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THE CLEAN AIR ACT: ANALYZING THE AUTOMOBILE INSPECTION, WARRANTY, AND RECALL PROVISIONS

JACK M. APPLEMAN*

Introduction

The Clean Air Act,[1] as modified by the Clean Air Amendments of 1970,[2] is the consequence of a decade of intensive legislative activity.[3] The objectives of the Act are to protect and enhance the nation's air quality by initiating and accelerating research, by providing assistance to state and local governments, and by encouraging regional air pollution control programs.[4] In order to attain these goals the Act provides for national air standards, state implementation plans, and regulation of air pollution from stationary and mobile sources.

This article offers an analysis of the difficulties of using the regulatory powers delegated by the Act for achieving the reduction of motor vehicle emissions. Statutory provisions for state vehicle inspection, recall initiated by the Environmental Protection Agency (EPA), and manufacturer warranty of emission levels appear to provide crucial incentives for realizing the Act's technological and environmental goals. But is the appearance deceptive? Is the EPA given sufficient authority? Will manufacturers respond to the Act's incentives? Will the public permit the provisions to be im-

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1 42 U.S.C. § 1857 (1970).

2 Pub. L. No. 91-604, 84 Stat. 1676 (codified in various subsections of 42 U.S.C. § 1857 (1970)).

3 *Id.*; Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954; Air Pollution Control Act of 1965, Pub. L. No. 89-272, 79 Stat. 992; Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392.

4 42 U.S.C. § 1857(b) (1970).

plemented? By examining the objectives and options available to the participants in the air pollution game (the public, the manufacturers, the automotive repair industry, the states, the federal government), the article will attempt to answer these questions as well as suggest some modifications of the Clean Air Act's approach.

In pursuing this objective the article will follow this format: (1) an examination of the power conferred and the goals mandated for EPA by the Act, (2) an analysis of the in-use testing of vehicles, (3) consideration of the efficacy of the warranty and recall provisions, and (4) an assessment of the Clean Air Act approach and the presentation of possible alternatives.

I. Legislative Provisions

The 1970 Clean Air Amendments originated in the House Committee on Interstate and Foreign Commerce.[5] Support for the legislation grew out of a general sense that progress in controlling air pollution was too slow.[6] The problem of motor vehicle emissions was a principal area of concern. The House Committee asserted that "automotive pollution constitutes in excess of 60 percent of our national air pollution problem . . . ."[7] The House bill provided for emission standards for new vehicles but no performance warranty or testing requirements beyond the assembly line.[8] Instead a one-year study was proposed to produce recommendations for a program to insure emission standards would be met during the life of such vehicles.[9] The Senate, however, took a more confident view of the state of the art of emission testing and the incentives that would be derived from in-use testing.[10] The Senate position prevailed, and in its final form the legislative strategy for control of automotive emissions embodied three major features: (1) the establishment of emission standards for new vehicles, (2) the institution of in-use inspection of vehicles by the states, and (3) the establishment of warranty and recall liability for manufacturers.

5 H.R. 17255, 91st Cong., 2d Sess. (1970).
6 *See* H.R. Rep. No. 1146, 91st Cong., 2d Sess. (1970).
7 *Id.* at 6.
8 H.R. 17255, 91st Cong., 2d Sess. §§ 6(a)-(b) (1970).
9 *Id.* § 7.
10 H.R. Rep. No. 1783, 91st Cong., 2d Sess. 45 (1970).

A. *Establishment of Standards*

Section 202 of the Act empowers the EPA Administrator to prescribe emission standards for new motor vehicles when in his judgment such emissions are likely to cause or contribute to air pollution which endangers the public health and welfare.[11] These standards are to be applicable to vehicles throughout their useful life,[12] which is defined by the statute as five years or 50,000 miles, whichever occurs first.[13] However, this seemingly broad discretionary authority entrusted to the Administrator is thereafter restricted by what have perhaps proved to be the most controversial features of the Act.[14] With regard to light duty vehicles (automobiles),[15] Congress mandated that beginning with the 1975 model emission standards for carbon monoxide (CO) and hydrocarbons (HC) should be reduced by at least 90 percent of the allowable emissions for 1970 models.[16] The standard for emissions of oxides of nitrogen (NOX) beginning with the 1976 model is a reduction of at least 90 percent from the average NOX emission for 1971 models.[17] Any manufacturer who sells a line of new motor vehicles which has not been certified by EPA as conforming to the prescribed standards is liable under the statute for a penalty of up to $10,000 per vehicle.[18]

The 1970 Amendments deleted from the Act provisions for explicit consideration of technical and economic feasibility in the formulation of vehicle emission standards.[19] A congressional judgment was made (albeit without economically and technically explicit analysis)[20] that it was feasible to redesign the auto to pollute

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11 42 U.S.C. § 1857f-1(a)(1) (1970).

12 *Id.*

13 42 U.S.C. § 1857f-1(d) (1970).

14 *See Hearings on S. 3329, S. 3466, and S. 3546 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 91st Cong., 2d Sess., pt. 5 (1970) [hereinafter cited as *Hearings*].

15 42 U.S.C. § 1857f-1(b)(2)(B) (1970).

16 42 U.S.C. § 1857f-1(b)(1)(A) (1970).

17 42 U.S.C. § 1857f-1(b)(1)(B) (1970).

18 42 U.S.C. §§ 1857f-2(a), f-4 (1970).

19 Clean Air Amendments of 1970, Pub. L. No. 91-604, § 6(a), 84 Stat. 1690, *amending* 42 U.S.C. § 1857f-1(a) (Supp. V, 1965-69).

20 No economic analysis of the consequences of the 90 percent reduction appears in the *Congressional Record* or hearings. *See* H.R. REP. No. 1146, 91st Cong., 2d Sess. (1970); S. REP. No. 1196, 91st Cong., 2d Sess. (1970); H.R. REP. No. 1783, 91st Cong.,

90 percent less. However the confidence of the Congress in the correctness of that judgment was less than absolute. Upon a showing by the manufacturers of good faith and technological inability to comply, the Administrator may suspend the applicability of the 1975 and 1976 standards for one year.[21] The statute explicitly prohibits the extension of the standards for more than a single year.[22] Further postponement of implementation can come only through congressional action. The feasibility of compliance with the statutory standards has been the center of a heated and continuing controversy between EPA and the automobile manufacturers.[23]

B. *In-use Inspection*

The Act delegates to the states the implementation of the in-use inspection systems necessary to insure that vehicles remain in compliance with emission standards during their "useful life." Prior to 1970 the Act provided that federal authorities only set forth criteria and the states promulgate ambient air standards — *i.e.*, allowable pollutant concentrations.[24] The 1970 Amendments nationalized air quality objectives and authorized the EPA Administrator to establish nationwide ambient air quality standards.[25] The Act requires states to submit plans for implementation of these standards.[26] The states have the opportunity to decide how to distribute the requisite reduction among polluters (*e.g.*, among various classes of mobile and stationary sources), or they may enforce stricter ambient standards than those set by EPA.[27] But state implementation plans are not to be approved unless they provide

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2d Sess. (1970); *Hearings, supra* note 14; *Hearings on H.R. 15848 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970); 116 CONG. REC. 19200-44 (1970).

21 42 U.S.C. § 1857f-1(b)(5)(A)-(D) (1970).

22 42 U.S.C. § 1857f-1(b)(5)(E) (1970).

23 In March and April of 1972, General Motors, Ford, Chrysler, and International Harvester pursuant to § 202 of the Act applied for a one year suspension of the 1975-76 standards. The applications were twice denied by EPA and twice remanded for further consideration by the D.C. Court of Appeals. On April 11, 1973, EPA Administrator Ruckelshaus announced a one year suspension of the standards. New York Times, Apr. 12, 1973, at 1, col. 1.

24 Air Quality Act of 1967, Pub. L. No. 90-148, §§ 2(107)(b), 2(108)(c), 81 Stat. 491, 492.

25 42 U.S.C. § 1857c-4 (1970).

26 42 U.S.C. § 1857c-5 (1970).

27 42 U.S.C. § 1857d-1 (1970).

"to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards."[28] Although states may enforce stricter ambient standards than the national requirements, they may not burden automobile manufacturers by setting any automotive emission standards as a condition precedent to initial retail sale, titling, or registration.[29] By omission, the statute seems to allow states to require operators to modify or operate in-use vehicles to conform to special, stricter standards; but as a practical matter the states are locked into the federal requirements.

The Act authorizes federal funding for up to two-thirds of the cost of developing and maintaining effective vehicle inspection and testing programs.[30] Individual states may argue that for them an in-use inspection program is neither necessary nor practical. But the law explicitly forbids anyone but the states from requiring mandatory testing for purposes of recall,[31] and it is conceivable that the EPA may seek to interpret the Act to allow imposition of vehicle testing on the states. The Administrator is empowered to prepare an implementation plan for a state in three instances: if the state fails to submit its own,[32] if the submitted plan is determined not to be in accordance with the statute,[33] or if the state fails to revise its plan after the Administrator has ruled it substantially inadequate.[34] What powers of enforcement the Administrator would have without state legislation is unclear.

C. *Warranty and Recall*

In-use testing is linked with warranty and recall liability for automotive manufacturers by a separate section of the Act.[35] From 60 days after passage of the Act all manufacturers have been required to warrant that each vehicle sold is designed, built, and equipped so as to conform with the emission standards set by EPA and free

28 42 U.S.C. § 1857c-5(a)(2)(G) (1970).
29 42 U.S.C. § 1857f-6a(a) (1970).
30 42 U.S.C. § 1857f-6b (1970).
31 42 U.S.C. § 1857f-5a(f) (1970).
32 42 U.S.C. § 1857c-5(c)(1) (1970).
33 42 U.S.C. § 1857c-5(c)(2) (1970).
34 42 U.S.C. § 1857c-5(c)(3) (1970).
35 42 U.S.C. § 1857f-5a (1970).

from defects in materials and workmanship which cause failure to conform to emission regulations during the "useful life" of the vehicle (again defined as five years or 50,000 miles, whichever occurs first).[36] However, since there is no provision covering failure to conform to EPA standards because of inadequate technological design of the pollution control system, this initial warranty requirement is likely to have only slight impact beyond the dealer's showroom.

The real muscle of the statute's warranty requirements may be implemented only after the Administrator determines that the results of in-use testing correlate with initial certification test results, and that inspection facilities are available.[37] At that point the Administrator shall prescribe regulations requiring manufacturers to warrant the performance (as well as materials and workmanship) of the emission control system.[38] This warranty will run to the original purchaser and each subsequent purchaser throughout the "useful life" of the vehicle.[39] If the emission control system on a vehicle fails to perform in conformity with EPA standards, then the manufacturer must remedy the nonconformity and bear the resultant costs with two restrictions: (1) the vehicle must have been maintained and operated in accordance with reasonable and necessary instructions prescribed by the manufacturer and (2) the nonconformity must have resulted in the imposition of a penalty or sanction on the owner of the vehicle.[40] Since a system of in-use testing and the imposition of a sanction on the owner are preconditions to manufacturer liability, the effectiveness of this prescribed warranty would seem to be limited to states which have an EPA-approved inspection system backed by state law.

EPA-initiated recall is the mechanism aimed at the repair of uninspected vehicles. The Administrator is empowered to require the recall and repair of an entire class or category of vehicles if he determines that a "substantial number" of that class do not conform to emission regulations, despite proper maintenance.[41] All

36 42 U.S.C. § 1857f-5a(a) (1970).
37 42 U.S.C. § 1857f-5a(b) (1970).
38 42 U.S.C. § 1857f-5a(b)(2) (1970).
39 *Id.*
40 *Id.*
41 42 U.S.C. § 1857f-5a(c)(1) (1970).

costs of such recall are to be borne by the manufacturer and the transfer of any of the recall costs to the automobile dealership is specifically prohibited.[42] As with the warranty provisions, the statute makes recall dependent on state action. Inspections for the purpose of recall can only be made by the state or when the owner voluntarily permits.[43]

Although the statute and congressional reports seem to indicate a straightforward and complete law, key sections turn on vague phrasing and administrative discretion and may become stumbling blocks for implementation. Disputes over what constitutes an "available" testing method,[44] a "reasonable correlation" with prior tests,[45] or a "substantial number" of non-conforming vehicles[46] might be used to invalidate or delay certain provisions. Beyond the problem of occasional vagueness, the question remains whether Congress has produced a rational plan for reducing vehicle emissions, and whether the details of that plan will mesh in operation to produce an efficient outcome.

II. The States and In-use Inspection

The adoption of an in-use vehicle inspection system is a question left primarily to the states.[47] In January 1972, when state implementation plans were submitted for EPA approval, 20 states indicated that in-use testing was under consideration as part of their air pollution control strategy.[48] Thirty state agencies did not include in-use testing provisions in their implementation plans. The decision by this latter group is largely attributable either to environmental conditions within these states or to EPA policy statements on in-use testing.

The extent of the motor vehicle pollution problem within a state is a function of many variables. Population density, automo-

42 42 U.S.C. § 1857f-5a(d) (1970).
43 42 U.S.C. § 1857f-5a(f) (1970).
44 42 U.S.C. § 1857f-5a(b)(2) (1970).
45 42 U.S.C. § 1857f-5a(b) (1970).
46 42 U.S.C. § 1857f-5a(c)(1) (1970).
47 States are required to include in-use inspection programs in their implementation plans "to the extent necessary and practical." 42 U.S.C. § 1857c-5 (1970).
48 J. Horowitz, The Effectiveness and Cost of Inspection and Maintenance for Reducing Automobile Emissions 1, Spring 1972 (unpublished paper prepared for EPA).

bile density, traffic patterns, number and size of urban centers, mass transit utilization, urban topography, and general meteorological conditions are several of the factors affecting auto air pollution and differ widely from state to state.[49] The emission inventory each state conducted in preparing its implementation plan confirms this.[50] The data lead to the conclusion there may be only a small number of states with the threshold level of vehicle pollution necessary to benefit from in-use inspection.

The EPA statements which may have influenced state implementation plans were published in regulations in August 1971.[51] The regulations specifically encouraged states to consider such control strategies as mandatory maintenance, gaseous fuels, commuter taxes, parking restrictions, expanded mass transit, and only to consider inspection and testing "at such time as the Administrator determines that such programs are feasible and practicable."[52] This cautious approach to inspection was adopted because EPA had several studies underway assessing the effects of inspection, the results of which would not be available before the January 31, 1972, filing date for the state plans.[53] Consequently states were advised that their 1972 plans only needed to identify tentative transportation control measures being considered, but that by Spring 1973 they must have definitive transportation control plans.[54]

The EPA studies, released in the spring and fall of 1972, are not likely to resolve the question of in-use inspection. Although the studies found that inspections reduce emissions, the reduction is not extraordinary.[55] The findings do more to point up the uncertainty of inspection benefits than to provide a clear measure of the benefits.

Whether EPA should or will direct its efforts toward encouraging inspection systems depends not only on the potential benefits

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49 *See* DEP'T OF COMMERCE, STATISTICAL ABSTRACTS 1972, H.R. Doc. No. 257, 92d Cong., 2d Sess. 12-13, 18-23, 178-90, 546 (1972).

50 Plans are available for inspection at Public Affairs Office, EPA, Washington, D.C.

51 40 C.F.R. § 51 (1972).

52 40 C.F.R. § 51.1(n) (1972).

53 37 Fed. Reg. 10844 (1972).

54 *Id.*

55 *See* Horowitz, *supra* note 48; *see also* J. Merenda & S. Kuhrtz, Control Strategies for In-Use Vehicles, Nov. 1972 (unpublished paper prepared for EPA).

but also on the probability of successful implementation of inspection systems by the states. The likelihood of realizing success on the state level seems to depend on three factors: direct costs to the states, confidence in the inspection program, and public acceptability of the inspection/repair system.

A. *Direct Governmental Costs*

Direct governmental costs are probably the most predictable, controllable, and salient features of in-use inspection programs and thus tend to dominate the decision process.[56] Depending on the test technology chosen, operating costs run $1 to $5 per car[57] and capital costs are estimated at $10,000[58] to $100,000[59] per lane.[60] The number of lanes needed is determined by the number of cars subject to inspection, the duration and efficiency of testing, and the number of retests required. A study prepared for California by the Northrop Corporation concluded that capital costs for state-operated testing of California's 12 million cars would be between $10 and $88 million, depending on the tests selected.[61] The New York City Environmental Protection Agency estimates that a statewide inspection plan for New York would require a $15 million capital investment to inspect its 7 million autos or that $5 million would be required if the program were restricted to New York City.[62] The start-up costs of an inspection program are likely to be substantial. The Northrop study has suggested that it would take two years to introduce a state-owned and operated program in California.[63] Costs of planning, situating, and constructing inspection stations along with training personnel, educating the public and the repair industry, and finally perfecting information systems would be a major expense, at least equal to a year's operating budget.[64]

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56 1 Northrop Corp., Mandatory Vehicle Emission Inspection and Maintenance 6-2, May 31, 1971 (prepared under contract with California Air Resources Board).

57 *Id.* at 8-1.

58 *Id.* at 6-2.

59 New York City Environmental Protection Agency, New York Regional Air Pollution Plan § 7, at 2, Jan. 10, 1972 [hereinafter cited as NYC-EPA].

60 An inspection lane is a strip of roadway and associated emissions testing equipment.

61 1 Northrop, *supra* note 56, at 8-1.

62 NYC-EPA, *supra* note 59, § 7, at 2.

63 2 Northrop, *supra* note 56, at 10-3.

64 *See* 1 Northrop, *supra* note 56, § 8.

Undefrayed by user charges and possibly only partially reduced by federal contributions, start-up costs charged directly to the states could be $5 to $10 million in states similar to California.[65]

Estimates of this magnitude provide significant incentives to adopt cost-reducing features. Two alternatives to state-owned and operated inspection stations are receiving attention. One is to combine state-run emission and safety inspection.[66] Since only New Jersey, Delaware, and Washington, D.C., have state-owned and operated safety inspection lanes,[67] this option is not widely available at present. In New Jersey such a system has been found feasible enough to undertake without federal funding.[68] The second alternative is to authorize private garages and gas stations to perform inspections.[69] While this alternative might lower direct state government costs, it might also reduce the fraction of federal funding available.[70] In addition, turning to private enterprise schemes to reduce cost may have detrimental effects on public acceptability (inspection fees would provide "profits"), flexibility (entrepreneurs would demand autonomy), and program confidence (quality control might be difficult).

B. *Program Confidence*

Program confidence refers to a state's assessment of its ability to institute a successful and accurate testing program. The lack of trained labor for testing may be critical. The Northrop study indicates that the 400 lanes necessary to blanket California will require 400 technicians with one to three years experience, 400 inspectors with three to ten years experience, and 100 station managers with 10 or more years experience.[71] Additionally, the

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65 *Id.*

66 This is the plan being attempted by New Jersey. Trenton Evening Times, Jan. 5, 1972, at 1.

67 DEP'T OF TRANSPORTATION, SAFETY FOR MOTOR VEHICLES IN USE, S. DOC. No. 103, 90th Cong., 2d Sess. 95-98 (1968).

68 Trenton Evening Times, Jan. 5, 1972, at 1.

69 This is the approach to safety inspection adopted in 27 states. NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, INSPECTION LAWS ANNOTATED (1969).

70 Since funds are only to be appropriated for emission testing, state programs which provide resources for both safety and emission testing can only be partially funded. 42 U.S.C. § 1857f-6(b) (1970).

71 2 Northrop, *supra* note 56, at 6-1.

study suggests that all personnel should be required to participate in a specialized training program and pass a certification test.[72]

Bureaucratic impediments and resistance may also be difficult to overcome since inspection may impinge upon the state motor vehicle department's organizational structure. Inspection station efficiency might be increased by gearing motor vehicle registration to inspection procedures. However, this may entail radical changes in the mode of operations of motor vehicle registration agencies.[73] In addition, technical factors may limit the effectiveness of the program. Nationwide emission projections for hydrocarbons and carbon monoxide[74] show that over the next 13 years the natural attrition of older pre-control vehicles will produce a steady drop in tons of pollutants emitted, independent of vehicles attaining the 1975 standards.[75] Thus whether or not an inspection program operates efficiently, EPA will be able to point to decreases in aggregate emissions. The Northrop projections for California emissions under various test regimes indicate that implementation delays will render ultimate in-use testing almost valueless since emission levels a decade from now are projected to be the same with or without testing of vehicles.[76]

On the other hand, even the optimal operation of the program may not lower ambient peak concentrations to within legislated standards.[77] For example, the failure to produce a maintainable anti-pollution device could nullify program efforts.[78] Or a shift to non-polluting energy sources could render in-use testing obsolete. This potential for obsolescence presents the danger that a significant capital investment and complex bureaucracy may outlive their usefulness in a relatively short period of time.

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72 *Id.* at 6-2.

73 New Jersey makes safety inspection a prerequisite for registration, requiring its registration system to be continual rather than annual.

74 National Academy of Sciences, Semiannual Report of the Committee on Motor Vehicle Emissions to EPA 46, 47, Jan. 1, 1972 [hereinafter cited as NAS].

75 *Id.* at 45-48. The NAS made two projections for each pollutant assuming, first, that 1975 cars meet the 90 percent reduction goals and, second, that 1975 cars are no better than 1974 cars.

76 1 Northrop, *supra* note 56, at 1-2 to 1-4.

77 For example, confidential EPA sources indicate that no major city is expected to meet 1976 ambient NOX goals.

78 If the device is unresponsive to maintenance, inspection will obviously be of no benefit.

C. *Public Acceptability*

An inspection system can fail to attain satisfactory public acceptability in either the testing or repair phase or both. Testing hours, station location, and notification of the inspection requirement all are normal prerequisites to obtaining the public's cooperation, and can easily be achieved.[79] However, test credibility may be very difficult to produce — that is, it may be difficult to convince someone who failed that he should have failed. Research reports indicate that "there is a significant variation in results when the same vehicle is tested several times . . . variations in emissions of 50 percent [above and below] the average value are not uncommon."[80] It does not take a very sophisticated owner to know that when his tires are bald, his horn is silent, or his emergency brake is inoperable, he will fail a safety inspection; and the owner knows beforehand how to correct these faults. However, assuming the public knows of the variations in emission testing, how many retests does one perform before convincing the citizen that his 14-month-old, $4000 auto has average emissions exceeding the standard, when the owner faces "average" repair costs of $20 or loss of his car registration as a result? While 75 percent of car owners in a sample survey conducted in California believed "a mandatory vehicle emission inspection and corrective maintenance program [was] necessary,"[81] did they so believe on the basis that the "other guy" would fail the inspection?

The primary reason for the credibility problem lies in the degree of technical sophistication embodied in emission testing. One solution to the credibility problem is to improve the test technology through a form of diagnostic testing which isolates the malfunction causing excess emissions (presumably the type of test most acceptable to the public). But this involves the heaviest capital and labor costs.[82]

In addition to establishing the credibility of testing, there is the problem of establishing public confidence in repairs. The Northrop study has revealed that there had been a "general lack of motivation on the part of the mechanics who performed service on

79 DEP'T OF TRANSPORTATION, *supra* note 67, at 95-98.
80 NAS, *supra* note 74, at 22.
81 1 Northrop, *supra* note 56, at 3-1.
82 NYC-EPA, *supra* note 59, § 7, at 2.

the test vehicles."[83] For both the California and New Jersey studies, garages were specially selected and the owners realized the experimental implications of their service. Nevertheless, "the majority of garages performed . . . without a real interest . . . . [Q]uality control was generally lacking [and though] . . . fraudulent practices were not detected . . . a number of services were of suspect quality."[84]

The New Jersey Repair[85] project that studied performance by dealerships, maintenance service centers, and gas stations found that even though repair service quality improved over time a discrepancy remained between laboratory and private cost of repair. The project concluded that total repair costs should range from $8 to $17 depending upon the emission problem, but found that private service costs were between $18 and $25.[86] More replacements were made on almost every category of parts by the private service industry than by the public laboratory.[87]

In approximately 20 percent of the vehicles, all or part of the carburetor had to be replaced.[88] In this repair category it was found that although a customer might pay up to $28 for a "rebuilt" or "mechanic rebuilt" carburetor, his vehicle would still fail the emission test unless he purchased a new carburetor.[89] The consumer is not only dependent on quality work from the repair center but also on quality control from parts suppliers. The Northrop survey of car owners, which showed that 75 percent favored mandatory inspection, found that fully 50 percent thought more than $10 for repair would be unreasonable.[90]

The Clean Air Amendments of 1970 appear to obviate the repair problems by requiring manufacturers to warrant parts and performance. Unfortunately, as will be seen in the next section, cir-

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83 2 Northrop, *supra* note 56, at 11-5.

84 *Id.*; *see* A. Andreath, J. Elston & R. Lahey, The New Jersey Repair Project, Tune-up at Idle, June 27, 1971 [hereinafter cited as N.J. Repair].

85 N.J. Repair, *supra* note 84.

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 1 Northrop, *supra* note 56, at 3-1. The New Jersey Repair Report indicates that repair costs are likely to range between $18 and $25. See text accompanying note 86 *supra*.

cumstances will probably conspire to force many owners to have warranty work done at their own expense.

Proposals to have emission system repairs performed by a state-owned, operated, or controlled facility seem doomed. Entering into such direct competition with an established portion of the private sector seems politically unfeasible. In the words of one consultant, "when mass emission inspection becomes a reality, the motorist will be a captive of the service industry."[91]

Another significant factor states must consider in relation to public acceptability of in-use inspection is the adverse effect of pollution control systems on auto performance — mileage, acceleration, and starting.[92] Deliberate disengagement of pollution control devices by owners is far more likely than voluntary repair.

In summary, in-use inspection appears to encounter formidable obstacles on all three decision criteria: cost, confidence, and public acceptability. But if a state has a significant pollution problem the decision will not merely be a "yes" or "no" to inspection; it will be between accepting inspection or another control strategy. EPA has suggested that states consider fuel conversion, auxiliary control devices, taxes, gas rationing, parking restrictions, staggered work hours, and mass transit.[93] None of these alternatives is without difficulties.

D. *State Experience with Testing*

In 1966 the New Jersey Pollution Control Act was amended to authorize the Department of Environmental Protection to promulgate standards and requirements for vehicle inspection.[94] Between 1966 and 1972 the department instituted wide-ranging tests, surveys, and experiments in anticipation of being allowed to add emission inspection to the repertoire of the state's 34 inspection stations.[95] Finally in April 1971, on the politically propitious "Earth Day," Governor Cahill announced that his administration

91 Clayton Manufacturing Co., New Jersey/Clayton Key Mode Demonstration Project 28, Apr. 5, 1971.

92 *See* H. Jacoby & J. Steinbruner, Salvaging the Federal Attempt to Control Auto Pollution (to be published in *Public Policy*, Winter 1973).

93 40 C.F.R. § 51.1(n) (1972).

94 Trenton Evening Times, Jan. 5, 1972, at 1.

95 *Id.*

intended to implement compulsory testing and compliance.[96] During the summer, while the inspection standards were being drafted and presented at public hearings, powerful opposition formed within the state administration. Led by the past and present Motor Vehicle Directors, the Labor and Industry Commissioner, the Director of Consumer Protection, the State Treasurer, and the Budget Director, the lobby argued that the auto repair industry would be unable to handle the repairs.[97] The argument that unscrupulous mechanics would cheat drivers who would in turn blame the state government was politically powerful. The proposal was shelved, ostensibly due to cost and test time, although test reports indicate these were not a problem.[98] Finally in December, the state announced that emission inspection (with a simpler test than originally proposed) would become a standard part of the vehicle inspection system, but enforcement of standards would be delayed for one or two years.[99]

Data on the Massachusetts and New York implementation plans prepared for EPA indicate that both states are taking a comprehensive rather than selective approach to reducing auto emissions.[100] A sample of the complex negotiations that are in progress among various interests within the states is provided by New York City, which has two Clean Air Act implementation plans. One has been provided by the state;[101] the other, by the New York City Environmental Protection Agency.[102] The state plan proposes a spot-check inspection program, but the New York City proposal claims that a more expensive and complex diagnostic test "will be the only truly meaningful and cost-effective approach."[103]

In Massachusetts the Bureau of Air Quality Control submitted

96 *Id.*
97 *Id.*
98 N.J. Repair, *supra* note 84.
99 Trenton Evening Times, Jan. 5, 1972, at 1.
100 Both states submitted exhaustive tests of so many control strategies as to indicate little familiarity with what might be actually entailed. Dep't of Public Health, Bureau of Air Quality Control, Massachusetts Clean Air Act Implementation Plan, Jan. 1972; New York State Dep't of Environmental Conservation, New York City Metropolitan Area Air Quality Implementation Plan, Jan. 1972 [hereinafter cited as N.Y. State].
101 N.Y. State, *supra* note 100.
102 NYC-EPA, *supra* note 59, at 6.
103 *Id.*

an implementation plan calling for parking restrictions and a moratorium on public garage construction two weeks after the Department of Public Works and the City of Boston launched a $300,000 study to develop a master plan for metropolitan parking.[104] The section of the Air Quality Control plan on motor vehicles was drafted by a member of the Governor's staff who described the plan only as "a pooling of ideas."[105] When pressed as to why Massachusetts gave so little attention to inspection, the Bureau replied that "there's no money" and that "a testing program would mean not only money but a lot of changes."[106] During the summer of 1972 the state formed an interagency committee to draft a new plan.[107] The committee was drawn from three state agencies and consults with 11 other federal and state groups. A final plan is not expected until the spring of 1973.[108]

In summary, although inspection has found its way into the implementation plans of some 20 states (perhaps because of the tentative nature of those plans), those states seriously considering in-use inspection must contend with the problems discussed above. EPA is in a position to influence state decisions, particularly through its control of funding grants. But whether EPA will or should encourage adoption of in-use inspection depends in part on the Agency's estimate of the response of manufacturers to the Act's provisions.

III. Manufacturers: Warranty and Recall

The motor vehicle section of the Clean Air Act is directly aimed at forcing automobile manufacturers to shoulder the burden of cleaning up vehicle emissions.[109] If automobile manufacturers are viewed as unitary, rational entities, then it is likely that the legislation will have its desired effect. However, a close look at the

104 Boston Globe, Jan. 6, 1972, at 20, col. 1.
105 *Id.*
106 *Id.*
107 GCA Corporation, Development of a Transportation Control Plan to Meet Ambient Air Quality Standards for Carbon Monoxide and Oxidants for Metropolitan Boston 1-3, Jan. 1973.
108 *Id.*
109 H.R. Rep. No. 1783, 91st Cong., 2d Sess. 49-52 (1970).

organizational process of automobile manufacturers indicates that if the desired outcome of the Act is reached it will probably be more fortuitous than planned. The design, manufacturing, and marketing process is so lengthy that the warranty/recall provisions of the Act are likely to have only a remote and unsubstantial effect on the critical production decisions. Also the complexity of the production process leaves few decisionmakers with a sense of responsibility for the performance of the pollution control system. In addition to the problems of production decisions, the automobile dealership system as currently administered is not suited to successful implementation of a comprehensive warranty plan.

A. *Organizational Structure and Incentives*

General Motors Corporation (GM) has been the acknowledged leader in the automotive industry for more than 30 years.[110] Because the other firms actively emulate its organization and production patterns, GM's decision process will be the central focus for this discussion.[111]

General Motors accounts for about 58 percent of all automobile sales and consists of 35 manufacturing divisions, a central staff, and miscellaneous special facilities and subsidiaries.[112] The corporation's operating philosophy is "decentralization with coordinated control."[113] Each division is under the direction of a general manager who possesses a large degree of operating discretion within his own division.[114] Automobiles are primarily designed, developed, manufactured, and merchandised by separate divisions.[115] When coordination between divisions becomes necessary, it is generated by two governing committees and three major staffs (operative, legal, and financial).[116] The operations staff includes the engineering group, which plays a major role in pollution matters.[117]

A line of automobiles goes through several design and produc-

110 E. Learned, General Motors Corporation 1, 1961 (Harvard Business School Case Study).
111 *See generally* L. WHITE, THE AUTOMOBILE INDUSTRY SINCE 1945, at 74 (1971).
112 Learned, *supra* note 110, at 1.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*

tion stages before it reaches the showroom floor. At each decision stage the design is judged on four major criteria: performance, driveability, fuel economy, and retail price.[118] Because the industry believes they determine saleability, the divisions concentrate their attention on these four criteria in order to meet profit and sales targets.[119] The Clean Air Act's certification and assembly line tests have forced the manufacturers to add emission levels to this list of criteria. But auto makers do not believe that new car purchasers will pay extra for lower emissions, if given a choice. Viewing emission control as unrelated to saleability, manufacturers have minimized their investments in producing emission control systems.[120]

Although evidence is limited, it appears GM's pollution control decisions consist of five steps:[121] (1) Initially small groups of scientists within GM's scientific laboratories conduct parametric studies on possible control systems. The studies show engine performance and emission characteristics. (2) The parametric studies are then submitted to the engineering staff, which is responsible for developing several alternative pollution control systems that will fit the emission-controlled engine into the total automobile design and pass EPA prototype certification tests. (3) The alternative system designs are sent to a staff policy group which selects one or two preferred systems on the basis of emission levels, costs, and performance tradeoffs. Performance measures probably dominate emission considerations at this stage. (4) Division managers and chief division engineers then tailor the emission system to provide enough leeway to allow for coverage of variances necessarily present in the assembly line process and still pass an assembly line emission test. (5) Finally, the design is considered by the division sales and distribution manager. Although his is the area of responsibility where massive warranty and recall repairs will be felt the most, he has other more immediate and, from his perspective, more important problems.[122] His primary task is to manage advertising, dealer-

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118 S. Moeller, Memorandum on Current Detroit Strategies for Controlling Emissions on the Internal Combustion Engine 18-19, Sept. 10, 1971 (for Automobile Air Pollution Project, John F. Kennedy School of Government, Harvard University).

119 *Id.* at 18.

120 Note the lack of advertising about emission levels. *See* L. WHITE, *supra* note 111, at 228-47.

121 Moeller, *supra* note 118, at 18.

122 *Id.*

ships, list prices, and discount schedules so as to maximize sales.[123] Problems that may follow sales by one, two, or five years will be of less concern. Even if future sales were hurt by a past model's poor pollution control design, it is doubtful that the problem, hidden among many other factors, would be clearly recognized.

The length of the process from design to sales and from sales to in-use inspection results in making the warranty/recall provisions of the Act ineffective incentives for manufacturers. The GM divisions start planning for new model vehicles two to three years in advance of the fall unveiling.[124] For example, division production decisions for the 1975 model Chevrolet, which will be unveiled in fall 1974, began in spring 1972; and the major mass production features have been fixed since the beginning of 1973.[125] Past production schedules indicate that the automobile will undergo prototype testing and certification during 1973.[126]

Testing at the design stage can never fully duplicate the strains which the system will undergo in actual use.[127] If the emission system fails after sale to the customer, the detection by in-use inspection and subsequent recall is from three to seven years removed from the faulty design decisions. Even if GM responds promptly in redesigning its new cars after detection of a design flaw, it is another two to three years before this redesigned system reaches the road and yet another year or two before in-use inspection verifies the effectiveness of the change. Thus it may be six to twelve years between a faulty design decision and confirmation of its correction. However, even this long-term response could provide some incentive if key personnel were sufficiently sensitive to the possibility of massive warranty costs.[128]

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123 L. WHITE, *supra* note 111, at 112.
124 Moeller, *supra* note 118, at 11.
125 *Id.*
126 *Id.*
127 *See* Jacoby, *supra* note 92, pt. I.
128 Although the discussion above has been primarily oriented toward General Motors, one reaches no different conclusions for Chrysler, Ford, or American Motors. Admittedly, recall and warranty pose relatively greater threats to the smaller manufacturers and their smaller profit margins, but their smaller share of sales makes them even more conscious of and constrained by the marketability ethic. Although their smaller size allows them a more centralized management, and possibly more integrated decisions, their relative inefficiency forces them to have a longer lead-time than GM. Thus to benefit from their centralization, they must have extraordinary foresight. Last but not least, they are oligopolistic followers and GM is the leader;

B. *The Likelihood and Cost of Warranty/Recall*

Most decision makers in the auto industry do not seem overly perturbed by the Act's performance warranty. Statements and interviews indicate that decisionmakers do not believe there is a high probability of an excessive number of warranty claims.[129] They also have a relatively low estimate of the cost should warranty claims in fact greatly exceed their expectations. This may be because the cost of a warranty crisis is limited by the expense of replacing air pollution control systems on all cars produced in the problem year. Although the cost is far from negligible, it is small compared to such routinely faced problems as UAW strikes, marketing an Edsel, or a demand slump. The Edsel is estimated to have cost Ford Motor Company $100 to $300 million.[130] Strikes and demand slumps can change General Motors profits by $240 to $340 million.[131] By comparison even if 30 percent of GM's new cars were failed by in-use testing in the 10 most populous states and the resultant warranty liability averaged $200 per car, the total cost would be only $123 million.[132]

Even though the possible economic consequences seem tolerable, the manufacturers have vigorously maintained that warranty implementation is highly unfeasible. In August 1970 Ford Motor Company's presentation to the Senate subcommittee emphasized that "a performance warranty rather than a [warranty against] failure of a specific piece of hardware . . . is completely unenforceable and impractical."[133] Ford supported its conclusion by arguing that dealers would have neither the testing nor engineering capa-

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therefore, GM's views on where the path of profit maximization is going are paramount. *See* L. WHITE, *supra* note 111, at 111-15.

129 *See* A. Spindler & S. Moeller, Memoranda for Automobile Air Pollution Project, John F. Kennedy School of Government, Harvard University, July and Aug. 1971 (based on interviews with auto industry and EPA officials).

130 L. WHITE, *supra* note 111, at 74.

131 The 1969 to 1970 decline in total passenger car sales was 1.7 million. The 1966-67 decline linked to a UAW strike was 1.2 million. Consequently a "production variation" equitably distributed over all manufacturers means a GM profit decline of $240 to 340 million. *Id.*

132 If the top 10 states fail 30 percent of all new GM cars, then based on 1969 registrations, GM would have to repair 615,000 autos at an estimated cost of $200 each, or a total of $123 million. Assuming $400 profit per car, this is equivalent to selling 307,500 fewer cars. *Id.*

133 *Hearings*, *supra* note 14, pt. 5, at 1605.

bilities necessary for repair and that it would be impossible to determine if a vehicle had been "properly maintained, serviced, and operated."[134] The Automobile Manufacturers Association (AMA) testified that the five-year/50,000-mile warranty put an "impossible burden" on manufacturers, arguing that if precertification and presale tests do not correctly predict lifetime performance, then the solution is better pretesting.[135] The AMA further argued that it may be unconstitutional to require manufacturers to replace failing devices.[136]

In its 1971 progress report[137] GM said that it would be impossible to meet warranty requirements for 1972 models and that there was no valid data base for predicting the degree of modification necessary to bring 1972-74 model automobiles into compliance.[138] GM described the problems mentioned by Ford and AMA as "severe" and claimed that "extremely stringent" maintenance procedures, lubricant and fuel specifications, and tune-ups to manufacturer specifications preceding in-use inspection were some of the basic requirements necessary under the Act's warranty provisions.[139] Even officials at EPA consider that warranty work is primarily a manufacturer-consumer problem with little likelihood of enforcement.[140] The belief in the impossibility of a workable warranty seems widely accepted, and that belief prevents the warranty and recall provisions of the Act from having the coercive influence on design decisions which congressional sponsors of the Act intended.

Although recall provisions seem to pose a greater threat to manufacturers than warranty repairs made necessary by in-use inspection, recall suffers from many of the same problems. Recall has to be based on testing of a "substantial number of any class or cate-

134 *Id.*

135 *Id.* at 1579-80.

136 *Id.* at 1580.

137 General Motors Corp., Progress and Programs in Automotive Emission Control 76, Mar. 12, 1971 (submitted to EPA) [hereinafter cited as GM].

138 There have as yet been no tests to determine whether 1972 cars are meeting their warranty requirements.

139 GM, *supra* note 137, at 74.

140 A. Spindler & C. Kellerman, Memorandum on Interview with George Allen, Office of Enforcement and General Counsel, EPA, in Washington, D.C., Aug. 5, 1971, prepared for Automobile Air Pollution Project, John F. Kennedy School of Government, Harvard University.

gory of vehicles or engines."[141] Since EPA is limited to voluntary surveillance of owners or to state-provided inspection,[142] the probability of recall is lower than that of warranty work. The per-car cost of recall may not be any greater than that of warranty because once EPA forces a recall it must still negotiate a "plan" with the manufacturers for remedying the nonconformity.[143] Such negotiations may allow manufacturers to argue their way out of repairing some cars or certain parts of the control device that might have to be repaired if brought in by an angry customer who had failed in-use inspection. Thus the expected cost[144] of a recall action might actually be lower than that of warranty.

The punitive incentives of warranty/recall are also lessened by the fact that manufacturers are insulated from some of the costs of warranty/recall by their dealership systems.

C. *Previous Warranty/Recall Experience*

The automobile manufacturers have experimented with various warranty plans and are presently subject to government-initiated recalls under the 1966 National Highway Safety Act.[145] During the first 16 months of the Safety Act over 4.5 million vehicles of various model-years were recalled, 65 percent for steering defects.[146] These recalls cost the industry $50 to 100 million.[147] Yet recalls continue, indicating that manufacturers may find it cheaper to detect defects via recall than through assembly line inspection or redesign. If they become as routine as safety recalls, emission recalls could result in manufacturer action to reduce the frequency of one or the other, or both. Thus one unexpected side effect of the Act might be to make cars safer.

Between 1961 and 1969, Chrysler, Ford, General Motors, and American Motors made warranty provisions a significant element of their competitive strategies.[148] From a 90-day/4000-mile war-

141 42 U.S.C. § 1857f-5a(c)(1) (1970).
142 42 U.S.C. § 1857f-5a(f) (1970).
143 42 U.S.C. § 1857f-5a(c)(1) (1970).
144 Expected cost of event A is equal to the probability of event A occurring times the cost of event A if it occurs.
145 23 U.S.C. §§ 401-04 (1970).
146 FTC, STAFF REPORT ON AUTOMOBILE WARRANTIES 154, 170 (1968).
147 *Id.*
148 *Id.* at 30-42.

ranty in 1961, manufacturers moved to a five-year/50,000-mile power train warranty in 1967.[149] Since 1969 there has been a substantial decline in the length and coverage to only one-year/12,000-mile warranties.[150] The decline might have been due to unexpectedly poor quality control, or because once the competitive extreme of a five-year/50,000-mile warranty was reached it was possible for everyone to cut back.[151]

A Federal Trade Commission (FTC) staff report covering a three-year period[152] provides evidence for a different conclusion: the auto companies were unable (or unwilling) to manipulate their organizations toward successful implementation of a comprehensive warranty plan. The FTC presented an impressive array of observations supporting three main causes for the unsuccessful warranty programs.

First, owners do not read or understand the warranty provisions. As a result dealers are often able to abuse warranty provisions on the one hand,[153] and on the other many customers make unjustified warranty claims and complain when repairs are not made.[154] Judicial remedies are often unknown to the owner or are too expensive.

Second, many dealers believe they receive inadequate compensation from manufacturers for warranty related work. Low compensation for predelivery inspection results in cursory inspection with dealers often depending on the warranty to catch defects.[155] On warranty work manufacturers are treated as wholesale customers; they pay dealers for parts at cost plus 25 percent (versus normal charge of cost plus 42 percent)[156] and the flat rate and time allow-

149 *Id.* at 23-25. Power train includes transmission, rear differential, and associated parts.

150 *Id.* at 200.

151 Confidential Federal Trade Commission discussions with manufacturers over a draft of the staff report may have provided the tacit communication necessary to coordinate the radical change in warranties from 1968 to 1969. The conferences took place in mid-July 1968 and when new warranties were announced six weeks later, they had not yet been printed, presenting some evidence that there may have been a "late" reassessment of warranty policy. *Id.*

152 July 1965 to July 1968. *Id.*

153 *Id.* at 173.

154 *Id.* at 107-08.

155 *Id.* at 91-92.

156 *Id.* at 94.

ances are such that reimbursement for warranty repair is below that for ordinary repairs.[157] The manufacturers also disregard inventory costs and diagnostic time, and compensation is denied for a disputed number of claims (perhaps as high as 2 percent).[158] All these are disincentives for the dealer to perform warranty work, or perform it well.

Third, the incentives directed at dealers by the manufacturers are not designed to ensure fulfillment of warranty obligations. The system of "performance competitions" among dealership regions is based, in part, upon underspending the warranty budgets.[159] Manufacturers provide advice on adequate service facilities, but there is no evidence they enforce their recommendations.[160] In those aspects where sales emphasis can be compared to service emphasis (*e.g.*, training facilities, accountability) sales are still foremost.[161]

The FTC study concluded that "although the manufacturers have a firm control over the character of dealer operations . . . they have not as yet taken steps to make the performance of warranty repairs live up to the standards implied by the written warranty."[162] It seems foolhardy to rely on the manufacturers to take the "steps" necessary to live up to the warranty Congress has written into the 1970 Clean Air Act.

In summary, the Clean Air Act assumes a corporate consciousness that probably is not present. Although emission control may eventually reach the level of emphasis presently given to marketability factors, at present we must deal with the following constraints: (1) warranty and recall represent incentives that are removed from industry decisionmakers in terms of personal responsibility, outlook, and time; (2) since the industry is insulated from the threat of in-use inspection, the first impact of an operating inspection system cannot be expected before the end of the decade; (3) recall and inspection costs supposedly borne by the manufacturer will be passed on to the new car buyer or taken out of dealer profits; (4) in terms of affecting design changes, the Act's certifica-

157 *Id.* at 95-99.
158 *Id.* at 96-101.
159 *Id.* at 145-47.
160 *Id.* at 119-20.
161 *Id.* at 194-95.
162 *Id.* at 197-98.

tion presale requirements may present the only effective "clubs" because they stand directly in the path of profits.

IV. Conclusions and Policy Alternatives

So far we have considered the likelihood that manufacturers, the states, the service industry, and the public would interact efficiently in the manner the Clean Air Act seems to envision. The discussion illuminated three weak links in the present Clean Air Act scenario:

State participation: It is doubtful that tests which are justifiable in terms of reduced emissions and cost will be sufficiently reliable to make them credible to the public. Similarly it is doubtful that any system but state-owned inspection stations is acceptable. However, state inspection systems are expensive and such a complex organizational undertaking that it is doubtful they can be implemented successfully. Given the costs and technological difficulties, most states seem reluctant to adopt in-use testing systems despite two-thirds funding by the federal government.

Service industry: Motivating the service industry to repair autos efficiently and at a fair profit may be the Achilles' heel of the inspection strategy. Insuring adequate private investment in equipment and training, keeping servicers from exacting an "ignorance" premium from auto owners, and integrating repair of pollution control devices into normal maintenance patterns all seem difficult objectives to attain.

Auto industry: The costs which warranty and recall provisions may impose for not bringing autos into compliance with in-use standards are not effective incentives for optimal control-device design. Recall as an uncertain eventuality may be more of a threat than warranty. The costs of warranty are probably more predictable and therefore easier to pass on to the purchaser. The "proper maintenance" and "substantial number" requirements of the Act undercut both the warranty and recall provisions. Judging from owner response to safety recalls, only a portion of those recalled will be submitted for repair.[163] Given past experience with warranty repairs, it seems unlikely that performance warranty will be

163 *Id.* Sec. III.

an efficient means of ensuring that pollution control devices perform up to standard.

Consequently the conclusion with respect to the Act's inspection-warranty-recall provisions is that EPA and Congress will be forced either into innovation in implementing the present provisions or revision of the Act. We gain some insight into the possible strategies for innovation or amendment by considering some of the general objectives Congress or EPA might be trying to attain:

> A. Clean ambient air: lower total emissions of HC, CO, and NOX everywhere in the country.
>
> B. Long-term stability of air quality: adoption of minimally polluting technologies, or adaptable control systems that will reliably sustain air quality through the life of the car.
>
> C. Maximized net benefits: maximize the benefits of reduced air pollution less the costs of control and inspection measures.
>
> D. Maximum implementability: maximize the speed and predictability of the societal changes dictated by the goals.
>
> E. Efficient interaction between localities: minimize the adverse interactions between localities, states, or regions which choose different levels of clean air or different control strategies.
>
> F. Minimal impediment to other social objectives: prevent the objective of clean air from greatly affecting population migration, economic growth, income distribution plans, etc.

Obviously all these objectives cannot be attained simultaneously. It is also obvious that both EPA and Congress are affected by divergent constituencies, political pressure, and conflicting values which make it difficult to predict what course will be followed. However the following alternatives to the present statutory scheme are likely to be considered.

A. *Innovation to Overcome Implementation Problems*

1. EPA might undertake an intensive surveillance program in some states. This is a far more limited undertaking than full, periodic, in-use testing of all vehicles in the state. A four- to six-lane testing station could be used for spot checks and voluntary surveillance. The results of this testing would provide a basis for local or statewide recall if EPA chooses to invoke that authority. Placed

under joint EPA-local control and operation, surveillance programs would represent a way station to more comprehensive state testing by training test and service personnel while familiarizing the public and the state bureaucracy with emission testing procedures. The program would also allow EPA to monitor the in-use characteristics of the auto in expectation of making specific design change suggestions, backed with the threat of recall.

2. Independently or in conjunction with the above surveillance projects, EPA could use funds to wage a campaign of auxiliary programs aimed at training mechanics, public education, public relations, and consultant grants for state agencies. These efforts would aim at reducing the "acceptability" implementation barriers and bringing internal pressure on some states to adopt inspection.

B. *Revision of Technological Goals*

At present the course of technological change does not discriminate between equally costly control devices, some of which have a high initial purchase price and low maintenance costs, and others which have a low initial price and high maintenance costs. The residents of those states which do not need active vehicle emission control strategies may be forced to purchase a device which gives them little or no benefit. This possibility argues for biasing policies and incentives in favor of control devices that are less expensive to purchase but more expensive to maintain. Such a device forces the residents of high pollution areas to pay most of the cost of cleaning their air via inspection and maintenance fees. Although the case can be argued for a nationwide solution despite localized benefits, the above approach has received significant attention lately,[164] and it is likely to receive more attention as the Act's inspection provisions are implemented. The following steps would be consistent with this view:

1. EPA could abandon the performance-warranty concept by an EPA determination that there are no tests correlatable with the certification tests. This increases the incentives for manufacturers to create a cheap, high deterioration, high maintenance design which may lower initial costs, raise repair expense, and possibly

164 *See* Ad Hoc Comm. of Office of Science and Technology, Cumulative Regulatory Effects on the Cost of Automotive Transportation, Feb. 28, 1972.

increase the potential benefits of inspection. States which chose to meet national ambient air standards by reducing automobile emissions could then do so by using periodic in-use testing to require residents to perform the maintenance necessary for continued effectiveness of pollution control devices.

2. The Act could be amended to empower EPA to force specific design changes on the manufacturers. This would enable EPA to force the production of an emission control system with high maintenance requirements (*i.e.*, over a wide range of emissions increased maintenance decreases emissions). By placing increased emphasis on maintenance expenditures greater benefits accrue from an inspection system.

3. Congress could amend the Act to raise allowable emission levels for new cars — thereby decreasing the cost of new cars[165] — and at the same time amend the law to allow states or regions, with EPA approval, to set manufacturing standards stricter than those the Act provides for vehicles sold or operated within their boundaries.

In summary, the Clean Air Act mandates change on many fronts — technological, regulatory, behavioral. Unfortunately the Act's present scenario of interaction between states, the EPA, and auto manufacturers seems simplistic at best. As the divergence between what is likely to happen and the statutory scheme becomes evident in regard to inspections, warranty, and recall, we can expect to see either a series of governmental crises or innovation and redirection of air pollution control efforts. We are not likely to see viable state emission inspection systems coupled to warranty and recall, and consequently it is unlikely that automobile emissions will remain within the legislated levels once cars are on the roads.

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165 *See Hearings, supra* note 14; GM, *supra* note 137.

NOTES

THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972: AMBIGUITY AS A CONTROL DEVICE

Introduction

On October 18, 1972, Congress overrode a presidential veto and approved the Federal Water Pollution Control Act Amendments of 1972.[1] Final approval climaxed one of the most bitterly contested legislative battles in the 25 years of the federal water pollution control program.[2] The new legislation reflects both a desire for rapid improvement in the quality of the nation's waters and growing concern over the high cost of achieving such improvement. The purpose of this Note is to evaluate the regulatory scheme devised by Congress to reconcile these competing interests.

The analysis is divided into three parts. Part I briefly recounts the 1972 struggle to produce new water pollution control legislation. Part II analyzes the two standards[3] Congress established to control industrial waste discharges. Problems of statutory interpretation are considered in detail as a basis for evaluating the regulatory mechanism. Part III suggests some problems which may arise in applying the technology assessment procedure and examines difficulties already encountered in implementing the law.

I. Legislative History

The history of the federal water pollution control effort has been described in detail elsewhere.[4] For the purposes of this Note,

1 118 Cong. Rec. S18554 (daily ed. Oct. 17, 1972); *id.* at H10272 (daily ed. Oct. 18, 1972); Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C.A. §§ 1251-376 (Supp. 1973)).

2 For a detailed report on the legislative history, see Barfield, *Economic Arguments May Force Retreat from Senate Water-Quality Goals*, 4 Nat'l J. 136 (1972).

3 The two standards on which effluent limitations will be based are "best practicable control technology currently available" and "best available technology economically achievable." 33 U.S.C.A. § 1311 (Supp. 1973).

4 *See, e.g.*, D. Zwick, Water Wasteland (1971) (Nader Report on Water Pollution).

two points about that history are significant. From the passage of the Federal Water Pollution Control Act[5] in 1948 to the Water and Environmental Quality Improvement Act of 1970,[6] federal responsibility for pollution control gradually increased as the states proved unwilling or unable to assume primary responsibility for the task.[7] Second, between 1965 and 1972 the principal federal enforcement program was based on a water quality standards approach.[8] Each state was required to develop a comprehensive set of water quality standards for all interstate waters, subject to approval by the Environmental Protection Agency (EPA).[9] By 1970 many states had secured approval for their standards,[10] but public concern for the environment demanded an approach which achieved quicker, more visible results.

In 1970 the Refuse Act of 1899[11] was rediscovered. Long regarded as applying only to obstructions to navigation, the Refuse Act assumed new significance after a 1966 Supreme Court decision expanded "refuse" to include virtually all discharges which adversely affect water quality.[12] The Refuse Act prohibits the discharge of all material, "other than that flowing from streets, sewers, and passing therefrom in a liquid state," into the navigable waters of the United States.[13] Only discharges for which a permit has been obtained from the Army Corps of Engineers are excepted from this prohibition.[14] Violators are subject to a maximum

5 Ch. 758, 62 Stat. 1155 (1948).

6 Pub. L. No. 91-224, 84 Stat. 91 (1970).

7 *See* D. ZWICK, *supra* note 4, at 265-84.

8 Federal enforcement activities during this period consisted primarily of conference proceedings designed to identify dischargers who were violating state water quality standards. *Id.* at 119.

9 Federal approval of these standards is still not complete. As of July 19, 1971, the latest date an official compilation is available, 36 states had received full approval of their standards. *See Hearings on Water Pollution Control Legislation — 1971 (Proposed Amendments to Existing Legislation) Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 214 (1971) [hereinafter cited as *House Amendments Hearings*].

10 *Id.*

11 33 U.S.C. § 407 (1970).

12 United States v. Standard Oil Co., 384 U.S. 224 (1966).

13 33 U.S.C. § 407 (1970).

14 *Id.*

penalty of a $2500 fine and one year in prison.[15] Any person who gives information leading to conviction may be awarded one-half the assessed fine.[16]

Virtually every industrial plant in America was in violation of the Refuse Act following its rediscovery. Faced with growing pressure to enforce the law from environmentalists,[17] President Nixon issued an Executive Order[18] directing the Army Corps of Engineers and EPA to establish immediately a permit program as provided by the Refuse Act.

A collision between the Refuse Act and the existing federal water pollution control program was inevitable. The Refuse Act's flat prohibition of all discharges was directly contrary to the "reasonable" discharge theory of the water quality standards program. In *United States v. Pennsylvania Industrial Chemical Corp. (PICCO)*,[19] the Court of Appeals for the Third Circuit resolved this clash in favor of the Refuse Act, declaring that compliance with state water quality standards did *not* exempt a company from prosecution under the 1899 Act.

The *PICCO* decision and increasing frustration over the lack of progress toward cleaner water led to renewed pressure for major changes in the Federal Water Pollution Control Act.[20] In response to these pressures, both the House and Senate opened hearings on new legislation in mid-1971.

After extensive hearings the Senate Subcommittee on Air and Water Pollution, chaired by Senator Edmund Muskie (D.-Me.), released a bill which would have altered both the pace and direction of the nation's water quality program. Among the more important provisions of the Muskie bill were the 1985 goal of "zero discharge" of all industrial and municipal pollutants[21] and a requirement that all industrial dischargers meet effluent limitations

15 *Id.* § 411 (1970).

16 *Id.*

17 *See* Rogers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761 (1971).

18 Exec. Order No. 11,574, 3 C.F.R. § 551 (Supp. 1972).

19 461 F.2d 468 (3d Cir. 1972).

20 *See* Wagner, *Water Pollution Permit Plan Worries Conservationists, Industries Alike*, 3 NAT'L J. 389-99 (1971).

21 S. 2770, 92d Cong., 1st Sess. § 101(a)(1) (1971).

based on the "best practicable" technology by 1976.[22] By far the most radical requirement, however, was the complete elimination of all *industrial* waste discharges by 1981, unless the Administrator "finds, that compliance is not attainable at a reasonable cost, in which event there shall be applied an effluent limitation based on that degree of effluent control achievable through the application of the best available technology . . . ."[23] Riding largely on the influence of Chairman Muskie,[24] S. 2770 swept through the Senate, 86 to 0, on November 2, 1971.[25]

Despite the reservations of a number of its members,[26] the House Public Works Committee quickly adopted H.R. 11896, a bill virtually identical to S. 2770.[27] Since the House Public Works Committee had established a voluminous hearing record between July and November 1971,[28] the decision to reopen hearings in early December was received with considerable surprise.[29] Several members of the Senate Subcommittee correctly interpreted the decision as the first move in an Administration effort to water down H.R. 11896.[30]

Concern over the cost of environmental improvement had been growing within the Nixon Administration throughout the summer of 1971.[31] The environmental movement seemed to be slowing and there was growing talk of "environmental backlash" in Washington.[32] Despite these developments few industry leaders believed that the position of the House Committee could be reversed at such a late date. Chairman John Blatnik (D.-Minn.) had consistently opposed reopening the hearings;[33] but when he was hos-

22 *Id.* § 301(b)(1)(A).
23 *Id.* § 301(b)(2)(A).
24 Barfield, *Administration Fights Goals, Costs of Senate Water Quality Bill*, 4 NAT'L J. 86 (1972).
25 117 CONG. REC. 38865 (1971).
26 Barfield, *supra* note 2, at 141.
27 H.R. 11896, 92d Cong., 1st Sess. (1971).
28 *Hearings on Water Pollution Control Legislation—1971 (Oversight of Existing Program) Before the House Comm. on Public Works*, 92d Cong., 1st Sess. (1971); *House Amendments Hearings, supra* note 9.
29 Barfield, *supra* note 2, at 137.
30 *Id.*
31 *See* Wagner, *Pace of Anti-Pollution Legislation Slows, but Support for Cause Remains Strong*, 3 NAT'L J. 2540 (1971).
32 *Id.* at 2541.
33 Barfield, *supra* note 2, at 142.

pitalized by a heart attack, the Committee voted to hold four additional days of hearings.[34]

The Administration quickly assembled an ad hoc panel of economists who stressed the fact that the zero discharge goal would cost billions of dollars "for no useful social or economic purpose."[35] The Council on Environmental Quality calculated that zero discharge would cost $317 billion.[36] Governor Rockefeller put the figure at $2 to 3 *trillion*.[37] The environmentalists, unable to immediately counter the Administration's figures, failed to rebut the counteroffensive mounted by the Administration and industry.[38]

The final House bill was considerably weakened as a result of the hearings.[39] The 1981 zero industrial discharge requirement was eliminated and additional requirements beyond 1976 were made contingent on the results of an economic impact study to be completed by the National Academy of Sciences.[40] On March 28, 1972, the House turned down by lopsided votes a series of amendments to restore the original Senate provisions and finally approved the bill the next day.[41]

The House and Senate bills contained fundamental differences in approach and emphasis. The conference was one of the most difficult and prolonged ever held by the two committees.[42] The conferees met throughout the spring and summer, and there was

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34 *Id.*

35 Statement of Marc Roberts, Associate Professor of Economics at Harvard University and member of the panel. *Id.* at 141.

36 *See Hearings on H.R. 11896, H.R. 11895 Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 259 (1971) (cost figures submitted by Russell Train, Chairman of the Council on Environmental Quality) [hereinafter cited as *House Hearings on H.R. 11896*].

37 *Id.* at 481.

38 The author of this Note subsequently discovered that the Administration figures were based on the cost of distilling seawater. A separate study conducted by the author based on the use of land treatment and increased recycling concluded that zero discharge could be achieved at a cost of $55 to $60 billion. For a full report on the latter study, see Wagner, *Environmental Coalition Formed to Push for Tougher Water Quality Bill on the House Floor*, 4 NAT'L J. 493 (1972).

39 White House aide Richard Fairbanks admitted, "The hearings were absolutely vital to us; almost everything rode on them." Barfield, *supra* note 2, at 137.

40 H.R. 11896, 92d Cong., 2d Sess. § 315(a) (1972).

41 *See* Barfield, *Environmentalists Fail to Amend House Water Bill*, 4 NAT'L J. 580 (1972).

42 118 CONG. REC. H9114, S16869 (daily ed. Oct. 4, 1972).

considerable doubt that a bill would be reported.[43] The Conference Committee finally reached agreement in early October, and the compromise measure was brought to the floor of both houses on October 4, 1972.[44] Both Senator Muskie and Representative Robert E. Jones (D.-Ala.), the respective chairmen of the Senate and House delegations, emphasized that final agreement had been reached only after substantial concessions by both sides, but that they were satisfied with the final product.[45] The conference bill was approved by overwhelming margins.[46] Citing the "unjustifiably" large sums authorized in the legislation, President Nixon vetoed the bill on October 17, 1972.[47] Both houses quickly overrode the veto and the Federal Water Pollution Control Act Amendments of 1972 became law.[48]

Some tentative conclusions can be drawn from the 1972 struggle to produce major new water pollution control legislation. The conflicts between the Senate and House were not over matters of detail, but involved fundamental differences in the proposed pace and direction of the federal control effort. The Senate appears to have been convinced that zero discharge could be achieved by 1981, at least by industrial dischargers. The House was not nearly so sanguine; its principal concern was the cost of achieving increased control. The Senate bill would have abandoned the water quality standards program in favor of a system of effluent standards geared to achieve broad water quality goals. The House bill retained the existing approach and preserved greater authority for the states.

Given these fundamental differences, one might expect that the competing interests were imperfectly resolved in the final Act. As the following analysis indicates, despite agreement on the lan-

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43 This and other similar observations are based on the author's personal experience during this period as Assistant Legislative Director of Friends of the Earth, a national environmental group.

44 *See* 118 CONG. REC. H9114, S16869 (daily ed. Oct. 4, 1972).

45 *Id.*

46 The Senate vote was 74 to 0, and the House vote, 366 to 11. 118 CONG. REC. S16895, H9134-35 (daily ed. Oct. 4, 1972).

47 8 WEEKLY COMP. PRES. DOC. 1531 (1972); *see* 4 NAT'L J. 1654 (1972). The sum actually committed by Congress through mid-1977 was $18 billion.

48 118 CONG. REC. S18554 (daily ed. Oct. 17, 1972); *id.* at H10272 (daily ed. Oct. 18, 1972).

guage of the Act, many difficult substantive issues were simply delegated to the Administrator in the form of increased discretion.

II. Technology Assessment: The New Enforcement Mechanism

The 1972 amendments to the Federal Water Pollution Control Act represent a major shift in enforcement policy from reliance on water quality standards to adoption of specific effluent limitations. Water quality standards specify the maximum *concentration* of various pollutants which is compatible with a desired use of the water; effluent standards limit the absolute *quantity* of particular pollutants which may be discharged by individual sources. Theoretically the two can be integrated. Limitations on individual discharges could be set which would reduce the concentration of pollutants in the receiving water to the level specified by the water quality standards.

The Senate and House committees rejected this integrated approach. Effluent limitations were tied not to existing water quality standards, but to the available control technology. Existing water quality standards provide a basis for enforcement only if they require a higher degree of control than that mandated by the new technology-based standard.[49]

There were several reasons why Congress chose not to retain water quality standards as the primary enforcement mechanism. First, many Senators and Representatives believed that the existing EPA-approved standards were not sufficiently stringent.[50] Second, the process of translating ambient water quality standards into meaningful effluent standards for individual point sources is both difficult and time consuming.[51] The models used to make this

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49 There shall be achieved "not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulation . . . ." 33 U.S.C.A. § 1311(b)(1)(C) (Supp. 1973). According to EPA officials interviewed by the author, it is unlikely that this provision will apply to a significant number of sources.

50 *Hearings on S. 75, S. 192, S. 280, S. 281, S. 523, S. 573, S. 601, S. 679, S. 927, S. 1011, S. 1012, S. 1013, S. 1014, S. 1015, and S. 1017 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess. 4130 (1971) [hereinafter cited as *Senate Hearings*].

51 *House Hearings on H.R. 11896, supra* note 36, at 222.

change are still imperfect.[52] In addition, Congress was simply unwilling to delay implementation of effluent standards another two to three years while such calculations were made.[53] Finally, Senator Muskie and others believed that enforcement could be greatly accelerated if Congress adopted a clear, uniform national standard of performance.[54] According to this view effluent limitations based on a single, simple standard would be easier to administer than those based on 50 different sets of state standards. It was also thought, perhaps naively, that a single standard would minimize problems of interpretation.

A. *Effluent Limitations: Section 1311*

Section 1311 delineates the basic standards which industrial dischargers must meet. The enforcement program consists of two stages. By 1977 industry must meet effluent limitations which can be achieved by application of the "best practicable control technology currently available."[55] By 1983 it must achieve control levels based on the "best available technology economically achievable."[56] Each standard contains two basic elements: a notion of technological *availability* ("currently available" and "available") and a notion of *economic capability* ("practicable" and

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52 *Id.* at 321.

53 Barfield, *supra* note 24, at 90.

54 *Id.*

55 The standard requires that there shall be achieved "not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title . . . ." 33 U.S.C.A. § 1311(b)(1)(A) (Supp. 1973).

56 There shall be achieved "not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him . . . that such elimination is technologically and economically achievable for a category or class of point sources . . . ." 33 U.S.C.A. § 1311(b)(2)(A) (Supp. 1973).

"economically achievable"). Although these two concepts cannot be completely separated,[57] they provide a useful analytical framework for interpreting the two standards.

This section first discusses the availability problem. Two fundamental questions to be examined are what types of control measures must EPA consider when determining effluent limitations and when does a particular control technology qualify as "available" under the Act? Second, this section focuses on the economic capability criterion. Precisely what standard did Congress adopt by the term "economically achievable"? What distinguishes "best practicable" from "best available . . . economically achievable"? What guidance do the § 1314(b) guidelines give in distinguishing the standards? Finally, the economic capability notion is examined in conjunction with the requirement that 1983 control levels produce "reasonable further progress toward the national goal of eliminating the discharge of all pollutants."[58] The central question is whether Congress successfully resolved the conflict between its desire for improvement and its concern over cost.

1. Technological Availability

In setting effluent limitations the Administrator must decide what waste reduction methods should be considered. Dr. Kneese points out that "[i]mproving the water quality of receiving waters by reducing waste loads can be accomplished in two broad ways: first, by reducing the generation of wastes; and second, by modifying [*i.e.*, treating] the residual wastes."[59] The former can be achieved primarily by changes in the manufacturing process which will enable the recovery of by-products and other waste reduction measures. The latter depends primarily on installing treatment devices at the end of the manufacturing process.

Representative Jones' interpretation of "control technology" virtually rules out consideration of the impact of process changes. "By the term 'control technology' the managers mean the treatment facilities at the end of a manufacturing, agricultural, or

57 Representative Jones combines these two notions in his interpretation of "available" technology. See text accompanying note 70 *infra*.

58 Full text cited note 56 *supra*.

59 A. KNEESE & B. BOWER, MANAGING WATER QUALITY: ECONOMICS, TECHNOLOGY, INSTITUTIONS 41 (1968).

other process, rather than control technology within the manufacturing process itself."[60] If this interpretation is accepted, two results can be expected: effluent limitations will not reflect the maximum possible reduction in waste levels and water quality improvement will cost more. The same level of water quality can frequently be achieved at much less cost by process changes than by treatment. "[M]any industries can reduce their waste loads most efficiently — at least over a considerable range — by altering production processes and/or recovering materials and producing by-products."[61] The pulp and paper industry provides a good example of the effectiveness of such changes: "The largest and most significant shift has been from the sulfite process to the sulfate process, which, by making the recovery of chemicals for internal reuse economic, can reduce the waste load in terms of pounds of BOD per ton of product to about 5-10% of the previous level."[62]

Language in § 1314(b) suggests that Representative Jones' interpretation of the term "control technology" is too narrow. Section 1314(b) directs the Administrator to consider "process changes" in determining what is the "best practicable control technology currently available," and the "best available technology economically achievable."[63] Whether the Administrator confines his analysis to *treatment* technology, as Representative Jones suggests, will probably depend on whether particular process changes can be widely adopted by an industry. If manufacturing processes vary widely in an industry, it is unlikely that the Administrator can justify effluent limitations which depend on a particular process change applicable to only a portion of the firms in the industry. Because most *treatment* technology consists of "add on" devices, it can be applied to a variety of manufacturing processes. Thus, effluent limitations based on treatment technology, as opposed to process changes, will be more uniform. Of course, to the extent firms in an industry use the same manufacturing process, standards based on process changes could produce a comparable degree of uniformity. The degree of uniformity the Act requires is considered

60 118 CONG. REC. H9114 (daily ed. Oct. 4, 1972).

61 A. KNEESE & B. BOWER, *supra* note 59, at 177.

62 *Id.* BOD, or bio-chemical oxygen demand, is a measure of the amount of oxygen necessary for the breakdown of a particular pollutant.

63 *See* 33 U.S.C.A. §§ 1314(b)(1)(B), (2)(B) (Supp. 1973) (setting out guidelines).

later in this section.[64] To the extent that the Act requires uniformity, EPA may be forced to sacrifice both efficiency and potential improvement in water quality.

A second major question is when does a technology qualify as "available"? Both the 1977 and 1983 standards stress this concept of availability. The determination of whether a technology has undergone sufficient development to be considered "available" will have a major bearing on the level of effluent reduction required.

Professor Katz has suggested a useful analytical framework for considering such problems:

> In a society sustained by the primary effects of technology, threatened by the secondary and tertiary effects, and seeking to minimize the latter, without losing the former, much will depend on whether [technological availability] . . . is measured [1] by the current operational capacity of an industry, [2] by new scientific and technical knowledge already available in the laboratories and design rooms, but not yet generally available in practice, or [3] by the potentialities of new research.[65]

He points out that few courts have seriously considered the last standard — the potential fruits of research yet to be undertaken — as a basis for decision. Yet in *Marsh Wood Products Co. v. Babcock & Wilcox Co.*[66] the Wisconsin Supreme Court affirmed a lower court order which based the standard of care in a negligence action on technology known only to experts and not currently in use by manufacturers. Referring to this decision, Professor Katz asks, "May not the law even go a step further, holding manufacturers accountable for the adoption not only of appropriate technology known only to experts, but also technology that could be discovered through the application of available scientific knowledge?"[67]

If Senator Muskie's interpretation of the new law is correct, this last standard may apply after 1977 in water pollution control:

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64 See text accompanying notes 91-95 *infra*.

65 Katz, *The Function of Tort Liability in Technology Assessment*, 38 CIN. L. REV. 587, 634 (1969).

66 207 Wis. 209, 240 N.W. 392 (1932).

67 Katz, *supra* note 65, at 635.

> In determining the degree of effluent reduction to be achieved for a category or class of sources by 1983, the Administrator may consider a broader range of technological alternatives and should, at a minimum, review capabilities which exist in operation or which can be applied as a result of public and private research efforts.[68]

"[C]apabilities . . . which can be applied as a result of public and private research efforts" clearly suggests that the Administrator is to consider "technology that could be discovered through the application of available scientific knowledge."

Representative Jones interprets the same statutory language quite differently:

> By the term "best available demonstrated[69] technology economically achievable," the managers mean those plant processes and control technologies which, at the pilot plant or semiworks level, have demonstrated both technological performance and economic viability sufficient to reasonably justify the making of investments in new production facilities.[70]

This version of technological availability seems to fall somewhere between categories 1 and 2 of Professor Katz' model. Unlike Senator Muskie, Representative Jones would merge the technical availability standard with the concept of economic viability. This precludes consideration by the Administrator of control technologies which have not reached the pilot plant stage, but which may promise substantial improvement at considerable savings over existing control methods.

The availability problem is further complicated by the fact that technology in water pollution control is undergoing rapid development,[71] and the time fixed for determining when a technology is "available" may be crucial. Frequently there is a lag of a year or longer between when a discharger adopts a control program and

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68 118 CONG. REC. S16873 (daily ed. Oct. 4, 1972).

69 In inserting the word "demonstrated" (which is not present in the law), Representative Jones was apparently thinking of the wording of the earlier House version. H.R. 11896, 92d Cong., 2d Sess. § 301(b)(2)(A) as printed in H.R. REP. No. 911, 92d Cong., 2d Sess. 22 (1972).

70 118 CONG. REC. H9118 (daily ed. Oct. 4, 1972).

71 *Senate Hearings, supra* note 50, at 4069-135; *House Hearings on H.R. 11896, supra* note 36, at 749.

when he commences construction.[72] Although it seems logical to determine technological availability at the time effluent limitations are adopted, Representative Jones has construed the Act to require the determination "at the time of commencement of actual construction of the control facilities."[73] This would give the Administrator two choices: he could impose effluent limitations based on his prediction of what techology would be "available" when construction commenced, or he could rewrite the requirements should new technology become "available" before construction starts. If he chooses the first alternative and his judgment proves inaccurate, his action could presumably be challenged in court under § 1369.[74] If he chooses the second course, the Administrator faces the prospect of revising effluent limitations just when the discharger is ready to install devices designed to meet the original limitations.

This "moving target" problem, as it has been called,[75] demonstrates the difficulty of pegging effluent limitations to a concept as elusive as technological availability. Even if EPA can reconcile the conflicting interpretations of when a technology is "available," it faces an almost impossible task if it accepts Representative Jones' judgment of when the determination should be made.[76]

2. The Role of Economic Capability

The second important element in both standards is the notion of economic capability. Even if technology is "available,"[77] EPA must consider the economic impact of requiring its application. Implicit in both standards is a judgment by Congress that the

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72 Compliance schedules examined by the author in EPA's Washington office provided anywhere from 12 to 18 months for planning and engineering studies.

73 118 CONG. REC. H9117 (daily ed. Oct. 4, 1972).

74 Judicial review of the Administrator's action in "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316," may be obtained by any "interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business . . . ." 33 U.S.C.A. §§ 1369(b)(1)(E) (Supp. 1973).

75 This term is used by EPA and industry officials to describe the problem of meeting standards which are constantly changing in response to the demand for tougher controls.

76 By revising effluent limitations just prior to construction, the Administrator faces not only additional delay while new plans are formulated, but also a loss of cooperation on the discharger's part.

77 "Available" is used in its technical sense.

pursuit of clean water must not produce massive economic dislocation. What standard did Congress intend by the phrases "best practicable" (1977) and "economically achievable" (1983)? Representative Jones has argued that "when the term 'economic capability' is referred to, it means the economic capability of the given point source."[78] But this interpretation appears to be directly at odds with the conference report: "The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of *classes and categories* of point sources, as distinguished from a plant by plant determination."[79]

Even if Representative Jones' interpretation were correct, the fundamental problem of determining what is "economically achievable" would remain. Whether applied to a plant or a "class or category" of industry, a standard expressed in terms of what is "economically achievable" or "practicable" provides no clear limit to the expenditures which EPA can require for control devices. One can imagine several possible interpretations of these two phrases, ranging from a standard which allows a "fair return on investment"[80] to one which leaves the firm at the "zero profit" level. Furthermore, what percentage of the firms in a "class or category" must be able to afford a particular control technology for it to qualify as "practicable" or "economically achievable"? In other words, how many marginal firms can be driven out of business before the standard becomes unacceptable?

In the water pollution area this problem becomes particularly acute for two reasons. First, by industry's own admission, in most cases technology now exists which is capable of achieving the zero discharge goal outlined in § 1311(b)(2)(A)(i). For example, William R. Samples, testifying for the American Iron and Steel Insti-

78 118 CONG. REC. H9114 (daily ed. Oct. 4, 1972).

79 S. REP. No. 1236, 92d Cong., 2d Sess. 121 (1972) (emphasis added). Examples of "categories," found in 33 U.S.C.A. § 1316(b)(1)(A) (Supp. 1973), include pulp and paper mills, meat product and rendering processing, grain mills, and organic chemicals manufacturing. "Classes" will probably be defined as less comprehensive than categories and drawn according to variations in control problems within an industrial category.

80 This is the standard normally used to describe the profit level allowed a regulated public utility. P. SAMUELSON, ECONOMICS 479 (8th ed. 1970). It suggests a reasonable, but not excessive, level of profits.

tute before the Senate Subcommittee on Air and Water Pollution, conceded: "Current technology levels are adequate to remove virtually all materials from industrial wastewater *with the qualification that the cost of removal is no object.*"[81] Similar admissions were made by representatives of the petrochemical industry,[82] the pulp and paper companies,[83] the electric utilities (heat removal),[84] and the chemical industry.[85] Second, a number of studies have demonstrated that cost of treatment tends to rise extremely rapidly once the 90 to 95 percent treatment level is attained.[86] In some cases this may mean that zero discharge will cost twice as much as treating to a 90 to 95 percent treatment level.[87]

Senator Muskie has suggested that best practicable control levels for a class of sources be determined on the basis "of an average of the best existing performance of plants of various sizes, ages, and unit processes within each industrial category."[88] This interpretation seems to assume that since *some* firms have been able to afford control equipment, most of the others will be able to afford the same, or perhaps a greater, level of control. This is unrealistic, however, since the ability to afford control equipment depends largely on the economic condition of the firm. Less profitable firms or those which are unable to obtain long-term credit may simply be unable to finance control expenditures.

This assumption would appear particularly unrealistic if the average control level is substantially above the level achieved by the best performers in classes which have inefficient technology. This situation would arise if the best performers in the top two or three classes (those classes which have achieved the highest control levels) have adopted processes which treat waste to a level far beyond what other classes have been able to achieve. This appears to be precisely the case in the pulp and paper industry.[89]

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81 *Senate Hearings, supra* note 50, at 4125 (emphasis added).
82 *Id.* at 4090.
83 *Id.* at 4073.
84 *Id.* at 4117.
85 *Id.* at 4108.
86 *See, e.g.*, A. KNEESE & L. KNEESE, THE ECONOMICS OF WATER UTILIZATION IN THE SUGAR BEET INDUSTRY (1968).
87 See note 36 *supra.*
88 118 CONG. REC. S16873 (daily ed. Oct. 4, 1972).
89 *See* Effluent Limitation Guidance for the Refuse Act Permit Program: Pulp

This suggests that EPA's discretion in determining what level of control is "practicable" or "economically achievable" is substantial. Consequently, the degree of effluence reduction actually achieved and the amount of economic dislocation accepted as tolerable are likely to be determined more by the political process and public opinion than by the wording of the statutory standards.

Perhaps the most important question raised by the economic capability requirement is what distinguishes effluent limitations based on the "best practicable control technology" from those based on "best available technology economically achievable"? The key to the distinction lies in § 1314(b), in which Congress outlined the factors the Administrator must consider in developing effluent limitations under each standard.

Section 1314(b)(1)(B) lists seven factors relevant to the determination of "best practicable control technology currently available." These factors:

> shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, nonwater quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.[90]

Aside from the problem of how the Administrator is to weigh these factors, the key problems involve interpreting the cost-benefit language. First, what ratio of costs to benefits is necessary before the Administrator can approve effluent limitations based on a particular technology? Must the technology be rejected if its cost of application just exceeds the projected benefits, or is some other standard implied? Second, what types of costs should be considered by the Administrator in his analysis?

The Conference Committee report is silent on these questions except for the admonition that "the Administrator is expected to be precise in his guidelines under subsection (b) of this section,

and Paper Industry, June 9, 1972 (unpublished EPA guidance study for imposing effluent limitations).

90 33 U.S.C.A. § 1314(b)(1)(B) (Supp. 1973).

so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations."[91] Senator Muskie was quite emphatic regarding what role cost is to play: "The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is *wholly out of proportion* to the costs of achieving such marginal level of reduction for any class or category of sources."[92] Because of his concern for costs, it is unlikely that Representative Jones would accept this "wholly out of proportion" standard. Senator Muskie may have feared that a straight cost-benefit analysis would not support the degree of treatment he desired, and therefore his interpretation probably constitutes an attempt to deemphasize the cost-benefit language.[93] These fears were shared by many environmentalists. One witness in the Senate hearings testified:

> I do not think we have the techniques to evaluate the cost-benefit of environmental quality clean-up nor the value of clean-up compared to other needs and if we permit ourselves to enter into that way of justifying the amount of money we spend, I am afraid that progress will not be as rapid as we would want.[94]

Senator Muskie's public explanation for his version of the balancing test is based on the desire of both the House and Senate conferees for uniformity:

> The conferees agreed upon this limited cost-benefit analysis in order to maintain unformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community.[95]

91 S. REP. No. 1236, 92d Cong., 2d Sess. 126 (1972).

92 118 CONG. REC. S16869 (daily ed. Oct. 4, 1972) (emphasis added).

93 This is somewhat speculative, but is generally in line with Senator Muskie's deemphasis of the importance of cost. *See, e.g.*, text accompanying notes 99-102 *infra*.

94 *Senate Hearings, supra* note 50, at 3713 (statement of Dr. Leon Weinberger, Vice-President of Enviro Control, Inc.).

95 118 CONG. REC. S16873 (daily ed. Oct. 4, 1972).

The concern for uniformity is clearly legitimate; but the problem is that this interpretation goes too far. It relieves the Administrator of having to justify effluent limitations for individual sources in cost-benefit terms, but it leaves him with no basis at all to support his decisions. If the Administrator does not have to consider the "water quality impact of effluent controls," what other basis is available for measuring benefits? If the Administrator does not at least initially consider the "economic impact of controls" on individual plants, how can he rationally conclude that a particular control level will not impose excessive costs on the entire industry? In trying to soften the cost-benefit requirement, Senator Muskie left the Administrator with very little to balance against costs. Unable to get the conferees to eliminate the cost-benefit language from the bill,[96] he attempted to cast it in such ambiguous terms that no empirical calculation of either costs or benefits would be necessary. The consequences of this effort are examined in much greater detail in part III.[97]

The second important question concerning cost-benefit analysis is what types of costs must be considered. On this point Representative Jones stated: "The term 'total cost of application of technology' as used in section [1314](b)(1)(B) is meant to include those internal or plant costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation, and rural area economic development sustained by the community area or region."[98] To the extent that the Administrator does consider such "external costs," control levels will be correspondingly lower. Although theoretically such costs should be included in the cost-benefit analysis, it is frequently difficult to segregate those external costs which are due to pollution controls from those which are due to ordinary competitive pressures. In many cases expenditures for pollution controls may only hasten by a year or two the demise of a plant on the verge of closing anyway. Yet the temptation will be to attribute all costs incident to such a closing to the decision to require pollution control expenditures.

96 This information was obtained by the author during lobbying activities connected with the legislation.

97 See text at notes 114-21 *infra*.

98 118 CONG. REC. H9117 (daily ed. Oct. 4, 1972).

The factors which are to guide the Administrator under "best practicable control technology currently available" are basically retained intact under the "best available technology economically achievable" standard. Senator Muskie summarized the difference between the two sets of factors: "In making the determination of 'best available' for a category or class, the Administrator is expected to apply the same principles involved in making the determination of best practicable . . . *except* as to cost-benefit analysis."[99] Instead of requiring the Administrator to undertake a formal cost-benefit analysis, the guidelines for "best available technology economically achievable" only require him to consider "the cost of achieving such effluent reduction."[100] Senator Muskie explained what he meant by "except as to cost-benefit analysis" this way:

> *While cost should be a factor* in the Administrator's judgment, no balancing test will be required. The Administrator will be bound by a test of "reasonableness." In this case, the reasonableness of what is "economically achievable" should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of available technology — *without regard to cost.*[101]

The contradiction between "[w]hile cost should be a factor" and "without regard to cost" seems obvious. If the test of reasonableness is to be formulated solely in terms of "what needs to be done to move toward the elimination . . . of pollutants and what is achievable through the application of available technology," no further obstacles to zero discharge remain. As already noted, representatives of virtually every major industry testified that technology is available now to achieve zero discharge, "if cost is no object."[102] Thus, at least under Senator Muskie's interpretation, consideration of the "cost of achieving such effluent reduction" apparently drops out of the assessment process.

Representative Jones' interpretation of this section seems to conform more closely to the statutory language: "In enforcing the

99 118 CONG. REC. S16869 (daily ed. Oct. 4, 1972).
100 33 U.S.C.A. § 1314(b)(2)(B).
101 118 CONG. REC. S16869 (daily ed. Oct. 4, 1972) (emphasis added).
102 See text accompanying notes 81-85 *supra.*

1983 'best available' technology regulation, EPA must consider whether such application is economically achievable by the category or class of industries affected, and at the sime time, will result in reasonable further progress toward the national goal of eliminating all water pollution."[103] Regardless of which interpretation one accepts, the problem of distinguishing the role of cost under "best practicable" and "best available" technology remains. It seems clear that Senator Muskie is correct in saying that no formal cost-benefit analysis is required in developing the "best available" limitations. But what does a test of "reasonableness" imply? Is not some sort of balancing test inherent in this concept, despite Senator Muskie's claim to the contrary? Ultimately, the difference between the two standards depends on the rigor with which the Administrator applies the balancing test. The absence of specific cost-benefit language in the § 1314(b)(2)(B) guidelines for best available technology suggests that costs should be a limiting factor only when they are substantially out of proportion to the expected benefits. This interpretation would be consistent with the requirement that the second stage limitations provide "reasonable further progress toward the goal of eliminating the discharge of all pollutants."

This analysis would probably be conclusive but for § 1311(c). This section allows individual sources to petition the Administrator after July 1, 1977, for a modification of the 1983 effluent requirements if they can show that compliance with the standards is beyond their *individual* economic capability.[104] Ironically, the practical effect of this provision may be to force the Administrator to give economic capability more weight in setting the 1983 limitations than in determining the 1977 requirements. Faced with the prospect of hundreds, possibly thousands, of dischargers claiming that compliance with the 1983 limitations is beyond their economic capability, he may decide that the risk of exceptions swallowing up a standard which largely ignores economic capability is too great. In this situation he may decide that a less restrictive standard would be more "appropriate." This decision would in turn clash with the requirement that the 1983 limitations provide

103 118 CONG. REC. H9119 (daily ed. Oct. 4, 1972).
104 33 U.S.C.A. § 1311(c) (Supp. 1973).

"reasonable further progress toward the national goal of eliminating the discharge of all pollutants."

3. EPA's Dilemma: Cost Versus Progress

The previous discussion in this section sought to interpret "best practicable control technology currently available" and "best available technology economically achievable." Here the analysis explores the logical consequences of attempting to comply with both the economic capability conditions and the requirement that the 1983 limitations provide reasonable progress toward the national goal of zero discharge.

Recall that the cost of treatment in most industries rises very sharply beyond the 90 to 95 percent control level[105] and that the "reasonable further progress" requirement "is *not* intended to justify modifications which would not represent an upgrading over the July 1, 1977, requirements of 'best practicable control technology.' "[106] Assume that "best practicable control technology" dictates that a certain discharger remove 95 percent of his wastes by 1977. Technology is available to reduce significantly the remaining discharge. If EPA has adopted a relatively strict interpretation of what is "economically achievable," what should the Administrator do when the company applies for a new permit in 1977 and he finds that the cost of achieving even an additional one percent reduction would force the company out of business? In this situation the Administrator obviously cannot meet both the economic capability condition and the 1983 upgrade requirement. Even if the Agency initially adopts effluent limitations which will enable most firms to continue to receive a "fair profit," it is quite possible that compliance with the second stage requirements would force them out of business.[107]

To reply that § 1311(b)(2)(A)[108] only requires the Administrator to consider the economic impact of the second stage limitations on

105 See note 86 *supra.*

106 118 CONG. REC. H9118 (daily ed. Oct. 4, 1972) (statement of Representative Jones).

107 Again, this is because of the sharp rise in abatement costs at high levels of treatment. The argument assumes that low cost advanced treatment technology will not be developed. For further discussion of this latter point, see part III(B) *infra.*

108 Full text cited note 56 *supra.*

a *class* of sources, and not individual dischargers, does not avoid the dilemma. Section 1311(c) specifically directs the Administrator to consider modified effluent requirements which "(1) will represent the maximum use of technology within the *economic capability of the owner or operator*; and (2) will result in reasonable further progress toward elimination of the discharge of pollutants."[109] Although Congress used the permissive "may" in § 1311(c) instead of "shall," the conference report clearly contemplates that the Administrator will give such petitions for relief a full hearing.[110] The language does not prohibit the Administrator from enforcing limitations which will result in plant closings, but other language in the statute suggests that the Administrator will find it very difficult in reality to deny such petitions.[111] In short, the dilemma is only too real and the option (if any) to force a shutdown does not appear to present a politically acceptable way out, particularly if used extensively.

The reason this dilemma assumes such importance is that after 1977 effluent limitations will presumably require levels of expenditure which even relatively profitable firms may be unable to afford. Some economic dislocation is to be expected from application of the "best practicable" standard. This will probably be largely confined to firms in marginal economic positions. But after 1977 the number of firms threatened with closure by enforcement of the "best available" standard could be substantial. While undoubtedly many firms could afford additional expenditures of the magnitude necessary to eliminate the last 5 to 10 percent of waste discharge, the number which cannot may also be substantial.[112] Unless control technology is developed which is capable of

109 33 U.S.C.A. § 1311(c) (Supp. 1973) (emphasis added).

110 S. REP. No. 1236, 92d Cong., 2d Sess. 121 (1972).

111 Section 1367(e) requires the Administrator to "conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this title, including threatened plant closures or reductions in employment allegedly resulting from such limitation or order." Public hearings are also required if requested by any party affected by such orders. Although the section provides that "nothing in this subsection shall be construed to require or authorize the Administrator to modify or withdraw any effluent limitation or order issued under this title," the practical effect will be to pressure the Administrator to minimize economic dislocation whenever possible. 33 U.S.C.A. § 1367(e) (Supp. 1973).

112 It is difficult to predict what percentage of the firms in a particular industry would be forced out of business should the 1983 standards be enforced. It is safe

achieving a high degree of treatment at relatively low cost,[113] EPA may find it very difficult to enforce the post-1977 standard.

III. Means and Ends: Will It Work?

The prior discussion has focused on problems of statutory interpretation. Here the emphasis shifts to practical problems resulting from the adoption of technology assessment as the basis for setting standards. Two fundamental problems of technology assessment are the difficulty of applying cost-benefit analysis and the disincentive to develop new technology created by gearing requirements to "available" technology.

A. *The Cost-Benefit Approach to Technology Assessment*

Cost-benefit analysis is an invention of economists which is theoretically attractive, but difficult to apply in practice. It has serious drawbacks when applied to environmental decisions because it seeks to quantify essentially subjective, long-term benefits and because its appearance of objectivity can isolate control decisions from effective scrutiny.[114] As one economist has argued:

> The costs of pollution, or the benefits of pollution control, are largely subjective, in the sense that there are no markets in which to observe the valuations which individuals place on health, comfort, or good views. There are attempts made to estimate these benefits of control, but they are never very successful, and are not useful guides to decisions, *especially since they probably underestimate the benefits of control.*[115]

Consider the difficulty of applying the "total cost . . . benefits" language of § 1314(b)(1)(B). How would one segregate, let alone calculate, the benefits of an 80 percent reduction in the amount of

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to say, however, that firms whose profits are lower than the industry average and which cannot secure long-term financing would be placed in a very difficult position.

113 This seems very unlikely given the disincentive to develop new technology discussed in part III(B) *infra*.

114 This is particularly true when regulatory officials lack the background to analyze the assumptions or statistical methods used in such studies.

115 *Hearings on Technology Assessment and the Environment Before the Subcomm. on Science Research and Development of the House Comm. on Science and Astronautics*, 91st Cong., 2d Sess. 365-66 (1970) (emphasis added) (statement of Larry Ruff, economist) [hereinafter cited as *Hearings on Technology Assessment*].

steel pickling liquor flowing into the nation's waters? Since economists cannot agree even on how to measure the benefits of safe swimming water,[116] it is virtually impossible to measure the various benefits which would result from reducing one pollutant by 80 percent in all the waters of the United States.

Calculating accurately the marginal benefits of moving from 90 to 95 percent reduction would require calculation of the benefits derived from present control levels (assuming this is possible) followed by a computation of the expected benefits from applying best practicable control technology (an even more uncertain task). The difference in these two figures must then be compared with the marginal cost of going from present control levels to best practicable control technology. A reasonably empirical calculation of this type is beyond the scope of current cost-benefit theory.[117]

Despite these problems, industry can be expected to use cost-benefit analysis to challenge effluent limitations as too restrictive. The fact that such studies cannot be empirically corroborated will not detract from their impact on decisionmakers, if experience is any guide.[118] They merely become part of the arsenal of apparent expertise used to convince regulatory officials who are impressed by numbers and complicated charts.

These considerations suggest why Senator Muskie tried to deemphasize the cost-benefit language of § 1314(b)(1)(B).[119] They also indicate the difficulty which confronts the Administrator in setting effluent limitations. Since there is no clear way to determine the benefits of pollution control, how can the Administrator make any intelligible weighing of environmental factors against cost factors? In this situation Agency "control" inevitably becomes a political bargaining process between the Agency and the regulated industries.[120] The problem seems insolvable within the framework of a regulatory mechanism.[121]

116 A. KNEESE & B. BOWER, *supra* note 59, at 129.

117 *Id.*

118 For a good example, see the testimony given by the author in which he analyzed a "cost-benefit" study done for the electric power industry of Pennsylvania concerning the economic impact of that state's proposed sulfur dioxide controls. *Hearings on the Implementation of the Clean Air Act Before the Senate Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 2d Sess. 372-87 (1972).

119 See text accompanying notes 92-96 *supra*.

120 A good example of this occurred in Pennsylvania as a result of the study mentioned in note 118. In that case the Pennsylvania Environmental Quality Board

B. *Disincentives to Develop New Control Technology*

Whether the 1985 zero discharge goal[122] is ever achieved will depend primarily on whether new technology is developed which can remove virtually all wastes at a reasonable cost. Senator Muskie recognized the importance of technological progress when he stated: "Through the research and development of new processes, and other improvements in technology, it is anticipated that it should be possible, taking into account the cost of controls, to achieve by 1983 levels of control which approach and achieve the elimination of the discharge of pollutants."[123] As indicated earlier, technology exists which is capable of achieving zero discharge; but it is prohibitively expensive. The Administration calculated that zero discharge could be achieved by *distilling* all of the nation's waste water — at a cost of $316 billion.[124] Thus the challenge is to find control processes which are both effective and inexpensive.

Despite the importance of technological development, the technology-based regulatory scheme established by the Act provides no incentives for such development. Industry may have a positive incentive *not* to develop new technology, for as soon as a new process is perfected it becomes eligible for adoption by EPA as the "best available" or "best practicable." Roy Weston, a consulting engineer in the pollution control field, conceded this in the Senate hearings:

> If regulatory agencies publicize an official "best available" level of treatment, this standard may be used as a crutch for

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decided to allow dischargers to emit 50 percent more sulfur dioxide following the presentation of the "cost-benefit" study commissioned by the Pennsylvania electric utility industry. The author was given no opportunity to present the results of the analysis of the industry study.

121 Mr. Ruff summarized these problems in the following statement:

> But how can we proceed to find the right answers? The approach based on technology assessment and systems analysis would be to hold hearings, calling in all the experts and anybody with an opinion . . . . After the testimony was taken, somebody would have to decide which experts were the most expert, in order to resolve disputes, would have to choose among alternatives, and then find a way to enforce the chosen program . . . . All in all it is not a very pleasing prospect, and does not sound like a very promising approach to the pollution problem.

Hearings on Technology Assessment, *supra* note 115, at 365-66.

122 33 U.S.C.A. § 1251 (Supp. 1973).

123 118 CONG. REC. S16873 (daily ed. Oct. 4, 1972).

124 See note 38 *supra*.

> failure to comply with environmental needs. Psychologically, it could restrain the development of new and better technology, because everyone would have it made. . . . The expenditure of research funds for this purpose (finding better technology) provides only a limited incentive, because successful research effort will surely result in the need for expending more funds for pollution control.[125]

The fact that research might lead to development of a new control technology capable of attaining even higher levels of treatment at lower cost is not sufficient to overcome the disincentive. Such a control technology, even if developed, would only be applied when both the capital and long-term operating costs of the new process were expected to be lower than operating costs of existing control technology. Thus, regardless of how effective a new technology may be, voluntary conversion is unlikely since in most cases it increases net long-term costs.

To counteract this disincentive effect the Government will have to spend substantially more on research if a real effort is to be made to achieve the 1983 standards, much less the 1985 zero discharge goal. Given federal budget constraints, this seems unlikely. Thus, the very element on which the success of the new law depends — technological development — is the one result industry has no incentive to achieve. Whether EPA can resolve this problem is doubtful; once again the defect seems inherent in the approach Congress adopted.

C. *Initial Administrative Difficulties*

The history of the federal water pollution control effort inevitably raises the question of whether the deadlines in § 1311 will be met. In the past dischargers have fallen an average of 18 to 24 months behind federal compliance schedules.[126] Construction delays, funding difficulties, and administrative redtape have caused many of the problems.[127] While supporters of the legislation point to the provisions for citizen suits[128] and stiffer fines[129]

125 R. Weston, *Water Pollution Control Implementation: Administrative Problems*, reprinted in *Senate Hearings*, *supra* note 50, at 3788.

126 D. Zwick, *supra* note 4, at 284.

127 *Id.* at 251.

128 33 U.S.C.A. § 1365(a) (Supp. 1973).

129 33 U.S.C.A. § 1319(d) (Supp. 1973) (providing penalties up to $10,000 per day

as insurance against such delays, there are already signs of impending difficulties.

Unpublished EPA memoranda suggest growing concern within the Agency that the 1977 deadline will not be met unless substantial numbers of permits are issued before the § 1314 guidelines[130] are published by the Administrator.[131] According to Agency sources, a dispute has been raging for months between EPA's General Counsel, John Quarles, and Robert Sansom, EPA's Assistant Administrator for Air and Water Programs, over whether permits should be issued prior to promulgation of the guidelines. Quarles has argued that unless certain major dischargers receive permits within the next few months, there is almost no chance that these companies will meet the 1977 requirements because of minimum design and construction schedules.[132]

Informed of Quarles' position, Senator Muskie wrote Administrator William Ruckelshaus on December 6, 1972, expressing his concern over the plan:

> Issuance of the number of permits proposed (2,700) without such guidance (section 1314 guidelines) will be wholly contrary to the purposes of the new law. . . .
>
> I cannot in good conscience . . . support any program which would permit individually negotiated effluent limitations for the Nation's major polluters and which would stimulate litigation by both public and private interests as to whether or not permits issued conformed to guidelines subsequently issued.[133]

Administrator Ruckelshaus' reply was delayed until January 30, 1973, "due to our continuing efforts to resolve major policy ques-

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for violating permit conditions).

130 The enforcement procedure under the Act consists of four elements: the standards of § 1311; the statutory guidelines of § 1314, which specify the factors the Administrator must consider in interpreting the § 1311 standards; EPA specification of guidelines for effluent limitations for classes and categories of sources; and EPA development of individual discharge permits based on its guidelines for classes and categories. The issues considered in this section involve primarily the third element above.

131 Much of the material in this section was obtained from interviews with EPA officials. The unpublished memoranda referred to were furnished on condition that the source not be identified.

132 Compliance schedules, depending on the technology to be employed, generally allow three to four years for planning and construction.

133 Letter from Senator Muskie to William Ruckelshaus, Dec. 6, 1972.

tions relating to the implementation of the program."[134] In the letter Ruckelshaus confirmed the Agency's intent to issue a limited number of permits where "interim effluent guidance based on best practicable control technology currently available has been developed and is sufficiently thorough and complete to justify reliance upon such guidance for the purpose of establishing effluent limitations."[135] The Administrator concluded by saying:

> We believe the approach indicated is consistent with the intent of Congress. We share your concern that permits issued under the new national permit system reflect the requisite degree of national uniformity in the application of effluent limitations to particular sources and establish the necessary degree of finality as to the requirements imposed . . . .[136]

It should be noted that Congress *did* give EPA limited authority in § 1342(a)(1) to issue permits prior to "the taking of necessary implementing actions relating to all such requirements . . . ."[137] To what extent Congress meant the Administrator to use such authority is unclear, although certainly it was not to become a general substitute for the guidelines required by § 1314(b).

The "interim effluent guidance" to which the Administrator referred in his letter should not be confused with the guidelines he is required to publish under § 1314(b). This "guidance" consists of a series of background studies on industrial treatment capabilities completed during the summer of 1972 for each major industry affected by the Refuse Act permit program.[138] These studies have never been published or undergone the administrative review procedures required of guidelines under § 1314(b). The dangers which Senator Muskie referred to in his letter are only too real. At least one environmental lawyer[139] has already expressed serious reservations to EPA officials over the lack of public review of the "guidance" on which the permits will be based.

Those Agency officials who agree with Quarles point out, how-

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134 Letter from William Ruckelshaus to Senator Muskie, Jan. 30, 1973.
135 *Id.*
136 *Id.*
137 33 U.S.C.A. § 1342(a)(1) (Supp. 1973).
138 For a description of these studies, see Wagner, *supra* note 31, at 2540.
139 The lawyer, Gus Speth, is a member of the staff of the Natural Resources Defense Council.

ever, that the difference between effluent limitations established under the "guidance" procedure and those finally determined by the official guidelines will be "at most 1-2 percentage points."[140] They argue with considerable force that even if the guidelines are *published* on time in October 1973,[141] they may not be finally *promulgated* for months, due to the extensive public review and comment which can be expected. One official estimated that the guidelines will not be in final form until May or June 1974. According to those officials,[142] to delay the issuance of permits until this date would insure failure to meet the 1977 deadlines.

Sansom has apparently yielded to this logic. On February 28, 1973, he and Quarles issued a joint memorandum to all regional administrators which outlined the conditions for issuing permits under the interim guidance criteria.[143] The memo contains a detailed breakdown of those plants within each industrial category for which permits may be issued prior to promulgation of the § 1314 guidelines. Such permits could be issued only to the major dischargers within an industry. But the memo also gives regional administrators authority to issue permits *outside* the categories outlined in the memo:

> There may be individual cases outside the areas indicated below where a determination of best practicable control technology currently available for the industrial facility in question can be made with a high degree of confidence, through reliance on the interim effluent guidance together

140 Quotation from EPA enforcement official who asked to remain unidentified.

141 At least one official said he had seen a memorandum indicating the guidelines will not be available until February 1974.

142 Quarles' position is particularly interesting in light of a memo he wrote in July 1971 to all regional administrators in which he expressed concern over the premature issuance of permits under the Refuse Act. The language he used in that memo is much like that used by Senator Muskie:

> For the remaining waters, you should exercise caution against establishing effluent limitations without adequate analysis, since such specifications will give rigidity to control requirements and these may be vulnerable to court challenges in the case of unduly stringent specifications or may impede establishment of necessary treatment levels after full analysis if initial requirements are too lax.

Memorandum from John Quarles to EPA regional administrators, July 15, 1971, reprinted in *House Amendments Hearings, supra* note 9, at 1101.

143 Unpublished EPA Memorandum from the Assistant Administrator for Enforcement and the Assistant Administrator for the Office of Air and Water Programs to EPA regional administrators, Feb. 28, 1973.

> with an evaluation of the *particular conditions in existence at the facility.*[144]

While the memo does warn administrators to use caution in such cases, this is precisely the plant by plant determination which concerned Senator Muskie and which could invite court challenges from both "public and private interests" over nonuniformity in effluent limitations.

Confronted with these questions, advocates of such authority claim that it will be used in very few cases and that any variations in permits for similar facilities in different regions of the country will be slight. Nevertheless, to the extent that such authority is used, EPA seems to be inviting attack in court for its failure to comply with § 1314. A court battle could seriously delay compliance with the 1977 deadline.

In conclusion, EPA is obviously under pressure to meet the deadlines established in the Act and to comply with the § 1314(b) administrative review procedure which is the heart of the technology assessment process. Administrator Ruckelshaus has already warned that it will be impossible to meet the 1977 "secondary treatment" standard for all public treatment works[145] due to the President's impoundment of the funds authorized under title II of the Act.[146] Public and congressional confidence in the Agency may be severely shaken if EPA is forced to admit it will also be unable to meet the 1977 industrial deadline. On the other hand, by trying to move ahead too fast before final approval of the § 1314 guidelines, EPA may be risking failure to achieve the deadline for a different reason: numerous court actions complaining of variations between the conditions of permits and the § 1314 guidelines. Whether such court challenges are brought will depend on the success of the negotiations between the Agency and dischargers for which EPA would like to issue permits prior to promulgating the final § 1314(b) guidelines. EPA clearly has authority under § 1342(a)(1) to issue *some* permits prior to publi-

144 *Id.* (emphasis added).

145 *See* 33 U.S.C.A. § 1311(b)(1)(B) (Supp. 1973).

146 *See* Corrigan, *President's Slash of Clean Water Funds May Shift Debate from Congress to the Courts*, 4 NAT'L J. 1846 (1972). On May 8, 1973, the President's impoundment of funds was declared illegal by a United States District Court in City of New York v. Ruckelshaus, 41 U.S.L.W. 2602 (D.D.C. May 8, 1973).

cation of the guidelines; whether this authority extends to issuing permits which reflect "the particular conditions in existence at the facility" is doubtful. Whatever the merits of the technology assessment approach, EPA is obviously convinced that implementation of the § 1314(b) procedures will cause such great delay that it must circumvent these procedures if it is to have any chance of meeting the 1977 deadlines.

IV. Conclusion

EPA faces problems from the decision by Congress to adopt a technology-based regulatory scheme and its inability to resolve the conflict between the desire for improvement and concern over cost. Even if EPA meets the 1977 deadlines, it may find it impossible to achieve "reasonable further progress" beyond this point without triggering massive economic dislocation. In conference Senator Muskie eliminated the House provision making tougher second stage standards contingent on an economic impact study,[147] but Congress may yet be forced to reconsider the 1983 standards if less costly advanced control technology is not developed. Unfortunately, the Act creates an incentive *not* to develop such technology. To this extent the legislation may carry the seeds of its own failure.

*Robert J. Rauch**

147 See text accompanying note 40 *supra*.

*Member of the Class of 1975 at the Harvard Law School. Former environmental aide to Senator William Proxmire (D.-Wis.); Assistant Legislative Director for Friends of the Earth (1971).

GUARDING THE TREASURES OF THE DEEP: THE DEEP SEABED HARD MINERAL RESOURCES ACT

Introduction

On May 23, 1970, President Nixon announced a new[1] United States oceans policy.[2] The policy responded to the growing need for clarification and development in the law of maritime mineral resources.[3] The *Oceans Policy Statement* and its attendant draft treaties[4] have been the subject of intensive scholarly analysis,[5] but one part of the statement has escaped this scrutiny. This is the President's call for an interim regime which, pending the establishment of an international regime, would allow continued exploration and exploitation of the seabed beyond the present limits of national jurisdiction.[6] Although the call for an interim regime

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1 This policy originated in the Marine Resources and Engineering Development Act of 1966. 33 U.S.C. §§ 1101-24 (1970). The Commission established by this Act recommended a policy very similar to that proposed by the President. COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, OUR NATION AND THE SEA 141-55 (1969) [hereinafter cited as OUR NATION AND THE SEA].

2 *United States Oceans Policy*, 6 WEEKLY COMP. PRES. DOC. 677 (1970) [hereinafter cited as *Oceans Policy Statement*].

3 Much has been written about this need. *See, e.g.*, J. ANDRASSY, INTERNATIONAL LAW AND THE RESOURCES OF THE SEA (1970); L. HENKIN, LAW FOR THE SEA'S MINERAL RESOURCES (1968).

4 The *Oceans Policy Statement* indicated that the United States would "introduce specific proposals at the next meeting of the United Nations Seabeds Committee to carry out [the new policy]." *Oceans Policy Statement, supra* note 2, at 678. Subsequently two draft treaties were tabled at meetings of that Committee. *Draft United Nations Convention on the International Seabed Area*, 25 U.N. GAOR Supp. 21, at 130, U.N. Doc. A/8021 (1970) [hereinafter cited as *Draft Convention*]; *Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries*, 26 U.N. GAOR Supp. 21, at 241, U.N. Doc. A/8421 (1971).

5 *See, e.g.*, Humphreys, *An International Regime for the Exploration and Exploitation of the Resources of the Deep Seabed — the United States Hard Minerals Industry Position*, 5 NATURAL RESOURCES LAW. 731 (1972); Krueger, *An Evaluation of United States Ocean Policy*, 17 MCGILL L.J. 604 (1971); Ratiner, *United States Oceans Policy: An Analysis*, 2 J. MARITIME L. & COM. 225 (1971).

6 At present international convention governs development of resources on the continental shelf. Convention on the Continental Shelf, *done* April 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311. It is the area seaward of the continental shelf which will be the subject of the proposed international regime and hence the subject of any interim regime. Unfortunately, the Convention left open the definition of the exact limits of the continental shelf by defining it as "the sea-

escaped the attention of most writers,[7] it caught the attention of the United States hard mineral[8] interests.[9] They responded by drafting S. 2801, the Deep Seabed Hard Mineral Resources Act,[10] which was introduced by Senator Metcalf (D.-Mont.). Hearings on S. 2801 were held in both the Senate[11] and the House,[12] but it was never reported out of committee. Identical legislation has been introduced in the Ninety-third Congress[13] amid growing pressure for an interim regime. This Note addresses the problem of establishing an interim regime for hard minerals and assesses whether S. 2801 is a proper response to this problem. The Note concludes that the bill is not a proper response, but its adoption in modified form would be a useful instrument of national policy.

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bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, *to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas . . . .*" 15 U.S.T. at 473, 499 U.N.T.S. at 312 (emphasis added). This "exploitability" criterion has come back to haunt the draftsmen of the Convention. As technology has pushed the outward limit of exploitability further and further from the coasts, the territorial limit of the shelf has become unclear. However, most authorities agree that there is some limit to the shelf, and consequently there is some seabed area beyond any nation's jurisdiction. This Note focuses on that area.

7 The Commission on Marine Science, Engineering, and Resources recognized the need for an interim regime. OUR NATION AND THE SEA, *supra* note 1, at 155. But even that body did not discuss the form of the proposed interim regime.

8 Hard minerals are non-living substances other than those which are normally recovered in liquid form, *i.e.*, other than oil, natural gas or other forms of hydrocarbon. S. 2801, 92d Cong., 1st Sess. § 2(d) (1971).

9 Nor did it escape the attention of the United States petroleum interests. *See Hearings on Issues Related to Establishment of the Seaward Boundary of United States Outer Continental Shelf and Related Matters, Including S. 3970, to Amend the Outer Continental Shelf Lands Act, Before the Subcomm. on Minerals, Materials, and Fuels of the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 2d Sess. 43-54 (1970) (testimony of Luke W. Finley on behalf of American Petroleum Institute) [hereinafter cited as *Hearings on S. 3970*]. The petroleum interests, however, felt their interests were protected for the foreseeable future by existing legislation. *Id.* at 53. This Note deals only with interim arrangements for the development of hard minerals.

10 Identical legislation was also introduced in the House. H.R. 13904, 92d Cong., 2d Sess. (1972).

11 *Hearings on S. 2801 Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *Senate Hearings*].

12 *Hearings on H.R. 13904 Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *House Hearings*].

13 S. 1134, H.R. 9, 93d Cong., 1st Sess. (1973).

TECHNOLOGY OUTSTRIPS INTERNATIONAL LAW

A. *Background*

At the close of the Second World War two things became apparent: the great mineral wealth[14] found in the seabed could be exploited by new technology[15] and international law had not kept abreast of this potential use of the seabed.[16] To remedy this divergence President Truman issued the Proclamation on the Continental Shelf,[17] which reserved the mineral resources of our continental shelf[18] for the use of the United States. Coastal state rights in the continental shelf rapidly became customary international law and were subsequently codified in the 1958 Geneva Convention on the Continental Shelf.[19] By 1966 the prospect of deep ocean mining[20] caused President Johnson to comment:

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14 A comprehensive description of this immense wealth was developed in 1969. 3 COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, PANEL REPORTS: MARINE RESOURCES AND LEGAL-POLITICAL ARRANGEMENTS FOR THEIR DEVELOPMENT pt. VII (1969) [hereinafter cited as PANEL REPORTS].

15 Krueger, *The Background of the Continental Shelf and Outer Continental Shelf Lands Act*, 10 NATURAL RESOURCES J. 441, 464 (1970).

16 There was international agreement only on appropriation of minerals underlying the internal waters and territorial sea of a nation. Internal waters are all waters lying landward of a system of coastal baselines. Normally the baseline is the low water line along the coast. Convention on the Territorial Sea and Contiguous Zone, art. 3, *done* April 29, 1958, [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. The territorial sea is a belt of the sea adjacent to the coast measured from this baseline. *Id.* art. 1. The width of the territorial sea was traditionally three miles, and the United States still claims this width. However, many states now claim wider territorial seas. L. HENKIN, *supra* note 3, at 13 n.30. Within these areas the coastal state had exclusive right to all minerals; outside of them there was no general agreement. Krueger, *supra* note 15, at 464.

17 Proclamation No. 2667, 3 C.F.R. 67 (1943-1948 Comp.).

18 Geologically, the continental shelf is "[t]he zone around the continent extending from the low water line to the depth at which there is a marked increase of slope to a greater depth." *Summary of the 8th Session*, 1 Y.B. INT'L L. COMM'N 131, U.N. Doc. A/CN. 4/SER. A (1956). The continental shelf is generally taken to end at a depth of 200 meters. J. ANDRASSY, *supra* note 3, at 3-8. Beyond the continental shelf lie the continental slope, the continental rise, and the deep ocean (abyssal plains). Together shelf, slope, and rise comprise the continental margin. The continental shelf constitutes approximately 10 percent of the seabed. OUR NATION AND THE SEA, *supra* note 1, at 61.

19 [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311. Article 2 codifies President Truman's assertion of sovereignty. *Id.* at 473, 499 U.N.T.S. at 312.

20 *See, e.g.*, J. ANDRASSY, *supra* note 3, at 17 nn.2 & 3. Although many hard mineral deposits have been discovered on and under the seabed, the Commission on Marine Science, Engineering, and Resources states: "The only presently known materials of potential economic importance on the deep ocean floors beyond the continental slopes are the manganese nodules and crusts." PANEL REPORTS, *supra*

> [U]nder no circumstances must we ever allow the prospects of rich harvest and mineral wealth to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings.[21]

In 1967 the issue was brought to the forefront in the United Nations when Ambassador Prado of Malta submitted a resolution calling for the reservation, as the "common heritage of mankind," of that part of the seabed outside the scope of the 1958 Convention on the Continental Shelf.[22] The Prado Resolution was never adopted, but it sparked an extensive international debate of the seabed question.[23] During this debate the need for an interim regime to govern seabed use was first formally recognized when the General Assembly adopted a resolution declaring a moratorium on "all activities of exploitation of the resources of the area of the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction . . . . "[24] This was followed by President Nixon's *Oceans Policy Statement*[25] which recognized the need for an interim regime but took quite a different view of its form.

Since the *Oceans Policy Statement*, international negotiations on the establishment of an international regime for the seabed have proceeded at a tedious pace. There have been two major accomplishments: the unanimous adoption by the General Assem-

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note 14, pt. VIII, at 106. Industry attention has focused on manganese nodules. *See, e.g., Senate Hearings, supra* note 11, at 33 (testimony of C. H. Burgess, Vice President, Exploration, Kennecott Copper Corp.). The economic value of these nodules has been the subject of considerable dispute. OUR NATION AND THE SEA, *supra* note 1, at 130.

21 Comments made by the President at the commissioning of the research vessel, *The Oceanographer*, July 13, 1966, 2 WEEKLY COMP. PRES. DOC. 930, 931 (1966).

22 U.N. GAOR, Annexes, Agenda Item No. 92, at 1, U.N. Doc. A/6695 (1967).

23 The developments in the United Nations are discussed in detail in Krueger, *supra* note 5, at 606-34.

24 G.A. Res. 2574D, 24 U.N. GAOR Supp. 30, at 11, U.N. Doc. A/7630 (1970). Resolutions of the General Assembly do not have a binding effect on member nations. Krueger, *supra* note 15, at 447 n.21. The United States has consistently taken this position with regard to the "Moratorium Resolution." Letter from John R. Stevenson to Senator J. William Fulbright (D.-Ark.), May 19, 1972 (on file at office of Professor R. R. Baxter, Harvard Law School).

25 *Oceans Policy Statement, supra* note 2.

bly of the "Declaration of Principles Governing the Sea-Bed and the Ocean Floors, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction";[26] and most importantly for this discussion, the setting of a firm schedule for a Law of the Sea Conference to adopt, *inter alia*, an international convention on the seabed.[27]

B. *Commitment to International Regime*

The United States is now in a position similar to the one at the time of the Truman Proclamation. Technology has developed that allows exploitation of seabed materials, but the law of the seabed is cursed with the uncertainties left upon the signing of the Continental Shelf Convention in 1958.[28] The one major difference is that the United States is now committed to an international solution of the problem. If there were no such commitment, or the reasons for the commitment were so weak as to justify the adverse effects of breaching it,[29] it would be possible to proceed with the

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26 G.A. Res. 2749, 25 U.N. GAOR Supp. 28, at 24, U.N. Doc. A/8028 (1971) [hereinafter cited as *Legal Principles Resolution*]. The relevant portions of this resolution state:

> 1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.
> 2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.
> 3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration.
> 4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international regime to be established.
> . . . .
> 7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries . . . .

27 27 U.N. GAOR, Annexes, Agenda Item No. 36, at 16, U.N. Doc. A/8949 (1972). The schedule as established calls for a preliminary session at New York in November and December 1973 to deal with organizational matters and a second session at Santiago, Chile, in April and May 1974 to deal with substantive matters. The resolution expressed the expectation that the Conference would be satisfactorily concluded "no later than 1975."

28 See note 6 *supra*.

29 There is no legal commitment for the same reasons that the "Moratorium Resolution" is not legally binding. See note 24 *supra*. The commitment that exists is primarily a moral and political one. See text accompanying notes 101-06 *infra*.

development of the deep seabed resources on some legal rationale other than an international regime.[30] The United States has manifested its commitment to an international regime not only through President Nixon's statement and the attendant draft treaty,[31] but also through its implicit support of the U.N. Sea-Bed Committee,[32] in which the United States has advocated an international solution to the seabed problem.[33] The reasons for this commitment have been extensively discussed.[34] They can be summarized in the observation that the United States has many and varied interests[35] in the whole of ocean space, many of which are conflicting, and these interests can best be accommodated in an international regime.[36]

C. *A Question of Timing*

Recognizing the need for, and our commitment to, the establishment of an international regime for the deep seabed is one thing; the political realities of the pace at which such a regime might develop are quite another. One projection places the ratification of the necessary treaties at least five years hence,[37] while others are considerably less optimistic.[38] If a projection is based on the bringing into force of the Continental Shelf Convention,[39]

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30 For a discussion of other possible international regimes, see R. FRIEDHEIM, UNDERSTANDING THE DEBATE ON OCEAN RESOURCES, Feb. 1969 (The Law of the Sea Institute Occasional Paper No. 1).

31 *Draft Convention*, *supra* note 4.

32 Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction established by G.A. Res. 2467A, 23 U.N. GAOR Supp. 18, at 15, U.N. Doc. A/7218 (1968). The establishment of the Sea-Bed Committee was a response to and a substitute for the Prado Resolution. It was given a broad mandate to study the seabed question. *See* Krueger, *supra* note 5, at 607.

33 See note 26 and accompanying text *supra*.

34 *See, e.g.*, OUR NATION AND THE SEA, *supra* note 1, at 141; L. HENKIN, *supra* note 3, at 10; Ratiner, *supra* note 5, at 231.

35 Besides the country's interests in mineral resources, which might dictate as large an extension of jurisdiction as possible, we make major military use of the oceans and have a large offshore fishing industry. These latter interests are best accommodated by relatively narrow limits of national jurisdiction.

36 In fact, some authorities have suggested that these interests can only be accommodated by an international regime. *See* E. BROWN, THE LEGAL REGIME OF HYDROSPACE (1971); W. FREIDMANN, THE FUTURE OF THE OCEANS 114-20 (1971).

37 Marine Resources Comm. of the Section of Natural Resources, ABA, *The Proposed Seabeds Treaty*, 5 NATURAL RESOURCES LAW. 132, 151 (1972) (statement of Robert B. Krueger).

38 *Senate Hearings*, *supra* note 11, at 27 (testimony of T. S. Ary, Vice President, Union Carbide Exploration Corp.).

39 For an account of this experience, see J. ANDRASSY, *supra* note 3, at 49.

and if adherence to the schedule of the 1974 Law of the Sea Conference[40] results in the signing of a treaty for an international regime by the summer of 1975, the earliest the treaty could be expected to come into force would be 1980. With such a delay it is necessary to ask whether any action in the interim is warranted.

D. *The Position of the Mining Industry: Immediate Development*

United States mining interests vigorously contend that development of the seabed resources must proceed during the interim period. First, miners argue that a critical need exists for the minerals which can be extracted from manganese nodules,[41] because the United States is presently dependent on foreign sources for large quantities of these minerals[42] and this dependency will grow as future demand increases.[43] The argument's corollary is that mining of the deep sea minerals will create new jobs and help to alleviate our unemployment problems.[44]

This argument makes a good case for the eventual exploitation of deep seabed minerals. No one doubts that exploitation should eventually proceed. However, no evidence indicates that the United States is unable to obtain the minerals it needs at the present time or will be unable to do so during the period required to establish an international regime. In fact, the contrary position is maintained by some.[45] The situation could change if the inter-

40 See note 27 *supra.*

41 Those manganese nodules, which contain concentrations of manganese (24 percent), nickel (1.4 percent), copper (1.2 percent), and cobalt (0.25 percent), are presently considered potentially profitable. PANEL REPORTS, *supra* note 14, pt. VII, at 111. American miners have identified several deep ocean areas where there are enough nodules with these concentrations to allow mining of one million tons per year over a 40-year period. The miners consider deposits of that size necessary if recovery is to be profitable. *House Hearings, supra* note 12, at 12, 17 (testimony of John E. Flipse, President, Deepsea Ventures, Inc.).

42 The United States imports approximately 95 percent of its manganese, 72 percent of its nickel, 15 percent of its copper, and 100 percent of its cobalt. SECRETARY OF THE INTERIOR, FIRST ANNUAL REPORT UNDER THE MINING AND MINERALS POLICY ACT OF 1970, at 37 (1972) [hereinafter cited as FIRST ANNUAL REPORT].

43 *Senate Hearings, supra* note 11, at 34 (testimony of C. H. Burgess, Vice President, Exploration, Kennecott Copper Corp.).

44 *Id.* at 56; *cf.* Letter from Charles N. Brower, Acting Legal Adviser and Acting Chairman, Inter-Agency Task Force on the Law of the Sea, to Senator J. William Fulbright, Mar. 1, 1973, app. at 11 (on file at office of Professor R. R. Baxter, Harvard Law School) [hereinafter cited as Brower].

45 *Senate Hearings, supra* note 11, at 66 (statement of Samuel R. Levering, Sec-

national regime were inordinately delayed. But this possibility gives little, if any, force to an argument intended to justify immediate action.

Second, because large sums[46] have been expended to develop the technology necessary to exploit the seabed minerals, the United States has a technological lead over the other nations which are capable of deep ocean mining.[47] The miners assert that this technology cannot now be put to use and no further investments can be made because of the insecure political environment of the deep ocean.[48] Furthermore they claim that this impasse will cause a loss of our technological lead, the development money already spent, and the opportunity for rewards, because the other countries capable of deep ocean mining will proceed with development despite the political climate.[49] If the United States stands still while they proceed, it may become difficult or impossible to catch up. S. 2801 supposedly provides the necessary political climate to allow American miners to continue development.

The technology argument has some force, but not nearly as much as its proponents ascribe to it. Although large sums have already been spent on deep seabed mining, these expeditures are only a small percentage of the amount that will have to be spent

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retary of S.O.S. (Save Our Seas) (United States Committee for the Oceans)); *cf.* Brower, *supra* note 44, app. at 7.

46 Deepsea Ventures, Inc., the ocean mining subsidiary of Tenneco Inc., estimates its total expenditures on manganese nodules at about $20 million through mid-1972. *Senate Hearings, supra* note 11, at 73 (statement of N. W. Freeman, Chairman of the Boards of Tenneco Inc. and Deepsea Ventures, Inc.). The Administration estimates that $90 million has been spent by the three U.S. firms who have publicly announced such expenditures. Brower, *supra* note 44, app. at 9.

47 *Senate Hearings, supra* note 11, at 31-33 (testimony of T. S. Ary, Vice President, Union Carbide Exploration Corp.).

48 *Id.* at 71 (statement of Samuel R. Levering, Secretary of S.O.S. (Save Our Seas) (United States Committee for the Oceans)).

49 John Flipse, President of Deepsea Ventures, Inc., in a dialogue with Senator Metcalf, states the point this way:

> Senator METCALF. In your opinion, would these foreign countries, some of which have already been outlined by previous witnesses, would they wait until ratification of an international treaty or a United Nations-sponsored regime?
>
> Mr. FLIPSE. It is my conviction that they would not, inasmuch as their expenditure in that area raises [sic] from a maximum of 25 percent of the cost to the minimum of no cost. It is this underwriting or subsidy in the foreign area which permits them to move ahead with much less regard for a stable political environment.

Id. at 43.

to develop a mine site.[50] Thus, the economic cost of waiting until the establishment of an international regime would be relatively small. The deep seabed miners of the other technologically advanced countries are faced with the same problems as our deep seabed miners. If the risk of loss of investment is high, they are going to be as reluctant as American miners are to proceed with the large additional investments required.[51] Also the American lead in technology can be maintained by research and development. Although the deep sea miners contend that additional funds will not be invested until the political climate improves,[52] quite the opposite would seem to be indicated. The protection of the present investment by additional expenditures appears wise, because of recent evidence suggesting an early conclusion to the proposed Law of the Sea Conference.[53] The fear of loss of investment should be eliminated once an international regime assures miners of a protected right to mine a particular portion of the seabed.

Third, the miners claim that adoption of S. 2801 would help to redress the current balance of payments deficit by partially replacing present foreign sources of supply of the metals concerned with what is the equivalent of domestic production.[54] The balance of payments argument appears insignificant. The Administration estimates the total value of our imports of the four nodule metals at only $600 million.[55] Only a portion of this total would be replaced in the foreseeable future by deep ocean mining.[56] Immediate

50 Estimates of the total investment required to bring a particular nodule site into commercial production vary. T. S. Ary, Vice President, Union Carbide Exploration Corp., estimates the cost at $250 million. *Senate Hearings, supra* note 11, at 32. Deepsea Ventures estimates the cost at $166 million. *Id.* at 74 (statement of N. W. Freeman, Chairman of the Boards of Tenneco Inc. and Deepsea Ventures, Inc.).

51 It has been suggested that the position of foreign deepsea miners is different from our own in that they are subsidized by their governments. *Id.* at 43 (testimony of John E. Flipse, President of Deepsea Ventures, Inc.). However, it is not clear that the governments which are presently subsidizing research and exploration will also subsidize the large investments required for commercial production without some assurance that they will recover their investments.

52 *Id.* at 43.

53 See note 27 *supra.*

54 *Senate Hearings, supra* note 11, at 35 (testimony of C. H. Burgess, Vice President, Exploration, Kennecott Copper Corp.), 72 (statement of N. W. Freeman, Chairman of the Boards of Tenneco Inc. and Deepsea Ventures, Inc.).

55 Brower, *supra* note 44, app. at 4.

56 See note 64 *infra.*

adoption of S. 2801 would still be followed by a substantial delay until commercial quantities of the metals could be produced.[57] This delay would further reduce any balance of payments advantage that would accrue during the limited period before the international regime would encourage seabed development. Furthermore, the animosity which would follow adoption of the miners' proposal[58] would likely reduce purchases of our goods and might jeopardize our extensive investment interests in the countries which produce the manganese nodule metals.[59] It would seem far better to deal with these supplier countries on as friendly a basis as possible rather than antagonize them by reducing purchases of their exports.[60]

Fourth, the miners contend that the metal resources made available by the bill would become a strategic reserve which would strengthen our defense posture[61] and give us more freedom in setting our foreign policy.[62] This argument depends of course on our reliance on other countries for these resources. No doubt these metals are important strategically, and they should eventually be put to use for the benefit of mankind.[63] But to argue that the resources are strategically necessary at this time is shortsighted. The metals that can reasonably be obtained from the deep seabed in the near future do not meet our present needs.[64] Thus, we will be

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57 *Senate Hearings, supra* note 11, at 42 (testimony of John E. Flipse, President of Deepsea Ventures, Inc.).

58 See part II(A) *infra*.

59 *Senate Hearings, supra* note 11, at 70 (statement of Samuel R. Levering, Secretary of S.O.S. (Save Our Seas) (United States Committee for the Oceans)).

60 The United States also has a net trade surplus with the nations which produce the manganese nodule metals. *Id.* The economic effect of removing the American market for their metals on the sale of American goods to them is speculative, but it could result in a decrease in such sales.

61 *Id.* at 30 (testimony of T. S. Ary, Vice President, Union Carbide Exploration Corp.), 35 (testimony of C. H. Burgess, Vice President, Exploration, Kennecott Copper Corp.).

62 *House Hearings, supra* note 12, at 11 (testimony of John E. Flipse, President, Deepsea Ventures, Inc.).

63 L. HENKIN, *supra* note 3, at 3; Statement of Dr. Vincent E. McKelvy before Subcomm. I of the U.N. Sea-Bed Committee, Mar. 14, 1972, U.N. Doc. A/AC. 138/SC. I/SR. 42 (1972).

64 The Administration has estimated that if the three production units which are now forecast from industry activity were in full production by 1975, the resultant metals would only comprise 12 percent of our projected import requirements of manganese, 53 percent of nickel, 41 percent of copper, and all of our cobalt requirements. Brower, *supra* note 44, app. at 5. This would leave some 84 percent of our

dependent upon others for a portion of our supply of these metals for the foreseeable future. In addition, the nodules yield only four strategic metals; and we are dependent upon imports for myriad other raw materials.[65] The same countries which supply our manganese, nickel, copper, and cobalt, as well as their economic allies, also supply us with these other materials.[66] For a short-run gain it seems unwise to prejudice these requirements by arousing unnecessary animosity.[67]

The argument also fails to consider the effect of immediate action on other strategic uses of the oceans. A good deal of the deterrent effect of our missile submarines depends upon the freedom of the seas,[68] and the approach taken by S. 2801 is likely to prejudice the free movement of these submarines by causing a partition of the seas.[69] Such a partition also adversely affects our use of international straits, which are necessary for the effective utilization of both our naval and merchant fleets.[70] For this reason, many military writers advocate an international solution to the problem.[71] In addition, with no evidence that our present supply of minerals is insufficient, an argument that it is strategically necessary to develop this new source now is unpersuasive. The seabed minerals will still be available to satisfy our strategic needs when the proposed international regime becomes operative.

Fifth, the miners argued that adopting the scheme proposed by the bill would strengthen the United States position during the

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total manganese requirements, 34 percent of our nickel, and 9 percent of our copper to be imported. See note 42 *supra*. However, there is no prospect that these firms will be in production by 1975.

65 FIRST ANNUAL REPORT, *supra* note 42, at 37.

66 For example, Peru, which supplies part of our copper requirements, also supplies 20 percent of our import requirements of lead. FIRST ANNUAL REPORT, *supra* note 42, app. I, at 134. Mexico, an economic ally of Peru, see note 74 *infra*, supplies 11 percent of our lead import requirements. *Id.*

67 That the developing nations are vitally concerned with the economic effects of seabed mining is evidenced by their requests for economic studies of the matter, the most recent of which was a resolution passed by the Twenty-seventh General Assembly. 27 U.N. GAOR, Annexes, Agenda Item No. 36, at 18, U.N. Doc. A/8949 (1972).

68 W. FRIEDMANN, *supra* note 36, at 52.

69 *Cf.* note 35 *supra*.

70 *Cf. Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries*, 26 U.N. GAOR Supp. 21, at 241, U.N. Doc. A/8421 (1971).

71 *See, e.g.*, Gehring, *Legal Rules Affecting Military Uses of the Seabed*, 54 MILITARY L. REV. 168 (1971).

bargaining process for an international regime.[72] They assert that if the United States shows readiness to proceed with ocean mining by implementing interim legislation, the negotiations will be speeded toward a successful conclusion.[73] Such impetus is required because certain nations are seen as delaying the negotiations[74] in order to further their interests. These nations are large suppliers of our import requirements for copper, nickel, manganese, and cobalt,[75] and U.S. ocean mining will compete with this production.[76] Delaying tactics have also allegedly been used to strengthen these nations' bargaining positions. Delay is seen as leverage to force the United States to compromise seabed mining to protect its other ocean interests.[77] This argument's entire force depends upon immediate passage of interim legislation. However, the real effect of immediately implementing such legislation, as will be seen, would be the exact opposite of what its proponents suggest.

The miners have failed to demonstrate a clear need to proceed

72 *House Hearings, supra* note 12, at 16 (testimony of John E. Flipse, President, Deepsea Ventures, Inc.); Letter from J. Allen Overton, President, American Mining Congress, to Robert M. White, Administrator, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Washington, D.C., Apr. 12, 1972, in *House Hearings, supra* note 12, at 103.

73 *Id.* at 45 (testimony of John G. Laylin, Member of the Bar of the District of Columbia and New York State, and of the Committee of the Law of the Sea and Deep Seabed).

74 In particular the ocean miners are concerned about an alignment of nations called the "Group of 77." The "Group of 77" is a private caucus of developing Latin and Afro-Asian states which ally themselves within the United Nations to produce a large voting block in situations when this might be tactically advantageous. *Cf.* SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92D CONG., 2D SESS., THE LAW OF THE SEA CRISIS pt. 2, at 15 (Comm. Print 1972) [hereinafter cited as THE LAW OF THE SEA CRISIS].

75 Approximately 75 percent of our manganese imports, 65 percent of our copper imports, and 60 percent of our cobalt imports can be identified as coming from countries which align themselves with or are in the "Group of 77." Substantially all of our nickel imports now come from Canada and Norway. FIRST ANNUAL REPORT, *supra* note 42, app. I.

76 Fears of adverse effects from such competition are probably unfounded. The Secretary General of the United Nations predicts there would be little effect on world metal prices due to the foreseeable amounts of deep ocean mining. U.N. Secretary General, *Additional Note on the Possible Economic Implications of Mineral Production from the International Sea-Bed Area*, 27 U.N. GAOR Supp. 21, at 109, 118 n.16, U.N. Doc. A/AC. 138/73 (1972) [hereinafter cited as *Additional Note*].

77 *See* M. GERSTLE, THE POLITICS OF U.N. VOTING (1970) (The Law of the Sea Institute Occasional Paper No. 7); THE LAW OF THE SEA CRISIS, *supra* note 74, pt. 2, at 10.

with immediate development. Moreover, the miners' fears of proceeding under the existing legal framework do not appear to have any substance. Their fears in this regard are twofold. First, miners contend that if they do proceed they will be subjected to foreign claim-jumping. However, metallurgical processing plants, which comprise the largest part of the total investment, must be custom built to the particular nodule site.[78] Considering the enormous investment required for each site and the multiplicity of possible sites,[79] there would be little incentive for the few organizations involved[80] to claim-jump should American miners decide to proceed.[81] The metals extracted from the nodules must also be marketed without severely depressing their world prices. This consideration would limit the number of firms which could initially make a profit mining.[82]

Second, the miners fear that without formal assurances of their exclusive rights over their individual seabed mining claims, their investment may be prejudiced by the terms of the future regime. To prevent this, they included in their proposal a section which would have a considerable lock-in effect. Their solution is stronger than necessary. The President has given his assurance that the miners' interim investments will be protected, which should be sufficient. Moreover, added protection is apparent from the Law of the Sea Conference schedule. If the schedule is adhered to, the requirements imposed under the future regime will be known before commercial production can commence.[83] It is unrealistic to assume that an international regime would make the terms of con-

78 *Senate Hearings, supra* note 11, at 42 (testimony of John E. Flipse, President of Deepsea Ventures, Inc.), 73 (statement of N. W. Freeman, Chairman of the Boards of Tenneco Inc., and Deepsea Ventures, Inc.).

79 *House Hearings, supra* note 12, at 13, 17 (testimony of John E. Flipse, President of Deepsea Ventures, Inc.).

80 At the present time only the United States, West Germany, and Japan are known to be actively pursuing deep ocean mining. Brower, *supra* note 44, app. at 11. However the Soviet Union and France are apparently beginning exploration also. *Additional Note, supra* note 76, at 113.

81 *Compare House Hearings, supra* note 12, at 36 *with Additional Note, supra* note 76, at 43.

82 Brower, *supra* note 44, attachment at 4. *But cf. Additional Note, supra* note 76, at 117.

83 The most optimistic projections place commercial production at least five years off. The first two of these years will entail further development at relatively little cost. *Senate Hearings, supra* note 11, at 42 (testimony of John E. Flipse, President of Deepsea Ventures, Inc.).

tinued mining so onerous as to render it economically unfeasible. In any event, the technology and capital to develop the deep seabed will have to come from the technologically advanced nations, so that the terms of the future regime must at least be attractive enough to bring about the necessary investments.[84] Those terms will likely be sufficiently attractive to protect preexisting miners.

E. *The Mining Interest's Proposal*

When the desire of American mining interests to proceed with an interim regime became apparent,[85] Senator Metcalf issued an invitation to the American Mining Congress to draft domestic legislation for him to introduce.[86] The result was the introduction of S. 2801 by Senators Metcalf, Jackson (D.-Wash.), Bellmon (R.-Okla.), and Stevens (R.-Alas.).[87]

S. 2801 attempts to establish a mandatory system of first-come-first-served[88] licensing of surface and subsurface "blocks"[89] for the mining of hard minerals.[90] Such licenses are to be issued by the Secretary of the Interior and will last for 15 years or until "commercial recovery" of minerals begun within that time ends, which-

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84 A form of international monopoly has been proposed by some states which might preclude this result. *See, e.g.*, 26 U.N. GAOR Supp. 21, at 93, U.N. Doc. A/AC. 138/49 (1971). The United States, however, has clearly indicated that such a scheme would be unacceptable. U.N. Doc. A/AC. 138/SC. I/SR. 58 (1972). In any event even a monopoly would have to obtain the necessary technology somewhere.

85 *Hearings on S. 3970, supra* note 9, at 55 (testimony of T. S. Ary, Vice President of Union Carbide Exploration Corp., on behalf of the American Mining Congress).

86 *Id.* at 56.

87 117 CONG. REC. 38890 (1970). For an interesting view of the development of S. 2801, see J. GOULDEN, THE SUPERLAWYERS 22 (1972).

88 S. 2801, 92d Cong., 1st Sess. § 5 (1971).

89 *Id.* §§ 2(c), 4, 5. Section 2(c) defines a block as:

> [A]n area of the deep seabed having four boundary lines which are lines of longitude and latitude, the width of which may not be less than one-sixth the length and shall include either of two types of blocks: (i) "surface blocks" comprising not more than forty thousand square kilometers and extending downward from the seabed surface to a depth of ten meters; (ii) "subsurface blocks" comprising not more than five hundred square kilometers and extending from ten meters below the seabed surface downward without limitation . . . .

This is the definition also used in the *Draft Convention, supra* note 4, app. A, § 5. It has been criticized as being too large. *Senate Hearings, supra* note 11, at 70 (statement of Samuel R. Levering, Secretary of S.O.S. (Save Our Seas) (United States Committee for the Oceans)). The Administration also appears to have had second thoughts about its validity. Brower, *supra* note 44, app. at 18.

90 Although the definition of hard minerals in § 2(d) is general, § 4(a)(i) specifi-

ever is later.[91] Any "qualified" person can obtain a license on a block by applying in writing and tendering a $5000 fee.[92] All licenses and other transactions concerning licensing are to be recorded in an "International Registry Clearinghouse" established for that purpose.[93]

The heart of the bill, however, does not lie in these rather straightforward provisions. It lies in the concept of the "reciprocating state."[94] According to the bill, "No person subject to the jurisdiction of the United States shall directly or indirectly develop any portion of the deep seabed except as authorized by license issued pursuant to this Act *or by a reciprocating state.*"[95] When granting licenses under the Act, the Secretary is directed to recognize the rights (*i.e.*, the exclusiveness of a claim to a block) not only of U.S. persons, but also of licensees of reciprocating states.[96] Thus, the bill seeks to establish a scheme whereby those states with the technology to develop the hard mineral resources of the deep seabed would mutually agree not to engage in claim-jumping. Hopefully there would be enough reciprocating states to create an internationally accepted arrangement and thereby avoid the necessity for an international regime or at least substitute for it until one comes into force.[97]

Recognizing the United States commitment to an international regime[98] and President Nixon's statement that interim measures

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cally includes manganese nodules as pertaining to surface blocks. S. 2801, 92d Cong., 1st Sess. § 4(a)(i) (1971).

91 *Id.* § 4(c). Commercial recovery is defined in § 2(g) as "recovery of hard minerals at a substantial rate of production (without regard to profit or loss) for the primary purpose of marketing or commercial use . . . . "

92 *Id.* § 5(a). The Secretary of the Interior is to establish regulations which will determine who is a "qualified" person.

93 *Id.* § 5(b). The function of the clearinghouse is only to record claims. No provision is made for settling disputes over these claims, a requirement that most authorities consider critical. *See, e.g.*, L. HENKIN, *supra* note 3, at 53; *cf. Draft Convention, supra* note 4, arts. 47-60.

94 A reciprocating state is "any foreign state designated by the President as a state having legislation or state practice or agreements with the United States which establish an interim policy and practice comparable to that of the United States under this Act . . . . " S. 2801, 92d Cong., 1st Sess. § 2(i) (1971).

95 *Id.* § 3 (emphasis added).

96 *Id.* § 4(a).

97 *See* Laylin, *Past, Present, and Future Development of the Customary Law of the Sea and Deep Seabed*, 5 INT'L LAW. 442 (1971).

98 See part I(B) *supra.*

should be subject to that regime, the bill makes all licenses subject to "any international regime for development of the deep seabed hereinafter agreed to by the United States . . . .[99] However, this subordination to the future regime is conditioned on two requirements: that the regime recognize the right of the licensees to develop their blocks; and, more importantly, that the United States indemnify the licensees for any loss of investment and pay any added costs caused by the establishment of the regime.[100]

II. S. 2801: An Effective Interim Regime?

A proper response to the problem of an interim regime should take account of the various United States interests in ocean space, enhance our stature and bargaining position in the negotiating process for an acceptable international regime, or at least not prejudice our position, and provide the optimal climate for orderly development of deep ocean mineral resources. S. 2801 accomplishes none of these objectives. It ignores long-range national objectives and political reality. Most of the supposed benefits do not respond to pressing needs or would prejudice other competing interests.

A. *Effect on United States Interests*

As previously observed, the United States has various competing interests in ocean space. Accommodation of these competing interests is the main reason for the commitment to an international regime. Although the proponents of S. 2801 claim that they are seeking an interim regime to be superseded by a future treaty, the provisions of the bill belie this. Section 10 provides that the United States will indemnify our licensees for "any loss of investment or *increased costs*"[101] caused by a switchover to the international regime. This provision, coupled with the provision that the international regime must recognize the exclusive rights granted to existing licensees, effectively locks the United States into the scheme of the bill.

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99 S. 2801, 92d Cong., 1st Sess. § 10(a) (1971).
100 *Id.*
101 S. 2801, 92d Cong., 1st Sess. § 10 (1971) (emphasis added).

On the one hand, the developing nations would never accept a regime which would acknowledge prior rights of licensees. Such a regime would be contrary to what they interpret as the meaning of "common heritage of mankind,"[102] a concept which the United States accepted when it voted for the *Legal Principles Resolution.* On the other hand, the Senate would have to give its advice and consent before the adoption of the international regime. If such approval would subject the treasury to large liability, as it could under § 10,[103] it is unlikely that approval would be forthcoming.[104] This lock-in effect will not go unnoticed by the developing nations.[105] They are likely to regard the initial licensing by the Secretary of the Interior under the bill as tantamount to unilateral extension of United States jurisdiction over the deep seabed or an attempt by the United States to impose an American regime.[106]

In effect S. 2801 creates a "flag nation"[107] approach to jurisdiction over the seabed as opposed to the international jurisdiction contemplated by the *Legal Principles Resolution* and openly espoused by the United States. Such a national approach can only benefit the technologically advanced nations.[108] Of course, states with no present capability of seabed mining could ostensibly join in the scheme; but it is hard to see how they would benefit from doing so other than by minimal receipts from the escrow fund.[109]

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102 The interpretation of this term is, of course, open to dispute. *See* E. BROWN, *supra* note 36. The important thing, however, is not this fact, but rather how the developing nations interpret the term. This will be what determines their vote.

103 The Comptroller General sees this liability as almost unlimited. Letter from Robert F. Keller, Deputy Comptroller General of the United States, to Edward A. Garmatz (D.-Md.), Chairman, House Committee on Merchant Marine and Fisheries, Mar. 29, 1972, in *House Hearings, supra* note 12, at 6.

104 *Id.* at 155 (testimony of Dr. John J. Logue, Director, World Order Research Institute, Villanova University).

105 The introduction of S. 2801 certainly did not go unnoticed by the developing nations. During a meeting of the U.N. Sea-Bed Committee on Mar. 9, 1972, the delegate from Chile commented on S. 2801: "[F]or the United States to grant licenses for deep seabed mining before a regime is agreed upon would be a mockery of all the efforts of the United Nations Sea-Bed Committee." U.N. Doc A/AC. 138/SC. I/SR. 35 (1972). Senator Metcalf's reply to this statement is contained in 118 CONG. REC. S3929 (daily ed. Mar. 14, 1972).

106 Brower, *supra* note 44, at 4.

107 *House Hearings, supra* note 12, at 58 (statement of H. Gary Knight, Campanile Charities Professor of Marine Resources Law, Louisiana State University Law Center).

108 *Id.*

109 The bill contains a provision for the setting aside of certain sums for the use

In order to benefit from the receipt of mining royalties, developing nations would have to attract capital from countries capable of exploiting the minerals. But such countries presumably would already be reciprocating states. To attract this capital, the developing nations would have to offer better terms than those offered by the technologically advanced reciprocating states. But if a developing nation's domestic law allowed for more favorable terms, it is unlikely that it could qualify as a reciprocating state under S. 2801.[110]

While it is claimed that S. 2801 is just an interim measure, the developing nations will not recognize it as such.[111] If they view the scheme as a permanent "flag nation" regime contrary to their interests, their likely response will be larger and larger jurisdictional claims over the oceans.[112] This response is, of course, logical as it is the only way these nations can compensate themselves for the taking of what they rightfully consider part theirs. The experience with the Truman Proclamation, which was the first large unilateral extension of jurisdiction over the seabed, confirms this response.[113]

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of developing reciprocating states. S. 2801, 92d Cong., 1st Sess. § 9 (1971). Little revenue can be expected to accrue, however. Payments consist of an unspecified percentage of the license fees received and an unspecified percentage of income tax revenues attributable to hard mineral recovery. License fees are only $5000 per block, so even if the entire fee were put into the escrow fund, no substantial revenue would accumulate. Payment of a portion of the income tax attributable to the mining would not result in any substantial revenues if present domestic tax law, including depletion allowances, is used. *Senate Hearings, supra* note 11, at 69 (statement of Samuel R. Levering, Secretary of S.O.S. (Save Our Seas) (United States Committee for the Oceans)).

110 *House Hearings, supra* note 12, at 46 (testimony of John G. Laylin, Member of the Bar of the District of Columbia and New York State, and of the Committee of the Law of the Sea and Deep Seabed).

111 *Cf.* Brower, *supra* note 44, at 4. It is no wonder this is so. The bill's proponents thinly veil their desire that S. 2801 become the permanent regime. *Compare House Hearings, supra* note 12, at 45 *with id.* at 47 (testimony of John G. Laylin, Member of the Bar of the District of Columbia and New York State, and of the Committee of the Law of the Sea and the Deep Seabed).

112 E. BROWN, *supra* note 36; *House Hearings, supra* note 12, at 155 (testimony of Dr. John J. Logue, Director, World Order Research Institute, Villanova University).

113 The Truman Proclamation caused many states without extensive continental shelves to extend the limits of their territorial waters. J. ANDRASSY, *supra* note 3, at 50-51. Many authorities have warned against the possibility of a "partition" of the seas should international negotiations fail. *See, e.g.*, E. BROWN, *supra* note 36. This phenomenon is well illustrated by the recent extension of jurisdiction made by

Review of the proposals made by some of the developing nations at recent U.N. Sea-Bed Committee meetings indicates the form unilateral extensions of jurisdiction might take. These proposals generally advocate a broad zone of exclusive coastal state jurisdiction.[114] Although the United States "trusteeship" zone[115] is a similar proposal, a significant difference exists.[116] Under the *Draft Convention* provision is made for compulsory settlement of disputes. If broad economic zones are established by unilateral action, as is the likely result of S. 2801, there would be no such provision. Without compulsory dispute settlement it is likely that the mining industry's investments in all areas other than those directly under United States jurisdiction would be less secure than they would be under an international regime.[117] This is a high price to pay for deep seabed mining, since the majority of the ocean's wealth lies in the continental margins which would undoubtedly be included in these coastal state controlled economic zones.[118]

B. *Effect on United States Bargaining Position*

Possibly the lock-in effect described above[119] would not result in permanent abandonment of an international regime. The reasons for the United States to adopt an international regime would still remain. In fact, they might become more pressing. Furthermore, the Administration has indicated it will not lightly disregard the objective of establishing an international regime for the development of the mineral resources of the deep ocean.[120] How-

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Canada. *See* Biler, *The Canadian Arctic Waters Pollution Prevention Act: New Stress on the Law of the Sea*, 69 MICH. L. REV. 1 (1970).

114 *See, e.g., Declaration of Santo Domingo*, 27 U.N. GAOR Supp. 21, at 70, U.N. Doc. A/AC. 138/80 (1972); *Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, held in Yaounde*, 27 U.N. GAOR Supp. 21, at 73, U.N. Doc. A/AC. 138/79 (1972).

115 *Draft Convention, supra* note 4, art. 26.

116 There are additional differences which are significant in other respects. For example, the royalties which would be collected under nationally controlled economic zones would be paid to the controlling state, while under the "trusteeship" zone concept a larger portion of the funds would be used for the benefit of all developing states. This difference would not significantly affect United States interests as we would not be a beneficiary of these sums in either event.

117 Logue, *The Trillion Dollar Opportunity*, in THE FATE OF THE OCEANS xvi (J. Logue ed. 1971).

118 *Id.* at xxix.

119 See text accompanying notes 101-06 *supra*.

120 Brower, *supra* note 44, at 3.

ever, implementing the scheme of S. 2801 would severely prejudice the ability of our representatives to negotiate an international regime.

The claims which developing nations are currently making in the U.N. Sea-Bed Committee demonstrate their strong nationalism,[121] but these claims are still negotiable. Once unilateral action solidifies the claims, they will be difficult or impossible to reverse;[122] and the best remaining hope would be an international regime covering the areas not swallowed up. Such a regime will be much less desirable than the one which can be expected absent interference from S. 2801. Even if the developing nations exhibit more restraint in their actions than we would have exhibited by the enactment and use of S. 2801, our bargaining position will be prejudiced. The nations of the world have collectively expressed their desire that the wealth of the deep seabed be reserved for the benefit of mankind.[123] The United States has consistently supported this position. To adopt an approach so diametrically opposed to this expression, even if it can be legally justified,[124] will surely result in distrust of our motives and more difficult bargaining.[125]

Moreover S. 2801 will reduce the flexibility that our negotiators

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121 See note 114 *supra.*

122 Not one unilateral extension of jurisdiction since issuance of the Truman Proclamation in 1945 has been withdrawn despite strong protests in many instances.

123 *Legal Principles Resolution, supra* note 26.

124 See note 24 *supra.*

125 As stated by Professor Knight:

> Although it is true that General Assembly resolutions do not constitute binding legal obligations, nonetheless such resolutions do, when adopted by such overwhelming majorities as was the case with [the *Legal Principles Resolution*], represent the expectations of the international community and thus create political and moral norms which should not be dismissed lightly. The legal regime proposed by S. 2801 contradicts each of the major premises of [the *Legal Principles Resolution*]. Thus, [S. 2801] not only conflicts with National oceans policy as manifested in the United States draft seabed treaty . . . but it also conflicts with an international resolution of almost universal acceptance which reflects the expectations of the entire international community. Only a National need of the highest priority should be permitted to override this international expectation, and I suggest that the needs of the deep seabed mining industry do not at present constitute such a priority.

House Hearings, supra note 12, at 61 (statement of Dr. H. Gary Knight, Professor, Marine Resources Law, Louisiana State University).

need to arrive at a satisfactory result.[126] The bill makes decisions in areas unnecessary to the resolution of the eventual limits of national jurisdiction. It touches on things as basic as the size of the areas covered by licenses, the flow of funds to an eventual international organization, and the method by which licenses will be granted, *i.e.*, first-come-first-served rather than competitive licensing. These issues are now subject to negotiation and our negotiators have flexibility in resolving them. Such flexibility will be effectively foreclosed by S. 2801, thus making a desirable accommodation less likely.[127] Of course, anything that makes our bargaining position more difficult will also have a tendency to delay a final resolution.[128] While it is not essential to reach a speedy conclusion to the seabed negotiations, it is desirable to proceed as rapidly as effective negotiating will allow. In this sense, S. 2801 is contrary to our best interests and conflicts with the urgent need for a satisfactory conclusion so highly touted by the bill's proponents.

III. A Suggested Response

If S. 2801 is not a proper response, what would be an improvement? A better response would incorporate the few positive aspects of S. 2801 and form a firm foundation for a future seabed regime should international negotiations fail.

A. *Delaying Clause*

The enactment of legislation with a clause which delays its implementation will utilize the one positive feature of S. 2801 and avoid its detrimental effects. The proponents of S. 2801 contend that it would help to spur on negotiations by showing that the United States will not sit still while others engage in delaying tactics. A distinction must be drawn, however, between preparation

126 *Id.* at 119 (testimony of C. H. Burgess, Vice President, Exploration, Kennecott Copper Corp.).

127 *See generally* Brower, *supra* note 4, app.

128 A vivid example of the type of delaying tactics which animosity can provoke is a draft resolution introduced in the March 1972 U.N. Sea-Bed Committee meeting by Kuwait. 27 U.N. GAOR Supp. 21, at 69, U.N. Doc. A/AC. 138/L. 11/Rev. 1 (1972). It was feared that this resolution would occupy a substantial portion of the August 1972 meetings of that committee, but it did not. *House Hearings*, *supra* note 12, at 242 (testimony of John R. Stevenson, Legal Adviser, Department of State)

and immediate action. S. 2801 is beneficial as a threat to those who may advocate substantial delay to the international regime. Once action such as the issuance of licenses is taken, this threat is lost, as such action is difficult to reverse.[129]

The adoption of legislation with a delaying clause would indicate an advanced state of readiness to those accused of delaying tactics, yet maintain the necessary threatening quality.[130] Such legislation would also demonstrate a high degree of restraint by the United States and thus indicate good faith bargaining. Incorporating a delaying clause in any proposed legislation would present few problems. The critical decisions would be the length of the delay and the factors, if any, which should trigger implementation. Because the Law of the Sea Conference is now firmly scheduled, a clause delaying implementation of legislation until after the scheduled completion date of the Conference, say January 1976,[131] seems appropriate. Our negotiators would have the needed flexibility at that Conference, and any adverse effects of the new legislation on the negotiations would be minimized. After this date implementation should be at the President's discretion, once he finds that an international regime will not be brought into existence or that the balance of policy considerations has shifted in favor of implementation. If the 1974 Conference results in a treaty that is open for signature at the Conference's conclusion, there will still be a substantial period before the treaty comes into force.[132] During this period Congress should authorize immediate implementation of the applicable treaty provisions and thereby supersede S. 2801.[133]

B. *A Credible Proposal*

Prior to the conclusion of the 1974 Law of the Sea Conference, a delaying clause would cure most problems of S. 2801. But if those negotiations break down, S. 2801 would be severely inade-

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129 L. HENKIN, *supra* note 3, at 36.

130 This phenomenon is the basic premise of nuclear deterrence. *See generally*, H. KISSINGER, THE NECESSITY FOR CHOICE (1960).

131 See note 27 *supra*.

132 *See* J. ANDRASSY, *supra* note 3, at 49.

133 Brower, *supra* note 44, at 5; *cf.* Civil Aviation Convention, *done* Dec. 7, 1944, [1947] 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

quate as a permanent framework. Part of the lock-in effect is due not to the prospective implementation of a "flag nation" scheme, but to the weighty indemnification provisions of S. 2801.[134] Even if a "flag nation" approach were found necessary after 1976, conditions could change so as to make an international regime both possible and desirable. The present indemnification provisions of S. 2801 would effectively preclude this, but some protection of investment would still be required.[135] This protection could be accomplished by indemnification against loss of investment, not loss of investment and profits as S. 2801 now provides. Such change in the indemnification provisions would provide future flexibility, make the proposal more acceptable to the Treasury, and lessen the lock-in effects that could arise despite the delaying clause.

Domestic legislation should also be as widely accepted as possible in order to mature into a satisfactory international legal framework in the event an international regime becomes impossible.[136] S. 2801 is so biased in favor of the mining interests of the technologically advanced nations it would not garner this wide acceptance. Thus, any legislation in this area should be made more credible to nations not possessing the necessary technology. Changing the indemnification provision would be a strong start in this direction, but other changes are also required. S. 2801 presently contains no real incentive to cause developing nations to become reciprocating states.[137] Such an incentive could be provided by making escrow fund payments more realistic.[138] The legislation should require that payments to this fund be a percentage royalty of the gross value of the minerals extracted,[139] and licenses should be issued on a competitive bidding basis.[140] Funding the

134 *See* S. 2801, 92d Cong., 1st Sess. § 10 (1971).

135 OUR NATION AND THE SEA, *supra* note 1, at 156.

136 Even the proponents of S. 2801 recognize this. *House Hearings, supra* note 12, at 110 (testimony of T. S. Ary, Vice President, Union Carbide Exploration Corp.).

137 See text accompanying notes 107-10 *supra.*

138 See note 109 *supra.*

139 *Senate Hearings, supra* note 11, at 69 (statement of Samuel R. Levering, Secretary of S.O.S. (Save Our Seas) (United States Committee for the Oceans)); *cf. Draft Convention, supra* note 4, app. A. Royalties rather than a percentage of tax revenues are presently used as the revenue mechanism under the Outer Continental Shelf Lands Act, under which all petroleum leases on our continental shelf are now made. 43 U.S.C. § 1334 (1970).

140 Possibly bidding could be on the basis of the maximum percentage royalty the licensee would be willing to pay into the escrow fund.

escrow fund in this manner would give the developing nations a real incentive to reciprocate and would comply more fully with the intent as well as the letter of the *Legal Principles Resolution.*

The major objection to competitive bidding is that large investments could be lost through such a procedure, since the company which discovered the deposit might not be the successful bidder.[141] This objection could be overcome by reimbursing unsuccessful bidders out of royalty payments for their reasonable and verified exploration costs applicable to the licensed area, *i.e.*, a "finder's fee." The blocks to be licensed under S. 2801 have been criticized as being too large.[142] Block size was taken from the *Draft Convention*,[143] but at best that was a rough estimate.[144] Because there is no firm basis for setting block size, it would be prudent to leave the determination of block size to regulation by the Secretary of the Interior. This would allow flexibility as experience develops and prevent windfall profits.

The minimum annual expenditures required under S. 2801 are too small to prevent speculation. The bill requires minimum expenditures, including those for off-site facilities, of only $6,150,000 over the first 15 years of a license.[145] Such minimums represent only about 2.5 to 3.7 percent of the total expected development cost of each nodule site,[146] and an even smaller percentage of the total expected pretax return from the site. However, like block size, the proper minimum required expenditures can be better determined with experience. Again regulation may be the best approach.

If negotiations for an international regime break down, it is also probable that no agreement will be reached on the limits of the continental shelf. A narrow limit would still be desirable to accommodate our other ocean interests, but other states should be required to accept such a limit before we become firmly committed. To accomplish this dual objective royalty revenues de-

141 *House Hearings, supra* note 12, at 91 (testimony of T. S. Ary, Vice President, Union Carbide Exploration Corp.).

142 *Senate Hearings, supra* note 11, at 77 (statement of F. L. La Que, President of the International Organization for Standardization).

143 *Draft Convention, supra* note 4, app. A., § 5.

144 Brower, *supra* note 44, at 18-20.

145 S. 2801, 92d Cong., 1st Sess. § 7 (1971).

146 See note 50 *supra.*

rived from the area between the 200-meter isobath and the end of the continental margin should be held in a special fund to be paid over to the escrow fund upon acceptance of the 200-meter limit by a reasonable number of reciprocating states. Finally, a general revamping of the language of the remaining provisions in S. 2801 is required to remove any overtones of bias in favor of mining interests.[147]

IV. Conclusion

The approach taken by S. 2801 is deficient in many respects. Its implementation would probably cause a partition of the oceans and prejudice our bargaining position with regard to an international regime. Interim legislation can be developed without these defects. Such legislation should contain an appropriate delaying clause, be designed to protect against loss of flexibility, and be a workable and politically acceptable substitute for an international regime.

*David W. Proudfoot**

147 The environmental provisions of new legislation should be stronger than they are under S. 2801. Determination of environmental standards should be left to regulation, as was done in S. 2801, but with the added proviso that they would be determined in consultation with the appropriate United Nations organizations and reciprocating states.

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EXECUTIVE PRIVILEGE AND THE CONGRESSIONAL RIGHT OF INQUIRY

Introduction

The denial of information to Congress by use of the doctrine of "executive privilege" has generated considerable conflict between the executive and legislative branches.[1] Many regard President Nixon as expanding both the use and scope of the privilege,[2] and many regard this in turn as only one aspect of a larger problem, increasing presidential control of congressional sources of information.[3] Dependence on the Executive for information implies less capacity to make fully informed, independent policy decisions. Any such shift in control of information implies a shift in the balance of power between the two branches and hence is a matter of interest regardless of one's concept of the most appropriate balance.

This Note discusses the problem of executive control of congressional sources of information, particularly noting the effect on congressional information sources of recent changes in the structure of the executive branch. Then the doctrine of executive privilege is examined, with emphasis on its effects in the area of foreign affairs. Third, political sanctions available to Congress are examined. The effectiveness of the power of the purse is studied in the context of a particular case — the recent conflict over

1 *Hearings on Executive Privilege: The Withholding of Information by the Executive Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) [hereinafter cited as *Hearings on Executive Privilege*]. This conflict is a recurrent theme in the history of the relations between these branches of the federal government. It arose in the administration of the first President and has troubled many successors. Berger, *Executive Privilege v. Congressional Inquiry* (pts. 1-2), 12 U.C.L.A. L. REV. 1043, 1287, at 1044 (1965).

2 *E.g.*, 119 CONG. REC. H2343 (daily ed. Apr. 2, 1973) (remarks of Representative Fascell, D.-Fla.). A study prepared under the guidance of the House Foreign Operations and Government Information Subcommittee reports that the Nixon Administration invoked the doctrine of executive privilege during its first term more often than any previous administration in any one term. Gov't & General Research Div., Cong. Research Serv., Library of Congress, The Present Limits of "Executive Privilege," reprinted in 119 CONG. REC. H2243 (daily ed. Mar. 28, 1973) [hereinafter cited as The Present Limits of "Executive Privilege"].

3 Cohen, *'Information Gap' Plagues Attempt to Grapple with Growing Executive Strength*, 5 NAT'L J. 379 (1973).

congressional access to certain United States Information Agency (USIA) planning documents. The Note concludes with comments concerning judicial review as an alternative to direct congressional action.

I. Control of Information by the Executive

Two developments during the Nixon Presidency indicate a trend toward increasing control of information by the Executive. First is accretion by the President's personal staff of powers and responsibilities formerly allocated to the bureaucracy. Second is centralization of control over the bureaucracy's relations with Congress. Both cast doubt upon the President's promise, given to Congress when he began his first term, that his Administration would be "dedicated to ensuring a free flow of information to Congress and the news media and thus to the citizens."[4]

A. *Transfers of Responsibility from Agencies to the White House*

White House staff has increased enormously in recent years. In response to a study commissioned by President Roosevelt which called for the creation of assistants to aid the President "in dealing with managerial agencies and administrative departments of the Government,"[5] Congress in 1939 authorized six administrative assistants to the President.[6] Since 1939, however, the number of administrative assistants has grown to 48.[7] President Nixon now has staff resources which far outstrip any available to his predecessors. During the period 1954-71, total White House staff personnel increased from 290 to 600, while the Executive Office

4 Letter from Richard M. Nixon to John E. Moss, Chairman, Foreign Operations and Government Information Subcomm. of the House Comm. on Government Operations, Apr. 7, 1969, in *Hearings on Executive Privilege*, *supra* note 1, at 36.

5 The President's Committee on Administrative Management, Report of the Committee 5 (1937).

6 Reorganization Act of 1939, ch. 36, § 301, 53 Stat. 565.

7 Gov't & General Research Div., Cong. Research Serv., Library of Congress, The Development of the White House Staff (Harold C. Relyea, Analyst), in *Hearings on U.S. Government Information Policies and Practices—Problems of Congress in Obtaining Information from the Executive Branch Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pt. 8, at 3021 (1972) [hereinafter cited as The Development of the White House Staff].

staff jumped from 1,167 to 5,395.[8] This geometric increase in presidential resources is in part a response to the greatly expanded role of the federal government since the New Deal and the corresponding failure of the Cabinet to cope with increasingly difficult problems of coordination and control.[9] Frustrated by a seemingly unresponsive and dilatory bureaucracy, successive Presidents have tended to shift more and more of the operational and managerial responsibility for the Government into the White House, where presidential control and influence is at a maximum. In addition, both Congress and the President have spawned a whole new generation of White House agencies.[10]

Perhaps the most notable example in the Nixon Administration is the shift in power between the State Department and the National Security Council. During Henry Kissinger's tenure as executive director of the National Security Council, it has grown from 12 to over 140 persons[11] and in the process has captured a great deal of the foreign policy responsibility once lodged in the State Department.[12] Since the influence of Congress in foreign policymaking is intimately tied to its advisory and oversight relationship with the State Department, a transfer of the State Department's responsibilities to the White House could result in a loss of congressional influence over the policy process. This development frustrates the traditional oversight relationship with the State Department, while the doctrine of executive privilege, applied to Dr. Kissinger as a presidential advisor,[13] hinders the development of a new relationship. Consequently, the principal foreign policy decisionmakers are left relatively unaccountable to Congress.

B. *Increasing White House Control over Congressional Liaison*

The second development involves centralization under White House authority of the congressional liaison offices of the various

8 *Id.*

9 R. FENNO, THE PRESIDENT'S CABINET 141-42 (1959).

10 The Development of the White House Staff, *supra* note 7, at 3022.

11 *Hearings on Executive Privilege, supra* note 1, at 21 (statement of Senator Fulbright).

12 The Development of the White House Staff, *supra* note 7, at 3023.

13 For a discussion of the use of executive privilege to protect presidential communications with personal advisors, see text accompanying note 68 *infra*.

departments. Executive departments began to establish these offices shortly after World War II, and by 1963 all 10 existing departments had established such offices.[14] Ordinarily all congressional requests for information must be funneled through them. They perform a legitimate service function and increase efficiency, but they also facilitate greater control over the information disseminated to Congress.[15] Such procedures create formal barriers to congressional contact with lower level bureaucrats.[16] If effective congressional oversight of federal programs depends on access to information and opinions from lower level bureaucrats, then centralization of the agency information disseminating function, to the extent that it insulates those officers, will hamper that congressional oversight.

Along with the creation of the congressional liaison offices in the agencies, there has been a similar development in the White House. President Kennedy created a White House congressional liaison under Lawrence O'Brien in order to increase presidential "control of the bureaucracy and at the same time to extend [White House] influence over Congress."[17] During the Johnson Presidency there was informal contact between White House congressional liaison officers and their agency counterparts, with some measure of control and direction supplied by the former.[18] Now President Nixon seeks to centralize the agencies' congressional liaison offices under the direction of a White House Office of Congressional Liaison. Under a new reorganization plan, the President intends to elevate departmental congressional liaison officers to the rank of Assistant Secretary and appoint them personally, rather than leave appointment to the particular Secretary.[19] The White House admits quite frankly that presidential appointment is designed to make the officer di-

14 Pipe, *Congressional Liaison: The Executive Branch Consolidates Its Relations with Congress*, 26 PUB. AD. REV. 14, 14-15 (1966).

15 *Id.* at 23.

16 *Id.*

17 *Id.* at 20.

18 *Id.* at 21.

19 Bonafede, *Administration Realigns Hill Liaison to Gain Tighter Grip on Federal Policy*, 5 NAT'L J. 35, 38 (1973). According to Bonafede, the President will probably try to create the new Assistant Secretary posts through legislation, but if that fails he can "dip into a little-known personnel pool of 30 Executive Level grades IV and V available to him at the Office of Management and Budget." *Id.*

rectly responsible to the President, while undercutting control by the Secretaries over the flow of information to Congress. According to Richard K. Cook, Deputy Assistant to the President for House Affairs:

> The President wants to beef up the congressional relations office and put his own men in the departments. They will know who hired them. In effect they will carry commissions from the President, not the Secretary. Regardless of who announces it, they'll see something hanging on their walls with Richard M. Nixon on it. There will be no more assistant secretaries saying, "I don't work for Nixon, I work for the Secretary." If he's hired, he will know why and by whom. There will be less disloyalty and more direction and guidance.[20]

Congressional power will be further subordinated to executive power to the extent that White House staff members actually exercise control over the flow of information from the bureaucracy to Congress and to the extent that access to information determines influence, independence, and power.

II. The Doctrine of Executive Privilege

The problem of executive privilege is almost as old as the Republic itself. The first congressional investigation brought forth the first claim of an inherent executive power to withhold information if disclosure would harm the national interest. Congress requested information relating to the disastrous St. Clair expedition against the Indians in 1792, and George Washington asked his Cabinet for advice. The Cabinet told President Washington "that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would endanger the public."[21] In this instance, President Washington gave the requested information to Congress.

Thus, the substance of the doctrine was articulated during Washington's Presidency.[22] Since then, there has been intermit-

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20 *Id.*

21 1 T. Jefferson, Writings 189-90 (Ford ed. 1892).

22 The phrase "executive privilege" itself goes back no further than the Eisenhower Administration when presidential refusals to disclose information to Con-

tent dispute between the Congress and the President on the existence and scope of the privilege. If the privilege exists, does the President have "uncontrolled discretion," as some have urged,[23] to refuse Congress any document in the federal government and to prevent any of the 2.5 million employees of the executive branch from testifying before Congress? Or is the privilege more restricted in scope so as to protect only the confidential communications of the President and his close personal advisors? Finally, there is a question as to who may exercise the privilege. May it be invoked by the President only, or is it delegable to Cabinet officers and even to lower level bureaucrats?

Proponents of executive privilege argue that its constitutional basis can be derived by three separate routes: by implication from the powers granted the Executive in article II, by the separation

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gress reached unprecedented proportions. Schlesinger, *Executive Privilege: A Murky History*, Wall Street Journal, Mar. 30, 1973, at 8, col. 3, in 119 CONG. REC. E2014 (daily ed. Apr. 2, 1973).

23 Attorney General William P. Rogers argued in 1958: "Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold information and papers in the public interest, and they will not interfere with the exercise of that discretion." Memorandum on Executive Privilege of Attorney General Rogers, in SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM CONGRESS 1 (Comm. Print 1958) [hereinafter cited as Memorandum on Executive Privilege]. Rogers' language was nearly identical to that used by his predecessor, Herbert Brownell, when justifying invocation of executive privilege to refuse information sought by Senator McCarthy's Government Operations Subcommittee. Memorandum from Attorney General to the President, in SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM CONGRESS 74 (Comm. Print 1958). According to Arthur Schlesinger, the "uncontrolled discretion" phrase and other material were "lifted" from an earlier series of articles by a Department of Justice attorney, Herman Wolkinson. Schlesinger, *supra* note 22, at 8, col. 3. *See* Wolkinson, *Demands of Congressional Committees for Executive Papers* (pts. 1-3), 10 FED. B.J. 103, 223, 319 (1949).

The Department of Justice has not retreated from its 1958 position. If anything, the scope of the privilege asserted by the executive branch was broadened when then Attorney General Richard Kleindienst told a Senate subcommittee in April 1973 that Congress was without authority to compel either the production of executive branch documents or the testimony of any of the 2.5 million executive branch employees in the face of an express presidential refusal. N.Y. Times, Apr. 11, 1973, at 1, col. 2.

The Justice Department's assertion that the courts have uniformly sanctioned these broad claims of executive privilege is simply without foundation. The executive privilege controversy has never been brought before the courts. Berger, *supra* note 1, at 1101.

of powers policies thought to be embodied in the Constitution, and by historical precedent.[24]

A. *Constitutional Basis of Executive Privilege*

Article II says only that "[t]he executive Power shall be vested in a President of the United States of America." Nowhere is there explicit mention of an executive privilege. However, supporters of the privilege assert that the duty imposed upon the President in § 3 of article II to "take care that the laws be faithfully executed" gives the President sweeping discretion in the discharge of his duties.[25]

But clearly there are limits on that discretion. For example, the Court rejected the Government's argument in *Kendall v. United States*[26] that the obligation imposed upon the President to take care that the laws be faithfully executed gives the President discretionary power to refuse to perform a congressionally commanded ministerial duty. The Court said that "[t]o contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."[27] On another occasion, the Court refused to read sweeping discretion into the clause directing the President to "take care that the laws be faithfully executed," though that clause was invoked in conjunction with his powers as Commander-in-Chief. The Court insisted that presidential action must rest either on a clear grant of constitutional authority or a clear and constitutional statute.[28] Claims that article II implies broad discretion to act contrary to congressional policies, whether implicit or explicit, should be treated with the greatest skepticism by the citizen and Congress.

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24 Memorandum on Executive Privilege, *supra* note 23; Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755 (1959). *But see* Berger, *supra* note 1.

25 Memorandum on Executive Privilege, *supra* note 23, at 3.

26 37 U.S. (12 Pet.) 524 (1838).

27 *Id.* at 613.

28 Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) [hereinafter cited as Steel Seizure case].

A related constitutional argument for executive privilege derives from the doctrine of separation of powers. An arguable purpose of that doctrine is to shield the internal decisionmaking process of each branch of government from the unwarranted intrusion of the other branches in order to promote the efficiency of each branch in its own sphere of activity.[29] The Executive may assert that it would be disruptive and demoralizing to make the opinions, tentative judgments, and contingent recommendations of presidential advisors the subject of public debate and congressional criticism. Disclosure of such matters might be calculated to embarrass a President, inhibit his advisors, and subject the Presidency to the sway of Congress.[30] This argument is strengthened by observing that each of the other branches employs a variation of the executive privilege. Judges meet in conference to deliberate upon particular cases. Legislators meet in secret session to mark up bills. Each branch claims a privilege to protect the confidentiality of its communications with its law clerks and legislative assistants, respectively. Each asserts that it would be intolerable to be required to decide in a goldfish bowl.[31]

This similarity breaks down when a President seeks to extend the scope of the privilege beyond his close personal advisors and Cabinet officers to information or people within the subcabinet bureaucracy. Yet recent presidential interpretation of the scope of the privilege presents the whole bureaucracy as a decision tree with the President at its base. President Nixon, in invoking executive privilege to deny the Senate Committee on Foreign Relations access to USIA Country Planning Memoranda, said that "the basic planning data requested reflect only tentative intermediate staff level thinking which is but one step in the process of preparing recommendations to the Department Heads, and thereafter to me."[32] If one accepts the view that the entire bu-

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29 *See Hearings on Executive Privilege, supra* note 1, at 428-38 (statement of then Asst. Attorney General Rehnquist).

30 *Id.* at 434.

31 *Id.* at 434-35.

32 Memorandum of Richard M. Nixon to the Secretary of State [and] the Director, U.S. Information Agency, Mar. 15, 1972, in 118 CONG. REC. S7022-23 (daily ed. May 1, 1972) [hereinafter cited as Memorandum of Richard M. Nixon (Mar. 15, 1972)]. An earlier memorandum established general, formal policy of the Nixon Administration. Memorandum of Richard M. Nixon to the Heads of Executive Departments

reaucracy is essentially an extension of the Presidency, an instrument to assist him in executing the laws, then it follows that the entire bureaucracy must also be within the scope of the Executive's privilege.

B. *Historical Bases of the Privilege*

In view of the slight textual basis for a constitutionally mandated doctrine of executive privilege, it is not surprising that modern Presidents have relied heavily on previous presidential refusals to disclose information to Congress to defend their own use of executive privilege. In 1958 the Justice Department published a controversial memorandum citing precedents for executive privilege as justification for President Eisenhower's expanded use of the privilege.[33] President Nixon has recently relied on historical precedent to sanction his own invocations of executive privilege.[34]

Scholarly analysis, however, strongly challenges these precedents as support for the constitutional doctrine asserted.[35] For example, the St. Clair incident[36] can be cited to support either side, since President Washington acceded to congressional demands for information. President Washington's refusal four years later to release documents to the House of Representatives about the controversial Jay Treaty with Great Britain offers a similarly cloudy precedent. President Washington did indeed refuse to give up the documents but on the ground that the House had no constitutional right to them since treatymaking was the sole prerogative of the President and the Senate. The papers were deposited with the Senate, and members of the House could go there to peruse them.[37]

A firmer historical precedent for the privilege occurred during the Jackson Presidency.[38] In 1835 Andrew Jackson refused the

and Agencies, Establishing a Procedure to Govern Compliance with Congressional Demands for Information, March 24, 1969, in *Hearings on Executive Privilege, supra* note 1, at 36-37 [hereinafter cited as Memorandum of Richard M. Nixon (Mar. 24, 1969)].

33 Memorandum on Executive Privilege, *supra* note 23.

34 Memorandum of Richard M. Nixon (Mar. 15, 1972), *supra* note 32.

35 Berger, *supra* note 1, at 1078-118.

36 See text accompanying note 21 *supra*.

37 Berger, *supra* note 1, at 1089 n.239.

38 Berger, *supra* note 1, at 1094-96.

Senate's demand for information on the dismissal of President Jackson's Surveyor-General, Gideon Fitz. The Senate wanted the information in connection with confirming Fitz' successor and investigating alleged fraud in the sale of public lands. Though Andrew Jackson was able to sustain his assertions of privilege, they were not based on any stronger legal argument. His refusal seems to be a most unjustifiable assertion of the privilege, because it asserts that the congressional power of inquiry does not reach former members of the executive branch even when charged with official wrongdoing.[39] One should question whether the obstinacy of Andrew Jackson before a legitimate congressional request for information should serve as controlling precedent or even persuasive evidence. Although President Jackson prevailed in his dispute with the Senate, a contemporary President did not. After first asserting that executive privilege barred all past and present presidential aides from testifying before a Senate subcommittee investigating the Watergate political espionage conspiracy, President Nixon finally acceded to the Senate demand that his aides testify. Mounting public criticism that executive privilege was being used improperly to mask their alleged involvement in criminal activities rendered the President's prior absolutist posture politically untenable.[40]

The historical precedents based on notions of separation of powers asserted by President Nixon and his predecessors[41] by no means foreclose the issue. In any case, it is well to remember that precedents in themselves do not establish constitutionality: "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."[42]

C. *Countervailing Powers of Congress*

Assuming that the arguments above establish executive privilege in some form, its appropriate scope in specific instances should be judged by balancing the executive interests in the privilege against the congressional powers which it seeks to limit. It

39 *Contra*, McGrain v. Daugherty, 273 U.S. 135, 177-79 (1926).
40 Editorial, *Mr. Nixon Turns Around*, N.Y. Times, Apr. 18, 1973, at 46, col. 1.
41 Berger, *supra* note 1, at 1078-118.
42 Powell v. McCormack, 395 U.S. 486, 546-47 (1969) (Warren, C.J.).

is on the interplay of constitutional and practical needs of both branches that analysis must focus.

The congressional power squarely challenged by executive privilege is the investigatory power which includes the power to call witnesses and subpoena documents. The roots of this legislative power are deeply embedded in English parliamentary history.[43] The article I grant of "all legislative Power" is commonly thought to imply the investigatory power. It is argued that the power to make laws comprehends the power of inquiry so that Congress can legislate intelligently. As stated by Dean Landis: "To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness."[44] Further, the power granted by article I to tax and expend revenues implies a right to supervise those expenditures, to insure that they conform with the terms of authorizing legislation.[45] The power to advise and the requirement of consent imply a duty to inquire into the qualifications of nominees.[46] Congressional supervisory power over administrative organization implies the power to inquire into administrative efficiency or corruption.[47] By similar analysis, there is a right to know which flows from each enumerated power of the legislative branch. Perhaps most importantly, the article II powers of the House to impeach and the Senate to try impeachment imply the power to inquire into almost any matter relevant

43 Watkins v. United States, 354 U.S. 178, 188 (1957).

44 Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 209 (1927).

45 *Id.* at 209.

46 It is Senator Fulbright's view that "[b]ecause the President and the Senate share the power to appoint ambassadors . . . when the Senate confirms a nomination it should have before it the same kind of information which the Executive has in making the nomination." Letter from Senator J. William Fulbright to Secretary of State John Foster Dulles, Feb. 5, 1959, in SENATE COMM. ON FOREIGN RELATIONS, 86TH CONG., 2D SESS., ADMINISTRATION OF THE DEPARTMENT OF STATE 205 (Comm. Print 1960).

47 Landis, *supra* note 44, at 196-99. Woodrow Wilson wrote that "[i]t is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. . . . The informing function of Congress should be preferred even to its legislative function." W. WILSON, CONGRESSIONAL GOVERNMENT 198 (Meridian Books ed. 1956). The Court has said that Congress may investigate alleged corruption in the Department of Justice, though the resolution directing the investigation did not expressly state that the purpose was to aid in legislation, because the subject was one on which Congress could legislate and because it would be materially assisted by the investigation if it chose to legislate in that area. McGrain v. Daugherty, 273 U.S. 132, 177 (1927) (dictum).

to the President's exercise of his duties, for certainly these powers are not to be wielded in ignorance.[48]

Of course, congressional investigative power is not unlimited. The Court has rigidly limited congressional inquiry that intrudes upon the private affairs of individuals.[49] But the Court has suggested that congressional inquiry into Government operations is not subject to such narrow constraints. In *Watkins v. United States,* the Court said in referring to private individuals that "there is no congressional power to expose for the sake of exposure,"[50] but it took care to distinguish the right of Congress to expose and publicize "corruption, maladministration or inefficiency in the *agencies of the Government.*"[51] This suggests only that Congress may have broad powers of inquiry to investigate maladministration and corruption in the "agencies of the Government."[52] It does not suggest the extent of congressional power to investigate the internal affairs of the Presidency. In the latter case, the constitutional equilibrium between the three branches embodied in the doctrine of separation of powers is most sensitive. Therefore, a court might require Congress to demonstrate a compelling legislative purpose if it sought the aid of the judicial process to enforce alleged contempt or perjury against uncooperative presidential aides.[53] Thus, the notion of "executive privilege"

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48 *See generally* R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

49 Watkins v. United States, 354 U.S. 178, 187, 198 (1957). Some basic principles for valid congressional investigation are these: The inquiry must be properly authorized by the parent house. United States v. Rumely, 345 U.S. 41, 47-48 (1953). It must be confined to a valid legislative purpose. Watkins v. United States, 354 U.S. 178, 187, 198 (1957); Barenblatt v. United States, 360 U.S. 109, 111-12 (1959). The questions must be narrowly drawn to elicit information "pertinent to the subject matter of the investigation." Watkins v. United States, 354 U.S. 178, 214-15 (1957); Barenblatt v. United States, 360 U.S. 109, 123 (1959). If these conditions are unmet, courts will refuse to lend their judicial power to punish for contempt. Gojack v. United States, 384 U.S. 702, 714 (1965).

50 Watkins v. United States, 354 U.S. 178, 200 (1957).

51 *Id.* at n.33 (emphasis added). The Court in this note quoted with approval Woodrow Wilson in *Congressional Government*: "The informing function of Congress should be preferred even to its legislative function." *See also* note 47 *supra* (discussion of McGrain v. Daugherty).

52 Watkins v. United States, 354 U.S. 178, 200 n.33 (1957).

53 *Cf.* Gibson v. Florida Legislative Comm., 372 U.S. 539, 546 (1962). Here the Court held, in striking down the state court contempt convictions of Miami NAACP members, that state legislatures must demonstrate a compelling state interest in investigating the political associations of noncommunists and communist infiltration of noncommunist groups. The first amendment considerations involved may

may only mean that there is a privilege absent compelling legislative purpose.

The doctrine of executive privilege and the countervailing congressional power of inquiry are both checks upon the arbitrary abuse of power by the opposite branch. Both are said to follow logically from policy considerations implicit in the doctrine of separation of powers. The policy favoring executive branch autonomy was meant to shield the executive branch from abusive use of the congressional power of inquiry, not to provide a sword by which the Executive might gain dominance over Congress. This is what Mr. Justice Brandeis meant when he wrote in *Meyers v. United States*:[54]

> The doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[55]

If this political theory of the Constitution has continuing vitality, then there is cause for concern if one of the checks designed "to save the people from autocracy" — the legislative power of inquiry — becomes subordinated to the Executive's "uncontrolled discretion" over the disclosure of information to Congress.

Mr. Justice Jackson's concurring opinion in the *Steel Seizure* case[56] provides a useful analysis in discussing accommodation of executive and congressional interests in areas where power is shared. In his view, article II is not a "grant in full of all conceivable executive power."[57] Rather it confers only those powers specifically enumerated therein. But enumeration does not necessarily cabin the executive power. A President acting upon the express or implied commission of Congress has broad discretion and power to deal with crises and emergencies because then his authority is at its greatest. "[I]t includes all that he possesses in his own right

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be analogous to the separation of powers considerations that arguably support executive privilege.

54 272 U.S. 52 (1926).

55 *Id.* at 293 (dissenting opinion).

56 343 U.S. 579, 634 (1952).

57 *Id.* at 641.

plus all that Congress can delegate."[58] But there is a "twilight zone" in which the President and Congress "may have concurrent authority, or in which [the] distribution [of power] is uncertain."[59] Here the powers of the Executive are what the President can make of them. And generally the personalities of the actors and the "imperatives of events"[60] have decided the tests of power between Congress and the President. Mr. Justice Jackson acknowledges that "congressional inertia, indifference or quiescence" may sometimes invite aggressive executive action; but he maintains nevertheless that presidential power is at its "lowest ebb" whenever the President acts against the expressed or implied will of Congress.[61]

The greatest conflict between the doctrine of executive privilege and the congressional power of inquiry occurs in that so-called twilight zone of concurrent authority, which includes executive agencies and the military establishment.[62] Here presidential refusals to disclose information to Congress have often found congressional acquiescence; but at other times Congress has protested vehemently and by using the political techniques available to it[63] has sometimes succeeded in obtaining the information.[64] Furthermore, Congress has enunciated in clear statutory language its right of access to executive branch documents,[65] as an expression of its article I power to legislate concerning administration of the executive branch. Although one might rightly disapprove of a congressional attempt to define its rights over the Executive by legislative fiat,[66] a statute tends to rebut any inference of acquiescence that might be drawn from congressional inertia and indicates congressional intent to preserve its right of inquiry.

58 *Id.* at 635.
59 *Id.* at 637.
60 *Id.*
61 *Id.*
62 In the opinion of the authors, Mr. Justice Jackson would include the executive agencies and the military etablishment within his "twilight zone" of concurrent authority. The President and his personal aides are very much outside this zone, and we have suggested that a congressional investigation may have to demonstrate a compelling legislative purpose before intruding upon the internal affairs of the Presidency. See text accompanying note 53 *supra.*
63 For discussion of political sanctions, see part III *infra.*
64 See notes 126-29 and accompanying text *infra.*
65 5 U.S.C. § 2954 (1970). For other examples see note 107 *infra.*
66 See note 193 and accompanying text *infra.*

Moreover, a properly drawn statute may be useful to any future Congress seeking judicial review of the question of executive privilege[67] or attempting to use threatened judicial review as a political sanction.

D. *The Scope of Executive Privilege*

Considerations developed above concerning countervailing interests and powers of the two branches must be brought to bear on the question of the proper scope of the privilege.

1. Scope of the Privilege: Personal Advisors

The separation of powers policy would arguably shelter confidential communications between the President and his personal advisors just as it would shield the confidential judge-law clerk and legislator-legislative aide relationships. Even some of the more strident congressional critics of the privilege are willing to concede that the President may invoke executive privilege to prevent Congress from questioning a presidential advisor about his confidential relationship with the President.[68] But other champions of the right of legislative inquiry, finding no explicit constitutional basis for the privilege, have been unwilling to acknowledge that even a limited "aide-privilege" exists.[69]

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67 For discussion of judicial review, see part IV *infra*.

68 Consider the statement of Senator Fulbright that "[n]o one questions the propriety or desirability of allowing the President to have confidential, personal advisors." *Hearings on Executive Privilege, supra* note 1, at 21. *See also* 119 CONG. REC. S4420 (daily ed. Mar. 13, 1973) (remarks of Senator Mansfield).

69 Note the following exchange between Professor Philip B. Kurland, Chief Consultant to the Senate Subcommittee on Separation of Powers, and Representative John E. Moss (D.-Cal.):

> Professor KURLAND. Congressman Moss, do I understand that you are saying that there are no confidential communications that the President has a right to refuse to congressional inquiry?
>
> Representative Moss. I think that where there is a strong enough need on the part of the Congress for those communications, that the Congress could compel their production.
>
> . . . .
>
> If the President wants the right to keep specific areas of communication privileged, he should come to the Congress and ask for statutory authority. I don't think he gets that right from the Constitution.

Hearings on Executive Privilege, supra note 1, at 335-36. In one sense Representative Moss is right when he asserts that the "aide-privilege" is not absolute. The House of Representatives has the "sole Power of impeachment." U.S. CONST. art. I, § 2. This power extends to any member of the executive branch; and incident to

One must assume Congress appreciates the President's difficulties in exercising control over the bureaucracy and that it applauds his effort to create order where apparent chaos existed before. Nevertheless, Congress fears an expanded bureaucracy of White House advisors.[70] Appointment solely by the President undermines the Senate's power of advice and consent, and the availability of the executive privilege claim to personal advisors reduces their accountability to Congress. Arguably bureaucratization of the Presidency may be unconstitutional if it so impairs and undermines traditional advice and consent, legislative oversight, informing, and investigative functions that Congress is rendered ineffective as an instrument of national policy and a coordinate vehicle of national government.

> The President is entitled, within the limits of the law, to organize his advisors and delegate authority among them as he sees fit. He is not, however, at liberty to create — nor is Congress at liberty to accept — a policymaking system which undercuts congressional oversight and the advisory role of the Senate in the making of foreign policy.[71]

Henry Kissinger, President Nixon's advisor for National Security Affairs, is the most cited example of the metamorphosis of the presidential administrative assistant position.[72] President Nixon has steadfastly refused to permit Dr. Kissinger to testify before the foreign policy committees of Congress.[73] Dr. Kissinger has met informally with members of the Senate Foreign Relations Committee in their private homes[74] and elsewhere,[75] and notes are some-

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an impeachment proceeding, the House could arguably inquire into confidential communications between the President and personal aides should they be relevant to the impeachment investigation. Absent an investigation incident to an impeachment proceeding, the power of the House of Representatives and the Senate to investigate alleged corruption and maladministration within the presidential inner circle may be more limited. See note 53 *supra* and accompanying text.

70 *Hearings on Executive Privilege, supra* note 1, at 22 (remarks of Senator Fulbright).

71 *Id.*

72 *E.g.*, The Development of the White House Staff, *supra* note 7, at 3023.

73 Interview with Henry Kissinger by NBC television, Feb. 25, 1973, reported in 5 NAT'L J. 387 (1973).

74 *Hearings on S. 3726 Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. 37 (1972) (remarks of Senators Sparkman (D.-Ala.), Case (R.-N.J.), and Percy (R.-Ill.)) [hereinafter cited as *Hearings on S. 3726*].

75 *Id.* at 26 (remarks of Senator Case).

times taken of the conversations.[76] Though these may be pleasant occasions[77] and may salve bruised egos, they do not solve the constitutional problem.

The exigencies of great events and the pace of modern diplomacy have in fact vested the President with the major responsibility for the conduct of foreign affairs.[78] This process has accelerated since Mr. Justice Sutherland wrote for the Court in 1936 that the President is the "sole organ of the federal government in the field of international relations."[79] But the Constitution allocates power over the conduct of foreign affairs to both the President and the Senate. *The Federalist* repudiates the view that the President was to be the sole organ of the nation in international relations.[80] Apparently the framers intended that the Senate share equally with the President in the conduct of foreign affairs.[81] A close examination of the text of the Constitution shows that the only power over the conduct of foreign affairs vested exclusively in the President is the article II power to "receive ambassadors" — even the power to "appoint ambassadors" is shared with the Senate's power of advice and consent.[82] However unrealistic it may be to argue that Congress should play a coequal role in the shaping of foreign policy, and even if history has already cast its die against that position, there is no doubt that the Constitution contemplates some foreign policy role for Congress. What disturbs many members of the Senate Foreign Relations Committee[83] is that the expanded power of personal advisors, coupled with their formal inaccessibility, leaves Congress very little role in shaping foreign policy.

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76 *Id.* at 37 (remarks of Senator Sparkman).

77 *Id.* (remarks of Senator Case).

78 Huntington, *Congressional Responses to the Twentieth Century*, in THE AMERICAN ASSEMBLY, COLUMBIA UNIVERSITY, THE CONGRESS AND AMERICA'S FUTURE 29 (D. Truman ed. 2d ed. 1973).

79 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (quoting a speech made in the House of Representatives by Mr. Chief Justice John Marshall, then a member of that body. 10 ANNALS OF CONG. 613 (1799-1801)).

80 THE FEDERALIST No. 69, at 450 (Modern Library ed. 1937) (A. Hamilton).

81 Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 55 (1972).

82 *Id.* at 4-5.

83 *E.g.*, *Hearings on Executive Privilege, supra* note 1, at 21-22 (remarks of Senator Fulbright).

2. Scope of the Privilege: The Bureaucracy

Former President William Howard Taft, speaking as Chief Justice of the Supreme Court, once described Cabinet officers as "the President's alter ego in the matters of [their department]."[84] In that sense, Cabinet officers are extensions of the Presidency. Moreover, the confidentiality of their personal communications with the President was early recognized by Mr. Chief Justice John Marshall in *Marbury v. Madison*.[85] However, power over Cabinet officers is shared, rather than exclusive. They are appointed with the advice and consent of the Senate. They must submit requests to Congress for the appropriations needed to run their departments. Their departments by constitutional implication[86] and statute[87] are subject to the congressional investigative power.

The Constitution recognizes a special relationship between Congress and the subcabinet bureaucracy by giving the Congress discretion to vest the appointment of "inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[88] Though there may be a continuum, at some point a line must be drawn which functionally distinguishes ordinary bureaucrats from presidential advisors. Presidents have argued[89] that executive privilege is necessary to shield the decisionmaking processes of the Presidency from being "second guessed" in the press and Congress. Even if this argument is accepted, it must be applied only to those who genuinely function as presidential advisors, not to the entire bureaucracy.

This distinction must be made to preserve the legislative functions of supervising the expenditure of funds, overseeing administration, and evaluating executive branch operations. In these functions congressmen have a critical need for candor at all levels of the bureaucracy, because they have no independent sources of information. Congressmen have no way to ascertain the competence of Lockheed to build the C5-A transport or the fitness of

84 Meyers v. United States, 272 U.S. 52, 133 (1926).
85 5 U.S. (1 Cranch) 137, 170 (1803) (dictum).
86 See notes 44-47 and accompanying text *supra*.
87 5 U.S.C. § 2954 (1970).
88 U.S. CONST. art. II, § 2, cl. 2.
89 *Hearings on Executive Privilege, supra* note 1, at 434 (remarks of William R. Rehnquist, then Asst. Attorney General).

Litton Industries to build ships for the Navy unless they are taken into the confidence of the executive branch. When they are denied that confidence, they must depend on gadfly critics like Ernest Fitzgerald[90] and Gordon Rule[91] for information on the extent of government waste and inefficiency. The revelations of Fitzgerald and Rule concerning Lockheed and Litton, respectively, indicate that the executive branch was less than candid with Congress and the public.

Admittedly there may be a danger to the orderly functioning of government if bureaucrats are allowed to vie for the favor of Congress and the press. But the danger to good government posed by an ignorant and uninformed national legislature may be greater. As Dean Landis said: "That [Congress] must announce a precise choice before adducing evidence necessary for a proper judgment, is to insist upon leaping before looking, to require of senators that they shall be seers. The grant of legislative powers by the founders in 1789 carried no such implications."[92]

There is, moreover, no indication that a more pluralistic bureaucracy will bring government to a halt. For example, the executive branch's conduct of national defense policies has been thought to require the greatest secrecy to strengthen security and to promote intragovernmental candor. Yet members of the Joint Chiefs of Staff are permitted by statute[93] to voice their personal views on national defense policies to congressional committees, even when those views conflict with policies espoused by the Com-

90 Fitzgerald was dismissed from his job as an Air Force cost analyst for revealing to Senator Proxmire's Joint Economic Committee the full extent of the Lockheed $2 billion cost overrun. Editorial, *The Fitzgerald Affair*, N.Y. Times, Apr. 2, 1973, at 34, col. 3.

91 Rule, formerly the Navy's top civilian procurement officer, was transferred to the staff of a logistics school at a small Washington, D.C., navy yard after he made critical remarks to a congressional committee concerning Mr. Nixon's nominee for Director of the Office of Management and Budget, Roy Ash. Rule told Senator Proxmire's Joint Economic Committee that the "Navy got sold a bill of goods" by Ash's Litton Industries and generally criticized Litton's poor performance in its Navy building contracts. 30 CONG. Q. WEEKLY REP. 3202 (1972); 31 CONG. Q. WEEKLY REP. 61 (1973).

92 Landis, *supra* note 44, at 221.

93 10 U.S.C. § 141(e) (1970). The Ninety-second Congress added a provision patterned on this statute which permits officials appointed to the foreign affairs agencies by the President with the advice and consent of the Senate to express their individual views upon request by the Senate Committee on Foreign Relations or the House Committee on Foreign Affairs. 22 U.S.C.A. § 2680(b) (Supp. 1973).

mander-in-Chief and the Secretary of Defense. Despite the sensitivity of the subject, Congress decided that it could not perform its constitutional duty to "provide for the common Defense"[94] or carry out its normal oversight and supervisory duties without access to competing points of view on defense policy.

In one celebrated case[95] of bureaucratic pluralism, numerous generals and admirals testified before a Senate subcommittee investigating the decision of the Department of Defense to award the TFX (now called the F-111) fighter plane contract to General Dynamics rather than Boeing. During the course of 10 months they heard both Navy admirals[96] and Air Force Chief of Staff Curtis Lemay[97] testify in favor of the Boeing design. Furthermore, during the course of their review of the decisionmaking process leading to the selection of General Dynamics as principal contractor for the TFX, the subcommittee had access to both tentative planning documents and internal working documents, many of which may be found in the 10-volume public record of the proceedings. In retrospect, apparently there has been no suggestion that this extensive and far-reaching investigation compromised national security or had any inhibiting effect upon candor in the upper ranks in the Navy and Air Force. In any case, in light of the later ill-fated history of the F-111,[98] congressional objections to the General Dynamics contract appear to have been well founded.

Memories of the McCarthy era make one more sympathetic to the contention that executive privilege is necessary to protect bureaucrats from irresponsible congressional harassment.[99] But

94 U.S. CONST. art I, § 8.

95 *See* Berger, *supra* note 1, at 1100.

96 *Hearings on the TFX Contract Before the Subcomm. on Investigations of the Senate Comm. on Government Operations*, 88th Cong., 1st Sess. 465 (1963) (remarks of Admiral Ashworth) [hereinafter cited as *Hearings on the TFX*]; 2 CONGRESSIONAL QUARTERLY, CONGRESS AND THE NATION, 1965-1968, at 875 (1969) [hereinafter cited as CONGRESS AND THE NATION].

97 *Hearings on the TFX*, *supra* note 96, at 695-712.

98 CONGRESS AND THE NATION, *supra* note 96.

99 Former Secretary of State Dean Acheson imagined such a case:

> With what relish one can imagine Senator Joseph McCarthy conducting these examinations [of presidential aides] without judge or defending counsel. Television would, of course, occupy half the hearing room; the press the other half. . . . What a picture presented to the world of a government as bizarre, absurd, and divided by tragic vendettas as the King of Morocco's birthday party.

Hearings on Executive Privilege, *supra* note 1, at 260-61.

this argument for a broad privilege assumes both the danger of an irresponsible Congress and a right in the executive branch to act alone and by whatever means necessary to curb congressional excesses. Certainly there is always the possibility of an irresponsible Congress, but it does not seem reasonable to suppose that executive privilege is the only or most important defense against a second McCarthy era. The courts share in the responsibility for protecting government bureaucrats from occasional harassment.

It would not be necessary to hamstring the bureaucracy or subject bureaucrats to public vilification in order to protect the congressional need to know. Diplomatic and military secrets are already made available to Congress on a classified basis. The confidential opinions of executive agency officials could be made available to the relevant congressional committees on condition that they not be incorporated into public records or otherwise made public. For example, there already exists a procedure whereby USIA makes its foreign public opinion polls available to Congress.[100] In the assessment of the Agency's former Congressional Liaison, Charles D. Ablard, this has "been most satisfactory [to the Agency], and we hope that it has been satisfactory to the Congress."[101] Proponents of the privilege argue, however, that giving Congress information on a classified or confidential basis is tantamount to publication in the press. Former Secretary of State Dean Acheson referred to the secret executive session as "that greatest of all frauds . . . where secrecy hardly outlasts the hearing hour itself, before everything said or produced is given to the press."[102] This view is vigorously rejected by Senator Stuart Symington (D.-Mo.), a former Secretary of the Air Force, who claims that during all his years of service with the two Senate committees that probably handle the most sensitive government information, Armed Services and Foreign Relations, "there has never been a leak."[103]

100 *Hearings on U.S. Government Information Policies and Practices — Problems of Congress in Obtaining Information from the Executive Branch Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pt. 8, at 3240 (1972) [hereinafter cited as *Hearings on Government Information Policies*].

101 *Id.*

102 *Hearings on Executive Privilege, supra* note 1, at 262.

103 *Id.* at 224.

There seems to be no principled way in which doctrine may be employed a priori to determine the extent of the privilege. The inexact dividing line between presidential aide and ordinary bureaucrat is likely to be given specific meaning only in particular cases.[104] Presidential aides may perform functions once performed by bureaucrats while some bureaucrats, such as Cabinet officers, have a confidential, aide relationship with the President. Nor is the extent of the privilege as a practical matter determined by doctrine alone. Rather, doctrine colors the political struggle in which accommodation is usually reached. In this struggle doctrine serves as an initial bargaining position and as a substantive constraint preventing the complete subordination of one branch to another. Our attention turns to the sanctions available to Congress in that struggle.

III. Political Sanctions of Congress

Congress has a variety of political sanctions available for attempting to coerce information from the executive branch. Notable are the power to enact laws (narrowed by the presidential veto power), the Senate's advice and consent power over appointments, and power over the purse. Though there are others,[105] the ones listed are often mentioned as proper congressional responses and provide a useful framework for discussing political sanctions. Power over the purse may be regarded as the most potent of the three, and therefore it will be given particular attention in the context of a selected case: the USIA authorizations for 1972.

104 Distinguishing between agency and presidential aide is not beyond the competence of the courts. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), held that the White House Office of Space and Technology (OST) was an agency rather than presidential staff for the purposes of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1970), and the Freedom of Information Act, 5 U.S.C. § 552 (1970). The court examined the functions of OST, legislative materials, and the executive reorganization plan which created OST. 448 F.2d at 1072-79. Similar analysis could be used in considering whether a White House office or council was presidential staff or agency in a claim of executive privilege.

105 Other possible congressional sanctions against the Executive include removal from office by impeachment by the House and trial by the Senate, and general marshalling of public opinion. These are less often proposed than those examined by this Note, presumably because the former is considered too severe to be practicable and the latter too unreliable. Judicial resolution of the conflict is discussed in part IV *infra*.

A. *The Lawmaking Power*

1. Requiring Provision of Information

Congress may enact legislation which requires the executive branch to furnish it information whenever requested. As a normal matter, presidential veto would probably be unlikely either because a President would want to avoid publicly appearing to deny Congress information, or because Congress would tie the bill to other legislation of high priority to the President.

An example of the exercise of this power occurred in August 1971, when the President invoked executive privilege to deny the Senate Committee on Foreign Relations (SCFR) access to Department of Defense military assistance five year plans. In response, SCFR added the following language to the foreign aid bill of 1971:

> The Department of State shall keep the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives fully and currently informed with respect to all activities and responsibilities within the jurisdiction of these committees. Any federal department, agency or independent establishment shall furnish any information requested by either such committee relating to any such activity or responsibility.[106]

The statute, bereft of any explicit enforcement mechanism or remedy, did not deter the President from again invoking executive privilege to protect the USIA Country Planning Memoranda only five weeks later.

This statute and others like it[107] reflect congressional impo-

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106 22 U.S.C.A. § 2680(b) (Supp. 1973).

107 *E.g.*, "Every Executive Department and independent establishment of the Government shall, upon request of the Committee on Expenditures in the Executive Departments of the House . . . or upon the request of the Committee on Expenditures in the Executive Departments of the Senate . . . furnish any information requested of it relating to any matter within the jurisdiction of the said Committee. 5 U.S.C. § 2954 (1970). This blanket provision repealed 127 special items collected at 45 Stat. 986-96 (1928). Berger, *supra* note 1, at 1112 & n.353.

A very recent example is provided by a bill introduced by Representative Fascell (D.-Fla.). 119 CONG. REC. H2344 (daily ed. Apr. 2, 1973). It would require that:

> (d)(1) Whenever either House of Congress, any committee thereof (to the extent of matter within its jurisdiction), or the Comptroller General of the United States, requests an agency to make available information within its possession or under its control, the head of such agency shall make the

tence. From both practical and theoretical perspectives, such statutes are imperfect instruments for vindicating the right of Congress to know. First, most concede that there will be occasions when the executive branch may legitimately refuse to provide information to Congress. The statute presented above provides no criteria for distinguishing proper and improper exercises of executive privilege, and it would probably be difficult to draft these into an effective statute. Second, if it is objectionable for the executive to judge the limits of its own power by asserting "uncontrolled discretion" to withhold information,[108] then it may be equally wrong for Congress to judge the limits of its own power through the simple expedient of enacting a statute. Finally, as a practical matter, the Executive will probably ignore statutory language that conflicts with his concept of constitutionally guaranteed executive privilege. But as already noted, the obligation to "take care that laws are faithfully executed" does not permit the President to refuse to enforce laws at his discretion.[109]

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information available as soon as practicable but not later than thirty days from the date of the request.

(2) Whenever either House of Congress or any committee thereof (to the extent of matter within its jurisdiction) requests the presence of an officer or employee of an agency for testimony regarding matters within the agency's possession or under its control, the officer or employee shall appear and shall supply all information requested.

(3) 'agency', as used in this subsection means a department, agency, instrumentality, or other authority of the Government of the United States (other than the Congress or Courts of the United States), including any establishment within the Executive Office of the President.

H.R. 6438, 93d Cong., 1st Sess. § (d) (1973). The proposed § (d)(3) would apparently reach executive officers lodged within the White House and ordinarily thought shielded by executive privilege. See discussion of executive privilege as to personal advisors in part II (D)(1) *supra*.

Another type of statutory response requires executive branch cooperation with GAO information gathering:

All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them, and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment.

31 U.S.C. § 54 (1970). The Comptroller General is appointed by the President with the advice and consent of the Senate for 15-year terms and is removable for cause by joint resolution of Congress after notice and hearing. *Id.* §§ 42, 43. He must submit reports to various congressional committees "from time to time." *Id.* § 60.

108 *See* Memorandum on Executive Privilege, *supra* note 23, at 3.

109 See notes 26-27 and accompanying text *supra*.

Mere enactment of a statute of this type is unlikely to resolve the conflict between the branches. Its interpretation and constitutionality are likely to become additional issues in that conflict. Nevertheless, care in drafting such a statute is central to framing judicial review.[110]

2. Regulating Invocation of the Privilege

The statutes just considered deny that there is any executive privilege to keep information from Congress. But a statute might take a different approach and acknowledge the privilege but prohibit its delegation by restricting invocation to the President. Senator Fulbright proposed such legislation in the Ninety-first Congress.[111] Section 306(b) of his bill would have prohibited an employee of the executive branch from invoking executive privilege when testifying before a congressional committee without specific written authorization from the President. The procedures proposed in § 307 for withholding information after congressional and GAO requests are similar to those contained in the President's Memorandum.[112] The differences are time limitations upon the intermediate steps in the process by which the Executive decides whether to invoke the privilege in specific cases[113] and budgetary sanctions should the President refuse both to disclose information and to invoke executive privilege within the established time.[114]

110 See part IV *infra*.

111 S. 1125, 92d Cong., 1st Sess. (1971). For discussion of S. 1125, see Note, *Policing the Privilege*, 5 J.L. REFORM 568 (1972). Senator Fulbright introduced a substantially identical bill in the first session of the Ninety-third Congress. By the provisions of a new section, when executive privilege is asserted against a congressional committee, the committee would be required to report that fact to its parent house within 10 days and to take whatever further action that body "deems proper." S. 858, 93d Cong., 1st Sess. § 306(c) (1973). Moreover S. 858 would give the executive branch only 40 days to invoke the privilege or disclose the information sought, instead of the 70 days provided in S. 1125, before funds for the program in question would be cut off. *Id.* § 307(f).

112 *Compare* Memorandum of Richard M. Nixon (Mar. 24, 1969), *supra* note 32, *with* S. 1125, 92d Cong., 1st Sess. § 307 (1971).

113 After receiving the request of a "congressional committee, subcommittee, or office" for specific information, the agency head and the Attorney General have 30 days to recommend to the President that executive privilege be invoked. If no such recommendation is made after 30 days, the agency head must furnish the information to the body which made the request. If the agency head and the Attorney General recommend invocation of executive privilege, the President has 30 more days to either invoke the privilege or furnish the information. S. 1125, 92d Cong., 1st Sess. § 307(e) (1971).

114 After the second 30-day period provided for in § 307(e), if the President has

The main concern of the Fulbright bill was to codify the principle of nondelegability, but it would have conceded presidential discretion to decide what information should be denied Congress. Proponents of the bill argue that shifting the focus from the bureaucracy to the Presidency would result in more responsible invocation of the privilege because the latter is more politically sensitive.[115] It is supposed that the publicity attendant to justifying each invocation of privilege, coupled with the political benefits of appearing to run an open Administration, will militate against abuse of the privilege.[116] This assumption may be tenuous at best. President Nixon takes pride in his "open Administration,"[117] and he has implemented a formal policy of nondelegability. Yet he has invoked executive privilege in circumstances where many observers viewed invocation as politically unwise. Moreover, it may not be politically costly for the President recurringly to deny congressional requests for information generated within the bureaucracy, if that information lacks inherent political volatility. Finally, if Congress suffers a string of defeats on the executive privilege issue, it may shrink from further challenges for fear of appearing weak and impotent in the face of executive obstinacy. Nevertheless, even if concentrating invocation in the President were to fail to mitigate abuse of the privilege, it might highlight executive noncooperation and thereby enable concerned congressmen to make abuse of privilege an issue which could command a congressional voting majority.

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neither released the information nor invoked executive privilege, the General Accounting Office can terminate funding of the offending agency after an additional 10-day period. *Id.* § 307(f).

115 *Hearings on Executive Privilege, supra* note 1, at 212 (remarks of Senator Fulbright).

116 *Hearings on Government Information Policies, supra* note 100, at 3103 (remarks of Professor Raoul Berger).

117 Consider the following statement of President Nixon:

> During the first four years of my Presidency, hundreds of administration officials spent thousands of hours freely testifying before Committees of the Congress. Secretary of Defense Laird, for instance, made 86 separate appearances before Congressional committees, engaging in over 327 hours of testimony. By contrast, there were only three occasions during the first term of my Administration when executive privilege was invoked anywhere in the executive branch in response to a Congressional request for information. These facts speak not of a closed Administration, but of one that is pledged to openness and is proud to stand on its record.

Statement by President Nixon on executive privilege, Mar. 12, 1973, reprinted in 31 CONG. Q. WEEKLY REP. 608 (1973).

It is further argued that a statute making executive privilege nondelegable will discourage evasion.[118] However, it is difficult to see how statutory codification of existing procedures will have any impact upon bureaucratic evasiveness. Administration witnesses have sometimes refused to disclose information unless confronted with a question so precisely framed as to make evasion impossible. For example, when Senator Fulbright asked a State Department witness who testified three years earlier why he left the misleading impression there was no U.S. air involvement in Laos, the official replied, "But if there were any direct questions asked of me about U.S. air operations . . . ."[119] Senator Fulbright's sharp response posed the problem for a legislature which seeks to fufill its oversight function:

> I would not wish to be too critical of you in saying that you were not asked and you did not give an incorrect answer, because we did not ask the right questions. The only way for us to get the information is if you volunteer it or to have a study like this with our staff people going out to find the information first and give it to the committee.[120]

Specific questions are impossible without general disclosure by departments of their activities. Without cooperation and disclosure, congressional committees "don't know what questions to ask."[121] In that event, a statutory procedure for compelling specific answers seems ineffective.

Still, it might be thought that a specific time limitation would reduce the bureaucratic delay which so often accompanies congressional requests for information. According to Senator Sam Ervin (D.-N.C.), bureaucratic stubbornness can outlast congressional inquisitiveness until information is "no longer perti-

118 *See* Note, *Policing the Privilege*, 5 J. L. REFORM 568, 580 (1972).

119 *Hearings on United States Security Agreements and Commitments Abroad Before the Subcomm. on U.S. Security Agreements and Commitments Abroad of the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess., pt. 1, at 547 (1971) (remark of William H. Sullivan, Deputy Asst. Secretary of State for East Asian and Pacific Affairs).

120 *Id.*

121 In the words of Senator Case, "our problem in great part is that unless we have access to complete information and unless our staff has access we don't know what questions to ask. . . . I believe it was Secretary Laird who, when he was asked, 'Why don't you tell us this?' said, 'You didn't ask me.'" *Hearings on USIA Appropriations Authorization, Fiscal Year 1973, Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. 25-26 (1972) [hereinafter cited as *Hearings on USIA Appropriations Authorization*].

nent."[122] Under the Fulbright bill the Administration would have had 70 days to provide information requested by a congressional committee from an agency or department. At the end of that time, if the President had not furnished the information or invoked executive privilege, the offending agency would be subject to a fund cutoff if GAO determined that there had been noncompliance with the statute. However, it may be objected that mandatory fund cutoff is too drastic to be a credible sanction.[123] Moreover, the procedure will be of little avail when Congress has an immediate need for information, *e.g.*, a statement of the environmental impact of a proposed nuclear test.[124] There may also be ambiguity and controversy as to when the request was actually made, due to sparring and delay at the staff level before the formal request is made by the committee chairman.

In sum, while resolving the problem of delegability, the suggested procedures would also codify the President's "uncontrolled discretion" over the scope of and necessity for executive privilege. Moreover, by shifting the focus to the President, these procedures would have the effect of insulating the bureaucracy from Congress and thus precluding productive bargaining between the two. The force of congressional sanctions against uncooperative agencies would be nullified since the agency would no longer bear direct responsibility for refusing to disclose information to Congress. Many congressmen will hesitate to punish an "innocent" agency. Finally, the suggested procedures would appear to be of little use in dealing with the problem of evasion and would not be significantly more effective in minimizing bureaucratic delay.

B. *Control by Advice and Consent*

1. Use to Force Retrospective Inquiry

The constitutional and statutory powers[125] of the Senate over the confirmation of presidential appointees may at times be uti-

122 *Hearings on Executive Privilege, supra* note 1, at 6.

123 See part III(C) *infra.*

124 *See* Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973).

125 The Constitution provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be estab-

lized as leverage to obtain information from the President. In April 1972 during the confirmation hearings of Richard Kleindienst as Attorney General, the President invoked executive privilege to prevent White House aide Peter Flanigan from testifying before the Senate Judiciary Committee on his knowledge of the Justice Department's controversial settlement of the ITT merger case.[126] Senator Ervin persuaded the Judiciary Committee to delay the Kleindienst nomination until the President permitted Flanigan to testify.[127] The President acceded to the Senate's demand and allowed Flanigan to appear under special ground rules which set limits to senatorial inquiry.[128]

Perhaps encouraged by this success, the Senate tried unsuccessfully to use the same tactic in the spring of 1973 to uncover facts relevant to alleged misfeasance by the FBI in its investigation of White House involvement in the Watergate case. Members of the Senate Judiciary Committee urged that confirmation of L. Patrick Gray as Director of the FBI be denied unless the President permitted present and former White House aides to testify to the Senate concerning allegations that confidential FBI memoranda had been misused by White House aides.[129] The President, however, found it politically more acceptable to let the Gray nomination fail[130] than to accommodate the Senate on the executive privilege issue.

Although the Senate's advice and consent power appears to be a powerful sanction, there are several arguments against using it. First, it is a haphazard political weapon because its potency de-

lished by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2. For discussion of the statutory power of advice and consent, see part III(B)(3) *infra*.

126 Letter from John W. Dean III to Senator Eastland (D.-Miss.), Apr. 10, 1972, in *Hearings on the Nomination of Richard Kleindienst to be Attorney General Before the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 1630-31 (1972) [hereinafter cited as *Kleindienst Hearings*]. For Senator Ervin's account, see 118 CONG. REC. S16460 (daily ed. Oct. 2, 1972).

127 *See Kleindienst Hearings, supra* note 126, at 1632.

128 For a summary of the ground rules for the Flanigan testimony, see *id.* at 1467, 1630. For Flanigan's testimony, see *id.* at 1685-739.

129 31 CONG. Q. WEEKLY REP. 690 (1973).

130 Gray requested that his nomination as F.B.I. Director be withdrawn April 5, 1973. N.Y. Times, Apr. 6, 1973, at 1, col. 1. For background on the nomination struggle, see 31 CONG. Q. WEEKLY REP. 551, 557 (1973).

pends on the presence of a presidential nominee before the Senate, and on whether his prior activities are related to the information sought. Second, it is unlikely to be effective unless there are genuine doubts about the nominee's qualifications or strong partisan political opposition.[131] Third, the President's nominees for high office should be considered on their merits. It is probably not in the public interest that such confirmations become embroiled in the volatile issue of executive privilege, unless the information sought by Congress is genuinely central to deliberation on the merits. Fourth, the threat of Senate veto of a nominee unless information is disclosed or a witness appears may still fail to produce the desired information or witness. As was the case in the Gray nomination, the President may withdraw the nomination or let it fail rather than compromise on the issue of executive privilege. In sum, when the President puts forth a strong nominee, the advice and consent power is unlikely to be an effective sanction. When the nominee is weak, considerations centering on the fitness of the candidate are likely to predominate and probably should.[132]

2. Use to Force Prospective Inquiry

At confirmation hearings[133] held during March 1973 the Committee on Foreign Relations used its advice and consent power to exact promises from ambassadorial and agency head nominees to comply with a statute which authorized foreign affairs agency officials "to express . . . [their] personal views, opinions, and recommendations to this committee [SCFR] at its request."[134] They promised also to answer all questions propounded by the Committee unless the President invoked executive privilege in writing and also to appear and testify upon all matters within their competency whenever requested by SCFR.[135]

131 Democrats were critical of Gray for having made speeches at Republican campaign rallies during the 1972 election campaign. For example, on Feb. 19, 1973, Senator Byrd (D.-W. Va.) said he would oppose Gray's confirmation because of Gray's "apparent political partisanship." 31 CONG. Q. WEEKLY REP. 378 (1973).

132 This argument is somewhat analogous to that at note 185 and accompanying text *infra*.

133 See *Hearings on Nominations Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess. 2 (1973) [hereinafter cited as *Hearings on Nominations*].

134 2 U.S.C.A. § 194a (Supp. 1973).

135 *See Hearings on Nominations, supra* note 133, at 2.

As one might expect, the nominees willingly agreed to each of these conditions. Though this confirmation catechism may help inculcate in the prudent diplomat or agency head an awareness of the congressional need for information, it does not resolve the problem of uncontrolled presidential discretion to invoke executive privilege. Indeed, it acknowledges that discretion by authorizing nondisclosure whenever "the President expresses in writing that he has requested [the official] to refuse to answer specific questions dealing with the specific matter because he desires to invoke executive privilege."[136]

3. Efforts to Expand the Advice and Consent Power

The Congress has tried to expand the Senate's power of advice and consent by statute[137] to militate against the loss of congressional influence resulting from transfer of the decisionmaking responsibility from departments whose heads are subject to advice and consent power, to White House councils whose directors are not. For example, the Nixon Administration has attempted to gather together the lines of responsibility for the making of foreign economic policy within a Council of International Economic Policy [CIEP]. CIEP is an adjunct of the National Security Council and coordinates foreign economic responsibilities of the Departments of State, Treasury, and Commerce.[138] In view of recent dollar devaluations and chronic balance of payments deficits, few congressmen would quarrel with the need for better coordination of foreign economic policy. But Congress does fear the creation of another White House council with broad policy responsibility

136 *Id.*

137 A bill which was passed by the Senate on Feb. 5, 1973, would have required the Director and Executive Director of the Office of Management and Budget (OMB) to be confirmed by the Senate. S. 518, 93d Cong., 1st Sess. (1973). OMB has been shielded by a claim of executive privilege as a White House agency, although its officers have testified from time to time before Congress. Success in the Senate by a 63 to 17 roll-call vote was apparently a consequence of alleged Nixon Administration abuse of executive privilege. The House passed an amended version of S. 518. 119 CONG. REC. H3228-29 (daily ed. May 1, 1973). This bill was vetoed by the President. 119 CONG. REC. S9375-76 (daily ed. May 21, 1973). His veto was overridden in the Senate, 119 CONG. REC. S9601-06 (daily ed. May 22, 1973), but sustained by the House. 119 CONG. REC. H3911-20 (daily ed. May 23, 1973).

138 For a discussion of the Council on International Economic Policy, see S. REP. No. 754, 92d Cong., 2d Sess. 12-15 (1972).

and a director as unaccountable to Congress as Kissinger is now.[139] Both SCFR and the Subcommittee on Foreign Economic Policy of the House Committee on Foreign Affairs vigorously resisted[140] the "kissingerization" of the foreign economic policy decision-making apparatus.

SCFR at first refused to authorize appropriations to run CIEP in fiscal year 1973 unless the President would submit Director Peter Flanigan's name for confirmation and thereafter permit him to testify regularly before Congress.[141] Fulbright's strategy was to use confirmation of the CIEP Director as a wedge into the executive privilege shrouded National Security Council.[142] Consequently, the Administration tried to bypass SCFR by routing the CIEP authorization request through the more pliant Senate Banking, Housing, and Urban Affairs Committee as title II of the proposed Equal Export Opportunity Act of 1972, S. 3726.[143] The bill passed the Senate in the form requested by the Administration, with a two-year authorization and no requirement of confirmation of the CIEP Director, by voice vote on June 21, 1972.[144] But when it appeared that SCFR had jurisdiction over the CIEP authorization, Senate passage was reversed by unanimous consent and S. 3726 was referred to SCFR.[145]

Senator Church supported by Senator Fulbright proposed an amendment requiring the CIEP Director to be confirmed by the Senate.[146] However, a majority of SCFR felt that all leverage over

139 *Id.*

140 *See Hearings on S. 3726, supra* note 74, at 6-10, 15-41; SUBCOMM. ON FOREIGN ECONOMIC POLICY OF HOUSE COMM. ON FOREIGN AFFAIRS, 92D CONG., 2D SESS., NEW REALITIES AND NEW DIRECTIONS IN UNITED STATES FOREIGN ECONOMIC POLICY 21 (Comm. Print 1972).

141 Nader Congress Project interview with Morella Hansen, SCFR Staff Consultant, by E. Mabry Rogers and Robert C. Randolph in Washington, D.C., Apr. 1972. According to Ms. Hansen, when it became apparent that in order to penetrate the cloak of executive privilege around the National Security Council, SCFR was delaying action on S.J. Res. 139 and 141, requested by OMB to authorize appropriations for CIEP, the Administration in effect dropped the request rather than compromise on the issues of executive privilege and confirmation of the CIEP Director.

142 *Id.*

143 SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, REPORT ON EQUAL-EXPORT OPPORTUNITY ACT OF 1972, S. 3726, S. REP. NO. 890, 92d Cong., 2d Sess. (1972).

144 FOREIGN AFFAIRS DIV., CONG. RESEARCH SERV., LIBRARY OF CONGRESS, LEGISLATIVE HISTORY OF THE SENATE COMM. ON FOREIGN RELATIONS, NINETY-SECOND CONGRESS, S. REP. NO. 98, 93d Cong. 1st Sess. 107 (1973).

145 *Id.*

146 *See id.* at 108.

CIEP would be lost by this nonnegotiable position. The President, rather than compromise, could simply withdraw the CIEP authorization request and fund it out of the Executive Office budget.[147] SCFR accepted instead a compromise proposed by Senator Javits, giving CIEP a one year authorization and leaving open for reconsideration in 1973 the issue of Senate confirmation of the CIEP Director.[148] This resolution was facilitated by a promise of CIEP Director Peter Flanigan to emulate Dr. Kissinger's practice of providing informal briefings for members of SCFR.[149] There was also sentiment among those supporting the compromise that "[c]onfirmation hearings [would] not provide sufficient leverage over CIEP, since confirmation is a one shot affair. Once he's confirmed, we've lost him, but with annual budget hearings we've got them and can keep an eye on them."[150]

This may have been too sanguine a view concerning the efficacy of congressional power of the purse for controlling the executive branch. For example, in 1972 Congress passed a law instituting periodic authorization of appropriations for USIA,[151] which had previously operated under a permanent authorization. SCFR, which had originally urged annual authorizations,[152] viewed the appropriations authorization as a mechanism for improving congressional oversight of USIA administration and heightening its responsiveness to the Committee and Congress.[153] Thus, in 1972 USIA, for the first time since its creation, had to seek authorizing legislation from SCFR for its budget.[154] Yet fear of a budgetary sanction did not deter USIA from withholding information from SCFR and recommending that the President invoke executive privilege to deny its release. The efficacy of budgetary sanctions as a tool for prying information from the Executive is examined more closely below.

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147 Nader Congress Project interview with Senator Charles Percy (R.-Ill.) by E. Mabry Rogers in Washington, D.C., July 28, 1972 [hereinafter cited as Percy Interview].

148 SENATE COMM. ON FOREIGN RELATIONS, REPORT ON EQUAL EXPORT OPPORTUNITY ACT OF 1972, S. 3726, S. REP. No. 981, 92d Cong., 2d Sess. 4 (1972).

149 Percy Interview, *supra* note 147.

150 *Id.*

151 22 U.S.C.A. § 1476 (Supp. 1973).

152 S. REP. No. 432, 92d Cong., 1st Sess. 17 (1971).

153 *Id.*

154 S. REP. No. 754, 92d Cong., 2d Sess. 3 (1972).

C. *Case Study: The Power of the Purse*

The congressman's power over appropriations is often suggested as an effective sanction against an overly secretive executive branch.[155] Among all Government agencies, USIA in 1972 appeared to be one of the most vulnerable to such a congressional sanction. It had lost the confidence of its oversight committee in the Senate, the Committee on Foreign Relations. Its mission, support of U.S. foreign policy objectives abroad through the dissemination of information, was strongly opposed and likened to the dissemination of propaganda by Committee Chairman J. William Fulbright.[156] Furthermore, USIA had no domestic constituency which could be mobilized quickly to lobby in Congress on its behalf. However, the following case study demonstrates that the power of the purse, even when brought to bear upon this relatively weak agency, is still a weapon so indiscriminate in its effects and thus politically unpredictable, as to effectively prevent its use.

On March 15, 1972, President Nixon invoked executive privilege to deny SCFR access to USIA Country Planning Memoranda.[157] This was only the third invocation of privilege acknowledged by the Nixon Administration,[158] but it was the second[159] against the inquisitive SCFR.

Committee staff had discovered the existence of the Memoranda by reading a publication by USIA which described the documents as an integral part of the USIA planning cycle: "The country and Washington element program Memoranda become the principal documents for proposing and planning program changes. When

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155 *E.g.*, Bishop, *supra* note 24, at 488.

156 *See Hearings on USIA Appropriations Authorization*, *supra* note 121, at 45-50.

157 Memorandum of Richard M. Nixon (Mar. 15, 1972), *supra* note 32.

158 31 CONG. Q. WEEKLY REP. 295 (1973) (remarks of an aide of Senator Hugh Scott, R.-Pa.). But in fact the President's Memorandum of March 15, 1972, made two invocations of privilege, bringing the total to four, not three. Memorandum of Richard M. Nixon (Mar. 15, 1972), *supra* note 32. The House Foreign Operations and Government Information Subcommittee was denied information concerning 1973 AID assistance to Cambodia, and SCFR was denied the USIA documents. 119 CONG. REC. H2242 (daily ed. Mar. 28, 1973) (remarks of Representative Moorhead, D.-Pa.); The Present Limits of "Executive Privilege," *supra* note 2, at H2245. The Library of Congress study lists 15 other occasions on which executive departments and agencies denied Congress information during the Nixon Administration. *Id.*

159 31 CONG. Q. WEEKLY REP. 295 (1973); The Present Limits of "Executive Privilege," *supra* note 2, at H2245.

proposing changes, the Memoranda must detail explicitly the what, how much, and the why of the proposals, including discussion of possible alternatives."[160] If these documents were so useful to the Agency in planning and budgeting, then Senator Fulbright concluded that they would be "of particular assistance to [SCFR members] in connection with the Agency's authorization hearings."[161] USIA denied an SCFR staff request for the documents on the ground that the planning papers were "substantially in the nature of internal planning or working documents which are in many cases unapproved and in a raw form."[162] Chairman Fulbright then demanded that USIA Director Frank Shakespeare reconsider his decision and reply no later than March 10, 1972. However Shakespeare did not respond until the 16th,[163] one day after the President invoked executive privilege to deny access to the documents.

On April 10, 1972, SCFR voted 15 to 0 to impose sanctions (then unspecified) upon USIA in retaliation for the President's invocation of executive privilege.[164] Later, by a 9 to 4 vote,[165] the Committee cut the USIA budget by $45 million when $200 million had been requested, with the bulk coming from USIA's media services.[166] The Committee said that its decision was "based in large part on the Agency's refusal," but that as a result of USIA's action the Committee was being asked to approve the budget request "in the blind" and that it was therefore giving the American taxpayer the "benefit of the doubt."[167] Thus the reduction was cast both as a sanction and as a consequence of being insufficiently informed to authorize expenditures in good faith.

Procedural aspects of the Committee's April 17th markup were

160 UNITED STATES INFORMATION AGENCY, THE AGENCY IN BRIEF 1972, at 19 (1972).
161 Letter from Senator Fulbright to Frank Shakespeare, USIA Director, Mar. 1, 1972, in S. REP. No. 754, 92d Cong., 2d Sess. 54 (1972).
162 Letter from Charles D. Ablard, USIA General Counsel and Legislative Liaison, to Robert Dockery, SCFR Staff Consultant, Feb. 28, 1972, in S. REP. No. 754, 92d Cong., 2d Sess. 55 (1972).
163 Letter from Frank Shakespeare to Senator Fulbright, Mar. 16, 1972, in S. REP. No. 754, 92d Cong., 2d Sess. 51 (1972).
164 Unpublished committee vote in files of the Senate Committee on Foreign Relations, United States Capitol, Washington, D.C.
165 118 CONG. REC. S7014 (daily ed. May 1, 1972) (remarks of Senator Fulbright).
166 S. REP. No. 754, 92d Cong., 2d Sess 51 (1972).
167 *Id.* at 51, 55.

later to cause considerable dissension within SCFR.[168] As a result, Senator Fulbright was unable to take to the Senate floor a Committee unanimously in favor of disciplining USIA. The floor fight to restore the cuts was led by a member of SCFR, Gayle McGee (D.-Wyo.), who thought that Chairman Fulbright had acted high-handedly and arbitrarily by marking up the USIA authorization while he was out of town.[169] Furthermore, Senator McGee was aided by an Administration lobbying effort which assigned top priority[170] to restoring the USIA cuts and which ultimately succeeded.[171]

In debate, Senator Fulbright tried to focus on the issue of executive privilege and avoid discussion of the merits of the Agency, although he admitted that in his mind there was "very great question about the merits of some of the Agency's activities."[172] He queried his colleagues: "Will the Senate assert its right to information so that it can properly discharge its responsibilities or will it bow to the will of the executive?"[173] These responsibilities,

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168 Senator McGee was away from Washington on April 17, but he left instructions with Committee Chief of Staff Carl Marcy that both his proxy and that of Senator Sparkman (which Senator Sparkman had earlier given to Senator McGee) were to be voted with the Administration position on the USIA authorization. Marcy, however, noted that McGee had voted earlier to discipline USIA on the executive privilege issue. See text accompanying note 164 *supra*. He wrote Chairman Fulbright expressing his doubt as to whether the proxies of Senators McGee and Sparkman should be voted for the full authorization in view of Senator McGee's previous vote. Senator McGee was angered upon returning to Washington to find that his proxy had not been voted, while Senator Fulbright had voted five proxies (Senators Mansfield, Church, Symington, Pell, and Muskie) in obtaining Committee approval of the USIA cuts. In executive session shortly thereafter, Senator McGee reportedly objected to the fact that an important decision had been made with only six members of the Committee present, and he inquired why his proxies had not been voted. Senator Fulbright pointed out that Senator McGee knew in advance that there would be a markup and could have made an effort to be there. He explained further that his failure to vote the proxies of Senators McGee and Sparkman represented good faith uncertainty about their position on this USIA sanction, given their previous vote in favor of a sanction and Marcy's communication to him before the vote. Nader Congress Project interview with Carl Marcy, SCFR Chief of Staff, by Robert C. Randolph in Washington, D.C., Aug. 16, 1972.

169 *Id.*

170 Nader Congress Project interview with William MacComber, Deputy Under Secretary of State for Management, by Robert C. Randolph and E. Mabry Rogers in Washington, D.C., Aug. 8, 1972.

171 The Senate passed Senator McGee's amendment restoring the proposed cuts in USIA funding by a vote of 57 to 15. 118 CONG. REC. S7045 (daily ed. May 1, 1972).

172 *Id.* at S7014.

173 *Id.* at S7017.

he reminded his fellow Senators, were a "voice in the policymaking, decisionmaking processes"[174] and "legislative oversight responsibilities."[175] Senator Fulbright admonished his colleagues to prevent further erosion of these responsibilities by asserting "[t]he only thing left to Congress . . . the power of the purse."[176] He warned that if the Senate voted to restore the funds as Senator McGee proposed, the executive branch would be given a " 'green light' . . . in its determination to withhold information from the Senate and the Congress as a whole."[177]

Success in political conflict often depends upon skill in defining and communicating the issue at stake. Senator Fulbright sought to sketch the conflict in terms of the limits of presidential privilege to deny Congress information and to link this to the larger issue of congressional participation in policymaking. Senator McGee, however, was able to offer a competing definition of the controversy which had broad appeal and proved dispositive—the survival of the Agency. He told his fellow Senators that cutbacks of "almost 30 percent of the operating budget of the USIA would, in effect, cripple a small agency with a big and important job."[178] USIA would have to close down in 30 countries, cease broadcasting over Voice of America in 25 of 36 languages, terminate many valuable publications abroad and cut its motion picture capability by 50 percent.[179] Especially hard hit, Senator McGee continued, would be the countries of Eastern Europe, including the Baltic States, and sub-Saharan Africa where American efforts to communicate with "50 million Africans" would be "largely curtailed."[180]

Senator McGee's appeal fell on fertile soil. Liberals like Senator Brooke (R.-Mass.) were "appalled" by the effect that the proposed cutback would have on the continent of Africa,[181] while conservatives like Senator Allen (D.-Ala.) lamented that permitting the cuts to stand would be "cause for rejoicing by those governments

174 *Id.*
175 *Id.* at S7014.
176 *Id.* at S7023.
177 *Id.* at S7014.
178 *Id.* at S7012.
179 *Id.* at S7011.
180 *Id.* at S7012.
181 *Id.* at S7041.

that have chosen to be our adversaries."[182] This unlikely coalition of conservatives and liberals evinced the broad appeal of Senator McGee's counter-issue.

Other Senators argued that to sustain the reduction would merely injure subordinate organizations ordered by the President not to disclose information, while delivering no more than an ineffective "glancing blow" to the party responsible for invoking executive privilege.[183] This illustrates how the President, by taking full responsibility for invocation of the privilege and making it nondelegable, can provide the "offending agency" with relative immunity from congressional sanctions.[184]

Senator McGee's strategy in this case suggests that opponents of budgetary sanctions in similar instances will try to shift debate to the merits of the agency whose funds are threatened. Supporters of the agency will argue that a sanction will damage the agency for reasons which have no substantive relationship to the agency's statutory purpose or demonstrated talents. The notion of a sanction necessarily implies that more money is to be withheld than if the agency's merits were the only consideration. Furthermore, a program in trouble for substantive reasons seems more likely to be a target for sanctions. In such a case, opponents of the sanction would be more reluctant to shift the issue to the merits of the agency, and hence proponents would be able to focus more sharply on the executive privilege issue. But it would be uncertain whether executive privilege was the principle issue or merely a technique for substantive attack on the agency.[185]

In sum, rarely will a budgetary sanction produce a "bright-line"

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182 *Id.* at S7029.

183 *Id.* at S7034 (remarks of Senator Javits).

184 See the discussion of the effects of statutes regulating the privilege in part III-(A) *supra.*

185 Certainly doubt concerning the continued relevance of USIA's traditional activities was an element in SCFR's 1972 hearings. Chairman Fulbright confessed his difficulty in distinguishing between whether the Agency genuinely informed persons abroad or whether it instead served primarily as a "propaganda" vehicle for American foreign policy. *Hearings on USIA Appropriations Authorization, supra* note 121, at 7. He questioned the efficacy of USIA's jamming Radio Moscow, preparing nonattributed propaganda pamphlets for distribution by foreign governments and American private industry abroad, printing 30,000 portraits of the Prime Minister of Laos and publishing a progovernment newspaper there, and commemorating the tenth anniversary of the Berlin Wall throughout its radio network. *Id.* at 28, 62, 394, 10.

executive privilege issue. Much depends on the political skills of those who shape the issue, and presidential supporters will always have an opportunity to shape the issue in competing terms. Precisely because the sanction is political, its invocation depends on relative bargaining power between forces within Congress. In the USIA case, some Senators may have responded in strictly partisan terms. Presumably others took the McGee and Fulbright arguments, balanced the effectiveness of the sanction against its harm to the public welfare and national interest, and decided that the merits of the program outweighed the limited effectiveness of the sanction. Both responses suggest that budgetary sanctions against presidential invocation of executive privilege will rarely succeed.

At least three factors that seem relatively unique to this case also influenced its outcome. First, Senator Fulbright's influence in the Senate had reached its nadir. The McGee forces skirted the merits of the executive privilege issue by implicitly alleging irascibility, arbitrariness, and high-handedness in the SCFR Chairman. Newspaper articles inserted into the *Congressional Record* alleged some of Senator Fulbright's major motives for cutting USIA funds to be his ideological and personal conflict with Agency Director Frank Shakespeare, his pique at being called "naive and stupid" by an Agency employee, and simple "spite."[186] In one sense the fact that Senator Fulbright is something of a maverick and is strongly opposed to most of the Nixon Administration's foreign policy may partially explain why he lost so badly. This interpretation undercuts the argument that the issue of imposing a congressional sanction against executive privilege was clearly delineated and posed at all. But some of those very qualities which contributed to Senator Fulbright's defeat also may have inspired him to challenge the growing power of the executive branch. Though out of step with the Senate and the country in 1972 on the executive privilege issue, Senator Fulbright may simply have been ahead of his time,[187] as he was with the China and Vietnam issues. In time a majority of Congress may accept

186 *E.g.*, 118 CONG. REC. S7043 (daily ed. May 1, 1972).

187 According to one SCFR staff consultant, who asked to remain anonymous, "Fulbright is like DeGaulle — arrogant, very bright, ahead of his time, and ultimately right." Nader Congress Project interview by Robert C. Randolph in Washington, D.C., July 1972.

his views on the executive privilege issue and successfully challenge the President, though perhaps coalescing around a more "representative" Senator such as Senator Ervin.

Second, Senator Fulbright made tactical errors and allowed himself to be badly outmaneuvered on the Senate floor. He could perhaps have made his point as effectively with a compromise tactic, a smaller cut coupled with the promise of a supplemental appropriation should USIA provide the information. Several Senators during the course of debate indicated their preference for a smaller cut to force the executive privilege issue without dismembering the Agency.[188] But Senator Fulbright had foreclosed maneuverability by agreeing beforehand, as Senator McGee announced upon opening debate,[189] that there would be no amendments to the McGee amendment without the unanimous consent of the Senate.[190] This precluded Senate consideration on the floor of a smaller cut and contingent supplemental appropriation.

Third, still another counter-issue was available to Senator McGee in that SCFR had proposed in another section of the Foreign Relations Authorization Bill, S. 3526, a foreign policy study commission "to make a long-range, in-depth study of the governmental mechanisms and programs for the making and conduct of foreign policy [and to] . . . submit findings and recommendations to provide a more effective system for the formulation and implementation of the Nation's foreign policy."[191] Senator McGee argued, rather persuasively, against taking a "meat-axe" to USIA in advance of such a commission's findings. The Senate would "look foolish" if it cut USIA funds and later a commission recommended that this Agency be restored to its present capabilities — even augmented."[192]

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188 *E.g.*, 118 CONG. REC. S7028 (daily ed. May 1, 1972) (remarks of Senator Aiken, R.-Vt.); *id.* at S7044 (remarks of Senator Case, R.-N.J.).

189 *Id.* at S7011.

190 The principal proponent and opponent of an amendment will often agree beforehand that there shall be no further amendments unless all Senators then present on the floor unanimously agree. This procedure expedites deliberations by keeping the issue on the floor relatively simple and is a courtesy to allow members a "straight up and down" vote on an issue.

191 S. REP. No. 754, 92d Cong., 2d Sess. 2, 11 (1972).

192 118 CONG. REC. S7045 (daily ed. May 1, 1972).

D. *Political Sanctions: Conclusions*

In a practical context the effectiveness of political sanctions in checking expansion of the privilege is problematical. It is difficult to isolate the scope of the privilege as an issue and debate it squarely on the merits. Other factors will always cloud the issue, such as the skills and personalities of key participants, and the merits of the agency as in the USIA example. The often forgotten public interest may suffer if Congress must cut the funds of a useful program in order to vindicate its constitutional role. Certainly Congress should invoke an appropriations sanction if the long-term public interest in reasserting congressional authority outweighs the short-term public detriment. This is a difficult assessment to make, and particularly so for Congress, because its deep immersion in the conflict may taint its objectivity. Further, it is central to Anglo-American jurisprudence that an interested party should not be allowed to decide his own case. Neither branch, therefore, is genuinely qualified to judge the limits of its own power. The conflict between them puts the delicate constitutional balance of powers in the federal government at issue, and neither party can be expected to give adequate deference to the interests of the other or to preservation of that balance. Professor Berger has written that "[n]either the Congress nor the nation can be content to have the executive branch finally draw constitutional boundaries when the consequence is seriously to impair a legislative function that is vital to the democratic process. No more can Congress decide the scope of executive power."[193] These considerations suggest review by a third party, the Court.

IV. Judicial Review

Congress[194] could frame judicial review of the conflict between the two branches over the scope of the privilege in one of three

193 Berger, *supra* note 1, at 1361.

194 Evidently an executive department could seek a declaratory judgment as to whether it was required to comply with an information request of Congress. *Id.* at 1334. The discussion herein examines only strategies available to Congress for framing judicial review. Note, however, that the "case or controversy" requirement must be met for actions under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1970). Considerations indicated immediately below as to that requirement in a suit by

ways. In theory, Congress could sue an entity of the executive branch for violation of a statute requiring the Executive to provide information to Congress[195] or for redress of its constitutional right to such information, pursuant to proper Senate or House resolutions. Second, Congress may initiate criminal contempt proceedings against a party who, properly "summoned as a witness . . . to give testimony or produce papers upon any matter under inquiry"[196] before the Congress, refuses to testify or give over the requested documents. Presumably, judicial review could arise upon appeal of the contempt conviction. Finally, Congress has its own summary contempt powers to punish recalcitrant or contumacious witnesses with imprisonment in the Capitol guardroom or the District of Columbia jail. Review would be appropriate when the offender sought release on a petition for writ of habeas corpus.

In the first of these, the proposed action would be scrutinized as a preliminary matter against the "case or controversy" requirement of article III and against judicial doctrines of standing. To satisfy the former, disputes should show "the essentials of an adversary proceeding involving a real, not a hypothetical controversy . . . ."[197] The dispute here is over the boundary line between executive and congressional powers and would seem to present the requisite adversity. Suits between different entities of the Government are now "commonplace."[198] They neither are nor should be considered to lack the requisite adversity on the reasoning that the plaintiff and defendant are both one party and must necessarily have an identity of interest.[199]

According to the Court in *Association of Data Processing Service Organizations v. Camp,* "[t]he question of standing . . . concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the

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Congress against the Executive would be as relevant if the parties were reversed. There would also be the additional considerations related to anticipatory litigation.

195 See notes 106-07 and accompanying text *supra.*

196 2 U.S.C. § 192 (1970).

197 Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 264 (1933).

198 Berger, *supra* note 1, at 1335.

199 *Id.* at 1335-41.

statute or constitutional guarantee in question."[200] There is the concern that the interests litigated be those of the parties before the Court, both so that the interests of non-parties will not be litigated and so that the parties will have "such a personal stake in the outcome"[201] that issues will be presented sharply. If it is accepted that the alleged injury to the legislative powers of Congress presents a case or controversy in the constitutional sense, then it follows that Congress would be the proper party to litigate that injury and would therefore have standing.

Whether a particular subentity of Congress would have standing is more problematical. The specific injury would be to a particular committee in a suit under a statute requiring the Executive to provide information to congressional committees upon request. The Court has been hesitant to imply a capacity to sue in particular committees. In *Reed v. County Commissioners of Delaware County*,[202] the Supreme Court held that a Senate committee was not authorized to sue under the resolution authorizing it to investigate. The Senate immediately responded by passing a resolution that authorized "any committee of the Senate . . . to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction."[203]

The Court, finding no authority to sue under the first resolution, did not reach the further question of whether mere resolution of the Senate would suffice.[204] In any case, Congress could confer by statute the power to sue on any of its subentities.[205] Further, the Senate resolution that responded to *Reed* also pro-

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200 397 U.S. 150, 153 (1970).

201 Baker v. Carr, 369 U.S. 186, 204 (1962).

202 277 U.S. 376 (1928).

203 S. Res. 262, 70th Cong., 1st Sess., 69 CONG. REC. 10596 (1928). S. Res. 262 is now Senate standing order 77. COMMITTEE ON RULES AND ADMINISTRATION, SENATE MANUAL, S. Doc. No. 92, 92d Cong., 1st Sess. 104 (1971).

204 Senator Thomas Reed of Missouri, who introduced S. Res. 262, did not believe it necessary to enact a law, as the following exchange with Senator Reed Smoot of Utah indicates:

> Mr. SMOOT. Mr. President, it is my opinion that that would have to be an act of Congress, and not merely a resolution of one body.
>
> Mr. REED of Missouri. I have examined the opinion of the Supreme Court recently rendered, and I am satisfied that this resolution will meet the requirements of the decision.

69 CONG. REC. 10596 (1928).

205 Berger, *supra* note 1, at 1334 & n.631, 1348.

vided that a committee bringing suit could choose to be represented by the Department of Justice or by "such attorneys as it may designate."[206] This provision is relevant to the problem that representation of the United States and its agencies and officers is confined by statute to the Department of Justice, under the direction of the Attorney General.[207] In a suit between Congress and the executive branch, it is probable that the Department would choose, or be ordered, to represent the Executive. It is doubtful that Congress would want Department of Justice representation, because of the implicit conflict of interest involved. Nor would it be appropriate for the Department to represent both parties. If there is doubt that a resolution could empower either House or a committee of Congress to select its own counsel, then the authority could be provided by statute.[208]

A suit against the Executive that passes beyond the threshold considerations of adversity and standing is likely to meet the argument that the issue is a "political question" better resolved by Congress and the President than by the Court. One can understand and sympathize with the Court's concern that intervention may both provoke a potentially embarrassing confrontation with the other branches and damage the Court's position as a coordinate branch of government. Although both President Nixon[209] and members of Congress[210] have welcomed a judicial decision on the question of executive privilege, one Justice has already stated that the Court probably would not hear such a case.[211] A reluctant Court would find some comfort in the language of *Baker v. Carr*.[212] There the Court states that a political question arises from the coordinate relationship of the three branches of the federal government and not from the relationship between the federal judiciary and the states, as in the Tennessee reapportionment case before it.[213] The Court said that it would refrain from

206 S. Res. 262, 70th Cong., 1st Sess., 69 CONG. REC. 10596 (1928).
207 28 U.S.C. § 516 (1970).
208 Berger, *supra* note 1, at 1334 nn.631 & 632.
209 31 CONG. Q. WEEKLY REP. 661 (1973) (text of President Nixon's press conference of March 15, 1973).
210 *E.g.*, 118 CONG. REC. S7034 (daily ed. May 1, 1972) (remarks of Senator Javits).
211 Weiner, *Stewart Doubts Supreme Court Ruling on Executive Privilege*, HARV. L. RECORD, Mar. 23, 1973, at 1.
212 369 U.S. 186 (1962).
213 *Id.* at 210.

deciding as a political question when the matter had "in any measure been committed by the Constitution to another branch of government."[214] But the Court warned that it was not barred by the doctrine of political question from deciding whether one branch had exceeded the authority committed to it by the Constitution.[215] That "delicate exercise in constitutional interpretation . . . is . . . a responsibility of this court as ultimate interpreter of the Constitution."[216]

Thus, even to bring the political question doctrine to bear upon the executive privilege issue, the Court must first implicitly decide that in asserting discretion to control disclosure of information to Congress, the President does not exceed the powers committed to him by the Constitution. The rule of decision for this latter question is that there must be a "textually demonstrable commitment"[217] of the challenged action to the defendant branch of the Government. It is at least doubtful that the article II command that the President "shall take care that the laws be faithfully executed"[218] is such a "textually demonstrable commitment" of discretion to the Executive to control information disclosure to Congress.

Powell v. McCormack[219] teaches that "textually demonstrable" refers to an explicit commitment. There the Court passed on the question whether the House of Representatives had exceeded its constitutional authority in excluding Adam Clayton Powell, as Representative-elect from New York's 18th Congressional District, from his seat in the Ninetieth Congress for allegedly improper behavior. Powell and 13 voters from his district brought suit charging that the exclusion was unconstitutional. Article I, § 2, clause 3 provides three qualifications for election to the House;[220] and Powell had met these. The defendants countered that the power of the House to exclude members was a nonjusticiable

214 *Id.* at 211.
215 *Id.*
216 *Id.*
217 Powell v. McCormack, 395 U.S. 486, 518 (1969).
218 U.S. CONST. art. II, § 3.
219 395 U.S. 486, 547-48 (1969).
220 "No person shall be a Representative who shall not have attained to the Age of twenty-five years, and been seven years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2.

political question by virtue of article I, § 5, which commits to each House the power to judge the elections and qualifications of its own members and to punish them for misbehavior. The Court held that the House could exclude Powell only on a finding that he failed to meet one of the three requirements, even though they could expel a seated member by two-thirds vote, and that he had been wrongly excluded.[221] The Court construed article I, § 5, as "at most a textually demonstrable commitment to Congress to judge only the qualifications expressly set forth in the Constitution."[222]

In *Powell,* it was at least arguable that the article I, § 5, grant of power to each House to judge the qualifications of its members included the power to exclude members for misbehavior. This construction was supported by previous instances in which the House had excluded members-elect by majority vote for reasons other than those found in article I, § 2, clause 3.[223] With executive privilege, however, there is no evidence of an arguable "textually demonstrable commitment" to the Executive. Presumably argument for the Executive would rely on the separation of powers precedents to demonstrate a political question. We have already noted that some precedents are ambiguous, while others are divided. Even if all precedents supported the Executive's position, *Powell* warns that an unconstitutional precedent "does not render that same action any less unconstitutional at a later date."[224]

In sum, when one branch exceeds its constitutional authority, the controversy is not a political question according to *Baker v. Carr* and *Powell v. McCormack,* and the Court may have a constitutional obligation to decide the limits of the powers committed to that branch.[225] However, some commentators[226] and jurists[227] have nonetheless suggested that even where there is no explicit constitutional commitment of a matter to another branch of the Government, Supreme Court review may still be discretionary

221 Powell v. McCormack, 395 U.S. 486, 548, 550 (1969).
222 *Id.* at 548.
223 *Id.* at 544-46.
224 *Id.* at 546-47.
225 *Id.* at 521; Baker v. Carr, 369 U.S. 186, 211 (1962).
226 Bickel, *Foreword: The Passive Virtues,* 75 HARV. L. REV. 40, 46 (1961).
227 Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting); L. HAND, THE BILL OF RIGHTS 1-30 (1958).

due to a lack of judicial standards for resolving the dispute or due to the prospect of conflict with a coordinate branch of government resulting from judicial intervention.

Whether there is an executive privilege and how far it extends is a constitutional question for which the Court is not devoid of standards. The Court has asserted its competence to decide whether a privilege attaches to sensitive Government information sought by private parties involved in litigation with the Government.[228] The courts make similar judgments frequently in suits[229] brought under the Freedom of Information Act.[230] Judicial reluctance to intervene in the executive privilege controversy would seem to be predicated more on the risk of conflict with the other branches, than on any lack of standards for judicial decision.

Powell v. McCormack rejected the argument that the Court, even when finding no "textually demonstrable commitment," should abstain where there is a possibility of potentially embarrassing confrontation between the coordinate branches.[231] Certainly there is greater risk of confrontation with the Executive in an executive privilege case than there was with Congress in the *Powell* case. There, the Court did not have to fashion coercive relief in an order to the Ninetieth Congress to seat Powell, because by the time the case was decided the Ninetieth Congress had terminated and Powell had been seated in the Ninety-first Congress.[232] But the Court refused to dismiss the suit as moot because they found that Powell's claim for back salary still presented a viable controversy.[233] Deciding that issue posed no immediate risk

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228 United States v. Reynolds, 345 U.S. 1 (1953). The Court upheld a privilege in the Government to withhold military secrets sought as evidence in private litigation against the Government, but it reasoned that:

> The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing disclosure of the very thing the privilege is designed to protect.
>
> . . . .
>
> . . . Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.

Id. at 8, 9-10.

229 Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). *See* note 104 *supra.*

230 5 U.S.C. § 552 (1970).

231 395 U.S. 486, 548 (1969).

232 *Id.* at 495.

233 *Id.* at 496.

of confrontation with Congress because Powell had asked only for declaratory relief,[234] which, if granted, would lead only to a suit in the Court of Claims for the sum due. But in a suit between the branches on the executive privilege issue, a congressional petition for declaratory relief would probably be used as a "springboard" for coercive relief against the Executive, if the latter persisted in noncooperation. Thus, the declaratory judgment expedient might avoid a potentially embarrassing confrontation between the Court and the Executive only in the short run. Nevertheless, the *Powell* Court stated quite categorically: "The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility."[235] A footnote to that sentence warned that it was " 'an inadmissable suggestion' that action might be taken in disregard of a judicial determination."[236] Hence that argument should be disregarded, though it is sometimes raised as an objection to the Court's deciding a case otherwise properly before it.

When confronted with the refusal of an Administration official to testify or produce documents, Congress might avoid the "political question" problem altogether by initiating a contempt proceeding under 2 U.S.C. § 192, which makes it a misdemeanor to fail to testify or produce documents in a valid congressional investigation. Under a companion statute, when the Speaker of the House or the President of the Senate "certify" such refusals to the appropriate United States Attorney, he is then bound to bring the matter before a grand jury.[237] But Congress could hardly rely on the Attorney General to seek an indictment and initiate a prosecution against a member of the President's Administration. It might expect the Attorney General to argue that Congress could not constitutionally command him to initiate such a proceeding. However, Congress could by statute create a special prosecutor with authority to bring actions under 2 U.S.C. §§ 192, 194.

A proceeding under the contempt statute must be artfully conceived and carefully prosecuted in order to avoid dismissal. The

234 *Id.* at 517-18.
235 *Id.* at 549.
236 *Id.* at n.86.
237 2 U.S.C. § 194 (1970).

Supreme Court's unfriendly scrutiny of the HUAC contempt convictions indicates the type of review that Congress could receive from a reluctant or unfriendly Court. From *Watkins*[238] in 1957 to *Gojack*[239] in 1966, the Court reversed contempt convictions, for example, where the pertinency of the questions had not been brought home to the witness at the time of the refusal to answer,[240] where the committee's questions were not pertinent to the subject of inquiry,[241] where the indictments failed to identify the subject under inquiry at the time the witness was interrogated,[242] and where the investigation had not been properly authorized by the parent House.[243]

If Congress wishes to avoid this narrow line established by judicial construction of the statutory contempt power, there is a third technique available for framing judicial review. As Justice Clark noted, dissenting in *Russell v. United States:*

> [T]he Court has now upset 10 convictions under § 192. This continued frustration of the Congress in the use of the judicial process to punish those who are contemptuous of its committees indicates to me that the time may have come for Congress to revert to "its original practice of utilizing the coercive sanction of [summary] contempt proceedings at the bar of the House [affected]."[244]

The summary contempt power originated in precolonial English parliamentary procedures; but unlike the English practice, congressional contempt has from the earliest days been subject to judicial review.[245] Since World War II, Congress has practically abandoned its original practice of using summary contempt to discipline recalcitrant witnesses. There has been no case in the Supreme Court since *Jurney v. McCracken*[246] in 1935.

The mechanics of the summary contempt proceeding are rather simple. Sam Ervin, chairman of the Senate committee investigat-

238 Watkins v. United States, 354 U.S. 178 (1957).
239 Gojack v. United States, 384 U.S. 702 (1966).
240 Watkins v. United States, 354 U.S. 178 (1957).
241 Deutch v. United States, 367 U.S. 456 (1961).
242 Russell v. United States, 369 U.S. 749 (1962).
243 Gojack v. United States, 384 U.S. 702 (1966).
244 369 U.S. 749, 780-81 (1962) (citing Watkins v. United States, 354 U.S. 178, 206 (1957)).
245 Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1820).
246 294 U.S. 125 (1935).

ing Watergate, recently threatened[247] to send the Sergeant at Arms of the Senate and his posse to arrest White House aides who refused to testify before his committee. This is not an inaccurate description of the procedure. Traditionally, whenever an official refused to produce documents, appear as a witness, or answer questions before a properly authorized committee, the committee could notify the President of the Senate or the Speaker of the House, who would swear out a warrant for the arrest of the offending official and then summon the Sergeant at Arms to arrest the offender,[248] "and clap him into the common jail of the District of Columbia or the guardroom of the Capitol Police."[249]

If the committee seeking the information was properly authorized, and if the information bore some relation to a legitimate legislative purpose, then the Congress would probably be able to obtain judicial review of the merits, incident to the offender's petition for writ of habeas corpus challenging the authority of Congress to hold him in custody.[250] The Court could only dismiss the habeas corpus proceeding as a political question if it were prepared to accept the notion that Congress could imprison an executive officer "without hindrance."[251] To do so would denigrate that officer's personal, constitutional right to habeas corpus.[252] Hence problems of requisite adversity, standing, and political question are unlikely to arise.

It seems paradoxical that justiciability of the executive privilege issue could turn on the procedure employed to bring the matter before the courts. Judicial reluctance to review the issue as a political question tends to force Congress toward self-help through use of these summary contempt powers. But congressional resort to self-help does raise the prospect of judicial review of the executive privilege issue. Such development is welcome. Crippling the legislative functions of Congress through abusive reliance on the doctrine of executive privilege presents a grave threat to the

247 31 CONG. Q. WEEKLY REP. 654 (1973).

248 *Hearings on Government Information Policies, supra* note 100, at 3128 (remarks of Professor Berger); *see* McGrain v. Daugherty, 273 U.S. 135 (1927); Jurney v. McCracken, 294 U.S. 125 (1935).

249 Bishop, *supra* note 24, at 484.

250 Jurney v. McCracken, 294 U.S. 125, 152 (1935).

251 Berger, *supra* note 1, at 1359.

252 U.S. CONST. art. I, § 9.

continued constitutional equilibrium between the branches of government. Indeed, it is a form of self-help by the Executive, one that does not necessarily lead to judicial review. Judicial abstention from the issue would represent an abdication of the Court's constitutional duty to interpret the Constitution.

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INCOME MAINTENANCE: NIXON'S FAP, MCGOVERN'S UTC, THE NEW BRITISH PROPOSAL, AND A RECOMMENDATION

Introduction

In the last four years, three income maintenance proposals — President Nixon's Family Assistance Program (FAP), presidential nominee George McGovern's universal tax credit proposal (UTC), and the British Treasury's tax credit proposal — have become major political and legislative issues.[1] After both the Ninety-first and the Ninety-second Congresses failed to enact FAP, President Nixon decided to drop income maintenance from his legislative program in the Ninety-third Congress.[2] In the meantime Senator McGovern's UTC proposal had proved to be one of the biggest political disasters of his presidential campaign.[3] While these developments have cast doubt on the future of income maintenance in America, the British Treasury's proposal has, it would seem, been received enthusiastically.[4]

This Note focuses on the relevance of the British proposal to the future of income maintenance in America. The British proposal offers a creative balance between the twin goals of maximizing work incentives and minimizing cost. Nixon's FAP and McGovern's UTC failed to balance these goals satisfactorily, and this Note will begin with a review of the problems which arose under these plans. FAP, which has already been extensively analyzed in the literature,[5] is examined to show how it did not adequately solve the problems of providing good work incentives and ensuring a decent income for recipients. The Note shows next that McGovern's UTC offered an improved approach to the latter two problems but would have produced an unacceptable amount of income redistribution to the nonpoor. This made the cost of the plan unrealis-

1 For another income maintenance proposal not considered here, see [Canadian] DEP'T OF NAT'L HEALTH AND WELFARE, INCOME SECURITY FOR CANADIANS (1970).

2 Boston Globe, Jan. 30, 1973, at 29, col. 4.

3 *See, e.g.*, Rosenthal, *Growth of an Issue: McGovern Dilemma*, N.Y. Times, July 9, 1972, at 10, col. 1.

4 *See, e.g.*, THE ECONOMIST, Oct. 14, 1972, at 81; Seldon, *Thaw in the Welfare State*, LLOYD'S BANK REV., July 1972, at 18-33.

5 *See, e.g.*, H. AARON, WHY IS WELFARE SO HARD TO REFORM? (1973); D. MOYNIHAN, POLITICS OF A GUARANTEED INCOME (1973); Wolf & Erickson, *Work Incentive Aspects of the Family Assistance Plan*, 9 HARV. J. LEGIS. 179 (1972).

tic. Finally, after analyzing the British proposal, the Note incorporates the lessons of that proposal into a recommendation for remedying some of the problems of FAP.

I. THEORETICAL VARIABLES

There are two general approaches to income maintenance.[6] First, there is the means-tested credit,[7] which is payable only to those whose income falls below a certain standard of need. The credit equals a proportion of the amount by which the recipient's income falls below this standard of need. In calculating the recipient's income, certain amounts received are disregarded, *e.g.*, a certain percentage of earned income. Second, there is the universal tax credit. As the name implies, everyone, regardless of income, is eligible to receive this type of credit; there is no standard of need as in the means-tested credit. Furthermore, everyone comes under a revised system of income taxation with generally higher starting rates to ensure that the credit is taxed back from those who do not need it.[8] Under a means-tested credit, on the other hand, people who do not receive the credit would continue to pay taxes as they always have.

Both the means-tested credit and the universal credit have the following variables in common:[9]

6 For general descriptions of the theory of income maintenance and the various types of plans, see C. GREEN, NEGATIVE TAXES AND THE POVERTY PROBLEM (1967); Tobin, *Raising the Incomes of the Poor*, in AGENDA FOR THE NATION 77, 100 (K. Gordon ed. 1968); Musgrave, Heller & Peterson, *Cost Effectiveness of Alternative Income Maintenance Schemes*, 23 NAT'L TAX J. 140 (1970); Prest, *The Negative Income Tax: Concepts and Problems*, 1970 BRIT. TAX REV. 352; Tobin, Pechman & Mieszkowski, *Is a Negative Income Tax Practical?*, 77 YALE L.J. 1 (1967).

7 A bewildering number of terms have been used to refer to the two types of income maintenance. For example, C. GREEN, *supra* note 6, at 54, 57, uses the term "social dividend taxation" for what is here called a "universal tax credit" and "negative income taxation" for what is here called a "means-tested credit." M. FRIEDMAN, CAPITALISM AND FREEDOM 191-94 (1962), brought the term "negative income tax" into general usage. *See* C. GREEN, *supra* note 6, at 57 n.21. The terms used here are somewhat novel, but more descriptive than the others. Hopefully their use will avoid confusion with particular concepts which other writers attach to their terminology.

8 In this Note all income maintenance plans will be treated as if the grant or credit remains constant and any reduction in net payments is the result of a tax collected on the recipient's other income. In fact, FAP is formulated in terms of reducing the credit or grant as income increases. In other words, the credit is reduced by the amount of income not "disregarded." The rate of disregard is 100 percent minus the tax rate.

9 C. GREEN, *supra* note 6, at 63.

C = the amount of the credit, benefit, or income guarantee;
R = the average rate at which income received in addition to C is taxed;
BBP = the benefit break-even point, or the level of income at which taxes payable equal the credit.

These three variables interact according to this formula:

$$BBP = C/R$$

This dependence means that all three variables cannot be optimized simultaneously. Once two variables are fixed, the third variable is set as well. For example, an income maintenance plan with a credit of $1000 and a tax rate of 33 percent would have a benefit break-even point of $3000 (BBP = $1000/.33). Were a tax rate of 50 percent to be used with the same credit, the benefit break-even point would be $2000; a person would continue to receive a net credit until his income reached $2000. For instance, if he earned $1000, he would receive a credit of $1000 but pay taxes of $500, which would result in a net credit of $500 and net receipts of $1500. (The latter sum may be thought of either as a credit of $1000 plus after-tax earnings of $500, or as earnings of $1000 plus a net credit of $500.[10]) A credit recipient with no income would merely receive his $1000 credit and pay no taxes. Thus income maintenance schemes not only provide a minimum income equal to the full amount of the credit, but also supplement the earnings of those with incomes below the benefit break-even point.

Another key variable in income maintenance schemes is the tax break-even point (TBP). This is the income level at which a taxpayer pays the same amount of taxes under the income maintenance scheme as he does under the present system. To illustrate, under the present system a single taxpayer with $4000 income might typically pay taxes of $306[11] if he took a standard deduction (low income allowance of $1300) and one personal exemption. Under an income maintenance plan with a $1000 credit and a 33 percent tax rate the same taxpayer would pay taxes of $1333 but receive a credit of $1000, making his net tax $333. Thus, at

10 See note 8 *supra*.

11 Present federal tax liabilities are taken from the 1972 tax tables in INTERNAL REVENUE SERVICE, 1972 INSTRUCTIONS FOR FORM 1040 (1972).

$4000 income he is above the tax break-even point. But at $3600 income he would pay $238 under the present system and only $200 under the new plan.[12] Thus he is below the tax break-even point, which is near $3800[13] for a single individual in this example.

There is no simple formula for the tax break-even point, as it is in part a function of the current tax rates. Generally, however, the level of the tax break-even point will vary directly with the level of the credit and inversely with the tax rate. Thus the total cost of an income maintenance plan includes not only the sum of the net benefits received by taxpaying units below the benefit break-even point but also the sum of the reduction in taxes for those taxpaying units between the benefit break-even point and the tax break-even point.[14]

What factors should be considered in setting the tax rate, the credit, and the benefit and tax break-even points in an income maintenance bill? Perhaps the most important decision with respect to the amount of the credit is where it should be in relation to the poverty line. A credit set at the poverty line will alone bring a recipient "out of poverty." If the credit is below the poverty line, it might then be necessary to have an additional form of assistance to fill the remaining "poverty gap."

In setting the tax rate[15] work incentives will be an important consideration. A high tax rate like 70 percent might be a serious disincentive. On the other hand, work incentives might be very good at, say, a 20 percent tax rate; but this rate would make the benefit break-even point five times the credit.

The level of the benefit break-even point in relation to the poverty line must also be considered. Were the benefit break-even point 200 percent of the poverty level, many people who are not poor would receive net benefits under the plan. Budgetary constraints may dictate that the plan minimize the payment of benefits to those already above the poverty level. But what are the consequences of lowering the benefit break-even point? To reduce the benefit break-even point one must raise the tax rate or lower

12 $200 = (.33 × $3600) − $1000.

13 Author's computations.

14 For a comprehensive analysis of the problems of integrating payments and the current tax structure under FAP, see Wolf & Erickson, *supra* note 5, at 208-15.

15 The legislator will be especially concerned with the marginal tax rate here.

the credit or do both. An increased tax rate might reduce work incentives.[16] But a decreased credit would hurt those with no other income. These are very difficult trade-offs. If a legislator places high value on having the credit at the poverty level and also places high value on not paying net benefits to those with incomes greater than, say, 125 percent of the poverty line, he will have to set the tax rate at 80 percent to achieve these two goals. On the other hand, setting the credit at the poverty line and the tax rate at 50 percent to improve incentives will drive the benefit break-even point up to 200 percent of the poverty line and the tax break-even point even higher.

Under a means-tested credit, those not receiving credits will remain under the general income tax system and pay the same taxes they always have.[17] Under a universal tax credit, on the other hand, those with incomes above the tax break-even point will pay higher taxes than before. This latter feature of a universal tax credit adds another difficult trade-off: in setting the tax break-even point one must not only decide where tax relief should stop, but also who should pay more taxes.[18]

Several other important decisions must be made in designing an income maintenance plan.

How universal should the plan be made with respect to marital and dependency status? Will the program apply to singles and childless couples, as well as families with children, as do the British proposal[19] and McGovern's UTC?[20] Or will only families with children be eligible for benefits, as under FAP?[21] If the plan is to be universal, what should be the relation among the credits given to singles, childless couples, and families with children?[22]

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16 See text accompanying notes 49-55 *infra*.

17 The taxes levied under a means-tested credit do not generate revenue to finance the plan, but only reduce the credits paid under the plan. To finance a means-tested credit, it may be necessary to increase taxes on nonrecipients or decrease other governmental expenditures.

18 This is true only for a UTC with a single tax rate. For a UTC with a variable tax rate see text following note 85 *infra*.

19 CHANCELLOR OF THE EXCHEQUER, PROPOSALS FOR A TAX-CREDIT SYSTEM, CMND. No. 5116, at 3 (1972) [hereinafter cited as GREEN PAPER].

20 Burby, *Complex McGovern Economics Plan Dissolves in Campaign Heat*, 4 NAT'L J. 1449, 1454-55 (1972).

21 H.R. 1, 92d Cong., 1st Sess. § 401(2155) (1971) (as passed by House).

22 For a detailed study of familial relationships in relation to income maintenance schemes, see Klein, *Familial Relationships and Economic Well-Being: Family Unit Rules for a Negative Income Tax*, 8 HARV. J. LEGIS. 361 (1971).

Should the existing welfare system be folded into the plan? Both American proposals were intended to replace the AFDC system,[23] while the British plan applies only to those with wage or salary income above a certain amount and to social security beneficiaries.[24]

One of the most important considerations in designing an income maintenance plan will be its cost. Plans with higher benefit and tax break-even points will naturally cost more. Plans which only include families with children will cost less than plans which also apply to singles and childless couples. The cost of the American proposals must be evaluated in view of the federal fiscal prognosis for the last part of this decade. Even with no new federal programs, an estimate of the full employment deficit in the federal budget in FY 1975 is $17 billion.[25]

In light of these theoretical variables, this Note will now examine Nixon's FAP, McGovern's UTC, and the British tax credit proposal. By analyzing each, the Note seeks to identify the best trade-offs available for future American legislation.

II. Nixon's Family Assistance Program

A. *H.R. 16311 and H.R. 1*

Income maintenance first entered the realm of the politically possible in August 1969, when President Nixon proposed his Family Assistance Program (FAP).[26] As H.R. 16311, the plan provided for a means-tested credit of $1600 for a family of four with a 50 percent tax rate on earnings.[27] The benefit break-even point was $3920 since the first $720 of income was tax exempt. This exemption was intended to cover the expenses of going to work, including clothes and commutation.[28]

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23 See text following notes 31 and 69 *infra*.

24 Green Paper, *supra* note 19, at 4-5.

25 C. Schultze, E. Fried, A Rivlin & N. Teeters, Setting National Priorities, the 1973 Budget 418 (1972). *But see* U.S. Office of Management & Budget, Budget of the U.S. Government, Fiscal Year 1974, at 39 (1973) (estimating a $2 billion full employment surplus for fiscal 1975).

26 5 Weekly Comp. Pres. Doc. 1105 (1969).

27 H.R. 16311, 91st Cong., 2d Sess. §§ 101(442), (443)(b)(4) (1970) (as passed by the House) (reproduced in *Hearings on H.R. 16311 Before the Senate Comm. on Finance*, 91st Cong., 2d Sess., pt. 1, at 7-106 (1970) [hereinafter cited as *Hearings on H.R. 16311*]).

28 *Hearings on H.R. 1 Before the Senate Comm. on Finance*, 92d Cong., 1st Sess.,

Single individuals, other persons living alone, and childless couples were not covered by the program; but a family with children was eligible even if the father was still in the household.[29] The plan provided that the grant would be reduced if such a father, or a mother in a fatherless family with no children under six, refused to register for or accept employment.[30] Although the credit in this proposal seems very low, the plan penalized a state if it did not supplement the FAP benefit up to its current standard of need for its Aid for Families with Dependent Children program (AFDC) or the poverty level, whichever was lower.[31]

FAP was designed primarily as a replacement for the AFDC system. Since in many states a family could not qualify for AFDC if the father was still in the home, the Administration believed AFDC encouraged fathers to desert their families.[32] FAP was intended to solve this problem by including all families with children. It was also thought that AFDC discouraged work, since in some localities the welfare budget for the average size family was higher than the income which could be earned by working at the minimum wage.[33] FAP was designed to alleviate this problem by supplementing the incomes of low wage earners.[34] A third reason for FAP was the sharp differences in AFDC benefits among the states.[35] FAP would establish a minimum for every state and thus make payments more uniform nationally.[36] Finally, the rapidly expanding AFDC program was becoming a tremendous fiscal burden on the states; and the Nixon Administration felt that the federal government should carry more of the burden.[37]

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pt. 1, at 243 (1971) (testimony of HEW Secretary Elliot Richardson) [hereinafter cited as *Hearings on H.R. 1*].

29 H.R. 16311, 91st Cong., 2d Sess. § 101(445) (1970).

30 H.R. 16311, 91st Cong., 2d Sess. §§ 101(447), (448) (1970).

31 H.R. 16311, 91st Cong., 2d Sess. § 101(452) (1970). The penalty provided for states which did not supplement was ineligibility for other types of federally financed welfare assistance. H.R. 16311, 91st Cong., 2d Sess. §§ 101(451), (454) (1970).

32 *Hearings on H.R. 16311, supra* note 27, at 167 (statement of HEW Secretary Robert Finch).

33 *Id.* at 174-75 (testimony and exhibits of HEW Deputy Under Secretary Robert Patricelli).

34 States, however, were not required to supplement payments to fully employed males. *Id.* at 114-17 (Finance Committee analyses), 202-06 (testimony of HEW officials).

35 *Id.* at 163 (statement of HEW Secretary Robert Finch).

36 The $1600 minimum payment to a family of four was above that of several states. *See id.* at 164 (HEW chart).

37 *Id.* at 188 (statement of HEW Secretary Robert Finch).

As H.R. 16311 in the Ninety-first Congress and as title IV of H.R. 1[38] in the Ninety-second, FAP easily passed the House.[39] However the Senate Finance Committee voted not to report the bill in both Congresses.[40] Liberal critics on the Committee had objected that the benefits in H.R. 16311 were inadequate.[41] In H.R. 1 the grant for a family of four was raised to $2400 ($800 each for the first two members of the family and $400 each for the next two), but the marginal tax rate was raised to 67 percent to keep down the cost of the program.[42] A conservative attack then developed on the high work disincentive of a 67 percent rate.[43] The latter development reflects the peculiar political dilemma of income maintenance. Liberals fight to raise the benefits. Then the marginal tax rate must be raised, which in turn stiffens conservative opposition.[44]

FAP is the starting point for future efforts to introduce income maintenance in America. It is thus important to review briefly the theoretical and political problems of the FAP approach to income maintenance. The remainder of this part will focus on FAP's marginal tax rate and level of benefits in relation to state responsibilities.

B. *The Tax Rate and Work Incentives*

Work incentives in income maintenance plans are a complex and multifaceted problem. It is often said that the AFDC program produces serious work disincentives.[45] Any welfare program providing a regular grant discourages work in that recipients may receive enough money to survive without working. For this reason present welfare programs generally are limited to those for whom regular employment is impossible or very difficult. The high marginal rates on earnings of AFDC recipients is a further work disincentive. Currently this tax rate is 67 percent on earnings above

38 H.R. 1, 92d Cong., 1st Sess. (1971) (as passed by House) (reproduced in 117 CONG. REC. 21406-61 (1971)).

39 116 CONG. REC. 12106 (1970); 117 CONG. REC. 21463 (1971).

40 D. MOYNIHAN, *supra* note 5, at 533 (describing the defeat of FAP in the Ninety-first Congress, Second Session); S. REP. No. 1230, 92d Cong., 2d Sess. (1972) (reporting H.R. 1 with title IV (FAP) deleted).

41 D. MOYNIHAN, *supra* note 5, at 441-46.

42 H.R. 1, 92d Cong., 1st Sess. § 401 (1971).

43 *See* H. AARON, *supra* note 5, at 38.

44 *Cf.* D. MOYNIHAN, *supra* note 5, at 551.

45 *E.g.*, C. GREEN, *supra* note 6, at 118-24.

$30 per month.[46] Income maintenance may affect work incentives in the same two ways. First, recipients of credits may feel they do not need additional income. Second, high marginal tax rates on the earnings of credit recipients may make work relatively unremunerative. The answer to these arguments is that the income maintenance credit can be made low enough that recipients would not be satisfied with the credit alone and marginal tax rates can be made low enough to make work attractive.[47]

There are many problems in creating an attractive system of work incentives. First there is the problem of whether economic incentives, however attractive, can overcome some of the common causes for unemployment among the poor: lack of training and education, poor health and physical disabilities, and various cultural inhibitions such as lack of self-esteem. Moreover, the expenses of day care may consume a substantial part of the earnings of the typical AFDC mother with three children.[48] These problems of unemployability might have to be solved by assistance programs in addition to income maintenance.

Assuming that economic incentives are to be at least part of the overall program for getting the poor to work, to what extent can work incentives be improved by lowering the marginal tax rate on earnings? Three work incentive problems must be considered in answering this question. First, those who are already working must be encouraged not to reduce the hours they work. This is often not a serious problem since most jobs do not allow the employee much flexibility in reducing his hours worked (other than overtime). Second, those who are not working must be given incentives to make the initial decision to go to work. Often the important factor here is the difference in total income between working and not working. Lastly there should be incentives for all workers to increase earnings per hour and for part-time earners to increase the number of hours they work. Here the marginal tax rate will probably be very important.

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46 42 U.S.C. § 602(a)(8)(A)(ii) (1970).

47 *See, e.g.*, A. TELLA, D. TELLA & C. GREEN, THE HOURS OF WORK AND FAMILY INCOME RESPONSE TO NEGATIVE INCOME TAX PLANS 24-30 (1971) [hereinafter cited as A. TELLA].

48 *See* SENATE COMM. ON FINANCE, 92D CONG., 1ST SESS., CHILD CARE, DATA AND MATERIALS 11-12 (Comm. Print 1971).

During the hearings on FAP in Congress, three sources of evidence were presented on the effect of income maintenance tax rates on work incentives. First, a statistical analysis of data from the Bureau of the Census Survey of Economic Opportunity indicated that able-bodied males working at less than $2.00 per hour would reduce their hours worked by 24 percent in response to a plan with a 67 percent tax rate and by 15 percent in response to a 50 percent tax rate.[49] On the other hand, actual field experiments in income maintenance financed by OEO resulted in almost no change in the average earnings of participants even when the tax rate was 70 percent.[50] Furthermore, the 1967 Social Security Amendments, which replaced the 100 percent tax rate on earnings of AFDC mothers with a 67 percent tax rate plus a $360 exemption,[51] produced indeterminate results with respect to employment among AFDC mothers.[52] Other research has predicted declines in work effort ranging from 3 percent to 46 percent in response to a 50 percent tax rate.[53]

The data is conflicting and inconclusive, but this Note will proceed on the assumption that in general work incentives are improved as the marginal tax rate is decreased. Whatever the range of uncertainty in the data, the 67 percent tax rate in H.R. 1 was clearly a political liability.[54] The apparent disincentive of allowing a worker to keep only one-third of what he earns was just not politically acceptable, and commentators on FAP have stressed the importance of using a lower appearing tax rate to get an income maintenance bill through Congress.[55]

The work incentive problems in H.R. 1 were complicated by the high implicit tax rates in other federal assistance programs which would have continued to operate alongside FAP. Eligibility for programs like medicaid now operates on the "sudden death"

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49 A. TELLA, *supra* note 47, at 27.

50 *Hearings on H.R. 16311*, *supra* note 27, pt. 2, at 907-25 (1970) (statement of J. Wilson, O.E.O.).

51 42 U.S.C. § 602(a)(8)(A)(ii) (1970).

52 *Hearings on H.R. 16311*, *supra* note 27, pt. 2, at 1012-14 (HEW exhibit). *See also* Rein, *Determinants of the Work-Welfare Choice in AFDC*, 46 SOC. SERV. REV. 539, 549-55 (1972).

53 This research is cited in H. AARON, *supra* note 5, at 36-37.

54 *Id.* at 38; Wolf & Erickson, *supra* note 5, at 194.

55 *Id.*

principle. When its income rises one dollar above the eligibility threshold, the family loses all benefits. When combined with a 67 percent tax rate, loss of medicaid eligibility would create a "notch" where an increase in earnings would result in a net loss of benefits, *i.e.*, a marginal tax rate over 100 percent.[56] H.R. 1 tried to address this problem by requiring families to pay 33 percent of their earnings above $720 (plus state supplements) toward medical expenses which they incur. This feature of the bill only created another notch.[57] Although some commentators on FAP question whether such notches really affect decisions to increase earnings, this aspect of FAP engendered considerable opposition in Congress.[58]

Federal rent subsidies would likewise add to the marginal tax rate for FAP recipients. Under such subsidies the federal government pays that portion of a tenant's rent which exceeds 25 percent of his income. If the tenant increases his income, he thus pays a marginal tax rate of 25 percent on his additional income. Although separate legislation would have lowered the tenant's share of the rent (and his tax rate) to 20 percent of his income for the first $3500, the combined FAP and rent subsidy tax rate would still have been 87 percent.[59] Above the medical expenses notch, the marginal tax rate might be as high as 120 percent (67 percent FAP tax rate, 33 percent medical expenses "deductible," and 20 percent implicit tax rate for rent subsidy).[60]

Another problem with work incentives under FAP was the effect of the $720 exemption for earned income.[61] When combined with the 67 percent marginal tax rate in H.R. 1, the exemption produces progressivity in the net rate of tax. For example, for earnings of $1000 taxable income is $280, the tax payable is $186.76, and the net tax rate is 19 percent. At $2000 earnings taxable income is $1280, the tax payable is $853.76, and the net tax rate is 43 percent. At the benefit break-even point ($4320) the tax rate is 56 percent. This progressivity in the net rate of taxation

56 For a good analysis of this problem, see H. AARON, *supra* note 5, at 13-16, 20-25.
57 *Id.* at 23.
58 Wolf & Erickson, *supra* note 5, at 199-201.
59 H. AARON, *supra* note 5, at 11-13, 22.
60 *Id.* at 38-41.
61 See text following note 27.

may have some effect on the unemployed who are making the initial decision of whether to seek full-time or part-time employment. Incentives for part-time work under H.R. 1 seem better than the incentives for full-time work since the net tax rates are lower at lower earnings.

The favoring of incentives for part-time work under H.R. 1 is misconceived. The proposal should encourage FAP recipients to work full time rather than part time or at least be neutral as between full-time and part-time work.

C. *Setting the Level of FAP Benefits and State Supplements*

The FAP benefits of $1600 for a family of four in H.R. 16311 and $2400 in H.R. 1 are of course well below the poverty line for a family of four.[62] However these FAP benefits must be evaluated in conjunction with the provisions concerning state supplementation in the two bills.

H.R. 16311 penalized a state which did not supplement the FAP benefit up to the state's present AFDC standard of need. However a state was not required to supplement FAP benefits to families headed by an employed male.[63] This provision might make it more profitable for a father to work part time than full time.[64] Theoretically if the state supplement were $1400 for a family of four, a man making $2000 per year by working less than 100 hours per month (thereby qualifying as "unemployed") would receive benefits of $3000 and keep $1360 of his earnings, for a total income of $4360.[65] A man working full time at $1.75 per hour would have

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62 H.R. 16311, 91st Cong., 2d Sess. § 101(453)(c)(1) (1970), defined the poverty level as $3720 for a family of four. A figure of $4000 will be used in the Note as more appropriate for 1973-75, the years which will form the political context for the proposal made here.

63 *Hearings on H.R. 16311, supra* note 27, at 114-15. Under current AFDC regulations a person is employed if working over 100 hours per month. 45 C.F.R. § 233.100 (Oct. 1, 1972).

64 *Hearings on H.R. 16311, supra* note 27, at 117 (Finance Committee analyses), 202 (testimony of HEW officials).

65
1600 federal benefit
1400 state benefit
+1360 take-home earnings
$4360 total income

Earnings are $2000. There is an exemption of $720 and a 50 percent tax on the remaining $1280. Take-home earnings are thus $720 + $640, or $1360.

about $3500 earnings per year, but would not get the state supplement. His total income with FAP benefits would be $3710.[66]

The state supplement provisions were modified in H.R. 1 to meet this problem. The new bill did not penalize the states for not supplementing. Moreover, a state electing to pay supplements was not required to pay any supplements to families where both parents were present and employable.[67] This provision in effect left to the states the above problem of the profitability of part-time work.

What were the options for the states? A state could opt to pay no supplements. If other states then chose to supplement, the present disparities in benefits between the states would continue. If a state paid supplements but excluded all father-headed families, this would defeat FAP's goal of removing the incentive to desert. If a state supplement program included families headed by an unemployed male, but excluded households headed by an employed male, some part-time employees would still fare better than full-time employees. The final alternative, supplements to all FAP recipients, could only be adopted at great state expense.

None of these alternatives open to the states under H.R. 1 is really satisfactory. H.R. 1 thus failed to provide a rational system for filling the "poverty gap" between the FAP grant and the poverty level and failed to provide a workable system for treating employed fathers in relation to unemployed fathers.

III. McGovern's Universal Tax Credit Proposal

A. *Elements and Politics of McGovern's UTC*

While H.R. 1 languished in the Senate Finance Committee, presidential candidate George McGovern proposed a $1000 universal tax credit as an alternative to the means-tested credit of FAP. He explained the $1000 per person figure as the minimum required to bring a family of four up to the poverty level.[68] Refer-

66 1600 federal benefit
+2110 take-home earnings
$3710 total receipts
Earnings are $3500, of which $720 are exempt. There is a 50 percent tax on the remaining $2780. Take-home earnings are thus $720 + $1390, or $2110.

67 H.R. 1, 92d Cong., 1st Sess. § 401(2156) (1971).

68 The proposal for a minimum income grant was first set out by McGovern in

ring to the work of Professor James Tobin, McGovern suggested that a 33 percent federal tax on income could finance the credit and give the effect of progressive taxation.[69]

While Nixon's FAP had been directed primarily at the "welfare mess," McGovern's proposal was intended not only to replace categorical welfare payments, but also to "provide a significant income supplement to millions of Americans in the medium income range."[70] The formula BBP = C/R,[71] places the benefit break-even point for a family of four at $12,000. Figure 1 shows that the tax break-even point would be above $20,000.[72] This relief to medium

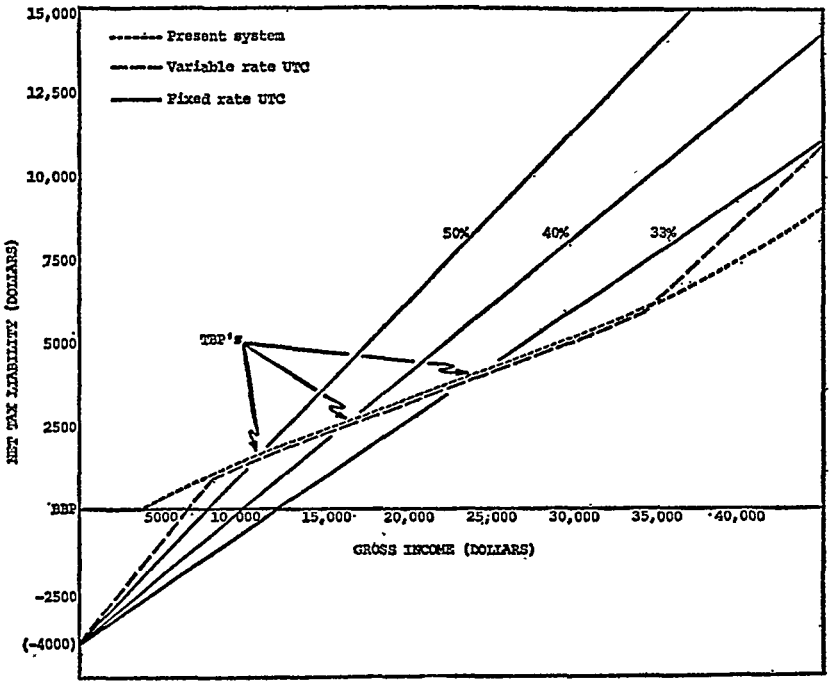

FIGURE 1. COMPARISON OF NET TAX LIABILITIES FOR FAMILY OF FOUR UNDER PRESENT SYSTEM AND VARIOUS UTC'S

a speech at Iowa State University on Jan. 13, 1972. Burby, *supra* note 20, at 1453. A partial text appears at *id.* 1454-55. A formal version appears in 118 CONG. REC. S5626-28 (daily ed. Apr. 7, 1972).

69 Tobin, *supra* note 6, at 105-08.

70 Burby, *supra* note 20, at 1454.

71 See text at note 9 *supra*.

72 See text accompanying notes 9-14 *supra* for an explanation of the relationship between BBP and TBP.

income families was only one of the many ways McGovern's plan differed from the President's. McGovern's plan included individuals and childless couples — in fact, everyone. McGovern's 33 percent tax rate was superior to the 67 percent rate in H.R. 1[73] in terms of work incentives, and the plan completely relieved the states from financing welfare. Furthermore, McGovern's plan eliminated the stigma of being poor since both poor and rich were under the same system of taxes and credits. The poor still had to apply for relief under H.R. 1. Finally, McGovern's approach eliminated the inequities in personal exemptions and deductions, which FAP left untouched. Personal exemptions and deductions are worth more to high-bracket taxpayers, precisely because their tax rate is higher. Moreover, exemptions and deductions are worth nothing to those with no income. A universal credit replacing the personal exemptions and the standard deduction would be worth the same amount of money to everyone.[74]

McGovern never described this proposal in greater detail. The most important unanswered questions were how much this proposal would cost and who would pay for it. Though the plan drew little attention at first, McGovern came under heavy fire from Hubert Humphrey in the California primary for the alleged astronomical cost of the UTC. McGovern did not produce any figures to defend himself, and many McGovern supporters felt that Humphrey's attack was successful.[75]

At this point two well-known economists came to McGovern's defense. In late June Joseph Pechman (later to join McGovern's staff) explained how to compute the average tax rate needed to finance the plan. An average grant of $1000 for 210 million people would cost $210 billion, and in addition the tax would have to raise $95 billion (his estimate) required for other federal expenditures. The tax would thus have to yield $305 billion. Assuming that personal exemptions and the standard deduction would be folded into the UTC, Pechman derived an expanded tax base

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73 For a description of the effect of medicaid and rent subsidies on tax rates under a McGovern-like proposal, see H. AARON, *supra* note 5, at 44-45.

74 Of course the marginal utility of money is greater to those with less income. This phenomenon lessens disparities under the present system.

75 Burby, *supra* note 20, at 1456.

of $663 billion. An average tax rate of 46 percent would raise $305 billion from this base.[76]

Actually the average tax rate would be much lower if a more comprehensive tax base were used. James Tobin pointed out how abolition of the tax preferences — the capital gains deduction, exemption of municipal bond interest, etc. — could increase the base to $1050 billion in 1975, thus reducing the average tax rate to about 33 percent. Tobin explained that at this rate the average taxpayer, after claiming his credits, would pay just about what he does under the present system.[77]

Pechman and Tobin assumed personal exemptions and the standard deduction would be folded into the credit. Eliminating these two features of the present system was clearly consistent with the introduction of a UTC. Under a UTC it would no longer be necessary to protect a certain minimum amount of income from taxation, especially if the credit equals a poverty line income.

Eliminating preferences, on the other hand, is really part of finding the best way to raise the additional revenue needed to finance a UTC. The difficulty with raising this additional revenue from the current tax base (plus additions from eliminating personal exemptions and standard deductions) is apparent from the 46 percent average tax rate Pechman computed. If the starting rate were 33 percent as McGovern originally suggested, the top rate would have to be rather high to get a 46 percent average. Using the current tax base would mean much heavier taxes on earned income than under the present system.[78] A tax increase on earned income would be not only theoretically unsound vis-à-vis work incentives, but also politically unacceptable.

Despite the political difficulties of abolishing preferences, an increase in taxes on earned income is even less popular. Furthermore, a general increase in rates without expanding the tax base

76 Silk, *McGovern Tax Proposal*, N.Y. Times, June 28, 1972, at 63, col. 6. By "average tax rate" Pechman apparently meant the percentage of the revenue base which would have to be collected to finance the credit and the rest of the federal budget.

77 Tobin, *Some Arithmetic on McGovern's Economic Policies*, N.Y. Times, July 18, 1972, at 31, col. 2.

78 INT. REV. CODE OF 1954, § 1348, currently provides a maximum tax of 50 percent on "earned" income.

can produce little added revenue from higher bracket taxpayers since much of their income is composed of preference items.[79] If one wants "the rich" to pay for the UTC, raising more revenue from them requires eliminating preferences.

In suggesting how to finance McGovern's plan, Tobin worked within the original proposal of an average grant of $1000 per person and a tax rate of 33 percent.[80] McGovern's advisers did not try to develop a workable proposal with lower benefit and tax break-even points. These aspects of McGovern's proposal were not only its greatest theoretical weakness, but also its greatest political vulnerability. Herbert Stein[81] and Milton Friedman[82] had attacked the break-even points in McGovern's proposal early in the game. Stein suggested that most of the benefits under the proposal would go not to the poor, but to those far more numerous (and less needy) families earning incomes between the poverty line and the tax break-even point. Friedman suggested most of the money reshuffled by the program would be redistributed from the top 20 percent income bracket to the middle 60 or 70 percent. McGovern never released any figures to refute Stein's and Friedman's characterization of the income redistributive effects of the UTC.

It is easy to see how McGovern's plan would produce these income redistributive effects. For a family of four, McGovern's plan would have paid net credits to households with incomes up to $12,000, the benefit break-even point. This benefit break-even point is 300 percent of the poverty line. Furthermore, families of four with incomes between $12,000 and the tax break-even point of $20,000+ would receive a tax cut. Simply stated, McGovern's plan would have redistributed income from families of four receiving more than $20,000 to families of four receiving less than $20,000. This simplified analysis ignores any change in the tax burden between large and small families which McGovern's plan may produce.

Moynihan has suggested that the plan was originally designed

79 *See* Pechman & Okner, *Individual Income Tax Erosion by Income Classes*, in JOINT ECONOMIC COMM., 92D CONG., 2D SESS., THE ECONOMICS OF FEDERAL SUBSIDY PROBLEMS pt. 1, at 13 (Comm. Print 1972).

80 Tobin, *supra* note 77.

81 Bartley, *Mr. Stein's Arithmetic Lesson*, Wall Street Journal, July 26, 1972, at 6, col. 4.

82 Burby, *supra* note 20, at 1456.

with these effects in mind.[83] The net benefits in the proposal for the middle income groups ($4,000 to $12,000 per year for family of four) was not an oversight but a political strategy to rally the middle income groups to McGovern's side. Providing tax relief to the so-called "forgotten" man — who struggled to make ends meet on an average income — would draw a clear line between McGovern and Nixon, whose FAP benefited only those at the lower end of the income scale.

By August 1972 it appeared the Senate Finance Committee would not report out FAP, and it became obvious that even this moderate version of income maintenance could not generate significant political support, much less McGovern's far more expensive proposal. McGovern thus decided in August to abandon the UTC.[84]

B. *Possible Improvements in McGovern's UTC Plan*

Since McGovern's staff did not design an alternate UTC which would decrease income redistribution to the middle income groups, the important question remaining today is whether the key variables of McGovern's UTC can be adjusted to achieve this result. There are compelling reasons for restricting income redistribution to the poor or near-poor. First, the generosity of McGovern's proposal to the middle income groups was its great political liability. If Congress refused to pass Nixon's FAP, it would certainly be even more reluctant to accept a costlier scheme which paid credits to families with incomes far higher than the benefit break-even point in H.R. 1. Deficits expected in the federal budget[85] make it hard to justify the expense of providing relief to people who are not really poor. Moreover, although tax relief to the middle income groups may be desirable, other pressing national needs, *e.g.*, national health insurance and environmental protection, may deserve priority.

One way to reduce the benefit and tax break-even points (and thus the cost) of McGovern's proposal would be to increase the tax rate. Figure 1 indicates how tax rates of 33 percent, 40 percent,

83 D. MOYNIHAN, *supra* note 5, at 448.

84 An excerpt from the speech in which McGovern announced his substitute proposal appears in Wall Street Journal, Aug. 30, 1972, at 10, col. 3.

85 *See* text accompanying note 25 *supra*.

and 50 percent would affect the burden of taxation under a UTC with a credit of $4000 for a family of four. The graph shows that using the two higer rates would reduce the benefit and tax break-even points. But reducing the tax break-even point in a UTC with a single tax rate means that taxpayers above the tax break-even point pay higher taxes. For instance, the tax break-even point with a 50 percent tax rate is about $11,000. An increase in taxes on all families with incomes in excess of $11,000 would probably be unacceptable. Any attempt to reduce income redistribution to the middle income groups by reducing the credits in the UTC will create the same problem of lowering the tax break-even point.

It is possible to reduce the benefit break-even point without increasing taxes on the middle income groups by using a sliding scale of tax rates instead of a single tax rate. For example, a system could be designed with a $4000 credit for a family of four where the benefit break-even point is $6666, where taxes are reduced for families with incomes between $6666 and $7500, but where the tax burden is not increased in comparison to the present system until income reaches $35,000. The dashed line in Figure 1 shows the taxes paid under such a UTC. This dashed line represents a 60 percent tax rate on the first $7500 of income. Taxes and credits equal zero at $6666, the benefit break-even point. At $7500, the tax break-even point for a UTC with a $4000 credit and a 60 percent tax rate, taxes equal those under the present system. A progressive tax could be applied to all incomes between $7500 and $35,000 to produce the same tax burden as the present system. Above $35,000 the tax rates could be increased to generate more revenue than the present system. In this way, a tax increase on those above $35,000 would finance a redistribution of income to those below $7500.

This tax scale certainly meets the criteria set for it. But the proposal would have exactly the same income redistribution effect as a means-tested credit (C = $4000, R = 60 percent) except for the tax increase on incomes over $35,000. Introducing a UTC to obtain these results would require a drastic overhaul of the entire tax system, while a means-tested credit with similar results could be introduced with a minimum of disruption, since a means-tested credit would replace the present system only for those below the benefit break-even point.

Financing such a means-tested credit by increasing taxes on "the rich" would require a tax reform outside the structure of the means-tested credit. A means-tested credit, unlike a UTC, does not have an integral method of financing itself. This feature of a means-tested credit is in one respect a political asset. A UTC will almost automatically develop political opposition among those who will pay more taxes under the UTC. With a means-tested credit, the question of financing can be separated to some extent from the question of whether the plan should be adopted. A means-tested credit will not automatically face the opposition of the preference lobby since it can be financed by methods other than eliminating preferences. Another reason that a means-tested credit would be easier to achieve politically is that it is more or less limited in scope to replacing the present welfare system. Since this system is generally acknowledged to be in a state of crisis, a means-tested credit can be justified as a "crisis measure."

In conclusion, to avoid redistributing income to middle income groups, it is best to drop the idea of a UTC and turn again to a means-tested credit. Although a UTC can be devised to reduce such redistribution, the means-tested credit is a far simpler and more feasible method. Furthermore, as Professor Musgrave has demonstrated, a means-tested credit is far more cost-efficient than a UTC if one's goal is to fill the poverty gap.[86]

IV. The British Tax Credit Proposal

A. *Background*

In October 1972 the British Treasury proposed a new tax credit system to replace Britain's present system of personal exemptions and income supplementation schemes.[87] While the "welfare mess" has been the main impetus for income maintenance in America, the British proposal contemplates leaving their welfare system largely untouched. To qualify for the tax credits one must either receive social security benefits or have wage or salary income above a certain amount. To understand the British proposal one must understand the British personal income tax, welfare system (sup-

86 Musgrave, *supra* note 6, at 148-49.
87 Green Paper, *supra* note 19.

plementary benefits), and social security system (national insurance).

1. Personal Income Tax and Exemptions

The personal income tax in Great Britain was recently reformed. Starting this year personal income will be taxed at a flat 30 percent on the first £5000 ($11,750)[88] of income with a progressive surtax on amounts exceeding £5000. The first £1000 of income over £5000 will be taxed at 40 percent and the rates will progress to 75 percent on income in excess of £20,000.[89]

The starting rate of 30 percent seems very high to Americans, but it is accompanied by very high "personal allowances" (exemptions), which make the tax progressive for incomes under £5000. The allowances for this tax year will be approximately £600 for a single person, £780 for a married couple, and £200 for each child under eleven (with higher allowances for older children). Since these allowances are so important to the taxpayer of average income, they are currently deducted from taxes collected in the withholding system, which is called PAYE (Pay As You Earn).[90]

2. Family Allowance and Family Income Supplements

In addition to the high exemptions, the present system also includes two systems of positive credits. In 1965 the family allowance was initiated.[91] This is the familiar tax credit for children which has been adopted by some Western European nations. In Great Britain the credit is zero for the first child, £0.90 per week for the second child (£46.80 per year) and £1.00 for each additional child.[92] All families are entitled to the family allowance regardless of income.[93]

The second system of credits, the Family Income Supplement (FIS), was enacted in 1970.[94] Only families with children are eli-

88 The rate of exchange is about £1.00 = $2.35 as of this writing.

89 Finance Bill Note, *The Prospect Before Us*, 1972 BRIT. TAX REV. 57, 58.

90 THE ECONOMIST, Sept. 30, 1972, at 84-89. PAYE is so complex that it requires 35,000 Treasury employees to administer it. As a result, Great Britain, with one-fourth the population of the U.S., has almost as many employees administering its national income tax as IRS has administering the federal income tax. *Id.* at 89.

91 Family Allowances Act 1965, c. 53.

92 A. BOULTON, LAW AND PRACTICE OF SOCIAL SECURITY 120 n.1 (1972).

93 Family Allowances Act 1965, c. 53, § 1.

94 Family Income Supplements Act 1970, c. 55.

gible.[95] This reform apparently originated to supplement the income of the working poor to ensure that they would be better off working than on welfare[96] (supplementary benefits, described below). Accordingly, the FIS is payable only where one member of the family is employed at least 30 hours per week.[97] FIS is a means-tested benefit. A family becomes eligible if its income is less than the "prescribed amount,"[98] which is currently £20.00 for a family with one child and £2.00 for each additional child.[99] The FIS payment is one-half the amount by which the prescribed amount exceeds actual income.[100] The maximum payment is £5.00 per week.[101] Thus the implicit tax rate is 50 percent on additional income.

3. National Insurance (Social Security)

Social security, or national insurance, is financed by a payroll tax, currently five percent.[102] Certain benefits received under national insurance, *e.g.*, sickness, disability, unemployment, are not taxable.[103] Under national insurance the standard, "flat rate" weekly benefits for several categories are £6.75 for a single person, with an additional £4.15 for a wife, and up to £3.30 for each child, depending on his age and benefit category.[104]

At income levels near the FIS prescribed amount a family enrolled in FIS will pay a marginal tax rate of 85 percent, if the income tax and payroll tax are included (50 percent FIS + 30 percent income tax + 5 percent payroll tax).[105] In addition, as its income increases it will become ineligible for various other means-

95 *Id.* § 1.
96 A. BOULTON, *supra* note 92, at 180-81.
97 *Id.* at 181.
98 Family Income Supplements Act 1970, c. 55, § 1.
99 The prescribed amount was adjusted in 1972 as reported in Note, *Changing Social Welfare Policies in Great Britain*, 46 SOC. SERV. REV. 103, 104 n.4 (1972).
100 Family Income Supplements Act 1970, c. 55, § 3.
101 Note, *supra* note 99, at 104 n.4.
102 This is the figure used by the Treasury in GREEN PAPER, *supra* note 19, at 2. For more precise figures see DEP'T OF HEALTH AND SOCIAL SECURITY, 1972 REVIEW OF SOCIAL SECURITY BENEFITS AND ASSOCIATED CHANGES, CMND. NO. 4958, at 10, 18-19 (1972) [hereinafter cited as SOC. SECURITY REV.].
103 GREEN PAPER, *supra* note 19, at 4.
104 SOC. SECURITY REV., *supra* note 102, at 13. The rates are those proposed for 1972.
105 GREEN PAPER, *supra* note 19, at 2.

tested benefits, such as the free school lunch program,[106] which currently operate on the "sudden death" principle.

A recent rent "rebate" scheme adds an additional implicit tax rate of 17 to 25 percent. The scheme operates like American rent subsidies: a family pays a certain percentage (17 to 25 percent) of its income as rent, and the subsidy pays the rest.[107] When this 17 to 25 percent is added to the 85 percent above, it is apparent that an increase in earnings can sometimes produce a decrease in income. For example, a couple with three children increasing its income from £23.00 to £24.00 per week would lose over £1.00 in benefits for the £1.00 increase in income.[108] The new tax credit scheme is largely directed at eliminating such "poverty traps."

4. Supplementary Benefits (Welfare)

The British program most closely corresponding to our system of categorical welfare payments is the supplementary benefits system. In essence this system guarantees a minimum income to everyone. The basic exclusions from coverage are full-time employees, students, and those directly unemployed as a result of a labor dispute.[109] The principle of the system is that if income ("resources") falls below a certain minimum level ("requirements"), the supplementary benefit will be paid to make up the difference. The requirements are £6.55 for a person living alone, £10.65 for a couple, £1.90 for a child under 5 years, £2.25 for a child between 5 and 11, and up to £5.20 (depending on age) for a child between 11 and 20.[110]

The recipients of supplementary benefits fall into four main categories. First, there are the national insurance recipients. Since national insurance benefits may be below the requirements levels, national insurance beneficiaries may receive supplementary benefits to make up the difference.[111] This aspect is regarded as undesir-

106 THE ECONOMIST, Sept. 30, 1972, at 26.

107 Housing Finance Act 1972, c. 47, sched. 3, ¶¶ 10, 11. The various implicit taxes (income, payroll, FIS, and rent subsidies) will not always be levied on the same taxpayer at the same time. Many FIS recipients, for instance, pay no income tax.

108 THE ECONOMIST, Sept. 30, 1972, at 26.

109 DEP'T OF HEALTH & SOCIAL SECURITY, ANNUAL REPORT, 1971, CMND. No. 5019, at 150-51 (1972) [hereinafter cited as ANNUAL REPORT].

110 SOC. SECURITY REV., *supra* note 102, at 17.

111 Ministry of Social Security Act 1966, c. 20, § 4. About two million pensioners receive supplements. GREEN PAPER, *supra* note 19, at 2.

able. It is thought that people who have qualified for national insurance through a lifetime of payroll contributions by themselves or their spouses should not be dependent on supplementary benefits in order to survive.[112] Second, chronically unemployed males receive supplementary benefits, since national insurance unemployment compensation, like our own unemployment compensation, expires after a period of unemployment.[113] In addition many unemployed do not receive national insurance unemployment compensation because they never worked long enough to qualify for it.[114] This category of unemployed is also eligible to receive supplementary benefits.[115] Third, fatherless families (*i.e.*, women under 60 with dependent children) are also eligible for supplementary benefits. The percentage of the British population in this category is far below the percentage of Americans receiving AFDC.[116] The final group eligible for supplementary benefits are the part-time employed. A family with an employed member may receive supplementary benefits if that member works no more than an average of 30 hours per week.[117] In calculating the resources of a recipient employed part time, only £1.00 of his earnings per week is disregarded.[118] There is thus an implicit tax rate of 100 percent on earnings above this normal level.

This 100 percent implied tax rate is not a very good incentive for part-time employment, but this disincentive is somewhat counteracted by the requirement that most able-bodied men in households receiving supplementary benefits must register for full-time employment. Furthermore, where a supplementary benefit

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112 GREEN PAPER, *supra* note 19, at 2, 26; DEP'T OF HEALTH & SOCIAL SECURITY, STRATEGY FOR PENSIONS, CMND. NO. 4755 (1971).

113 ANNUAL REPORT, *supra* note 109, at 138-39.

114 *Id.*

115 In 1971, 24 percent of the unemployed in Great Britain were on supplementary benefits only. SOCIAL TRENDS, No. 1, 1970, at 97 (publication of U.K. Central Statistical Office).

116 The United Kingdom in 1971 had 635,000 persons (1.2 percent) on this form of relief out of a population of about 55 million. ANNUAL REPORT, *supra* note 109, at 334, 337. In 1971 the United States had 10.7 million persons receiving AFDC out of a population of 207 million (4.4 percent). U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S., 1972, at 5, 299 (1972) [hereinafter cited as STATISTICAL ABSTRACT].

117 *See* A. BOULTON, *supra* note 92, at 181 (referring to FIS standard, which is assumed to be the same).

118 *See id.* at 145.

is paid on condition that the beneficiary register for employment, "the weekly amount of any supplementary allowance shall not exceed what would be his net weekly earnings if he were engaged in full-time work in his normal occupation."[119] This so-called wage stop provision was added to make it impossible for an individual to gain by quitting a low-paying full-time job to go on supplementary benefits. The wage stop is controversial, since a man with low earning capacity cannot receive a supplementary benefit equal to his requirements. But a man who earns the average wage for manual labor (about £32.00 per week)[120] will generally not need to worry about the wage stop if he goes on supplementary benefits, since the benefits are considerably below this level even for large families.[121]

In addition to their requirements, supplementary benefit recipients also receive their rent up to a "reasonable" amount.[122] The average rent allowance paid in 1971 was about £3.00 per week.[123] Family allowances are not disregarded in computing resources, but they are not limited by the wage stop. For example, a man with a wage stop of £18.00 and requirements of £20.00 might be eligible for a family allowance of £1.90. Although his supplementary benefit will be limited to £18.00, he will still receive his family allowance and get total benefits of £19.90 despite the wage stop.[124]

5. Summary

At present Britain has two parallel systems of income maintenance. Only full-time employees may receive an FIS, while supplementary benefits are only available to the part-time working and nonworking. The family allowance overlaps these two systems. FIS and supplementary benefits have two different standards for eligibility and assistance which do not always interrelate rationally, especially when the family allowance is accounted for.

Despite the wage stop, it is still possible for a head of household

119 Ministry of Social Security Act 1966, c. 20, sched. 2, ¶ 5.

120 GREEN PAPER, *supra* note 19, at 4 (by implication).

121 *See* A. BOULTON, *supra* note 92, at 139-40. For typical supplementary benefits, see text at note 125 *infra*.

122 Ministry of Social Security Act 1966, c. 20, sched. 2, ¶ 13.

123 Computed from figures reported in ANNUAL REPORT, *supra* note 109, at 344-45.

124 *See* A. BOULTON, *supra* note 92, at 184 (indicates how family allowances operate in conjunction with wage stop).

to receive almost as much on supplementary benefits as from full-time employment plus FIS. There are two reasons for this. First, the family allowance offsets the effect of the wage stop as explained above. Second, the supplementary benefits requirements in some cases approach the prescribed amount under FIS.

To take a simple example, consider a family with children 14, 12, and 9 years old paying rent of £4.00 per week. Assume the father earns £20.00 per week. Supplementary benefits requirements for this family are £23.05.[125] The FIS prescribed amount is £24.00 (£20.00 plus £2.00 for each child after the first).[126] If the father is working, he will receive one-half the amount by which the FIS prescribed amount exceeds his wage, or £2.00, as a Family Income Supplement. He will also receive £1.90 in family allowances. Since he will pay a national insurance contribution of £1.00, his take-home income will be £22.90. Were the same man on supplementary benefits, a wage stop of £20.00 would apply. However, he would still receive his family allowance, so his total income would be £21.90.

In summary, the present British system of taxes, credits, social security, and welfare has several problems. FIS and family allowances discriminate against singles and childless couples, who receive no credits.[127] There are very high implicit tax rates on FIS recipients.[128] National insurance benefits do not always provide a decent living and recipients must resort to the alternative of going on supplementary benefits.[129] FIS has not succeeded in making work more profitable than supplementary benefits.[130]

B. *Elements of the New Credit Proposal*

The Treasury's proposal solves these problems. Briefly stated, it makes five reforms. First, it simplifies the system by folding income tax, personal allowances, family allowances, and FIS into one tax credit which is paid out weekly. Second, it provides such credits

125 The total payment derived from SOC. SECURITY REV., *supra* note 102, at 17, is £10.65 for husband & wife, £2.25 for child age 9, £2.75 for child age 12, £3.40 for child age 14, and £4.00 for rent, for a grand total of £23.05.

126 See text at note 99 *supra*.

127 See text at notes 92 and 95 *supra*.

128 See text at note 105 *supra*.

129 See text at note 111 *supra*.

130 See text at note 125 *supra*.

for singles and childless couples as well as for families. Third, it taxes the income of credit recipients at the existing income tax rate of 30 percent, at which work incentives are excellent. Fourth, it gives national insurance beneficiaries enough income to bring them above the supplementary benefits requirements. And finally, it supplements the income of the working poor by amounts sufficient to make work more attractive than supplementary benefits.

Specifically, the Treasury proposed credits of £4.00 per week for a single person, £6.00 for a childless couple, and £10.00 for a married couple with two children, with an average credit of about £2.00 for each additional child.[131] The following groups would be eligible for the credit: employed persons earning at least one-fourth of the average industrial wage (presently £8.00 per week); all national insurance beneficiaries; and those on private pensions.[132] The proposal makes national insurance and pension benefits taxable. The net effect would considerably improve the position of national insurance beneficiaries, whose present benefits are considerably below the benefit break-even points of the tax credit proposal.[133] The Treasury tables illustrating the working of the scheme are set out here as Table 1. Typical supplementary benefits requirements appear on the right side of Table 1 for comparison. The tax credit scheme will generally increase the total income of national insurance beneficiaries to a level above the supplementary benefits requirements and will also improve the position of wage earners relative to supplementary benefits recipients.[134] The Treasury estimates that 90 percent of the population will come under the tax credits.[135]

It is important to understand who does not qualify for the credit. The exclusion of those whose earnings are less than £8.00 per week means that three important categories of supplementary benefits recipients will not come under the scheme: the chronically unemployed who do not receive national insurance unemployment compensation; women with dependent children; and many part-time employees. However, the guaranteed income which these

131 GREEN PAPER, *supra* note 19, at 3.
132 *Id.* at 4-5.
133 *Id.* at 4, 24-26.
134 *Id.* at 24-28.
135 *Id.* at 5.

TABLE 1
Illustrative Examples of the Operation of the Tax-Credit System
Persons in Employment

		Present net income of family	Position under the tax-credit system				Supplementary benefits requirements	
	Weekly pay		Weekly pay	Less tax at 30%	Plus credit	Pay after tax and credits		
Single	£ 10	£10	£ 10	£ 3	£4	£11	Rent	2·00
	15	13·93	15	4·50	4	14·50	SB	6·55
	20	17·43	20	6	4	18	Total	8·55
	25	20·93	25	7·50	4	21·50		
	30	24·43	30	9	4	25		
	35	27·93	35	10·50	4	28·50		
	50	38·43	50	15	4	39		
	100	73·43	100	30	4	74		
Married without children	10	10	10	3	6	13	Rent	2·50
	15	14·97	15	4·50	6	16·50	SB	10·65
	20	18·47	20	6	6	20	Total	13·15
	25	21·97	25	7·50	6	23·50		
	30	25·47	30	9	6	27		
	35	28·97	35	10·50	6	30·50		
	50	39·47	50	15	6	41		
	100	74·47	100	30	6	76		

(Table 1 continued)

	Weekly pay	Present net income of family	Position under the tax-credit system				Supplementary benefits requirements	
			Weekly pay	Less tax at 30%	Plus credit	Pay after tax and credits		
Married with	£10	£15·90	£ 10	£ 3	£ 10	£17	Rent	3·00
2 children	15	19	15	4·50	10	20·50	SB	15·15
under 11	20	21·50	20	6	10	24		
	25	24·56	25	7·50	10	27·50	Total	18·15
	30	28·06	30	9	10	31		
	35	31·56	35	10·50	10	34·50		
	50	42·06	50	15	10	45		
	100	77·06	100	30	10	80		
Married with	10	17·90	10	3	14	21	Rent	4·50
4 children—	15	22	15	4·50	14	24·50	SB	17·95
2 under 11 and	20	24·50	20	6	14	28		
2 between 11-16	25	27·90	25	7·50	14	31·50	Total	22·45
	30	31·48	30	9	14	35		
	35	34·98	35	10·50	14	38·50		
	50	45·48	50	15	14	49		
	100	80·48	100	30	14	84		

Source: CHANCELLOR OF THE EXCHEQUER, PROPOSALS FOR A TAX-CREDIT SYSTEM, CMND. NO. 5116, at 32 (1972).

groups receive under supplementary benefits exceeds the amount of the credits alone. As can be seen from Table 1, the credits under the Treasury proposal range between about one-half and two-thirds of what the same person would get under supplementary benefits.

The Treasury must have decided that it would be too expensive to fold supplementary benefits into a *universal* tax credit. This alternative would have been similar in effect and cost to McGovern's proposal to fold welfare into a universal tax credit equal to the poverty line. One can reduce the cost of a credit plan by reducing the level of the credit. The British Treasury saw that it could reduce the level of the credit by retaining a "two-tiered" system, *i.e.*, one level of benefits for those who work full time (or more precisely, those who earn more than £8.00 per week) and a separate and higher level of benefits for the unemployed and unemployables outside the national insurance system (or more precisely, those who earn less than £8.00 per week).

C. *Income Redistributive Effects of the Proposal*

The benefit break-even points under the proposal are £13.33 for a single person, £20.00 for a childless couple, £33.33 for a married couple with two children, and £46.67 for a married couple with four children.[136] These benefit break-even points are considerably above the income levels where one begins to pay taxes under the present system. Moreover, the benefit break-even points in the credit proposal are 150 to 200 percent of supplementary benefits requirements, which appear to be the only official figure for a "poverty level" income.

The Treasury proposal does not indicate what the tax break-even points are for credit recipients. However, Table 1 indicates that all taxpayers listed in the table are below the tax break-even point; in other words, everyone with an income before taxes of less than £100 per week gets a tax cut under the credit proposal. For example, a single individual with income of £100 per week has after-tax income of £74.00 under the credit and £73.43 under the present system. But when will taxes under the new system actually catch up with present taxes? The tax break-even point for

136 *Id.* at 34.

a childless couple is exactly £6000 per year (£115.38 per month). For a single individual it is somewhat less and for a married couple with two children it is slightly more.[137]

An income of £6000 (about $13,500) is very high in Great Britain, where the average industrial wage is about £1700.[138] If supplementary benefits requirements are taken as the official poverty level, the tax break-even point under the Treasury proposal is about 13 times the poverty level for a single individual (£444.60), and about six times the poverty level for a married couple with two children (£1111.40).[139] The proposal, like McGovern's, thus represents a significant tax cut for the middle income groups.

As one might expect in a proposal with such high tax break-even points, the Treasury's tax credit system will be relatively expensive. It will cost £1.3 billion — over $3 billion — more than the present system.[140] This represents the entire British fiscal dividend for three years.[141] The British Treasury has not released figures showing what part of the £1.3 billion will go to reducing taxes of those between the benefit break-even point and the tax break-even point and what part will go to increased net benefits for those below the benefit break-even point. Such figures would enlighten political discussion considerably by showing the extent to which the proposal is a tax cut for middle income groups. It is obvious, however, that a considerable portion of the cost of the program will be the cost of introducing credits to singles and childless couples, who do not receive credits under the present system.

But even if a large part of the proposal's cost is tax reductions to middle income groups, this does not necessarily condemn the proposal. *The Economist*[142] has suggested that the generosity of the tax credit proposal to middle income taxpayers might make the proposal politically more acceptable. Since so few people are worse off under the proposal, few will oppose it. Remember, however,

137 Author's computations.

138 GREEN PAPER, *supra* note 19, at 4. This is about $4000. The average gross income of a production worker in "manufacturing" in the U.S. is about $8000. STATISTICAL ABSTRACT, *supra* note 116, at 233.

139 Author's computations.

140 GREEN PAPER, *supra* note 19, at 29.

141 THE ECONOMIST, Oct. 14, 1972, at 81.

142 *Id.*

that the high tax break-even points of McGovern's proposal turned out to be its greatest political liability. If considerable opposition did develop in Parliament to the high tax break-even points of the Treasury proposal, it would be a simple matter to lower the tax break-even points by applying the progressive surtax at a lower level than £5000. Lowering the tax break-even points would of course mean more people would pay higher taxes, but this may be easier to do in Great Britain because the tax system is still in a state of flux. All the details of the new 30 percent tax have not been worked out yet. Moreover, the tax system introduced this year represented a big tax cut for middle and upper bracket taxpayers, and lowering the tax break-even point could be structured to cut back on this reduction rather than increase taxes on these groups.[143]

D. *Work Incentives Under the Proposal*

The British proposal seems to solve the problem of high implicit tax rates under FIS and other aspects of the present system. The marginal tax rate for most taxpayers below £5000 income per year will be 35 percent (30 percent income tax plus five percent national insurance payroll tax), under which work incentives would seem to be excellent. However, the credit will not fold in rent subsidies and various in-kind assistance programs, such as the school lunch program, which operate on the sudden death principle. Rent subsidies will add 17 to 25 percent to the tax rate, since the tenant pays a certain proportion of his income in rent as in the American programs.[144] Hence, the implicit marginal tax rate for some taxpayers could reach 60 percent, even if the effect of the notches in the in-kind assistance programs is ignored. It thus might be advisable to devise a rent subsidy system with a lower marginal tax rate.

The marginal tax rate is, however, only one aspect of the work incentives problem under the plan. As demonstrated above, FIS does not really make it worthwhile for a taxpayer with low earning power and several children to go to work, since his supplementary benefits are very close to his FIS income.[145] How does the credit

143 *See* Finance Bill Note, *The Prospect Before Us*, 1972 BRIT. TAX REV. 57, 58.
144 THE ECONOMIST, Oct. 14, 1972, at 28. See text accompanying notes 105-07 *supra*.
145 See text accompanying note 125 *supra*.

proposal affect his income from employment in comparison to supplementary benefits? Here it will be assumed that increases in take-home income from working, relative to supplementary benefits, will increase incentives to give up supplementary benefits in favor of wages.

Let us examine how the credit proposal will affect the five member household described above where the father earns £20.00 per week. Under the present system recall that he receives a net income of £22.90 by working at £20.00 per week. His supplementary benefits income is £21.90. Under the tax credit proposal, he would pay a tax of £7.00 (at 35 percent) if working, but receive a credit of £12.00, giving him a net income of £25.00. Assuming he will receive the same supplementary benefits income under the new system,[146] work becomes a more attractive alternative under the tax credit. The incentive for work, *i.e.*, additional income of £3.10, is, to be sure, modest at this low income level. However, if the same man made £25.00, he would receive £28.25 under the new system.

The poor incentives for supplementary benefits recipients to seek part-time work will remain under the new credit. The tax rates of 100 percent on earnings above £1.00 per week will continue unchanged in the supplementary benefits system. Of course, those earning over £8.00 per week will become eligible for the credit, but this will probably not create incentives to earn until earnings reach or exceed the amount that one could receive in supplementary benefits. For example, a married couple with two children might typically have supplementary benefits requirements of £18.15. If the father works enough to earn £10.00 per week, he will be eligible for a tax credit which will boost his take-home pay to £17.00. With this income he will still be entitled to a supplementary benefit of £2.15; and he will still receive the same income, £19.15, which he would receive if he only earned £1.00 per week. He will probably not have much incentive to work until

146 The proposal does not indicate whether family allowances will be completely abolished or just eliminated for those coming under the tax credit. Even if the family allowance is eliminated for supplementary benefits recipients, the supplementary benefits rates would probably be raised to make up for the loss.

his take-home pay exceeds his supplementary benefits requirements by several pounds.[147]

Hence under the new tax credit, one will have no economic incentive to work part time until his take-home pay significantly exceeds the amount he could receive through supplementary benefits, since there will continue to be a 100 percent tax on part-time earnings up to the amount of supplementary benefits requirements. There will, however, be incentives for those with low earning power to work full time. Suppose the taxpayer in the preceeding paragraph can only earn £15.00 full time. His supplementary benefits requirements will still be £18.15, but he will only receive £15.00 in supplementary benefits due to the wage stop. However, if he gets a full-time job with weekly pay of £15.00, his income will be boosted to £20.50 by the credit.

Why did the Treasury decide to leave the 100 percent tax rate on part-time earnings of supplementary benefits recipients? The answer is probably that there would be situations where one would be better off working part time than working full time if the tax rate on part-time earnings were lower. Suppose that a married man with two children can earn £20.00 by working full time and that his supplementary benefits requirements are £18.15. If he works 40 hours per week, he will take home £24.00 under the credit system. Since he can work up to 30 hours per week and still receive supplementary benefits, he might earn £15.00 while receiving supplementary benefits. If the tax rate on part-time earnings of supplementary benefits recipients were only 50 percent, he would keep £7.50 of his earnings in addition to his benefit of £18.15, for a total income of £25.65, which is more than he would make working full time. Even if the tax rate on part-time earnings of supplementary benefits recipients were 67 percent, the taxpayer would take home £23.15 by working part time which is only £0.85 less than his full-time take-home pay (£24.00).

The British Treasury has in effect decided that it will not worry about creating incentives for part-time work under its two-tiered system. It will tax earnings from part-time work at 100 percent

147 Of course a man who works over 30 hours per week will become ineligible for supplementary benefits.

so that it can create better incentives for full-time work. This decision was of course made easier by the fact that a part-time employee on supplementary benefits is required to register for full-time employment.

E. *Political Acceptability of the British Proposal*

Why has the British tax credit proposal been so well received? McGovern's UTC proposal was widely regarded as too radical for the American political climate.[148] On the other hand, a proposal amounting in effect to a universal tax credit was respectable enough for a Conservative government to propose in Britain. Why does the credit idea have such an easier time in Britain? First, there are several factors which reflect more the political, cultural, and institutional differences between the two countries than the inherent soundness of these proposals. Britain has in effect already adopted the concepts of a guaranteed minimum income and wage supplementation with the introduction of the supplementary benefits system and FIS respectively. In this context the credit proposal does not represent a radical ideological departure. It can be accepted in large part as an administrative improvement and simplification of the current system of income maintenance. Furthermore, since the only people who benefit from it either work or receive social security, it cannot be attacked as a further "give-away" to those on welfare.

Second, the acceptability of the British proposal is probably due largely to the use of a two-tiered system in the proposal. The alternative would have been to introduce a fully universal tax credit like McGovern's which accomplishes in one credit both the function of replacing the welfare system and the function of supplementing the incomes of the working poor. By separating out the latter function, the British have designed a credit which is significantly cheaper than a UTC. Since the credit does not have to provide a decent living to those with no other income, the credit can be set lower than the credit in a UTC. One can supplement the incomes of the working poor enough to give them good incentives to work (versus going on welfare) by paying them a credit

148 *See, e.g.*, text accompanying note 75 *supra*.

which is significantly lower than the poverty level income, or so the British thinking goes.

Since the tax credit can be low under a two-tiered system, the British were able to design a system with both a relatively low tax rate and a relatively low benefit break-even point. Had the British wanted the same benefit break-even points suggested in the proposal, but also wanted a credit high enough to replace supplementary benefits, they would have had to use a much higher tax rate.

By separating the function of supplementing the incomes of the working poor from the function of an income guarantee to the nonworking, the British are able to escape the constraints of the BBP = C/R formula. And yet the British proposal will still guarantee a minimum income for the whole populace. The nonworking and part-time employed will have a minimum income equal to their supplementary benefits requirements, and the full-time employed will have a minimum income equal to the lowest full-time wage plus the net credit they will receive.

The third important factor making a universal credit politically more feasible in Great Britain is the ease with which the credit can be grafted onto the present British tax system. A UTC in America would represent a radical change in our approach to income taxation. Britain, on the other hand, is starting with a system of taxation based on a very high flat tax rate balanced by very high exemptions. A credit can be superimposed on this system with little disruption; one simply replaces the high exemptions with a lower credit. In America on the other hand, a credit could be introduced only with a complete overhaul of the rate structure.

To look at the British proposal from a broader perspective, one might say that its thrust is completely different from FAP and McGovern's UTC. Both these plans attempt to include the working poor and welfare recipients in one system of credits. The British proposal, on the other hand, contemplates increased assistance only to the working poor and to national insurance beneficiaries. In American terms this would be equivalent to leaving AFDC unaltered and creating a new system of credits to supplement the earnings of low-paid workers and the benefits of social security recipients.

For example, an income maintenance system could be designed for the U.S. in which only those who worked and did not receive welfare would receive credits. Since the credit would not be the sole means of support for recipients, it could be set very low, say $1500 for a family of four. With such a low credit, it would be possible to have a tax rate as low as 33 percent without pushing the benefit break-even point up to an unacceptably high level. In fact, the benefit break-even point for the foregoing plan would only be $4500.

This plan has the political advantage of helping only the working poor. It cannot be called a "welfare giveaway" by opponents of income maintenance. However, the plan does not answer the critical need of the United States to reform its welfare system. While the plan in general might make work more attractive by increasing its profitability, the plan provides no incentive for people to leave welfare until total income under the plan exceeds welfare benefits plus whatever earnings the welfare system allows the recipient to retain. For example, in a state where welfare benefits are $3000, a welfare mother earning $2000 could keep $910 of her earnings ($30 per month tax free plus 33 percent of the remaining $1640) for a total income of $3910. Under the income maintenance scheme she would get a credit of $1500 plus $1333 of her $2000 earnings for a total income of $2833. Thus it is more profitable for her to stay on welfare.

Because welfare is considered to be in such a state of crisis in America, it is prudent to direct income maintenance efforts in America to reforming the welfare system and improving work incentives under that system.

V. The Future of Income Maintenance

Where should the United States go in income maintenance? There are significant problems with H.R. 1, both of workability and political acceptability. But a universal tax credit may face even greater obstacles of political acceptability and fiscal feasibility.

Given the fiscal constraints projected for the mid-70's,[149] it seems prudent to design a plan whose cost does not significantly

149 See text accompanying note 25 *supra.*

exceed the $6.4 billion figure[150] for H.R. 1. The question is whether the problems of H.R. 1 can be solved without greatly increasing its cost.

One problem of H.R. 1 which must be solved is that of work incentives. For one thing, the 67 percent tax rate was a great political liability. Conservatives on the Senate Finance Committee believed that 67 percent was a significant work disincentive.[151] Previous studies of FAP have suggested that FAP would produce better work incentives and would gain more political acceptability if the tax rate was 50 percent. HEW estimated that this reduction in the tax rate would increase the cost of FAP from $6.4 billion to $7.9 billion if the $720 exemption was retained.[152] However, the additional cost of reducing the tax rate to 50 percent could be held to $200 million if the $720 exemption were eliminated.[153] Exemption of a flat amount of income could be replaced by an exemption of a percentage of earnings — the latter exemption simply given in the form of a lower tax rate, *i.e.*, 50 percent instead of 67 percent. The elimination of the $720 exemption (or any exemption of a flat amount of income) is not undesirable since such an exemption has a questionable effect on work incentives. The overall effect of the $720 exemption is to create better incentives for part-time work than for full-time work, since the exemption creates a sharply progressive scale of taxation.[154]

Another problem with work incentives under H.R. 1 was the increase in the marginal rate of taxation of earnings through the effect of the federal rent subsidy and medicaid programs.[155] This problem can be solved by reducing the implicit rate of taxation and eliminating notch effects in the latter programs, but only at an increase in cost. The most effective plan devised appears to be that of Henry J. Aaron, who suggested a housing subsidy with an implicit tax rate of less than 10 percent.[156] This rate was achieved under Aaron's plan at the cost of a sizable reduction in the average

150 *Hearings on H.R. 1, supra* note 28, at 244 (HEW estimate with $720 disregard and 67 percent tax).
151 See note 54 *supra*.
152 *Hearings on H.R. 1, supra* note 28, at 244-45 (HEW estimate).
153 *Id.*
154 See text following note 60 *supra*.
155 See text following note 55 *supra*.
156 H. AARON, *supra* note 5, at 63-64.

amount of assistance available under present programs. Aaron also recommended a health insurance program where the implicit tax rate in the premiums payable under the plan would be eight to ten percent. When combined with the 50 percent tax rate recommended in this Note, these health and housing programs would result in a total tax rate of 70 percent. Since only a small proportion of those receiving the means-tested credit would also be receiving rent subsidies, most recipients of the credits would only be paying a 60 percent rate. If, however, a 60 percent or 70 percent total rate were felt to be too high, the implicit taxes paid under the housing and health programs could be wholly or partially credited to tax liabilities under the 50 percent rate in the means-tested credit. In other words, a credit recipient who was also paying an implicit tax rate of 20 percent under the health and housing programs would have his 50 percent tax rate under the credit scheme reduced by 20 percentage points (or less).[157] Such a scheme of crediting health and housing "taxes" to taxes due under FAP would be especially important where the tax rate on part-time earnings is 100 percent under the plan proposed below.[158]

157 Aaron suggests such a tax "ceiling" but rejects it because of alleged federal-state fiscal difficulties. *Id.* at 55. Since the rent subsidy and health plans proposed by Aaron are federally financed, this objection is not applicable to them, but would, on the other hand, lead to increased federal costs.

158 Aaron also proposes a wage supplement program as an alternative to the means-tested credit approach of H.R. 1. Actually the scheme he proposes is subject to the same BBP = C/R formula inherent in all income maintenance schemes. Under his proposal C is $2400 for a family of four. The tax rate is on a sliding scale depending on the level of hourly earnings with a higher exemption and lower marginal tax rate for those with lower hourly earnings. For instance, a man earning $1.60 per hour net would have his earnings exempt from tax up to $2133 while a man earning $4.00 per hour would get only a $593 exemption. The marginal tax rate for a man earning $1.60 per hour is 30 percent with higher marginal rates for those with higher hourly earnings. Thus, the benefit break-even point is lower for those who earn more per hour. For instance, under Aaron's plan the benefit break-even point is $7728 for a man earning $1.60 per hour but less than $6000 for a man earning $4.00 per hour.

The high exemptions in Aaron's plan for those employed at low hourly earnings provide excellent incentives for part-time employment, since, in effect, there is a zero marginal tax rate up to the level of the exemption. However, under Aaron's plan the burden of taxation falls heavier on full-time employees than on those who work part time. Part-time employees will often pay no tax at all. But once the exemption is exceeded the average rate of taxation will increase as hours of work increase even if earnings per hour remain constant. The marginal rate of taxation under Aaron's plan also increases as earnings per hour increase.

Aaron's scheme of incentives is in a sense the opposite of the scheme of incentives in the British plan and the plan proposed here. While part-time earnings below a

A second problem in H.R. 1 which must be solved is the development of a workable system of state supplements. State supplements are the only method to bring total benefits closer to the poverty line. Since federal finances are in no position to absorb the entire cost of income maintenance, state supplements are required. State costs, however, can be kept to a minimum through the use of a two-tiered system, like the British proposal, with one level of benefits for the full-time employed and a separate, higher level of benefits for the unemployed. Such a system is proposed below.

Although it may be politically possible to require the states to supplement FAP payments to fatherless families, it does not seem politically or fiscally possible to require all the states to supplement the benefits to a family where the father is present. It is probably best, then, to design a federal mechanism for dealing with father-headed families.

While H.R. 1 provided benefits of $800 each for the first two members of a household and $400 each for the next two members, it would be better to have the amount of the federal grant depend on whether the family member to whom it was attributable was a parent or child. A grant of $900 could be paid for each parent present and $500 for each of the first three children. A couple with two children would thus receive $2800, and a mother with three children would receive $2400.

The states would be required to maintain a certain percentage, *e.g.*, 60 percent, of their current AFDC contribution as a supplement to FAP payments. However the state would only be required to pay supplements for mothers and children in families where the father was not present. For households where the father was present, the FAP payment would be increased by a sum equal to the supplements for the mother and children which the particular state would pay if the father were absent from the household. The father's earnings would be taxed at 100 percent until they equaled

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certain level will be taxed at a marginal rate of 100 percent in the latter two plans, Aaron's plan taxes part-time earnings at a zero marginal rate up to a certain point. Aaron apparently assumes that lower marginal rates are more important for part-time than for full-time employees. This Note makes the opposite assumption. H. AARON, *supra* note 5, at 60-62.

twice the amount of the additional FAP payment in lieu of the state supplement.

To illustrate let us assume that the state supplement was $900 for a family consisting of a mother and two children. A family consisting of an unemployed father, mother, and two children would receive a FAP payment of $2800 plus an extra federal payment of $900 in lieu of the state supplement, for a total benefit of $3700.

Instead of the flat 50 percent FAP tax mentioned above, the following scheme could be used. If the father in the latter family goes to work part time, the first $1800 of his earnings will be taxed at 100 percent. Thus if the father worked 20 hours a week at $1.75 per hour, he would earn $1800 but would be no better off than if he were unemployed. When the father passed $1800 in earnings, a marginal rate of 50 percent would begin to apply. Thus his total earnings and benefits would be $3700 if he were earning between zero and $1800. For earnings between $1800 and the benefit break-even point of $5600, the scheme would operate just like a FAP with a credit of $2800 and a tax rate of 50 percent. For instance, if the father worked full-time at $1.75 per hour, his earnings would be about $3600. At this point he would have net income of $4600 ($2800 plus 50 percent of $3600). Thus at a wage of $1.75 per hour he would gain $900 in net income by working full time versus not working at all or working under 20 hours a week.

Under this scheme an unemployed man in a family of four receives a benefit of $3700 while a man employed full time receives a benefit of $2800 in addition to his net pay. There is, in effect, a two-tiered system of benefits. Under this two-tiered system it is impossible for a man working part time to receive more than a man working full time. This is because earnings less than twice the difference between the two levels of assistance are taxed at 100 percent. Of course, incentives for earning amounts less than twice this difference are very poor under this scheme; but this is the price for the advantage of a two-tiered system. The great advantage of this system is that it is far cheaper than a scheme where the credit for all families of four is $3700. A man with no earnings can

be given a decent income without raising the credit for a man who works full time.

How will the scheme work for fatherless families? Here it will be exactly like H.R. 1, except that the tax rate will be 50 percent and there will be no $720 disregard. In the example given above, the mother with two children will have a benefit break-even point of $5600 since her benefit is $2800 ($1900 FAP and $900 supplement). The benefit break-even point for a one-parent family will be the same as the benefit break-even point for a family of four where the father is present. This more favorable treatment for one-parent families is justified by the extra expenses which the working single parent incurs for day care.

This proposal minimizes the cost of income maintenance by paying a lower level of benefits to those who work full time than to those who do not work at all.[159] Although it sacrifices incentives for part-time work, it ensures that a full-time worker will always fare better than a part-time worker. The emphasis in work incentives under the proposal is on full-time employment, where it should be. The marginal tax rate on full-time earnings will virtually always be 50 percent. At the same time the plan ensures that a family without an employed member will receive benefits significantly closer to the poverty line than those provided by H.R. 1. Although this proposal lacks perfection, it solves most of the problems of H.R. 1 and does so at a more reasonable cost.

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159 Only a very rough estimate of the plan's cost can be made. If it is assumed that this plan would cost the same as a FAP with a benefit of $2800 for a family of four, a tax rate of 50 percent, and no disregard, its cost would be $9.3 billion. *Hearings on H.R. 1, supra* note 28, at 244-45 (HEW estimate).

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