor. While the GAO favored using social security numbers, Jennings and Valeo were aware that their use would be very unpopular in Congress. After they were convinced that it would not be politically feasible, Thompson, Wohl, and Potter agreed not to require social security numbers.

The new legislation permits any citizen who believes there has been a violation of the disclosure provision to file a complaint with the relevant supervisory officer.[118] It was decided by the principal staff members not to prescribe a form for such complaints. It was agreed, however, to require that citizen complaints be notarized. This was done at the suggestion of the congressional offices in order to minimize frivolous complaints.[119]

The staffs from the three offices disagreed about how to define "file," "filed," and "filing" with respect to the political committee and candidate reports. The law states only that "such reports shall be complete as of such date as the supervisory officer may prescribe, which shall not be less than five days before the date of filing. . . ."[120] In addition to the regular quarterly reports, in election years addi-

117 37 Fed. Reg. 6162 (1972).

118 Act § 308(d)(1), 2 U.S.C.A. § 438(d)(1) (Supp. July 1972).

119 37 Fed. Reg. 6168 (1972).

120 Act § 304(a), 2 U.S.C.A. § 434(a) (Supp. July 1972).

tional reports are to be filed 15 days and five days prior to an election.[121]

Wohl, backed by House Clerk Jennings, argued that "filing" should mean mailing or hand delivery on the dates set by Congress. This definition could destroy the usefulness of the final pre-election report. If the forms were mailed on the specified dates, there would be little time to disseminate information which would be of interest to voters. Potter and Thompson vigorously opposed this definition of "filing" and argued for a tougher interpretation which would require the reports to be received by the supervisory offices by the specified deadlines. A decision could not be reached by the three staffers, and a meeting between the supervisory officers was set up to resolve the conflict. In mid-March, Valeo, Jennings, and Staats met privately for the first time. A decision was reached to adopt the stricter interpretation. "Filing" is currently defined as delivery before the declared dates or deposit as certified airmail no later than midnight of the second day preceding the filing date.[122]

This process is illustrative of the way the body to which Congress gives the duty to administer its programs can "make law" by interpreting the ambiguities which are to be found in virtually all legislative pronouncements. Had the three supervisors decided differently in this instance, much of the efficacy of the final pre-election report would have been lost. The administrators here properly defined the questionable words to further the policy behind the Act. This power of administrators to fill the gaps and subtly alter the laws passed by Congress has not received sufficient attention.

Congress left another interesting problem for the Comptroller General: would a political advertisement against the candidate count as an expenditure by his opponent? If an advertisement

121 *Id.*

122 37 Fed. Reg. 6162 (1972). The regulation also states that in the event of a mailing deadline following a day when mail cannot be certified, then the next preceding day becomes the deadline. Reports mailed within 500 miles of Washington need not be sent airmail, but they still must be certified. The law provides that any contribution of $5000 or more received after the last pre-election report is filed must be reported within 48 hours of its receipt. Act § 304(a), 2 U.S.C.A. § 434(a) (Supp. July 1972).

against candidate *A* is authorized by candidate *B* or if it includes statements on behalf of *B*'s candidacy, then it is clear from the law that such expenditures should be considered an expenditure by *B*.[123] Comptroller General Staats has ruled, however, that unauthorized advertisements which do not do more than criticize candidate *A*'s stand on campaign issues or urge his defeat will not count against *B*'s media spending limit.[124] Accordingly, there is nothing in the regulations to prevent individuals or groups from spending unlimited amounts without *B*'s authorization for advertising restricted to negative comments about candidate *A*.

The House and the Senate conferees had specifically instructed the Comptroller to decide how to deal with this touchy issue of "anti-ads." The conferees stated that their refusal to decide should not be construed as support for the position finally reached by Staats.[125] The reason the conferees gave this power to the Comptroller General was that they were concerned about the questions a restriction on "anti-ads" would raise under the first amendment.[126] In order to avoid this potential constitutional attack on the Act itself, Congress purposely left its provisions ambiguous in this area, thus passing the buck to the administrators. This practice may often be practical (as it was here), but also may well constitute Congress' abrogation of its policy-making duty. As we have seen in other contexts (such as the determination of what constitutes "filing" of reports[127]), the way these ambiguities are clarified can have an important effect on the character of the law.

B. *Congressional Activity*

No sooner had the new law been passed, than some in Congress sought to weaken it. The assault was led by Representative Wayne Hays who announced on May 1 that he would move to amend it to reduce the number of reports filed in election years from six

123 Act §§ 104(a)(7)(B), 104(b), 47 U.S.C.A. §§ 803(a)(7)(B), 803(b) (Supp. July 1972).
124 37 Fed. Reg. 6158 (1972).
125 S. Rep. No. 580, 92d Cong., 1st Sess. 28 (1971).
126 *See generally* Fingerhut, *A Limit on Campaign Spending — Who Will Benefit?*, Public Interest, Fall 1971, at 3; Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. Legis. 359 (1972); Note, *Free Speech Implications of Campaign Finance Expenditure Ceiling*, Harv. Civ. Rights-Civ. Lib. L. Rev. 214 (1972).
127 See text at notes 120-22 *supra*.

to four.[128] Later in the month, he said that his House Administration Committee was also considering an amendment to the provision which required disclosure of a contributor's business occupation.[129] The committee was considering the addition of the qualifier "if known" to the requirement that the contributor's identification include business occupation.[130] The qualifier would make it more difficult to identify contributions linking business interests to a candidate. In addition, Representative Hays even suggested that a revision be passed transferring the supervision of the new law from the Clerk to his Administration Committee.[131]

The officers who were responsible for drafting the regulations were often subjected to pressure from Congress. Soon after the Act was passed, Representative Hays made his position on the administration of the legislation clear to House Clerk Jennings. When Jennings went before the Hays committee to request funds for personnel and equipment to administer the law, the hearings became a donnybrook of name-calling and threats.[132] Jennings requested an annual appropriation of $399,030 for 38 additional staff, but the Committee approved $156,984 for 12 new positions.[133] The relationship between Hays and Jennings has not been amicable;[134] how much this will impair the enforcement of the law on the House side remains to be seen.

The Hays committee also ordered that the price for xeroxing copies of the filed reports be raised from 10 cents to $1 per page. Common Cause responded by suing the House Clerk in a federal court.[135] A spokesman for Common Cause has asserted that Representative Hays then threatened to pull out the newly purchased xeroxing equipment if Common Cause won their suit.[136] Common Cause called his bluff, and he backed down to 10 cents per page before the suit was adjudicated.

On June 20, Representative Hays held hearings on a bill to

128 Washington Post, May 2, 1972, at A4, col. 1.
129 Act § 304(b)(2), 2 U.S.C.A. § 434(b)(2) (Supp. July 1972).
130 Washington Post, May 25, 1972, at A14, col. 1.
131 TRB, *Second Thoughts*, NEW REPUBLIC, May 27, 1972, at 6.
132 *Id.*
133 Washington Post, May 2, 1972, at A4, col. 1.
134 *House Discord over New Law: Hays vs. Jennings*, 30 CONG. Q. 712 (1972).
135 Washington Post, May 2, 1972, at A4, col. 1.
136 Interview with campaign finance reform participant, June 9, 1972.

amend the Federal Election Campaign Act.[137] The proposed changes included a re-definition of the word "filing" to mean airmail postage, special delivery, or hand delivery on the deadline date rather than 48 hours prior to the deadline as now required. The bill would also eliminate quarterly financial reports, and election year filing dates would be switched to March 15, September 15, and 10 days before and 30 days after an election. Representative Hays decided to drop the "if known" qualifier, and he did not attempt at this time to transfer the supervisory duties of the Clerk's Office to the House Administration Committee.

C. *The Work of Common Cause*

Common Cause has made the monitoring of this law one of its major projects. It has trained volunteers to examine the reports and has taught them how to file citizens' complaints under the new law. Fifteen full-time volunteers direct the project out of the national headquarters in Washington, with four paid staff members to oversee the volunteer effort. Common Cause estimates that there are 200 to 400 in the "field" (congressional districts across the country) who check the duplicate reports filed at the state capitols.[138]

The Common Cause strategy has been to expose those candidates who have not filed reports by releasing their names to the local press. Usually they first attempt to send a letter to the candidate asking him to explain his action, but one Common Cause lobbyist has admitted that they do not always get a letter out.[139] In addition, they have prepared a handbook for members which explains the new law in detail and outlines the complaint procedures.[140]

Common Cause seems to have gotten off on the wrong foot, however, by unjustly accusing a number of congressmen of not filing their reports by the first deadline set by the new law. These

137 H.R. 15511, 92d Cong., 2d Sess. (1972).

138 The law requires that copies of all reports which are filed with a supervisory officer must also be filed with the secretary of state of the appropriate state. Act § 309(a), 2 U.S.C.A. § 439(a) (Supp. July 1972).

139 Interview with campaign finance reform participant, June 9, 1972.

140 F. Wertheimer, The Common Cause Manual on Money and Politics, March 1972.

accusations have resulted in bitterness toward Common Cause and led to an attack on Gardner when he appeared before the Hays committee.[141] Nevertheless, Common Cause is right to believe that the best weapon for enforcement of disclosure is public revelation of the non-compliance of a candidate or committee. Monitoring by the media, individual citizens, Common Cause, and other citizen groups is crucial to the implementation of the Federal Election Campaign Act.

IV. Conclusion

The Federal Election Campaign Act was the product of strong congressional initiative, contrary to the recent movement of presidential initiation of key legislation.[142] Moreover, this legislation was not the product of the executive and legislative branches working closely together; rather, it was the result of Congress' overcoming the indifference and, at times, the opposition of the White House. The White House displayed little positive interest in this significant legislation, and the Nixon Administration often failed to communicate its views clearly to the Republican congressional leaders.[143]

The enactment of the Federal Election Campaign Act exemplifies the potential strength of Congress in domestic policy making, but it also illustrates some of the weaknesses of the legislative branch. Congress waited far too long to replace the well-intended but totally ineffectual Corrupt Practices Act of 1925. Congress procrastinated until the problem had become such a national scandal that it became embarrassing for its members not to act. Hopefully, Congress will not now rest on its new laurels because much remains undone by the Act. While it does effectively limit spending on various communications media, it does nothing to prevent large sums from being spent in other areas such as media production, campaign workers, and computerized mailings. No attempt was made in the law to correct the abuses of the franking

141 Washington Post, June 21, 1972, at A12, col. 1.

142 *See* Neustadt, *Presidency and Legislation: Planning the President's Program*, 49 Am. Pol. Sci. Rev. 980 (1955).

143 *See* D. Truman, The Congressional Party: A Case Study 289-316 (1959).

privilege by incumbent congressmen. As the sums spent on the pursuit of the Presidency exceed all rational bounds, the need for public financing of presidential elections becomes all too obvious.[144] While the new campaign finance law is a strong piece of legislation, it is but a first step in eliminating odious campaign practices.

The passage of the Federal Election Campaign Act also illustrated the changing nature of congressional leadership. It was not so long ago that men like Sam Rayburn, Everett Dirksen, and Lyndon Johnson led their congressional parties with unquestioned authority.[145] The less forceful, low-key approach of Speaker Albert, Senate Majority Leader Mansfield, and Senate Minority Leader Scott represents a dramatic shift in the style of congressional leadership. In the case of campaign finance legislation, the ambivalence of Speaker Albert, for example, seriously threatened a melding of the Hays and Macdonald bills. It is too early to tell whether strong committee chairmen, like Representative Wayne Hays, will assert increasing authority, leading to a more decentralized leadership system, or whether strong party leadership will return to the top posts.

The activities of two public interest groups, the NCEC and Common Cause, were especially significant in the development of the Act. Their efforts demonstrate the important role that such publicly oriented interest groups can play in the national policy-making process. While the endeavors of the NCEC in the Ninety-second Congress should not be overlooked, their painstaking work in the Ninety-first Congress was of particular importance in the evolution of campaign finance legislation. In helping to catalyze action on the vetoed Political Broadcast Act, the NCEC contributed to making campaign finance reform an inevitable part of the agenda of the succeeding Congress.

The Common Cause monitoring project represents an attempt to extend its role beyond that of traditional lobbying. The success of Common Cause is dependent upon two resources: extensive

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144 *See* D. DUNN, FINANCING PRESIDENTIAL CAMPAIGNS (1972); TWENTIETH CENTURY FUND, VOTER'S TIME (1969).

145 *See, e.g.*, R. EVANS & R. NOVAK, LYNDON B. JOHNSON: THE EXERCISE OF POWER (1966).

volunteer labor and adequate press exposure to call attention to candidates who do not fully comply with the letter and spirit of the new law. This type of "watchdog" approach may be an increasingly suitable role for public interest organizations.

This study has demonstrated the interrelationship of process and policy. To distinguish one as the independent variable and the other as the dependent variable would be an inadequate method for describing the development and passage of a piece of legislation. Still, Froman's suggested framework of viewing policy as an independent variable and examining its influence on process[146] should not be dismissed too easily. Its utility may be more appropriate in comparing the impact of different types of issues on process rather than in analyzing a single piece of legislation. The thrust of this case study has been to emphasize the importance and the difficulty of clarifying such general concepts in something as complex as the legislative process.

Finally, while Congress has become the subject of increased scholarly attention in recent years,[147] many gaps in our knowledge of that institution and its place in the political process still remain. For example, far more attention needs to be paid to the ways in which congressional enactments are developed into administrative regulations. Information is needed about how those who draft administrative rules and regulations interpret the mix of law, politics, and public interest. The impact of personality on the legislative process is another area where much research still needs to be done;[148] although one can assert that this is an awkward and imprecise focus, the history of the Federal Election Campaign Act illustrates the importance of this personality factor in legislative policy making. Campaign finance reform remains a suitable vehicle for these and other research areas, since efforts to amend the law and to legislate public financing of elections will be important issues in future sessions of Congress.

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146 FROMAN, *supra* note 4. *Cf.* J. DAVIS & K. DOLBEARE, LITTLE GROUPS OF NEIGHBORS 241-47 (1968) (in the context of the Selective Service System).

147. *E.g.*, R. HUITT & R. PEABODY, CONGRESS: TWO DECADES OF ANALYSIS (1969).

148 For a useful summary of the field of personality and politics, see F. GREENSTEIN, PERSONALITY AND POLITICS (1969).

BOOK REVIEW

GUIDE TO THE CONGRESS OF THE UNITED STATES: ORIGINS, HISTORY AND PROCEDURE. By Congressional Quarterly Service. Washington, D.C., 1971. Pp. xxxi, 639, appendices, index. $35.00.

*Reviewed by Louis Fisher**

Introduction

Congressional Quarterly (CQ) has provided another major service for congressmen and their staffs, lawyers, political scientists, journalists, and students. The *Guide to the Congress* is immense in size as well as scope. Reduced to normal book size and single columns, the volume would run well beyond 2000 pages. The *Guide* attempts to cover a vast area. Beginning with colonial precedents, it traces the history of American legislative procedures, party leaders, and the committee system. Congress' fiscal powers — as well as its prerogatives in foreign affairs, nominations, and investigations — are examined in detail. Separate chapters explore the pay system, campaign financing, reapportionment, lobbying, and congressional ethics. The style is characteristic of CQ: clear, sprightly, well-organized. No doubt the volume will take its place among the standard reference works on Congress.

That, indeed, is the problem. Notwithstanding the introductory remarks, which describe the volume as "definitive" and "complete" (p. vi), it falls far short of satisfying either standard. Nor is it always dependable on what it does cover. Hopefully, within a few years, CQ will publish a revised edition, taking into account additional research of its own as well as comments from reviewers. Rather than dwelling on the many merits of the *Guide*, this review concentrates on how it might be improved and made more useful as a reference tool.

I. SUGGESTIONS FOR REVISIONS

The *Guide* is basically a history and has to be reviewed as such. One of its fundamental problems is its heavy reliance on secondary

* Congressional Research Service, The Library of Congress. B.S. 1956, College of William and Mary; Ph.D. 1967, New School for Social Research. The views expressed are those of the author, not of the Congressional Research Service.

sources. To have recourse to scholarly studies is one thing: simply to string together a series of quotations — as the *Guide* does in the section "History of the Speakership" (pp. 130-38), for example — is something else. Even more objectionable is the practice of routinely accepting at face value the observations made in secondary sources, instead of questioning their reasonableness or checking them against other sources. Primary sources should be used wherever possible but, short of that, one could at least consult competitive studies in the area. The following examples illustrate these methodological weaknesses.

The *Guide* quotes Hubert Bruce Fuller as saying that Henry Clay "so framed his committees as to force an English war" (p. 603). The remark is dropped into the discussion as though it disposes of the issue, and yet who can believe that the War of 1812 was precipitated by Clay's stacking of House Committees? How many other factors, of more fundamental importance, were at work? To what extent was the momentum toward war reversible? These vital questions are not even raised, much less explored.

Similarly, the *Guide* cites a quotation from a journalist, Ray Tucker, to suggest that press coverage helped tip the scales against ratification of the Treaty of Versailles in 1919. According to Tucker, "The Covenant was defeated by the Senate press gallery long before it was finally rejected by the Senate" (p. 622). Again, the remark is included without any evaluation. Who was Tucker? Was he a Wilsonian? How reliable was his judgment? Where is the balancing point of view? Surely some of the press must have been sympathetic to Wilson. Should we attribute the Treaty's defeat solely (or even primarily) to the press? What other factors contributed? The fragment from Tucker's article is titillating, perhaps, but hardly dispositive.

Closely related to the quotation-without-evaluation approach is the *Guide's* propensity to contain statements wholly lacking in documentation or supporting argument. For example, the press receives this credit for the Spanish-American War: "President William McKinley sought to keep the nation out of the war, but the wave of hysteria whipped up by the *World* and the *Journal* eventually proved too much for both Congress and McKinley" (p. 621). Aside from the fact that this is the conventional and pop-

ular explanation, where is the evidence? Was it really a case of the press being "too much" for the two branches? In fact, the record suggests otherwise.[1]

A third weakness concerns errors of fact or interpretation. A book of this size, dependent as it is on secondary sources, is bound to have its share of inaccuracies. The following examples raise doubts as to the general dependability of the *Guide*.

It is suggested that serious systematic attempts to compile a Federal Budget did not begin until 1920, with the Secretaries of the Treasury up until that time only collating budgetary estimates from the various departments of government (p. 44). In fact, active Executive Branch concern with and involvement in the budgetary process began well before that time. Such Presidents as John Quincy Adams, Van Buren, Tyler, Polk, Buchanan, Grant, Cleveland, and Taft all took a hand — assisted by their Secretaries of the Treasury — in scrutinizing and revising departmental estimates.[2]

"Although the first tariff law was enacted in 1789, the Supreme Court did not have occasion to consider (and uphold) the constitutionality of this form of taxation until 1928" (p. 176). The latter reference apparently is to the *Hampton* decision.[3] But what of *Field v. Clark*,[4] decided in 1892, in which appellants protested the delegation of tariff-adjustment powers to the President by arguing that the power to tax should remain with Congress? The Supreme Court upheld the President's power to suspend duty-free arrange-

1 For example, McKinley, during his first year in office, held tenaciously to diplomatic means to wrest from Spain a number of concessions: withdrawal of General Weyler from Cuba, revocation of the concentration policy, and a modest start toward local autonomy. But a number of events early in 1898 shook his confidence in Spain's ability to carry out a reform policy. Anti-American riots broke out in Havana; the Cuban rebels rejected Spain's autonomy plan; and the situation further deteriorated when an indiscreet letter written by Dupuy de Lôme, the Spanish minister in Washington, was made public. Not only did the letter contain an unflattering portrait of the President, it also revealed de Lôme's insincerity in supporting a plan of autonomy for Cuba. While it is true that the press helped fan the public's appetite for war, much more important was the fact that McKinley had reached the point, in an election year no less, where he could not trust Spanish promises. *See* H. MORGAN, WILLIAM MCKINLEY AND HIS AMERICA 374 (1963).

2 Some of this history is covered in L. FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 85-103 (1972).

3 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

4 143 U.S. 649 (1892).

ments (in effect adding a tax) on certain articles whenever he discovered inequalities in reciprocal trade provisions.

The *Guide* states that the House Ways and Means Committee was created in 1802 (p. 181). More precisely, that is the date it became a *standing* committee. A more complete account would show that the committee existed as a select committee in 1794 and had existed and functioned as a standing committee since 1795. In fact, a committee on ways and means existed for a few months in 1789.[5]

A table on page 192 lists budget surpluses and deficits for selected fiscal years from 1790 to 1970. Such a list would be meaningful only if the budget concept had remained constant over that period. In recent decades, however, there has been a shift from the administrative budget to consolidated cash statements and finally to the unified budget (and now even to a "full-employment" budget). Depending on which budget one uses — whether one includes or excludes federal trust funds, *et al.* — the size of the surplus or deficit changes.[6]

According to the *Guide,* nominations for Democratic committee assignments in the Senate and in the House were made subject to caucus approval in 1971 (p. 153). But that had been the practice for years. The significant change in 1971 was that this practice became part of formal policy. Moreover, there are now opportunities to vote on individual chairmen instead of en bloc for the entire committee assignment list.

Reference is made several times to the Constitution's granting "all legislative powers" to Congress (pp. 103, 245). Such a statement plays into the hands of those who contend that no legislative power was granted to the President. Of course the complete language of article I is "[a]ll legislative powers herein granted" shall be vested in Congress. Even that article provides the President with a veto power, while article II gives him a share in the legislative process by recommending such measures as he shall judge necessary and expedient. The *Guide* later refers to the Pres-

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5 *See* Furlong, *The Origins of the House Committee on Ways and Means,* 25 WM. & MARY Q. 587 (1968).

6 OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1973, at 553 (1972).

ident's role in legislation (pp. 575-87), but no mention is made of executive orders, proclamations, or rules and regulations.[7] Brief reference is made to executive agreements (pp. 206, 208), and yet a good deal more attention is needed regarding the legal and practical limits of this form of presidential legislative power.[8]

Beyond these questions of accuracy and interpretation, there are a number of significant omissions. There is need of a solid section on House and Senate rules, with far greater detail and analysis on the evolution of committee and floor procedures and the development of conference practices. While CQ describes (pp. 118-19, 121-22) the restrictions placed on conference committees by the Legislative Reorganization Acts of 1946 and 1970,[9] what is needed is a detailed treatment on the extent to which those restrictions were actually enforced — or even enforceable. For instance, the 1946 Act allowed conferees to include matter "which is a germane modification of subjects in disagreement."[10] Who decides what is a germane or nongermane modification? What are the criteria, if any, for deciding germaneness? What precedents have been established?

The 1946 Act also attempted to restrict the discretion of conferees in cases where one house makes an amendment in the nature of a substitute.[11] Violations of that restriction were subject to a point of order,[12] but with what frequency were points of order made? To what extent were rules adopted waiving points of order? In short, how was the intent of the 1946 Act defeated in practice? Similar questions should be raised regarding the provision in the

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7 *See* FISHER, *supra* note 4, at 42-52.

8 *See generally* Reid v. Covert, 354 U.S. 1 (1957) (executive agreement providing for court-martial of civilians accompanying armed forces personnel outside the United States violates constitutional right to trial by jury); United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953) (executive agreement with Canada invalid because it contravened existing statute regulating commerce with Canada); Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) (executive agreement invalid because it impaired constitutional right to compensation for the taking of property).

9 Pub. L. No. 91-510, § 125(a)(2), 845 Stat. 1159, *amending* Pub. L. No. 79-601, § 135, 60 Stat. 832; codified in 2 U.S.C. § 190c (1970).

10 2 U.S.C. § 190c(a) (1970).

11 *Id.*

12 *Id.* § 190c(b).

Legislative Reorganization Act of 1970 on nongermane Senate amendments.[13]

In addition, no mention is made of the use of concurrent resolutions as a means of controlling executive action. A strict reading of the Constitution suggests that concurrent resolutions should not have the force of law (in that they are not presented to the President), but that interpretation has never been followed. Concurrent resolutions, even simple resolutions (passed by a single house), have been used to direct and control executive activities. The literature on this issue is extensive and important.[14]

The section on "Power over Spending" (pp. 185-91) could be expanded to show the extent to which that power has shifted to the executive branch. The only discretionary power mentioned is impoundment (pp. 191, 584). Major controversies have also involved transfer authority, coercive deficiencies, carryover balances, unauthorized commitments, reprogramming, and other forms of executive spending discretion.[15]

II. Conclusion

If the *Guide* is to become definitive and complete while at the same time remaining a manageable size, most of the 323-page appendix should be eliminated. The bulk of the material contained therein is readily available in public documents, standard reference works, or other Congressional Quarterly publications. There is no need, for example, for the inclusion of 175 pages of a Biographical Index in light of the existence of the more detailed *Biographical Directory of the American Congress*.[16] About 25 pages of the appendix material — including the list of House and Senate

13 Pub. L. No. 91-510, § 126(b), 84 Stat. 1160.

14 *See* Buckwalter, *The Congressional Concurrent Resolution: A Search for Foreign Policy Influence*, 14 Midwest J. Pol. Sci. 434 (1970); Cotter & Smith, *Administrative Accountability to Congress: The Concurrent Resolution*, 9 West. Pol. Q. 955 (1956); Gibson, *Congressional Concurrent Resolution: An Aid to Statutory Interpretation?*, 37 A.B.A.J. 421 (1951); Ginnane, *The Control of Federal Administration by Congressional Resolutions*, 66 Harv. L. Rev. 569 (1953).

15 These subjects are treated in detail in Fisher, *Presidential Spending Discretion and Congressional Controls* to be published in the Winter 1972 issue of Law & Contemp. Prob.

16 H.R. Doc. No. 442, 85th Cong., 2d Sess. (1961).

leaders and the information on closed and open committee hearings — should be retained; but such material could be more appropriately incorporated into the text.

In sum, lawyers and students in search of a general introduction to Congress will find the *Guide* a valuable pulling-together of primary and secondary sources. In its present form; however, the study suffers from a number of shortcomings: overreliance on secondary sources, a lack of documentation or supporting argument, errors of fact and interpretation, and superficial treatment of areas that require much deeper exploration.