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FOREWORD

THE CONGRESSIONAL ROLE IN FORMULATING NATIONAL POLICY: SOME OBSERVATIONS ON THE FIRST SESSION OF THE NINETY-THIRD CONGRESS

As its 1973 session opened, Congress perceived a challenge, precipitated by presidential assertions of power, to the legislature's role as a coordinate branch of government. By briefly describing this challenge and then analyzing several congressional actions which reflect that body's reaction to it, this Foreword provides a framework for the articles which follow. While the rhetoric of some Congressmen indicated a desire that Congress obtain the power to shape the ultimate course of national affairs, the conclusion this Foreword draws is that most members desire to re-establish the norm of cooperation between the branches and to insure that Congress be consulted on major questions. In short, they desired that the legitimizing function of Congress be acknowledged.

I. CONGRESSIONAL PERCEPTIONS OF A CHALLENGE

During the 92d Congress, executive action led to serious concern among Congressmen that Congress was losing the ability to meaningfully affect the conduct of government. The President was actively "impounding" money for a variety of domestic programs which Congress had funded.[1] Congressional access to information about government operations and policies was restricted by claims of executive privilege and by other devices.[2]

1 *See* Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973) [hereinafter cited as Note, *Impoundment*].

2 *See* Note, *Executive Privilege and the Congressional Right of Inquiry*, 10 HARV. J. LEGIS. 621 (1973) [hereinafter cited as Note, *Executive Privilege*]; *Hearings on Executive Privilege, Secrecy in Government, Freedom of Information, Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

American military operations in Southeast Asia were carried on without congressional consultation and in the face of congressional opposition.[3] The 1972 election appeared to set the stage for further assertions of presidential power. The President was no longer a "minority" President, having received over 60 percent of the popular vote and 520 of 538 electoral votes. But the voters had also returned a Democrat-controlled Congress, though the Democrats lacked the strength in either House to override a presidential veto.

The postelection reaction of Congress to this situation was to call for a reassertion of congressional power and influence, and for the preservation of Congress' constitutional duties. In reflecting on the events of the 92d Congress and on the election, Senate Majority Leader Mansfield (D.-Mont.) remarked:

> [I]f there is one mandate to us above all others, it is to exercise our separate and distinct Constitutional role in the operation of the Federal government. The people have not chosen to be governed by one branch alone. They have not asked for government by a single party. Rather, they have called for a reinforcement of the Constitution's checks and balances. . . . The people have asked of us an independent contribution to the nation's policies. To make that contribution is more than our prerogative, it is an obligation.[4]

II. The Congressional Battle for Increased Participation

During the first session, Congress moved to check the power of the President to take unilateral action in the areas of impoundment of appropriated funds[5] and the commitment of U.S. forces to hostilities abroad.[6] In an analogous action with respect to the judiciary, Congress sought an increased role in the formulation

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3 *See An Introspective and Angry Congress Begins Its Work*, 31 Cong. Q. Weekly Rep. 3, 5 (1973) (House Democratic Caucus members voice feelings of resentment at President, vote resolution calling for termination of appropriations for Southeast Asia conflict after prisoner release).

4 119 Cong. Rec. S217 (daily ed. Jan. 4, 1973) (remarks of Senator Mansfield to the Democratic Conference).

5 See text at note 9 *infra*.

6 See text at note 36 *infra*.

of the Federal Rules of Evidence.[7] Congress also acted to increase its ability to participate in the formulation of policy by increasing its access to executive branch information.[8] These steps did not exhibit an intent on the part of Congress to dominate policy-making; they exhibited an intent to increase the mutual accommodation between the branches.

A. *Impoundments*

The President's actions to curtail domestic spending were perhaps the most publicized challenge to Congress. During the 92d Congress and the early part of the 93d, the Administration, claiming the need to reduce expenditures and thus the deficit, moved to "impound" funds for several domestic programs.[9] The Office of Management and Budget reported that as of February 29, 1973, about $8.7 billion had been impounded.[10] These impoundments were in addition to the Administration's non-allocation of several billion dollars of "contract authority"[11] under the Federal Water Pollution Control Act Amendments of 1972,[12] a measure which had become law after both Houses overrode a veto.[13] While previous Presidents had impounded funds, the Nixon Administration's impoundments were of record levels;[14]

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7 See text at note 45 *infra*.

8 See text at note 61 *infra*.

9 "Impoundment" is a nontechnical term which can have several meanings. When Congress appropriates money, it in effect places the sum on account at the Treasury for agency expenditure. Impoundment generally refers to the process by which the Office of Management and Budget places part of this amount in a budgetary "reserve" against which the agency may not draw. *See* Note, *Impoundment*, *supra* note 1, at 1505 n.1.

10 38 Fed. Reg. 3476-96 (1973).

11 Congress may also grant an agency "contract authority" which enables the agency to sign long-term contracts, payments for which will be made from funds to be appropriated in the future. A refusal by the Administration to let an agency use all its contract authority is sometimes referred to as an impoundment although no appropriated funds are involved. *See* Note, *Impoundment*, *supra* note 1, at 1505 n.1.

12 Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-376 (Supp. II, 1972)). For the reduced allocation, see 37 Fed. Reg. 26,282-83 (1972).

13 This limitation on allocation was declared unlawful in several court actions. *See, e.g.*, City of New York v. Ruckelshaus, 358 F. Supp. 669 (D.D.C. 1973).

14 In 1966, President Johnson impounded $5.3 billion in funds for highways and other domestic programs. *See* Note, *Impoundment*, *supra* note 1, at 1511.

and its use of impoundments as a device to terminate "significant non-military programs" was "unprecedented."[15]

The ability to set funding levels is obviously a crucial one for Congress. It not only provides members funds to carry out favored programs, but also provides a method of exerting leverage on agencies via the threat of fund reduction.[16] It is not surprising to find that the House report on an impoundment control measure criticized the Administration's impoundments as having "encroached upon the legitimate role of Congress in establishing spending priorities, eroded Congress' constitutional and vital powers of the purse, upset the delicate constitutional balance of power between the legislative and executive branches, aggrandized executive power, exercised an item veto never authorized by Congress, and created chaos in the operation of state and local governments."[17] In his Budget for Fiscal 1974,[18] the President set forth proposals which would effect a fundamental change in the nature and funding level of federal domestic programs,[19] and undercut the categorical grant programs which had formed the basis of Democratic national policy from the New Deal to the Great Society. This spending heritage may have contributed to the limited congressional interest in controlling overall expenditures in prior years, when both Congress and the President were sympathetic to expanded budgetary totals:

> By the 1960s . . . President and Congress were operating in tandem and their budgetary partnership produced the escalating deficits of the past decade. . . . But in 1973, President Nixon decided to dissolve the budgetary partnership and to battle for a slowdown in spending growth. The 'budget busters' that now provoke Presidential ire are the same kinds of programs that were once Presidentially fashionable.[20]

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15 *Id.* at 1512.

16 *See generally* R. FENNO, THE POWER OF THE PURSE xiii, 264-349 (1966).

17 H.R. REP. No. 336, 93d Cong., 1st Sess. 3 (1973) (Impoundment Control and Expenditure Ceiling Act).

18 BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 1974 (1973).

19 *See* E. FRIED, A. RIVLIN, C. SCHULTZE & N. TEETERS, SETTING NATIONAL PRIORITIES, THE 1974 BUDGET vii (1973).

20 Schick, *Congress versus the Budget*, in *Hearings on Committee Organization in the House Before the House Select Comm. on Committees*, 93d Cong., 1st Sess., vol. 2, pt. 3, at 625, 633 (1973) [hereinafter cited as *Congress v. the Budget*].

The Administration's actions presented a strong political challenge to the Democratic Congress. The President, however, deemphasized the political nature of his actions and addressed Congress in institutional terms. In his second veto in 1972 of the appropriations bill for the Departments of Labor and Health, Education and Welfare, he stated that congressional action in twice passing that "excessive" measure amounted "to a textbook example of the seeming inability or unwillingness of the Congress to follow prudent and responsible spending policies."[21]

The challenge posed by the President's desire for reduced congressional expenditures was a difficult one for Congress. Congressional action to limit the President's freedom to impound would point up the lack of a congressional mechanism for controlling total appropriations. In recognition of that situation Congress took steps to improve its budget handling procedures.[22]

Aside from such budget reform efforts, the congressional response to the President's actions was twofold: piecemeal legislation and an impoundment control bill. The piecemeal legislation revised program enabling legislation to make spending authority mandatory; previous spending authority had been construed by the Administration to give it discretion in spending. One revision involved the emergency loan program under the Consolidated Farm and Rural Development Act.[23] Another revision, involving the rural water-sewer grant program,[24] was vetoed and the veto was sustained.[25] One program whose funds were impounded, the Rural Electrification Act,[26] was completely revised as part of a compromise with the Administration.[27]

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21 8 WEEKLY COMP. PRES. DOC. 1577, 1578 (1972) (pocket vetoing H.R. 16654, 92d Cong., 2d Sess. (1972)).

22 For a discussion of congressional attempts to establish such a mechanism, see Schick, *Budget Reform Legislation: Reorganizing Congressional Centers of Fiscal Power*, 11 HARV. J. LEGIS. 303 (1974).

23 7 U.S.C. § 1961 (1970). The revision is contained in Act of Apr. 20, 1973, Pub. L. No. 93-24, § 3, 87 Stat. 24. As part of a compromise certain program benefits were reduced at the same time operation of the program was made mandatory.

24 7 U.S.C. § 1926 (1970).

25 H.R. 3298, 93d Cong., 1st Sess. (1973), *vetoed*, Apr. 5, 1973, H.R. DOC. No. 77, 93d Cong., 1st Sess. (1973), *veto sustained*, 119 CONG. REC. H2540-56 (daily ed. Apr. 10, 1973).

26 7 U.S.C. §§ 901-24 (1970).

27 Act of May 11, 1973, Pub. L. No. 93-32, 87 Stat. 65; *see* Statutory Comment,

The impoundment control bill was passed by both Houses,[28] but remained deadlocked in conference as the session ended.[29] Both versions of the bill would require that impoundments be subject to congressional action. However, in the Senate version impoundments would be ineffective unless specifically approved by Congress within 60 days. The House bill would place the risk of default on Congress; an impoundment would become effective unless disapproved within 60 days.[30] Both versions couple impoundment control with spending control. The President is required to keep expenditures within a specific dollar amount by making pro rata reductions in budget "functional categories."[31]

One commentator felt that coupling a spending ceiling with impoundment control would make "the President a mere agent of Congressional intent."[32] It is questionable, however, whether such a system would operate to check the vast influence of the Executive in budget formulation and execution.[33] This is particularly so if the House version requiring affirmative congressional action to prevent an impoundment is adopted. Unlike mandatory spending language, which may be enforced by courts,[34] the impoundment control legislation gives the President increased flexibility in the expenditure of funds by establishing procedures by which he can lawfully make "programmatic" impoundments. This aspect of the measure was explicitly recognized by the Senate report:

The Amended Rural Electrification Act: Congressional Response to Administration Impoundment, 11 HARV. J. LEGIS. 205 (1974).

28 S. 373, 93d Cong., 1st Sess. (1973). The House version appears in 119 CONG. REC. H6628 (daily ed. July 25, 1973), and the Senate version appears in *id.* at S8871 (daily ed. May 10, 1973).

29 The House has again passed its version of the Impoundment Control Act as an amendment to the House budget reform measure, H.R. 7130, 93d Cong., 1st Sess., tit. 2 (1973). 119 CONG. REC. H10,671-720 (daily ed. Dec. 5, 1973).

30 S. 373, 93d Cong., 1st Sess. § 3 (Senate version), § 102 (House version) (1973).

31 *Id.* § 202 (House and Senate versions).

32 *Congress v. the Budget, supra* note 20, at 630.

33 For an outline of the mechanisms through which the executive branch exercises nonimpoundment discretion over the actual use of appropriated funds, see Fisher, *Congressional Control of Budget Execution,* in *Hearings on Committee Organization Before the House Select Comm. on Committees,* 93d Cong., 1st Sess., vol. 2, pt. 3, at 593 (1973).

34 *See* cases collected in Fisher, Court Cases on Impoundment of Funds, Aug. 22, 1973, at 49-56 (unpublished Congressional Research Service study).

> In fact, S. 373 . . . gives the President a "second chance" at specific items in the budget. As such, it allows him a limited "item veto," subject only to getting approval of the Congress for each action. . . . There is room within the interstices of the Constitution for that type of pragmatic accommodation to the pressures of modern government, an accommodation that will also help to preserve the benefits of the separation of powers. The Constitution establishes a system of "antagonistic cooperation" between the branches; S. 373 . . . will further that concept.[35]

B. *War Powers*

On November 7, 1973, Congress overrode the President's veto[36] of H.J. Res. 542, thereby enacting the War Powers Resolution.[37] It establishes, for the first time in American history, a general procedure governing the deployment of American forces abroad.[38] The resolution is the result of several years of growing congressional concern with the manner in which the President has entered into foreign military activities without full, informed congressional participation. Section 3 of the resolution requires the President to "consult with Congress" before and during the introduction of U.S. armed forces into hostile situations. Section 5(b) requires the President to terminate the use of U.S. forces within 60 days of their deployment or within an additional 30 days if "unavoidable military necessity" requires the continued use of such forces "in the course of bringing about a complete removal" of them. These strictures do not apply if Congress has declared war, has specifically authorized troop use, or has extended the 60-day period.[39]

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35 S. REP. No. 121, 93d Cong., 1st Sess. 17 (1973).

36 H.R. Doc. No. 171, 93d Cong., 1st Sess. (1973).

37 Pub. L. No. 93-148, 87 Stat. 555 (1973).

38 For a more detailed analysis of the resolution, see Statutory Comment, *The War Powers Resolution: Statutory Limitation on the Commander-in-Chief*, 11 HARV. J. LEGIS. 181 (1974). The resolution's passage followed enactment of a prohibition against the use of appropriated funds for military operations in Southeast Asia. Second Supplemental Appropriations Act, Fiscal Year 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99 (1973); Continuing Appropriations Act, Fiscal Year 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130 (1973). Both of these contained an August 15, 1973, cutoff of funds. An earlier version of the Second Supplemental Act, H.R. 7447, containing an immediate termination of bombing funds, was vetoed on June 27, 1973. The House sustained the veto. 119 CONG. REC. H5486-88 (daily ed. June 27, 1973).

39 War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 555 (1973).

A chief aim of the resolution's sponsors was to force the President to cooperate with Congress. This aim was expressed by House Majority Leader O'Neill (D.-Mass.): "If the President can deal with the Arabs, and if he can deal with the Israelis, and if he can deal with the Soviets, then he ought to be able and willing to deal with the U.S. Congress. That is all we ask of him."[40] While the President's personal difficulties may have played a part in providing enough Republican votes for the two-thirds majority needed to override, the approval of the resolution reflected the deep congressional uneasiness over the events of the past decade.[41] One of the resolution's chief Senate proponents, Senator Javits (R.-N.Y.), remarked on another dimension of the support for the resolution, that of the congressional role in the legitimization of national policy. Noting that the resolution gives the people a voice in the process of warmaking through their broad representation in Congress, he observed: "This is critically important, for we have just learned the hard lesson that wars cannot be successfully fought except with the consent of the people and with their support."[42]

The President in his veto message condemned the resolution's provisions as a limitation on both his inherent constitutional powers as commander-in-chief and as a practical limitation on his flexibility to deal with specific international crises.[43] However, one of the resolution's initial sponsors, Senator Eagleton (D.-Mo.), was concerned that the provision for continued military action by the President for up to 90 days did not limit the power of the President, but enacted the present unilateral process of foreign policy decisionmaking.[44] If this is so, Congress may have again operated to increase presidential power when attempting to increase its own participation. Whether that is the case will depend on the willingness of Congress to reject a presidential request for a continuation of the 60-day period.

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40 119 CONG. REC. H9652-53 (daily ed. Nov. 7, 1973).

41 *Congress Overrides Nixon's Veto of War Powers Bill*, 31 CONG. Q. WEEKLY REP. 2985-86 (1973).

42 119 CONG. REC. S20,105 (daily ed. Nov. 7, 1973).

43 H.R. DOC. No. 171, 93d Cong., 1st Sess. (1973).

44 119 CONG. REC. S20,095 (daily ed. Nov. 7, 1973).

C. *Rules of Evidence*

In the midst of the conflict between the legislative and executive branches, Congress also made an assertion of power vis-à-vis the judiciary. The occasion was the Supreme Court's promulgation of the "Rules of Evidence for United States Courts and Magistrates."[45] The Court's adoption of the rules, which were written by an Advisory Committee on Evidence appointed by the Judicial Conference of the United States, was made pursuant to the provisions of the various "rules enabling" statutes. These empower the Court to prescribe rules of practice and procedure for Federal courts.[46] Through this mechanism, the rules adopted by the Court automatically become effective within 90 days of their transmittal to Congress, unless Congress disapproves them by that date.[47]

After publication of the initial draft of the rules in 1971,[48] several Senators expressed concern that some of the rules either were contrary to prior congressional intent or were controversial enough to merit extensive congressional scrutiny.[49] It was argued that the requirement for disapproval by both Houses within 90 days of transmittal was not long enough to permit effective congressional action. Hence, legislation was introduced to provide that the rules would not go into effect if disapproved by resolution of either House during the session in which they were transmitted.[50] The bill did not get out of committee, however.

The controversy was resumed upon transmittal of the rules in 1973. In particular, the sections dealing with the testimonial privileges caused concern. Rule 509, dealing with the privileges sur-

45 The Rules were transmitted February 5, 1973, to be effective July 1, 1973. H.R. Doc. No. 46, 93d Cong., 1st Sess. (1973).

46 18 U.S.C. §§ 3402, 3771, 3772 (1970) (criminal procedure); 28 U.S.C. §§ 2072, 2075 (1970) (civil procedure).

47 The ability of the Supreme Court to adopt the Federal Rules of Evidence, both as a matter of construction of the Rules Enabling Act and as a matter of constitutional power, was a matter of dispute. However, a preliminary study of the matter sponsored by the Judicial Conference had upheld the validity of the Court's adoption of such rules. *Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73 (1962). *But see* H.R. Doc. No. 46, 93d Cong., 1st Sess. vi-vii (1973) (Douglas, J., dissenting to order of Supreme Court adopting rules).

48 51 F.R.D. 315 (1971).

49 117 CONG. REC. 29,894-96, 33,641-60 (1971) (remarks of Senator McClellan).

50 S. 2432, 92d Cong., 1st Sess. (1971).

rounding "secrets of state" and other official information, might prejudice the outcome of the current congressional debate over access to such information.[51] Other rules, such as those affecting husband-wife, doctor-patient, and newsmen's privileges, might affect the "substantive" rights — in fact, if not in law — of persons involved.[52]

Additionally, objections were made that, while the rules were drafted by a committee of eminent lawyers, there was inadequate opportunity for affected sections of the nonlegal public to comment on them.[53] Moreover, it was claimed that the Department of Justice had made "energetic" interventions which had led to the complete rewriting of the section on governmental privileges, among others, and that these changes were forwarded for final approval without opportunity for any public comment.[54]

The Rules of Evidence thus became entangled in the dual circumstance of Congress' displeasure over the substance of some of the rules and Congress' growing sensitivity to its responsibility not to let other branches unilaterally make important policy decisions. Senator Ervin (D.-N.C.) introduced a bill "[t]o promote the separation of constitutional powers."[55] The bill extended the time for congressional disapproval of the rules until the end of the first session. The measure passed the Senate in that form, but the House amended the bill to provide that the rules would have no effect "except to the extent, and with such amendments, as may be expressly approved by Act of Congress."[56] This action had the incidental effect of removing any challenge to the rules on the ground that they exceeded the delegation of power contained

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51 *See, e.g.*, 119 CONG. REC. H1729-30 (daily ed. Mar. 14, 1973) (statement of Representative Moorhead).

52 *See id.*, at H1721-22 (statement of Representative Rodino); *Hearings on the Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 117, 119 (1973) (statement of the Committee on Federal Courts of the Association of the Bar of the City of New York).

53 119 CONG. REC. H1728 (daily ed. Mar. 14, 1973) (memorandum of Representative Holtzman); H.R. REP. No. 52, 93d Cong., 1st Sess. 3 (1973).

54 119 CONG. REC. H1728 (daily ed. Mar. 14, 1973) (memorandum of Representative Holtzman).

55 S. 583, 93d Cong., 1st Sess. (1973).

56 H.R. REP. No. 52, 93d Cong., 1st Sess. 1 (1973).

in the Enabling Acts. The Senate accepted the amendment and it was signed by the President in this form.[57]

The sentiment of many Congressmen in reversing past policy and requiring affirmative approval was expressed by the author of the House amendment, Representative Holtzman (D.-N.Y.).

> It is Congress — not the Supreme Court or the Justice Department — which has the prime responsibility for establishing national policy with respect to executive privilege, newsmen's privilege, and personal privacy. We have, indeed, been grappling with these problems in this session of Congress. If we fail to adopt the bill before us, we would be delegating the lawmaking function to an unholy alliance of Congressional inaction, executive intervention, and judicial fiat.[58]

Yet, in its approval of the congressional version of the rules, the House Judiciary Committee left the question of privilege, except "insofar as required by the Constitution or statute," to a judicially developed common law,[59] thus granting to the courts a large responsibility for the development of privilege doctrine. Additionally, the committee bill permitted amendments to the rules to be promulgated by the Court, subject only to disapproval by either House in 180 days. The requirement for affirmative congressional action was dropped due to "the dictates of convenience and legislative priorities," which might otherwise have resulted in "worthwhile" amendments not being approved "because of other pressing demands on the Congress."[60] One interpretation of these actions is that Congress sought to reassert its prerogative to make policy by legislative procedures, while granting to the courts the determination of policy in the same area by adjudication. At the same time the House committee's action with respect to future rules changes by the rulemaking process exhibits the familiar tendency of insuring nominal congressional participation in policymaking, while granting the other branch broad freedom of action.

57 Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

58 119 CONG. REC. H1727 (daily ed. Mar. 14, 1973).

59 H.R. REP. No. 650, 93d Cong., 1st Sess. 8-9 (1973); *cf.* FED. R. CRIM. P. 26. The committee did make substantive changes in other areas of the rules.

60 H.R. REP. No. 650, 93d Cong., 1st Sess. 17-18 (1973).

D. *Increasing Congressional Access to Information*

The Executive's reluctance to turn over information to Congress has been evident for some time, but the situation has become more pronounced during the current Administration.[61] During the first session, the Senate passed legislation which deals with this problem in a comprehensive manner. There were also congressional attempts to expand the number of officials subject to confirmation as a method of obtaining information.

By passing the "Congressional Right to Information Act,"[62] the Senate moved to increase congressional access to a broad range of executive branch information. The measure establishes the obligation of each head of a Federal agency to keep each congressional committee informed of matters within its jurisdiction, and to respond to requests for information made by the committee chairman or two-fifths of its membership.[63] The only ground for withholding requested information is compliance with an express, written presidential order.[64] If the official fails to comply, or if the committee feels that information withheld at presidential direction is necessary for proper legislation, the chairman of the committee may issue a subpoena for the information. With the concurrence of his House, he may institute a civil action for its enforcement.[65] This legislation, while providing a regularized procedure for obtaining information from the executive branch, leaves the ultimate resolution over access to documents to the courts.[66]

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61 *See* Note, *Executive Privilege, supra* note 2, at 621-25. A study by the staff of the Senate Subcommittee on Separation of Powers, not fully completed, found more than 200 instances of refusals by government officials to turn over information to Congress or the General Accounting Office during the period January 1, 1964, through February 28, 1973. S. REP. No. 497, 93d Cong., 1st Sess. 9-11 (1973) (Annual Report of Senate Subcommittee on Separation of Powers).

62 S. 2432, 93d Cong., 1st Sess. (1973); 119 CONG. REC. S23,188-93 (daily ed. Dec. 18, 1973).

63 S. 2432, 93d Cong., 1st Sess. § 2(a)(341) (1973).

64 *Id.* § 2(a)(342(a)).

65 *Id.* § 2(a)(343).

66 The passage of this bill followed the failure of Congress to override the President's veto of an annual funds authorization for the U.S. Information Agency, which contained a provision which cut off funds for that agency if requested documents were not furnished to the appropriate congressional committee within 35 days. S. 1317, 93d Cong., 1st Sess. § 4 (1973), *vetoed*, S. Doc. No. 41, 93d Cong., 1st Sess. (1973), *veto sustained*, 119 CONG. REC. S19,768 (daily ed. Oct. 30, 1973). *See also* Note,

The confirmation of Gerald Ford as Vice President[67] under the provisions of the 25th amendment highlights the congressional role in the appointment process. Confirmation can be viewed as a method by which the Senate screens out unqualified appointments, but the rejection of Administration nominees is relatively rare. Rather, the appointment process has become a method by which Senators can gather information about Administration policy by questioning prospective executive branch officials.

During this session Congress sought to make confirmation a means of forcing officials to recognize a responsibility to testify before Congress and to limit official invocations of executive privilege. Many nominations are now routinely reported "subject to the nominee's commitment to respond to requests to appear and to testify before any duly constituted committee of the Senate."[68]

Congress also sought to extend its confirmation power to cover members of the Executive Office of the President. The expansion of the decisionmaking authority of these officials, and the reduced importance of some cabinet members, stimulated congressional interest in this area.[69] Legislation to require confirmation of the Director and Deputy Director of the Office of Management and Budget devolved into a heated battle. The debate on this measure was complicated by the fact that the bill mandated that the incumbents of these offices be subject to confirmation.[70] Though the bill cleared Congress, the President vetoed it.[71] The Senate overrode the veto, but the House sustained it.[72] Subsequently the Senate passed legislation which would require the confirmation of *future* Directors and Deputy Directors of OMB, and of the Executive Secretaries of the National Security Council and the

Executive Privilege, supra note 2, at 654-63. This funds cutoff approach had been opposed by sponsors of the Congressional Right to Information Act. 119 CONG. REC. S19,009-10 (daily ed. Oct. 10, 1973) (statement of Senator Roth for himself and Senator Ervin).

67 H.R. Doc. No. 165, 93d Cong., 1st Sess. (1973); 119 CONG. REC. S21,197-210 (daily ed. Nov. 27, 1973); *id.* at H10,740-828 (daily ed. Dec. 6, 1973).

68 *E.g.*, 119 CONG. REC. S21,232 (daily ed. Nov. 28, 1973) (report of the nomination of Don S. Smith to be a member of the Federal Power Commission).

69 *See* H.R. REP. No. 109, 93d Cong., 1st Sess. 3-4 (1973) (confirmation of OMB Director).

70 S. 518, 93d Cong., 1st Sess. (1973).

71 S. Doc. No. 16, 93d Cong., 1st Sess. (1973).

72 119 CONG. REC. S9601-06 (daily ed. May 22, 1973); *id.* at H3911-20 (daily ed. May 23, 1973).

Domestic Council.[73] The Senate legislation passed the House on December 17, amended to apply only to the top OMB officials.[74]

Additionally, the Senate on May 2 passed a bill[75] establishing a term of four years for Cabinet officers and requiring confirmation on reappointment. The report on the measure was an example of bitter overstatement. It said the bill was designed to insure that department heads "shall come before Congress not less than *once every 4 years* and that they shall be subject to detailed inquiry into the performance of their duties notwithstanding earlier refusals to speak to Congress with respect to specific actions."[76] (emphasis in original) This bill is pending in a House committee. Other legislation enacted in the first session required the prospective confirmation, among other officials, of the Executive Director of the Council on International Economic Policy[77] and the Director of the Office of Energy Policy,[78] both in the Executive Office of the President.

The Senate also used the confirmation process as a lever to force concessions from the Administration. The Senate used the nomination of Elliot Richardson as Attorney General both to force the Administration to agree to the appointment of an "independent" special prosecutor and to establish guidelines for the conduct of his office.[79] This agreement did not prevent the prosecutor's ouster, though Mr. Richardson felt compelled to resign to keep faith with the Senate.[80] A new special prosecutor was appointed. He was given approximately the same "charter" the previous prosecutor had possessed, but with the addition of a formal "as-

73 S. 37, S. 2045, 93d Cong., 1st Sess. (1973); 119 CONG. REC. S11,920-22 (daily ed. June 25, 1973).

74 119 CONG. REC. 11,544-46 (daily ed. Dec. 17, 1973) (S. 37).

75 S. 755, 93d Cong., 1st Sess. (1973).

76 S. REP. No. 122, 93d Cong., 1st Sess. 6 (1973). Cabinet members generally appear before House and Senate Appropriations Committees at the annual budget hearings on their departments, and in addition, regularly meet with the various legislative committees. *E.g.*, Secretary of State Rogers appeared before the Senate Foreign Relations Committee at least six times during January 1 to June 30, 1973. SENATE COMM. ON FOREIGN RELATIONS, 93D CONG., 1ST SESS., LEGISLATIVE CALENDAR 59-60 (Oct. 18, 1973 ed.).

77 Act of Oct. 4, 1973, Pub. L. No. 93-121, § 5, 87 Stat. 447.

78 Act of Nov. 16, 1973, Pub. L. No. 93-153, § 404, 87 Stat. 576 (Alaska Pipeline Act).

79 *See* 119 CONG. REC. S9708-15 (daily ed. May 23, 1973).

80 9 WEEKLY COMP. PRES. DOC. 1271-72 (1973) (exchange of letters between Mr. Richardson and the President).

surance" by the President, published in the *Federal Register*, that the President would not remove him "without . . . first consulting the Majority and Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and the House of Representatives and ascertaining that their consensus is in accord with his proposed action."[81] This unusual ad hoc arrangement is perhaps the epitome of congressional participation in executive branch decisionmaking.

III. Congressional Reliance on the Other Branches — the Faltering Will to Power

At the same time that Congress was attempting to establish its policymaking role, certain of its actions indicated a strong reliance on the other branches. This section will discuss the granting to the Executive of broad discretion to formulate policies of great importance and the enlisting of the judiciary by individual members, and by Congress itself, in the congressional struggle with the Executive.

A. *Reliance on the President*

During the first session, Congress moved on several fronts to give the President broad discretion to deal with domestic and international problems. In two of these cases Congress sought to retain a participatory role by including a provision for legislative "veto" of presidential action. The first occasion for congressional review of a broad grant of presidential discretion came with the extension of the Economic Stabilization Act of 1970.[82] Congress did not use this opportunity to decrease the scope of the President's discretion to impose wage and price controls as he saw fit. It chose to extend the Act's authority for one year and to give the President additional unrestricted authority in order to provide for the "establishment of priorities of use and for systematic allocation of supplies of petroleum products, including crude oil."[83]

81 28 C.F.R. § 0.37 appendix (1973), *revised by* Departmental Order 551-73, 38 Fed. Reg. 30,738 (1973).

82 12 U.S.C. § 1904 n. (Supp. II, 1972). The grant of presidential authority under the Act expired April 30, 1973.

83 Act of Apr. 30, 1973, Pub. L. No. 93-28, § 2(b), 87 Stat. 27.

In response to the President's request for trade reform legislation,[84] the House passed a bill[85] designed to give the President expanded authority — within certain guidelines — to negotiate mutual reductions in both tariff and nontariff trade barriers. These reductions and implementing regulations would automatically go into effect unless either House votes to disapprove them within 90 days of their transmittal to Congress.[86] While the bill requires that the President appoint 10 members of Congress as official advisers to trade negotiations,[87] and provides for other liaison mechanisms, the House report on the bill recognizes "that the achievement of these objectives entails a substantial delegation of Congressional authority."[88]

Finally, the National Energy Emergency Act of 1973[89] gives the President broad power to impose changes on American work and recreation patterns in order to conserve energy.[90] As reported out by a conference committee and agreed to by the Senate,[91] the bill gives the President temporary authority to establish "end-use" fuel rationing plans without congressional action.[92] Additionally, a Federal Energy Administrator may promulgate energy conservation plans, including transportation controls and other restrictions on the public and private uses of energy.[93] Such plans are effective unless disapproved by either House of Congress within 15 days.[94] This is obviously minimal participation.

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84 H.R. Doc. No. 80, 93d Cong., 1st Sess. (1973).

85 H.R. 10710, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. H11,027-72 (daily ed. Dec. 11, 1973). The Senate was to take up the measure in the second session.

86 H.R. 10710, 93d Cong., 1st Sess. §§ 102(f), 204(b), 302(b) (1973).

87 *Id.* § 161.

88 H.R. Rep. No. 571, 93d Cong., 1st Sess. 3 (1973).

89 S. 2589, 93d Cong., 1st Sess. (1973).

90 It is somewhat ironic that at the beginning of the first session, the Senate established a Special Committee on the Termination of the National Emergency. S. Res. 9, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. S270 (daily ed. Jan. 6, 1973). Since 1933 the nation has been operating under continuing declarations of a state of national emergency. S. Rep. No. 549, 93d Cong., 1st Sess. iii-iv (1973). The special committee is to study the effect of this and recommend ways in which termination of this status can best be accomplished. *Id.*

91 119 Cong. Rec. S23,821 (daily ed. Dec. 21, 1973). The text of the reported bill was passed, in modified form, as an amendment to S. 921, 93d Cong., 1st Sess. (1973). 119 Cong. Rec. S23,875-89 (daily ed. Dec. 21, 1973).

92 S. 2589, 93d Cong., 1st Sess. § 104 (1973) (passed as amendment to S. 921).

93 *Id.* § 105.

94 *Id.* § 105(b)(3). This authority expires April 1, 1974.

B. *Congress Turns to the Courts*

Much of Congress' influence over the executive branch is negative in character and comes from its power to deny requested program authorizations, funds, or confirmations to the Administration.[95] However, though the President did have a legislative program,[96] the Administration did not seem willing to do much trading with Congress to get it passed.[97] The President's major actions on the domestic budgetary front involved cutbacks,[98] which meant reduced leverage for congressional influence.

Because of this lack of political influence with the Administration, some Congressmen turned to the courts. There they found a fairly reliable, if not always willing, ally. Particular success came in the field of impoundment.[99] Other successful actions included the obtaining of an injunction against the continuation in office of the Director of the Office of Economic Opportunity on the ground that he was illegally serving in that capacity,[100] the declaration that the firing of Archibald Cox as special prosecutor was unlawful,[101] and the determination that a measure allegedly pocket vetoed by the President had, in fact, become law.[102]

Congress also took steps to formalize reliance on the courts. A bill giving the Senate Select Committee on Presidential Campaign Activities standing to sue to enforce subpoenas of documents related to its investigation was enacted,[103] and the Senate passed a bill setting up a mechanism by which other committees could get

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95 *See* Huntington, *Congressional Responses to the Twentieth Century*, in THE CONGRESS AND AMERICA'S FUTURE 7 (2d ed. D. Truman 1973).

96 *See* H.R. Doc. No. 1, 93d Cong., 1st Sess. (1973) (listing by the President of more than 50 legislative proposals he submitted in 1973).

97 *See Presidential Support: Nixon Score Hits Record Low*, 31 CONG. Q. WEEKLY REP. 2344 (1973).

98 See text at note 9 *supra*.

99 *See Impoundment: Administration Loses Most Court Tests*, 31 CONG. Q. WEEKLY REP. 2395 (1973). *See, e.g.*, State Highway Comm. v. Volpe, 479 F.2d 1099 (8th Cir. 1973), in which the chairmen of 16 of 17 standing Senate committees were parties to an amicus brief. STAFF OF JOINT COMM. ON CONGRESSIONAL OPERATIONS, 93D CONG., 1ST SESS., REPORT IDENTIFYING COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO CONGRESS 31 (Comm. Print June 1973).

100 Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973).

101 Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973) (merits decided solely with respect to congressional plaintiffs).

102 Kennedy v. Sampson, 364 F. Supp. 1075 (D.D.C. 1973).

103 Act of Dec. 18, 1973, Pub. L. No. 93-190, 87 Stat. 736.

judicial enforcement of subpoenas of executive branch documents.[104] Likewise, the impoundment control legislation passed by both Houses and now in conference contains a provision which would empower the Comptroller General to file suit "as the representative of Congress" to compel executive branch compliance with the measure.[105]

What has emerged is an increasing tendency on the part of Congressmen to substitute a court judgment for the political struggle that generally characterizes the interaction between Congress and the Executive. It is unclear whether this phenomenon will remain peculiar to the relationship between Congress and the present Administration or will come to affect the way in which Congress deals with the executive branch in the future.

IV. Groping Toward a Proper Role

In his September 10 "State of the Union" message to Congress, President Nixon observed:

> [I]t is apparent as the fall legislative session begins that many Members of Congress wish to play a larger role in governing the Nation. They want to increase the respect and authority which the American people feel for that great institution. Personally, I welcome a Congressional renaissance. Although I believe in a strong Presidency — and I will continue to oppose all efforts to strip the Presidency of the powers it must have to be effective — I also believe in a strong Congress. . . . There can be no monopoly of wisdom on either end of Pennsylvania Avenue — and there should be no monopoly of power.[106]

While Congressmen would agree with this statement, conflict obviously can arise over the delineation of which powers are needed for an effective Presidency. Congressional actions involving the War Powers Resolution[107] and impoundment control,[108] as

104 S. 2432, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. S23,188-91 (daily ed. Dec. 18, 1973).

105 S. 373, 93d Cong., 1st Sess. § 8 (Senate version), § 106 (House version) (1973).

106 H.R. Doc. No. 1, 93d Cong., 1st Sess. 1 (1973).

107 See text at note 36 *supra*.

108 See text at note 28 *supra*.

well as trade reform[109] and energy control,[110] showed that Congress had no intention of denying the executive the flexibility needed for leadership. The use of the "legislative veto" device, or the requirement of congressional ratification of presidential actions, compels congressional participation only to the extent of making congressional views part of the Executive's calculus.

This desire for participation is a far cry from a desire for "power," if that term is taken to be the ability to exercise leadership and to control the conduct of national affairs. Rather, it represents an assertion that Congress is a legitimizing force which can and should mediate among conflicting interests and establish a framework for national action.[111] Yet, it is not at all clear that the effect of such congressional input will be of major significance. Certainly, the traditional close relationship of congressional committees and the middle-level management of their affiliated executive branch agencies has been, and should remain, of importance.[112] But the attempts of Congress to increase the flow of information from the executive branch, both through access to documents[113] and by the confirmation of additional officials,[114] may merely lead to a greater ability to embarrass the executive branch rather than to an increase in the ability of Congress to meaningfully criticize and counter agency actions. For the latter to occur, Congress must increase its capacity to analyze detailed information and to take coherent action.

One commentator stated, with respect to a key area of congressional concern, that "a sizeable portion of its membership believes that Congress cannot control spending and cannot match the Executive Office [of the President] in budgetary power or capability."[115] Unless Congress institutes reforms which give it the ability to check its tendencies to make compromises which lead to higher spending, or to make compromises which make sub-

109 See text at note 84 *supra.*

110 See text at note 89 *supra.*

111 This attitude was most explicit in the controversy over the Federal Rules of Evidence. *See* text at note 51 *supra.*

112 *See* Neustadt, *Politicians and Bureaucrats,* in THE CONGRESS AND AMERICA'S FUTURE 123 (2d ed. D. Truman 1973).

113 See text at note 62 *supra.*

114 See text at note 67 *supra.*

115 *See Congress v. the Budget, supra* note 20, at 625.

stance secondary to appearance, there is little likelihood that Congress will be in a position to assert power as defined above.

Congress has appeared to move away from serious political confrontation with the President. Perhaps this resulted from Congress' reduced bargaining leverage with the President, as evidenced by the events of the first session. If Congress increasingly relies on the judiciary to force executive action,[116] and there is a decrease in political bargaining with the President, Congress may find that it has even further reduced its institutional influence.

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116 See text at note 95 *supra*.

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STATUTORY COMMENTS

THE WAR POWERS RESOLUTION: STATUTORY LIMITATION ON THE COMMANDER-IN-CHIEF

Introduction

As the Vietnam conflict dragged on, Congress became increasingly aware of its inability to influence the course of events. Extensive congressional hearings and debate on Congress' proper role in the initiation and continuation of war culminated on November 7, 1973, in the enactment of the War Powers Resolution[1] — the first bill in the 93d Congress to become law over the President's veto.[2] This Note will describe why Congress felt it needed to reassert its warmaking role and will analyze how the War Powers Resolution responds to this goal.

I. THE HISTORICAL SETTING

The war powers struggle has its origins in the ambiguities of the Constitution.[3] The character of the struggle has evolved through two centuries of presidential and congressional practice. The Administrations of Presidents Roosevelt and Truman marked the beginning of a more expansive conception of presidential war powers.[4] President Roosevelt engineered the famous destroy-

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1 Pub. L. No. 93-148, 87 Stat. 555 (1973). *Hearings on War Powers Before the Subcomm. on Nat'l Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *1973 House Hearings*]; *Hearings on S. 440 Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *1973 Senate Hearings*]. For the conference report (H.R. REP. No. 547, 93d Cong., 1st Sess. (1973)), which synthesized S. 440, 93d Cong., 1st Sess. (1973) and H.J. RES. 542, 93d Cong., 1st Sess. (1973), see 119 CONG. REC. H8655-58 (daily ed. Oct. 4, 1973) [hereinafter cited as CONFERENCE REPORT]. For the President's veto message, see 9 WEEKLY COMP. PRES. DOC. 1285-87 (1973).

2 N.Y. Times, Nov. 8, 1973, at 1, col. 8.

3 The constitutionality of the War Powers Resolution is beyond the scope of this Note.

4 The historical development of the war powers of Congress and the President is considered in Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1260-65 (1969); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968) [hereinafter cited

ers-for-bases deal, occupied Greenland and Iceland, and carried on an undeclared naval war with Germany, all without specific congressional authorization.[5] In committing American troops to Korea, President Truman also acted without specific congressional approval. The Truman Administration spoke of "the *traditional* power of the President to use the Armed Forces of the United States without consulting Congress . . . ."[6]

Under Presidents Eisenhower, Kennedy, Johnson, and Nixon this expansion continued at the expense of congressional war

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as Harvard Note]; Indochina: The Constitutional Crisis (prepared by students at Yale Law School, May 1970), in SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG., 2D SESS., DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA 73 (Comm. Print 1970) [hereinafter cited as DOCUMENTS]. *See also* J. JAVITS, WHO MAKES WAR (1973).

Early in the history of the United States President Jefferson articulated a view of the power of the President to engage in war defensively. In 1801, after disarming enemy vessels in hostilities off Tripoli, the Navy liberated the vessels and their crews. While ordering this operation, President Jefferson believed that anything else would have constituted offensive action requiring congressional approval. Fifty years later, President Polk sent troops into disputed territory between the United States and Mexico, claiming the resulting clashes were defensive. Although Congress finally declared that a state of war existed, two years later the House of Representatives passed a resolution referring to "a war unnecessarily and unconstitutionally begun by the President." CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848). In the Civil War the Supreme Court upheld the validity of Lincoln's blockade of southern ports. The Prize Cases, 67 U.S. (2 Black) 635 (1862). However these cases were limited to direct armed attacks against the territory of the United States.

It was only after two world wars that this limited presidential power was combined with theories of extraterritorial interest and collective self-defense to greatly increase presidential powers. *See* Harvard Note, *supra*, at 1782. Additionally, even the offensive/defensive war distinction no longer provides an effective limitation on presidential war powers in an age with increasingly mobile weapons where "the President may sometimes conclude that offense is the best defense." Ratner, *The Coordinated Warmaking Power — Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461, 469 (1971). As Professor Commager has noted, "the kind of intervention we have witnessed in the past quarter century is, if not wholly unprecedented, clearly a departure from a long and deeply rooted tradition." *Hearings on S. 731, S.J. Res. 18 and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 8 (1971) [hereinafter cited as *1971 Senate Hearings*]. Regarding McKinley's intervention in the Boxer Rebellion as an anomaly, Professor Commager notes that all other presidential commitments of troops before the past quarter century have been related to hemispheric defense. *Id.* at 9. Professor Bickel has argued that the Vietnam War marked the farthest extension of presidential power: "The decisions of 1965 amounted to an all but explicit transfer of the power to declare war from Congress, where the Constitution lodged it, to the President, on whom the framers explicitly refused to confer it." *Id.* at 552.

5 S. REP. No. 129, 91st Cong., 1st Sess. 14-15 (1969).

6 *Dep't of State Memorandum of July 3, 1950*, 23 DEP'T STATE BULL. 173, 174 (1950) (emphasis added).

powers.[7] In spite of Congress' shrinking warmaking role, few congressional voices rose in opposition until Vietnam made the public and Congress aware of Congress' subordinate and ineffectual role in the initiation and continuation of war. This awareness led to considerable activity by legal writers and finally to congressional action.[8]

One explanation for the growth in presidential power stems from the nature of the President's office. One person can act and react more quickly and decisively than 535 persons. A single person chosen by the entire electorate creates a focal point for the press and the public.[9] The President is easier to see and follow and therefore occupies an advantageous position in shaping and

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7 When President Eisenhower asked Congress for authority to use armed forces to protect Formosa and the Pescadores, he stated, "Authority for some of the actions which might be required would be inherent in the authority of the Commander-in-Chief. Until Congress can act I would not hesitate, so far as my Constitutional powers extend, to take whatever emergency action might be forced upon us in order to protect the rights and security of the United States." 1955 D. EISENHOWER, PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES 209-10.

President Kennedy consulted congressional leaders only after he had made the decision to "quarantine" the missile shipments. Arguably he could have been basing his actions on the Cuba Resolution. *See* notes 15-16 *infra* and accompanying text; S. REP. No. 129, 91st Cong., 1st Sess. 21 (1969).

Discussing the Gulf of Tonkin Resolution, the Johnson Administration said that the authority to commit troops to South Vietnam did not depend on the resolution, but on article II of the Constitution. Meeker, *The Legality of U.S. Participation in the Defense of Vietnam*, 54 DEP'T STATE BULL. 474, 484 (1966).

Finally, in the Nixon Administration the State Department's official position in opposing S. Res. 85 (a war powers proposal) was that "although reasonable men may differ as to the circumstances in which he should do so, the President has the constitutional power to send U.S. military forces abroad without specific Congressional approval." Memorandum attached to letter from William B. Macomber, Jr., Asst. Secretary of State for Congressional Relations, to Senator Fulbright (D.-Ark.), in S. REP. No. 129, 91st Cong., 1st Sess. 37 (1969). Later the State Department did not fight the attempt to repeal four area resolutions, see text at note 15 *infra*, because "the Administration is not depending on any of these Resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans." Letter from H. G. Torbert, Jr., Acting Asst. Secretary for Congressional Relations, to Senator Fulbright, Mar. 12, 1970, in 62 DEP'T STATE BULL. 468 (1970).

8 Eagleton, *Congress and the War Powers*, 37 MO. L. REV. 1 (1972); Fulbright, *American Foreign Policy in the 20th Century Under an 18th Century Constitution*, 47 CORNELL L.Q. 1 (1961); Javits, *The War Powers Crisis*, 8 NEW ENG. L. REV. 157 (1973); Reveley, *supra* note 4; Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEXAS L. REV. 833 (1972); Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 U. RICH. L. REV. 1 (1971); Harvard Note, *supra* note 4.

9 *See* Reveley, *supra* note 4, at 1265-67.

molding public opinion. This is in direct contrast to Congress' popular image as a "parochial and inefficient group" which represents a variety of vested interests and is afraid to take a decisive stand.[10]

Executive power has also been augmented by what has been referred to as the "cult of executive expertise."[11] The President purportedly has access to much secret information, extensive diplomatic communications, and teams of foreign policy experts. Whenever he claims, citing expert opinion based on secret information, that a crisis situation exists requiring unilateral executive action, it has been and will continue to be very difficult for anyone without access to the secret information to effectively criticize or evaluate the executive action.[12] If only the President has the information, then only the President can decide.

Also offered to explain Congress' abdication of its warmaking authority are the constant crises, real or assumed, which have existed since World War II. Such urgencies often have placed emphasis on expediency rather than constitutionality.[13] For Congress to raise nice constitutional questions when the United States purportedly faced an impending crisis was not feasible politically.[14] Such considerations have led either to congressional acquiescence or to overbroad delegations of congressional authority in the form of area resolutions.[15] Depending on the in-

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10 *Id.* at 1296.

11 S. REP. No. 129, 91st Cong., 1st Sess. 16 (1969); L. Fisher, Congress and the War Power, July 28, 1971 (paper presented to the Center for the Study of Democratic Institutions, Santa Barbara), in *1971 Senate Hearings, supra* note 4, at 812. Louis Fisher is a member of the Congressional Research Service.

12 For an attack on the large role secrecy plays in the formulation of foreign policy, see Katzenbach, *Foreign Policy, Public Opinion and Secrecy*, 52 FOREIGN AFFAIRS 1 (1973).

13 S. REP. No. 129, 91st Cong., 1st Sess. 8 (1969).

14 "In time of emergency there is a natural, powerful tendency to fall in line behind the leadership of the President. When the nation is thought to be in danger, it seems to most people irresponsible, capricious, or even unpatriotic to question the President's word as to the need for action of one kind or another." S. REP. No. 606, 92d Cong., 2d Sess. 10-11 (1972). The Senate report illustrated this process by quoting from *Hearings on S. Con. Res. 8 Before the Senate Comm. on Foreign Relations and the Senate Comm. on Armed Services*, 82d Cong., 1st Sess. 93 (1951), where then Secretary of State Acheson said, "[W]e are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour . . . ."

15 Javits, *supra* note 8, at 157-58.

stitutional prejudices one holds, area resolutions either give powers to the President in a specific geographic area or reconfirm his powers in that area. These resolutions are reminders that Congress once considered the office of the President capable of exercising war powers decisions without congressional help.[16]

Finally, Congress' own reluctance to deal with foreign policy helps to explain the extension of executive power. Congress' unwillingness is said to stem partly from a type of penance for its isolationist position during the twenties and thirties,[17] and partly from practices and procedures in Congress that render it unable to act with the speed at which the relationships among nations are changing. Until now, Congress tacitly chose to lose part of its power rather than to reform its practices and procedures.[18] At the other end of Pennsylvania Avenue, strong Presidents were ready to increase the prestige and power of their office.[19]

Once in 1967 and again in 1969 the Senate passed war powers legislation — not in the form of a bill but as a nonbinding "sense of the Senate" resolution that any subsequent national commitments should be concluded by both the President and the Senate.[20] Only after President Nixon's incursions into Laos and Cambodia indicated his unwillingness to accept the nonbinding resolutions did both the House and the Senate commence a second approach — the enactment of binding legislation.

The Senate and the House embarked upon divergent paths which could only be reconciled after several years of legislative effort. No joint action was taken in the 91st Congress.[21] In the

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16 Berlin Resolution, H. Con. Res. 570, 87th Cong., 2d Sess., 76 Stat. 1429 (1962); Cuba Resolution, Pub. L. No. 87-733, 76 Stat. 697 (1962); Middle East Peace and Stability Act, 22 U.S.C. §§ 1961-65 (1970); Formosa Resolution, 50 App. U.S.C. n. prec. § 1 (1970) (originally enacted as Pub. L. No. 84-4, 69 Stat. 7 (1955)); United Nations Participation Act of 1945, 22 U.S.C. §§ 287-87e (1970).

17 S. REP. No. 129, 91st Cong., 1st Sess. 16 (1969).

18 *See* Reveley, *supra* note 4, at 1271.

19 *Id.* at 1265, 1298-99.

20 On July 31, 1967, Senator Fulbright introduced S. Res. 151 on national commitments, which was reported from committee on November 20, 1967, as S. Res. 187. S. REP. No. 797, 90th Cong., 1st Sess. (1967). On April 16, 1969, the Senate Committee on Foreign Relations again reported out a national commitments resolution, S. Res. 85. S. REP. No. 129, 91st Cong., 1st Sess. (1969).

21 The House approved a war powers resolution near the end of the 91st Con-

92d Congress each chamber successfully passed a bill affecting war powers only to see it die because conferees were unable to agree before the end of the session.[22] In the 93d Congress the Senate tried again with S. 440, which was identical to the bill it had approved the previous year.[23] Meanwhile the House passed H.J. Res. 542, which only slightly modified its previous attempt.[24] These two bills formed the basis of the conferees' compromise bill subsequently passed by both Houses by a comfortable margin, vetoed by the President, and repassed by a two-thirds majority of both Houses.[25]

It is against this historical and institutional backdrop that the significance of the War Powers Resolution and the other war powers bills introduced in Congress since 1967 must be judged. Of course the very introduction of different bills and resolutions and the passage of one of them by a two-thirds majority in both Houses is an indication that many members of Congress are ready to take a more active role in decisions concerning the deployment of United States armed forces. Whether they are willing to undertake necessary institutional changes to make Congress an active partner remains an open question.

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gress, H.J. Res. 1355, 91st Cong., 2d Sess. (1970). *Hearings on Congress, the President, and the War Powers Before the Subcomm. on Nat'l Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. (1970).

22 On February 9, 1972, the Senate Committee on Foreign Relations reported a war powers bill, S. 2956, which represented a synthesis of war powers bills introduced by a number of Senators. S. REP. No. 606, 92d Cong., 2d Sess. (1972); *1971 Senate Hearings, supra* note 4. S. 2956 was passed in April 1972. 118 CONG. REC. S6101 (daily ed. Apr. 13, 1972).

Representative Zablocki (D.-Wis.), chairman of the Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs, introduced H.J. Res. 1, a slightly modified version of H.J. Res. 1355 (*see* note 21 *supra*) during the first session of the 92d Congress. *Hearings on War Powers Legislation Before the Subcomm. on Nat'l Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 92d Cong., 1st Sess. (1971). H.J. Res. 1 was passed August 2, 1971. 117 CONG. REC. 28,878 (1971).

23 On June 14, 1973, the Senate Committee on Foreign Relations reported out S. 440, which was identical to S. 2956 in the 92d Congress. S. REP. No. 220, 93d Cong., 1st Sess. (1973).

24 Representative Zablocki submitted H.J. Res. 542, which was reported out of committee on June 15, 1973. H.R. REP. No. 287, 93d Cong., 1st Sess. (1973). The House passed the bill a month later. 119 CONG. REC. H6284 (daily ed. July 18, 1973).

25 *See* note 1 *supra*.

II. The War Powers Resolution

A. *Using Troops Without Congressional Approval*

Although the War Powers Resolution embodies elements of both S. 440 and H.J. Res. 542, the end result is closer to the House version than to the Senate. The resulting compromise is not only ambiguous in its wording but also in its ultimate purpose. Nowhere is this more apparent than where it delineates the circumstances in which the President could commit troops upon his own authority and those in which he could not without specific congressional approval.

The Senate bill explicitly enumerates the circumstances in which the President can commit troops without congressional approval by allowing him to do so only: (1) to repel armed attacks upon the United States, to retaliate in the event of such an attack, and to forestall the direct and imminent threat of such an attack; (2) to repel an attack against the armed forces of the United States and to forestall the direct and imminent threat of such an attack; (3) to protect citizens and nationals of the United States while evacuating them; or (4) pursuant to specific statutory authorization.[26] Any other use of American armed forces on foreign soil would require congressional approval. This limited enumeration of presidential powers is subject to the general criticism that any attempt to specify presidential war powers will be too narrow since all possible future exigencies cannot be prophesied. Such a criticism would be undercut by a flexible interpretation of "armed attack." Any future exigencies which threatened the United States as an "armed attack" could be treated as an armed attack. Nevertheless, such a functional interpretation is not clear from the statute; and the enumeration of war powers may be too inflexible to cover novel situations.

The Senate bill also was attacked as being overly broad. The provisions allowing presidential action to retaliate (not just defend) and to forestall the threat of an attack are claimed to give the President too much discretion.[27] Also, once the President

26 S. 440, 93d Cong., 1st Sess. § 3 (1973).

27 S. Rep. No. 220, 93d Cong., 1st Sess. 33-35 (1973) (supplemental views of Senator Fulbright).

could fit a war powers decision into a pigeonhole, S. 440 would give him license to continue hostilities with impunity until the expiration of 30 days.[28]

H.J. Res. 542, on the other hand, contained no such list. Any restriction on the variety of circumstances in which the President may commit troops without congressional approval must be implicit in other parts of the resolution. Two parts which appear to be relevant to this question specify that nothing in the resolution "is intended to alter the constitutional authority of the Congress or of the President . . . . " and nothing "[s]hall be construed as granting any authority to the President with respect to the commitment of United States Armed Forces . . . . "[29] However, according to the House report on H.J. Res. 542, the first provision was designed to help insure the constitutionality of the resolution "by making it clear that nothing in it can be interpreted as changing in any way the powers delegated to each branch of government by the Constitution,"[30] and the second was included to emphasize that the resolution did not grant the President any authority he did not already have.[31] So interpreted, neither seems to limit the variety of authorized unilateral presidential troop deployments.

Like the House bill, the War Powers Resolution contains only § 2(c), which states that the President's power as Commander-in-Chief to "introduce United States Armed Forces can only be exercised" pursuant to "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[32] Section 2(c)(3) seems to limit the President's power more than the Senate bill did. That section requires a national emergency and an attack on United States territory or its armed forces. Gone is the language referring to retaliation or forestalling the threat of an attack. Also no mention is made of the President's powers to intervene while evacuating United States citizens and nationals. In fact, since it does not specifically allow the Presi-

28 *Id.* at 34-35.
29 H.J. Res. 542, 93d Cong., 1st Sess. §§ 8(a), (c) (1973).
30 H.R. REP. No. 287, 93d Cong., 1st Sess. 12 (1973).
31 *Id.* at 13.
32 War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555 (1973).

dent to use armed forces to evacuate American citizens and nationals, the provision has been questioned on constitutional grounds.[33] Alternatively this may be considered a mere statement of policy to be interpreted much as a preamble.[34] Such an interpretation would eliminate any constitutional problems by eliminating any changes in the current division of war powers.

As a result, anyone supporting § 2(c)(3) as an effective limitation on the situations in which the President can unilaterally deploy troops finds himself in a dilemma. If the policy statement is given a definite statutory effect, it is of dubious constitutional validity — excluding powers arguably within the President's prerogative. However, if one interprets § 2(c)(3) only as a general policy statement, the War Powers Resolution would not restrict in advance the types of situations in which the President can introduce troops without congressional authorization. Instead of clearly mapping out exactly which situations allow the President to initially introduce armed forces without congressional participation, the War Powers Resolution leaves the President and Congress in the same uncertain positions they traditionally occupied.

It was precisely this objection that prompted one of the early sponsors of S. 440 to vote against the War Powers Resolution. He felt that without the careful enumeration of the limited situations in which the President could introduce troops, the resolution might not only fail to reconfirm the Congress' proper role but might even lead to a further expansion of executive power.[35]

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33 119 CONG. REC. S18,992-95 (daily ed. Oct. 10, 1973) (remarks of Senator Eagleton, D.-Mo.). Senator Javits (R.-N.Y.) attempted to counter the constitutional argument but was effectively rebutted by Senator Eagleton.

34 *Id.* at S18,992.

35 Senator Eagleton's views are summarized in his essay *A Dangerous Law*: "The President assumes the inherent right to initiate war. By remaining silent about this assertion and attempting only to impose an after-the-fact review, Congress has now provided a legal basis for the President's erroneous claim. Instead of curbing executive power, the bill has dangerously expanded it." Eagleton, *A Dangerous Law*, N.Y. Times, Dec. 3, 1973, at 39, col. 3 (city ed.). Senator Eagleton thus claims that although the War Powers Resolution does constitute "a more efficient mechanism for terminating Presidentially initiated American participation in hostilities after they have begun," it is potentially counterproductive because it contains no substantive limits on the initial presidential actions that can be taken. 119 CONG. REC. S18,993 (daily ed. Oct. 10, 1973).

B. *Reporting Provisions*

Since the War Powers Resolution does not place any clear limitations on the specific situations in which the President can act, but rather seeks to give Congress effective control over the actions once they have already been taken, the reporting provisions are of primary importance. The final version, as did both the House and Senate bills,[36] specifies both the content of the report required and the circumstances under which the report must be made.[37] In addition to requiring the President to set forth: "(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement," it requires "such other information as the Congress may request."[38] It further provides for periodic reports as hostilities continue.[39]

Much more important than the details of the report are the circumstances which require a report. The nature of the triggering device not only is critical to the determination of when a report is required, but additionally sets a starting point for the time during which the President is able to continue hostilities without explicit congressional approval.[40] If the President can successfully argue that his actions do not trigger the 60-day period, the cutoff provisions of the resolution are ineffectual. The triggering device of S. 440 was exactly the same list which enumerated when the President could act without prior congressional authorization.[41] The bill therefore provides a useful dichotomy: either the President must obtain prior congressional authorization or he must justify his actions as within one of the enumerated categories and thus submit a report.

The House resolution and the War Powers Resolution employ a slightly different triggering device. Instead of drawing up a list

36 H.J. Res. 542, 93d Cong., 1st Sess. § 3 (1973); S. 440, 93d Cong., 1st Sess. § 4 (1973).
37 War Powers Resolution, Pub. L. No. 93-148, § 4, 87 Stat. 555-56 (1973).
38 *Id.* §§ 4(a), (b).
39 *Id.* § 4(c), 87 Stat. 556.
40 *Id.* § 5(b).
41 S. 440, 93d Cong., 1st Sess. § 4 (1973).

of situations with which the President might be confronted, as did the Senate bill, they set up a triggering device in terms of the responses the President might take.[42] The responses which trigger the reporting requirement are limited to introducing armed forces: "(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated; . . . (2) into the territory, airspace or waters of a foreign nation, while equipped for combat; . . . or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation . . . ."[43]

Both lists of triggering devices are subject to two important caveats. First, many presidential actions which ordinarily might be considered exercises of war powers are simply outside the ambit of the triggering devices. No report would be required after military alerts, destroyers-for-bases deals, movements of ships in international waters, or movements of military equipment unless United States troops were involved. Since Presidents of the recent past have been unwilling to initiate clashes by the actual introduction of troops, only rarely would reports be required. These more passive measures would force foreign opponents to be the first to intervene with armed forces.[44]

Certain actions, although not involving troops directly, could have such a high correlation with retaliations and subsequent troop involvement that they should also trigger the reporting requirement and start the cutoff period running.[45] Of course such a widening of the circumstances included within the triggering definition would destroy the bright line offered by the introduction-of-troops test. The importance of such a bright line must be weighed against the utility of including Congress in warmaking decisions at an earlier time. The potential overreporting resulting from the destruction of the bright line might well be less egregious than underreporting caused by an unduly restrictive bright line test. On the other hand, overreporting could

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42 H.J. Res. 542, 93d Cong., 1st Sess. § 3 (1973); War Powers Resolution, Pub. L. No. 93-148, § 4, 87 Stat. 555-56 (1973).

43 War Powers Resolution, Pub. L. No. 93-148, § 4, 87 Stat. 555-56 (1973).

44 A salient example of such a decision was President Kennedy's determination to "quarantine" missile shipments to Cuba instead of bombing the emplacements.

45 The cutoff period is discussed in part II(C) *infra*.

weaken the bill to a certain extent. The President could submit reports for even the most inconsequential movements of troops, such as assigning a small armed contingent to an embassy, until their sheer volume would make Congress' subsequent approval little more than a perfunctory act.

The effectiveness of the triggering list depends on the interpretation of its various elements. "Introduction of United States Armed Forces" is defined to include

> the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such military forces will become engaged, in hostilities.[46]

Although the term "advisor" does not appear, the clear import of the definition seems to control this notorious form of American involvement in past hostilities. The definition does leave open such questions as whether training troops on American soil for a subsequent invasion of a foreign country would constitute an "introduction of United States Armed Forces." The status of people in charge of a military aid program also would be open to question.

Many elements of the triggering list are not defined by the War Powers Resolution or by either of the predecessor bills. Most notable are "hostilities" and "imminent" and to a lesser extent "equipped for combat."[47] Furthermore, policymakers and their lawyers will probably be able to construe other elements in a manner so as to make their meaning unclear. Under such circumstances it becomes critical to resolve who determines when a report is required.

Curiously, neither the War Powers Resolution nor the accompanying report makes any mention of who determines the necessity of a report, nor does S. 440 or H.J. Res. 542.[48] While the President has the relevant information at his disposal, and only

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46 War Powers Resolution, Pub. L. No. 93-148, § 8(c), 87 Stat. 559 (1973).

47 *See, e.g., id.* § 4(a)(1), 87 Stat. 555.

48 *Id.* § 5(b), 87 Stat. 556; S. 440, 93d Cong., 1st Sess. § 4 (1973); H.J. Res. 542, 93d Cong., 1st Sess. § 4(b) (1973).

he can determine when the facts satisfy the ambiguous standards necessitating a report, there is an obvious danger in allowing any branch of government to determine the limits of its own power. This general fear is especially appropriate when this power seems to be the very evil the statute is trying to remedy.[49] This argument suggests that Congress must ultimately decide when the President has failed to submit a necessary report. The legislative history, as well as the "Purpose and Policy" section of the War Powers Resolution, confirms this interpretation.[50] Moreover, it would seem that § 2(c), while it does not narrow the circumstances in which the President can act without congressional approval, does establish the standards which Congress should apply to decide whether a report is required.[51]

An argument against allowing Congress to decide whether a report is to be submitted is that Congress may have insufficient data on which to base a rational judgment. However § 3 of the War Powers Resolution, which is similar in effect to corresponding provisions of the House version, states that "[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into

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49 In this context note Abraham Lincoln's admonition in 1848:

> Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such a purpose—and you allow him to make war at his pleasure. Study to see if you can fix *any limit* to his power in this respect . . . . If, to-day, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, "I see no probability of the British invading us" but he will say to you "be silent; I see it, if you don't."

Letter from Abraham Lincoln, while in Congress, to William H. Herndon, his law partner, Feb. 15, 1848, in 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 451 (R. Basler ed. 1953).

50 This argument draws most of its force from the claim that if Congress actually intends to reassert its authority in the war powers area, it must be the final arbiter of the necessity for a report. Section 2 of the War Powers Resolution, the "Purposes and Policy" section, states that the resolution is designed to insure that the "collective judgment" of the President and Congress would determine whether troops would be introduced. Pub. L. No. 93-148, § 2, 87 Stat. 555 (1973). This implies an equality in war powers that would be undercut if the President could decide whether a report was required. Similarly, the Senate committee report speaks of reconfirming Congress' authority in the declaration and conduct of war. S. REP. No. 220, 93d Cong., 1st Sess. 2 (1973). For there to be any role other than an advisory one, Congress must be able to decide when a report is required.

51 *See* note 32 *supra* and accompanying text.

situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . ."[52] The legislative history of this section indicates that this consultation is to be "meaningful," *i.e.*, the President must not have already made up his mind when he consults Congress.[53] Therefore if this section is to have any effect, Congress will have to be consulted in a wider range of circumstances than those requiring a report. Then hopefully a cooperative decision could be reached. If not, Congress would then have the requisite data upon which it could make an informed judgment as to whether a report is required.

C. *No-Action, the Time Limitations, and Priority Provisions*

The determination that a report is required leads to a series of additional events. First, if by the end of the 60 days Congress has taken no affirmative action specifically authorizing the President to continue hostilities, his power to continue lapses, and he must withdraw the troops in question.[54] But there is one loophole. The President has an extra 30 days "if he determines and certifies to the Congress in writing that unavoidable military

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52 War Powers Resolution, Pub. L. No. 93-148, § 3, 87 Stat. 555 (1973); *see* H.J. Res. 542, 93d Cong., 1st Sess. § 2 (1973). The Senate bill contained no such provision.

53 Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

H.R. REP. No. 287, 93d Cong., 1st Sess. 6-7 (1973). Congress had something more in mind than the after-the-fact briefing President Kennedy gave congressional leaders after his decision to "quarantine" Cuba. S. REP. No. 129, 91st Cong., 1st Sess. 21-22 (1969). Of course enforcement could be difficult. Other than forcing the President to go through the procedural motions of a meaningful consultation, the section might have little effect.

Also it can be argued that even though the President has made up his mind, his warmaking decision is not final until he undertakes an irrevocable action. Until then Congressmen may well be able to change the President's mind.

54 War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 556 (1973). This 60-day limitation is the result of a compromise between the 30-day period originally proposed by the Senate bill, S. 440, 93d Cong., 1st Sess. § 5 (1973), and the 120-day period proposed by the House bill, H.J. Res. 542, 93d Cong., 1st Sess. § 4(b) (1973). CONFERENCE REPORT, *supra* note 1, at H8657.

necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."[55]

If the bill does not realistically limit in advance the situations in which the President can introduce armed forces, the main force of the bill is to limit the length of time the President can continue hostilities. This gives Congress a good bargaining position since it can revoke the President's authority at any time. Previously Congress had to affirmatively pass legislation over a presidential veto to stop a presidential war. Under the War Powers Resolution Congress need do nothing to stop further hostilities. It is the President who must report to Congress and convince the members to allow him to continue. Since the President would know that he would have to convince a majority of the House and Senate that hostilities should be continued, he would have to be more cautious in deciding to commit American troops.

The question remains whether the President should be required to withdraw armed forces, presumably against his own judgment, without affirmative action by Congress. Two arguments can be made against an affirmative answer to this question. First, Congress took affirmative action when it passed the War Powers Resolution. This position is weakened because Congress could not have foreseen the circumstances of a particular future confrontation when it overrode the President's veto. Second, the priority provisions in the War Powers Resolution provide a substitute for affirmative action. Once a Senator or Representative introduces a bill which would authorize an extension of the 60- or 90-day limitations, the measure must be debated, considered, and voted on within the 60-day period.[56] Only in the unlikely event that no one introduced a measure could Congress prevent further hostilities by taking "no action."

A very different situation arises if Congress is not in session when the report is submitted. Then the Speaker of the House and the President pro tempore of the Senate, if they deem it advisable or if they are petitioned by 30 percent of the membership of

55 War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 556 (1973).
56 *Id.* § 6(a), 87 Stat. 557.

their respective Houses, would have to request the President to convene Congress so that action could be taken.[57]

Another problem concerning this "no-action" provision is whether anything can be inferred from a lack of congressional action. Assume, for example, that troops are committed in a situation for which no one is sure whether a report is necessary, and the President fails to submit one. Assume further that Congress does nothing for the next 90 days. In trying to determine whether the President still has the authority to keep troops there, one must somehow discern from Congress' inaction whether it meant that no report was required or whether it meant to revoke the President's authority by inaction.

It is important to note that affirmative action here does not imply the same type of action required to pass a bill. The President would not be able to veto inaction by Congress. Congress can effectively prevent an extension of the 60-day period if a majority of either House fails to support such an extension. Thus, by the passage of the War Powers Resolution, Congress has purposely changed the terms on which it can overcome presidential opposition.

Congress' inability to prevent the continuation of hostilities has frequently stemmed not from the majority's desire to continue the fighting but from a coalition of those favoring continuation and those preferring to criticize the President rather than take affirmative action themselves.[58] This coalition can oftentimes prevent Congress from coming to a decision; absent an affirmative decision by Congress, the President has been able to pursue his own policies. The "no-action" provisions effectively break up this coalition.

D. *Disengagement and the 30-Day Extension*

Congress can force a disengagement of troops prior to the end of the 60-day period by concurrent resolution.[59] Such a resolution must be reported out of either the House Foreign Affairs Committee or the Senate Foreign Relations Committee within 15 days

57 *Id.* § 5(a), 87 Stat. 556.
58 *Cf.* Katzenbach, *supra* note 12, at 14-15; Spong, *supra* note 8, at 10.
59 War Powers Resolution, Pub. L. No. 93-148, § 5(c), 87 Stat. 556-57 (1973).

after being referred to one of these committees.[60] The House whose committee reported the resolution must vote on it within three days.[61] After passage, the other House must follow the same procedure.[62] After each House has adopted a bill, a conference committee must be established and must report a deadlock within 48 hours or, if in agreement, issue a report within six days.[63] Both Houses must then vote on the conference report within six days.[64] The longest period from introduction to passage would be 48 days.

If Congress decided to pass such a resolution, the question remains whether the resolution would eliminate the 30-day extension. Such an interpretation would be unwise. If Congress could at any time pass legislation which would require the President to withdraw armed forces immediately, those uses of the armed forces over which there might be dispute, but which ultimately were decided to be legitimate, would have to be conducted so as to insure a quick retreat. This interpretation would unduly inhibit the legitimate use of armed forces by the President.

A practical problem with the preceding analysis is that it assumes such a rapid pace of congressional action that cessation of fighting would be mandated before the President had an opportunity to plan an orderly withdrawal. Such rapid congressional action is highly unlikely. The War Powers Resolution does prescribe limits on the amount of time Congress can devote to the various phases of considering a proposed concurrent resolution,[65] but these maximum times are so abbreviated that they are also likely to be minimum times. This conclusion is strengthened if one assumes that many Congressmen are reluctant to take public positions on war powers issues until they have to. Rarely would a concurrent resolution proceed from introduction in one House to the final vote in the other House in significantly less time than the 48-day maximum. Furthermore, additional time would probably be lost because of delay between the introduction of troops

60 *Id.* § 7(a), 87 Stat. 557.
61 *Id.* § 7(b).
62 *Id.* § 7(c), 87 Stat. 557-58.
63 *Id.* § 7(d), 87 Stat. 558.
64 *Id.*
65 *See* notes 60-64 *supra* and accompanying text.

by the President and the introduction of a concurrent resolution.

As a result, disengagement resolution would take almost as much time as the 60-day no-action period. Tacking the 30-day extension (and any delay in introducing a resolution) onto the 48-day period would almost destroy any extra disengagement power the concurrent resolution section would give Congress. If the concurrent resolution section is to have a nontrivial effect, Congress must have intended that the 30-day period not be available.

E. *Condemnation of Certain Presidential Practices*

The section of the War Powers Resolution which establishes rules of construction seeks to limit possible inferences drawn from treaties and appropriation measures.[66] It states that no law or statute shall be construed to authorize the introduction of armed forces unless such authorization is explicit.[67] This section should effectively negate statements made by previous Presidents that by appropriating funds for military operations Congress was tacitly endorsing the executive action.[68] Such a provision recognizes the difference between voting to feed, clothe, and otherwise logistically supply American fighting men and voting to support a continuing involvement in a presidential war.

The effect of these provisions on the area resolutions is less clear. It is possible that they satisfy the strict requirements set forth in the War Powers Resolution, which states that authority shall not be inferred

> from any provision of the law (whether or not in effect before the date of the enactment of this joint resolution) . . . unless such provision specifically authorizes the introduction of

66 War Powers Resolution, Pub. L. No. 93-148, § 8(a), 87 Stat. 558 (1973).

67 *Id.* § 8(a)(1).

68 *See* F. WORMUTH, THE VIETNAM WAR: THE PRESIDENT VERSUS THE CONSTITUTION 54-58 (1968); The War in Southeast Asia: A Legal Position Paper, 1970 (paper prepared by students at New York University School of Law), in DOCUMENTS, *supra* note 4, at 106; Harvard Note, *supra* note 4, at 1801-02.

There is some indication that judges have also interpreted congressional appropriation measures as implied concurrence in warmaking decisions. *See* Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971); DaCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); United States v. Sisson, 294 F. Supp. 511, 514-15 (D. Mass. 1968).

> United States Armed Forces into hostilities or into such situations *and* states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution . . . .[69]

Some of the area resolutions seem to satisfy the first requirement. For example, the Middle East Resolution states:

> The President is authorized to undertake . . . military assistance programs with any nation or group of nations of that area desiring such assistance. . . . [I]f the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism . . . .[70]

Similarly the Formosa Resolution authorized the President "to employ the Armed Forces of the United States as he deemed necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack . . . ."[71] The Cuba Resolution noted that the United States was determined "to prevent by whatever means may be necessary, including the use of arms, . . . [any Cuban aggression in the Western Hemisphere]."[72]

Whether these resolutions satisfy the second requirement in § 8(a)(1) is more troublesome. No clue is offered in the conference report as to how the second requirement should be interpreted, except that it was an "adoption of modified Senate language defining specific authorization."[73] S. 440 would have included the above resolutions within the definition of specific statutory authorization.[74] Although the final version varies from the Senate bill, it seems unlikely that Congress would attempt to effect the wholesale repeal of all current area resolutions sub rosa. Given this improbability, plus the ambiguity of the provision upon which implied repeal must depend, it seems reasonable to

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69 War Powers Resolution, Pub. L. No. 93-148, § 8(a)(1), 87 Stat. 558 (1973) (emphasis added).

70 Middle East Peace and Stability Act, 22 U.S.C. § 1962 (1970).

71 Formosa Resolution, 50 App. U.S.C. n. prec. § 1 (1970).

72 Cuba Resolution, Pub. L. No. 87-733, 76 Stat. 697 (1962).

73 CONFERENCE REPORT, *supra* note 1, at H8658.

74 S. 440, 93d Cong., 1st Sess. § 3 (1973).

conclude that Congress did not intend to nullify the area resolutions.

The section also stands for the proposition that many of the collective defense treaties entered into by the United States should not be considered "self-executing," *i.e.*, as authorization for the intervention of United States armed forces without subsequent approval by Congress.[75] This provision should buttress previous contentions that the "constitutional processes" clauses in most collective defense treaties incorporate by reference the Congress' duty and power to decide whether to declare war.[76] The resolution was careful to exclude situations in which United States armed forces were part of a high level military command such as NATO or the United Nations, but this exclusion was clearly restricted to the joint operations of such commands.[77]

F. *Conflicting Congressional Intent*

The interpretation section also stated that nothing in it "is intended to alter the constitutional authority of the Congress or the President . . . ."[78] Such a provision seems to present a certain lack of consistency. The War Powers Resolution is written in an area which is generally acknowledged to be one of concurrent powers held by both Congress and the President.[79] When legislating in such an area, Congress cannot pretend that it is not altering constitutional powers. In the words of Justice Jackson in the *Steel Seizure Case*, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[80]

There is a great distinction between a President acting on his authority in an area in which Congress has failed to legislate and acting on his authority in direct contravention of a legislative mandate. Therefore the very fact that Congress passed the War Powers Resolution switches the standards by which a presidential

75 War Powers Resolution, Pub. L. No. 93-148, § 8(a)(2), 87 Stat. 558 (1973).
76 Harvard Note, *supra* note 4, at 1798-800.
77 War Powers Resolution, Pub. L. No. 93-148, § 8(b), 87 Stat. 558 (1973).
78 *Id.* § 8(d)(1).
79 *See generally* Harvard Note, *supra* note 4.
80 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

action is to be judged from the second to third division of Justice Jackson's tripartite universe of presidential power. When the President acts in an area where Congress has neither granted nor denied him authority, he must rely only on his independent powers. But "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ."[81] Therefore the War Powers Resolution alters the constitutional balance by its very existence. The explanation for this apparent inconsistency lies in Congress' intent merely to restore the traditional constitutional balance between the two branches and not to take any power from the President other than those that belong to Congress.

III. The Potential Effectiveness of the War Powers Resolution

The War Powers Resolution, as well as many of the earlier legislative attempts, is limited by the *fait accompli* problem. With his wide, virtually unlimited discretion over foreign affairs, the President is free to start a chain of events which might require presidential deployment of armed forces without the necessity of congressional approval.[82] Such foreign policy actions can be distinguished from those actions which involve military maneuvers.

For example, the President could break off diplomatic relations or impose other nonmilitary sanctions. Information concerning such actions would not even have to be reported to Congress.[83] Therefore whenever the President has a number of possible alternatives, each with a different probability of causing future hostilities, he is able to choose action which is either more or less likely to lead to war. When the time to deploy troops finally arrives, the decisionmaking process will have already been completed. Unless Congress can involve itself in these earlier decisions, it may find its later participation ineffective.

81 *Id.* at 637.

82 *See* Morgenthau, *The American Tradition in Foreign Policy*, in Foreign Policy in World Politics 264 (R. Macridis ed. 1967).

83 *See* part II(B).

Another aspect of the War Powers Resolution's effectiveness is whether it will prevent future Vietnams. Recognizing that Congress can never legislate wisdom, it appears unlikely that the War Powers Resolution alone could prevent a future Vietnam. First, the President could have instituted armed intervention after the Gulf of Tonkin incident within the War Powers Resolution, since his claim was that American ships were fired upon.[84] If such a situation recurred, Congress could be caught up in the same kind of emotions that led to the Gulf of Tonkin Resolution in the first place. The statute would not prevent such a result. A President wishing to introduce forces in the future would still have all of his special advantages, including selectively supplying information to Congress until a vote was taken to support the presidential position.

Finally, since the earlier Presidents and Congresses did not seem too worried about the constitutional questions concerning the use of American troops without congressional approval, it is unlikely that a statutory solution would have changed anything. Arguably the only way Congress could effectively prevent a future Vietnam would be to be involved in foreign policy matters from the beginning in order to rationally judge the commitment of American troops. At most, the War Powers Resolution would give an already angered Congress a technique for restricting the President. Although the War Powers Resolution would make it easier for Congress to articulate and enforce its judgment, Congress must become aroused through means independent of this legislation. This arousal and not the wording of a particular statute will prevent future Vietnams.

Another question concerning the effectiveness of the resolution is whether it actually would limit the President's warmaking. The Senate's version seems to show that the Senate was interested in arresting the steady flow of power toward the President. The House bill and the War Powers Resolution are not so clear. Senator Eagleton and others believe that its net effect is to increase the role of the President, not to limit it.[85] Indeed the War Powers Resolution contains no explicit list of situations in which the President can act without congressional approval. It provides

84 War Powers Resolution, Pub. L. No. 93-148, § 2(c)(3), 87 Stat. 555 (1973).
85 *See* note 35 *supra*.

for no mandatory congressional participation in foreign affairs until after armed forces have crossed onto foreign soil equipped for combat. It does not codify the existing constitutional division of powers between the President and Congress.

The danger remains that the War Powers Resolution might cripple the President in foreign affairs by eliminating secrecy and decisiveness as diplomatic tools. Any crippling effect would be partially undercut by the likelihood that the President would not hesitate to follow a course of action he felt to be in the national interest. To assure later congressional approval, he might be forced to inform Congress, and thus the world, of his plans. Foreign leaders might be more willing to force a confrontation if they knew that the President would need congressional support before he could respond forcefully. Negotiations might be delayed while a foreign power waited for the 60- or 90-day period to expire. The President might also tend to use excessive force to win a victory within 60 days.

IV. Alternative Approaches

One alternative found to be successful is the actual or threatened termination of appropriations. Although often considered a clumsy and ineffectual weapon, it did work to end the Cambodian bombing campaign.[86]

The creation of a congressional committee whose members would be privy to the same secret diplomatic information and the same foreign policy experts as the President might also work.[87] The President would then have to convince the permanent committee whenever he wished to introduce troops, unless the emergency fell within those limited circumstances for which prior permission need not be sought. Such a committee would at least

86 Although opposition to American operations in Indochina had been growing for some time, it was not until May 10, 1973, that the House amended an appropriations bill, H.R. 7447, 93d Cong., 1st Sess. (1973), to cut off funding for such activities. 119 Cong. Rec. H3548-605 (daily ed. May 10, 1973). President Nixon vetoed this bill. 9 Weekly Comp. Pres. Doc. 861-62 (1973). Only the imminent cutoff of appropriations for the entire federal government at the end of the fiscal year prompted him to accept a compromise of an August 15, 1973, cutoff of funds for combat in Indochina. *See* N.Y. Times, July 1, 1973, § 4, at 4. The House and Senate both passed this compromise on June 29, 1973. 119 Cong. Rec. H5659-87, S12,582 (daily ed. June 29, 1973). *See* Pub. L. No. 93-50, 87 Stat. 99 (1973).

87 Spong, *supra* note 8, at 20. *But see* Katzenbach, *supra* note 12, at 16.

insure the independent judgment of more than one person before the nation was committed to war. Whatever the committee's composition, there could exist the same "cult of expertise" and the same cloak of secrecy.

Congress could be much more restrictive in passing area resolutions.[88] One possible step would be to repeal the ones still in existence. Another step would be to carefully draft future ones to clarify that Congress is delegating power which belongs exclusively to it. Such resolutions might also contain reporting provisions and specific limitations as to the scope and type of operations to be conducted. These proposals do encroach on the President's powers as Commander-in-Chief as the conditions approximate tactical decisions usually left to the military. Arguably, some traditionally military decisions, such as expanding the theater of war operations, even for defensive purposes, should involve more than the Commander-in-Chief.[89] Another possible condition on future area resolutions is a definite time limit,[90] so that Congress will be forced to periodically review the wisdom of a continuing involvement.

The legislative history of the War Powers Resolution makes it very clear that Congress no longer, if indeed it ever did, views inaction or passage of an appropriations bill as tacit approval of presidential conduct. In fact, Congress goes even further to state that it does not interpret previous treaties as self-executing.[91] The President has been made aware of where Congress stands and will be more likely to act in a manner consistent with Congress' view.

*Gerald L. Jenkins**

88 For a list of current resolutions, see note 16 *supra*.

89 The characterization of the Cambodian bombing campaign as a purely tactical decision would no doubt cause argument today. A continuum could be constructed running from broad national goals, to foreign policy, to global military strategy, and finally to tactical decisions. Most would agree that Congress has the power to engage in the determination of national goals. On the other hand, the President, as Commander-in-Chief, is in charge of military operations including tactical decisions and even strategy. This dichotomy is beginning to break down because the last decade has shown that strategy and tactical decisions can implicate foreign policy and national goals. *But cf.* Rehnquist, *The President and Cambodia, His Constitutional Authority*, N.Y.L.J., June 9, 1970, in *1971 Senate Hearings, supra* note 4, at 829-32.

90 S. REP. No. 129, 91st Cong., 1st Sess. 19 (1969).

91 War Powers Resolution, Pub. L. No. 93-148, § 8(a)(2), 87 Stat. 558 (1973).

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THE AMENDED RURAL ELECTRIFICATION ACT: CONGRESSIONAL RESPONSE TO ADMINISTRATION IMPOUNDMENT

Introduction

By press release of December 29, 1972,[1] the United States Department of Agriculture announced a major change in the operation of the rural electrification program. Prior to the release, rural electric generation, transmission, and distribution systems had received 35-year direct loans from the Rural Electrification Administration (REA) pursuant to the Rural Electrification Act of 1936;[2] and rural telephone services had received similar direct loans pursuant to the Rural Telephone Act of 1949,[3] an amendment to the 1936 Act. Since the Pace Act of 1944,[4] the interest rate had been fixed at an increasingly attractive 2 percent. But beginning January 1, 1973, according to the press release, the direct loan program would be replaced by insured and guaranteed loans made under the authority of the Rural Development Act of 1972.[5] Henceforth insured loans to electric and telephone cooperatives

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1 *Rural Electric and Rural Telephone Program Change,* NEWS, U.S. DEP'T OF AGRICULTURE, Dec. 29, 1972 [hereinafter cited as USDA NEWS].

2 The Rural Electrification Administration was created by Exec. Order No. 7037 (May 11, 1935). The REA program was given statutory authority by Congress in Act of May 20, 1936 (the Rural Electrification Act of 1936), ch. 432, tit. I, § 1, 49 Stat. 1363. Direct loans were made by the government upon application by the borrower and were financed by annual budget appropriations. Repayments were directed into the Treasury.

3 Act of Oct. 28, 1949, ch. 776, 63 Stat. 948.

4 Act of Sept. 21, 1944, ch. 412, tit. V, 58 Stat. 739 (relevant sections codified at 7 U.S.C. §§ 903-05, 915 (1970)).

5 The authorizing section would be 7 U.S.C. § 1929(a) (Supp. II, 1972), *amending* 7 U.S.C. § 1929 (1970). Funds for insuring and guaranteeing loans would come from the rural development insurance fund created by this section, which the Nixon Administration believed would support the new loan program without an increase in appropriations or the transfer of already appropriated REA direct loan funds.

An insured loan under the Rural Development Act would operate as follows: the Administrator would lend money to the borrower at 5 percent, then sell the borrower's note to a private lender at whatever higher rate is demanded, the govenment agreeing to make up the difference. The proceeds from the sale would then be used to replenish the rural development insurance fund, minimizing the need for appropriations.

A guaranteed loan would be arranged directly between the borrower and the private lender, but the government would guarantee the lender against loss by default. *See* 7 C.F.R. § 1873.2(e) (1973).

would be made at 5-percent interest,[6] while cooperatives borrowing directly from private lenders and all *commercial* electric and telephone companies would have their loans guaranteed at interest rates agreed upon by the borrower and the lender.[7]

The Nixon Administration's announced goal was to compel rural electric and telephone borrowers to pay "interest rates that are more in line with the cost of money on today's market,"[8] to reduce the impact of the loan program on the Federal budget by impounding funds appropriated for the REA direct loan program for the current fiscal year,[9] and to facilitate more rapid growth of such lenders as the Rural Utilities Cooperative Finance Corporation (for rural electric utilities) and the Rural Telephone Bank.[10]

Despite claims to the contrary,[11] the Nixon Administration vigorously denied any intention of repealing the Rural Electrification Act[12] or of working extreme hardship on borrowers. As evidence, the Administration cited its plan to increase the loan authority of the rural development insurance fund, the source of insured and guaranteed loans under the Rural Development Act, by $200 million;[13] its intention to continue issuing direct loans

6 7 U.S.C. §§ 1926(a)(1), 1927(a) (Supp. II, 1972). A cooperative is a membership organization in which electric or telephone subscribers hold shares; it is not operated for profit.

7 7 U.S.C. §§ 1927(a)(1), (2), 1932(a) (Supp. II, 1972). A commercial system is investor-owned and operated for profit. However, the profitability of such systems may be doubtful. *See* note 73 *infra*.

8 USDA NEWS, *supra* note 1.

9 The press release did not speak specifically of impoundment but referred to the revised program as "a part of the effort to . . . keep the outstanding public debt within the statutory limit." *Id.*

10 For a brief description of these lenders, see text at notes 30-33.

11 In addressing Earl Butz, Senator Hubert Humphrey (D.-Minn.) charged: "The issue is whether or not you as Secretary of Agriculture . . . can terminate programs, not impound funds, not take over 10 percent, or 20 percent, but terminate and end programs which have been duly authorized by the Congress of the United States and for which funds have been appropriated." *Hearings on Impoundment of Funds for Farm and Rural Programs Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 1st Sess. 43 (1973) [hereinafter cited as *Senate Hearings*]. *See also id.* at 168; H.R. REP. No. 91, 93d Cong., 1st Sess. 3 (1973); 119 CONG. REC. S1189 (daily ed. Jan. 23, 1973) (remarks of Senator Mondale, D.-Minn.).

12 Secretary Butz replied to Senator Humphrey: "[T]he REA Act continues as it was. We simply terminated the source of loans provided for under that act and used a different source of loans under the authority of the Rural Development Act of 1972." *Senate Hearings, supra* note 11, at 45. *See also id.* at 591, 740 (statement of Earl Butz).

13 USDA NEWS, *supra* note 1. This increase in lending authority should not

approved prior to January 1, 1973,[14] and to continue unchanged all direct loans outstanding at 2-percent interest;[15] and its plan to continue at a "high level" all REA programs other than direct loans.[16]

The Nixon Administration's alteration of the REA direct loan program was only part of a much larger impoundment affecting such other Department of Agriculture operations as the rural environmental assistance program and the Farmer's Home Administration's rural housing loan programs.[17] Nevertheless, modification of the REA direct loan program evoked special attention, as is to be expected of a major change in a long-standing program which had affected over 25 million people in 46 states[18] and which had developed into an indisputably big business.[19]

I. Weighing the Administration Proposal

A. *Economic Objectives and Justifications*

The Administration's primary motive in replacing the direct loan program with insured and guaranteed loans was control of the Federal budget, for insured and guaranteed loans under the Rural Development Act, unlike direct REA loans, are not charged against the Federal budget.[20] If major changes in the REA loan program had no more effect than to create a more attractive bud-

be confused with an increase in the fund through appropriation. The Administrator of the fund would simply be authorized to increase the ratio of debt to capital in the fund.

14 *Hearings on H.R. 2276, H.R. 5683, and S. 394 Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 208 (1973) (remarks of David Hamil, REA Administrator) [hereinafter cited as *House Hearings*].

15 *Id.* at 56 (statement of J. Phil Campbell, Under Secretary of Agriculture).

16 *Senate Hearings, supra* note 11, at 740 (statement of Earl Butz).

17 *Id.* at 3-4 (statement of Senator Talmadge, D.-Ga.).

18 *House Hearings, supra* note 14, at 94 (remarks of Weldon Barton, Asst. Dir. of Legislative Services, Nat'l Farmers Union).

19 A 1969 study found the REA to be one of the largest money-lending institutions in the United States. As of June 30, 1967, its investments were $4.506 billion. The largest bank in the United States, Bank of America, had investments totalling $3.995 billion as of Dec. 31, 1967. Bickley, *REA—A Brief Study of a Federal Agency: Part I. Progress and Problems of the Rural Electric Program*, 83 Pub. Util. Fort., Feb. 13, 1969, at 19.

20 *House Hearings, supra* note 14, at 76 (remarks of J. Phil Campbell). *See also* note 5 *supra*.

get, some critics charged, the changes were merely cosmetic.[21] Not only would the appearance of the budget be improved, however; the actual cost of the REA loan program would also be substantially reduced. If the government pays 6 percent for funds it relends to rural electric and telephone borrowers at 2 percent, the taxpayer will be paying REA borrowers an interest subsidy of 4 percent. This subsidy grows in significance when annual direct loans approach three-quarters of a billion dollars and the repayment period is 35 years.[22] Increasing to 5 percent the rate borrowers pay would of course dramatically reduce this subsidy.

Nor did the Administration consider this increase in the interest expenses of rural electric and telephone systems harmful. Total loan authority would in fact be increased,[23] and some borrowers had themselves admitted that their primary concern was not the cost but rather the availability of loans.[24] Even if some marginal borrowers did suffer hardship because of increased interest costs, the Administration argued that the Rural Electrification Act had already accomplished its primary purpose — to aid in providing central electric and telephone service to rural residents.[25] Over 98 percent of all farms were electrified, as opposed to 11 percent when the rural electrification program began;[26] and over 84 percent of rural establishments had telephone service.[27] Moreover, as rural America increasingly became suburban America, the number of nonfarm hookups increased substantially,[28] despite abundant ref-

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21 *Id.* at 160-61 (remarks of Representative Poage, D.-Tex.).

22 *See* Act of Aug. 22, 1972, Pub. L. No. 92-399, 86 Stat. 591. The 1973 appropriation for the REA loan program totalled $740 million — $595 million for rural electrification and $145 million for rural telephone service.

Senator Jesse Helms (R.-N.C.) pointed out in debate that the 4-percent subsidy amounts to almost $400 for each $1000 borrowed, discounted over the life of the loan. 119 CONG. REC. S3083 (daily ed. Feb. 21, 1973).

23 *See* text at note 13 *supra*.

24 *House Hearings, supra* note 14, at 116 (statement of Representative Nelsen, R.-Minn.).

25 Rural Electrification Act § 2, 7 U.S.C. § 902 (1970).

26 *Senate Hearings, supra* note 11, at 18 (statement of Earl Butz).

27 *Id.* at 179 (statement of David C. Fullarton, Exec. Vice Pres., Nat'l Tel. Coop. Ass'n).

28 In 1972 electric lines financed by REA provided service to an average of 14 meters per mile. *Id.* at 18. And, according to Representative Charles Teague (R.-Calif.), nonfarmer subscribers of REA-financed electrical service outnumber farmers four to one. *House Hearings, supra* note 14, at 105.

erences in the legislative history of the Rural Electrification Act to providing service to farms.[29]

Reducing the likelihood of hardship under the revised REA loan program, the Administration found, was the existence of two active lending organizations, the Rural Utilities Cooperative Finance Corporation (CFC) and the Rural Telephone Bank. The CFC, begun in 1971, had initially been capitalized by subscriptions of rural electric utilities in the comfortable position of having excess funds which they desired to lend to other utilities at a rate over 7 percent[30] — hardly an indication of financial debility. Of those utilities in the less fortunate position of borrowers, moreover, only 88 of 1,094 active borrowers failed to qualify for CFC loans.[31] The Rural Telephone Bank, created by statute[32] to provide telephone borrowers with the same opportunities available to electric borrowers under the CFC, had enjoyed similar success, providing loans ranging from 4 to 8 percent, depending upon the borrower's ability to pay, to 153 telephone borrowers in its first year of operation.[33]

A switch to insured loans at 5 percent and guaranteed loans at market rates, the Administration reasoned, would in fact increase the lending capability of these already flourishing private lenders, enabling them to lend to borrowers otherwise unable to pay the lenders' rates or so lacking in stability that a loan at any rate, absent a guarantee, was a poor risk.[34]

Critics of raising interest rates argued, on the other hand, that most systems could ill afford an increase in their expenses. The

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29 *See, e.g.*, S. REP. No. 1581, 74th Cong., 2d Sess. 4 (1936): "Experience shows that nothing can be more beneficial to the *farmer* and that nothing will add more to the comfort, satisfaction, and happiness of the rural population than the electrification of *farm* homes." (emphasis added.)

30 *Senate Hearings, supra* note 11, at 172 (reply of R. C. Partridge, Exec. Vice Pres., Nat'l Rural Elec. Coop. Ass'n (NRECA)).

31 119 CONG. REC. S3082 (daily ed. Feb. 21, 1973).

32 Act of May 7, 1971, Pub. L. No. 92-12, 85 Stat. 30, 7 U.S.C. §§ 941-50(b) (Supp. II, 1972).

33 *Senate Hearings, supra* note 11, at 197 (statement of William Mott, Exec. Vice Pres., U.S. Independent Tel. Ass'n).

34 With respect to the insured loans, the CFC or the Rural Telephone Bank could purchase the borrower's notes resold by the Administrator of the rural development insurance fund, thus indirectly becoming a lender at less than the usual 7-percent-plus rate.

systems, they argued, suffered from unprofitably low customer density and revenue per route mile of line.[35] Meanwhile, costs of labor and material (and energy for those systems engaged solely in distribution and compelled to purchase power from other sources) were increasing[36] and, in view of the impending energy crisis, were likely to increase further.[37] This situation was especially serious, critics alleged, because the REA program had not yet accomplished its statutory purpose, notwithstanding Administration claims to the contrary. True, most of rural America had been electrified and provided with telephone service; but systems were in need of considerable upgrading[38] and repair,[39] some mandated by State public service commissions[40] and some necessitated by increasing demands of subscribers.[41] And while an increasing num-

35 REA-financed telephone systems had an average density, per route mile of line, of 4.2 subscribers, as compared with approximately 16 for the entire independent telephone industry and over 40 for the Bell system. *House Hearings, supra* note 14, at 22 (statement of A. H. Peterson, Exec. Dir. and Counsel, NRECA). Average annual revenue per mile ranged from $385 for cooperatives to $856 for commercial borrowers. *Senate Hearings, supra* note 11, at 179 (statement of David Fullarton, Executive Vice President, Nat'l Tel. Coop. Ass'n).

For rural electric cooperatives average density per mile is 3.7 subscribers, as compared with 35.5 for most commercial utilities. *House Hearings, supra* note 14, at 133 (statement of Representative Pickle, D.-Tex.). Average annual revenue per mile is $696, as compared with $10,499. *Id.* at 95 (statement of Weldon Barton, Nat'l Farmers Union).

36 *House Hearings, supra* note 14, at 43 (statement of Charles Frazier, Director, Washington Staff, Nat'l Farmers Organization); *id.* at 196 (statement of T. C. Long, Mgr., Walter County Elec. Membership Coop., Monroe, Ga.); *Senate Hearings, supra* note 11, at 164 (statement of Senator Abourezk, D.-S.D.).

37 Representative J. J. Pickle estimated that the fuel shortage will raise power costs to rural electric distribution systems 25 to 30 percent in the next few years. *House Hearings, supra* note 14, at 133.

38 Rural telephone systems as of December 31, 1970, were facing demands to upgrade 4- and 5-party service now provided to 25.6 percent of their subscribers and 8-party service to another 22.9 percent. REA projections indicated, however, that 8-party service would continue into the 1980's. *Senate Hearings, supra* note 11, at 179 (data included in statement of David Fullarton).

39 Rural electric systems were faced with the need to replace badly weathered lines built 25 years ago. *House Hearings, supra* note 14, at 110 (statement of Representative Andrews, R.-N.D.).

40 *See, e.g.*, Application of Bonduel Telephone Company, UTIL. L. REP. ¶ 21,150, at 47,092 (Wis. Pub. Serv. Comm'n 1969): "The discontinuance of party-line service is in the public interest and in accordance with the furnishing of reasonably adequate telephone service and facilities to the public."

41 Senator Herman Talmadge pointed out that utilization of electric energy is more than doubling every 10 years. *Senate Hearings, supra* note 11, at 95. Increased capital requirements because of this increase are discussed in *Hearings on the Problems Facing Rural Electric Cooperatives in Providing Adequate Power at*

ber of nonfarm customers were being served,[42] the Rural Electrification Act nowhere speaks of farmers but is identified merely as an act "to provide for rural electrification and other purposes."[43]

Furthermore, critics took small comfort in the Administration's reliance on the Cooperative Finance Corporation and the Rural Telephone Bank. Although the CFC charged an interest rate over 7 percent, making it appear initially that all CFC cooperative borrowers — as well as the 88 applicants who had failed to qualify for CFC loan funds — would benefit from the availability of 5 percent loans, such was not the case. The CFC was matching REA direct loans on a 30- to 70-percent basis, which meant that the *overall* rate paid by CFC borrowers was only something over 3 percent.[44] The 88 applicants thus were deemed unable to pay even this 3-percent-plus rate.

Because the Rural Telephone Bank charged a variable rate, blending was a much less significant feature. In the first year of its operation, however, the Bank blended its funds with the 2-percent direct loan funds of the REA to assist 21 borrowers unable to pay the Bank's minimum 4-percent rate.[45] Even if all these borrowers were cooperatives and hence eligible for the 5-percent insured loans, that higher rate would be of no help. An additional 57 applicants would be rejected because of the requirement in the act establishing the Bank that applicants must first be holders of direct loans from the REA.[46]

Despite the problems, however, critics of the Administration program may well have overdrawn their pleas of hardship. For most electric and telephone utilities, low average density and revenue are offset at least in part by lower operating expenses and

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Reasonable Rates for Rural America Before the Subcomm. on Agricultural Credit and Rural Electrification of the Senate Comm. on Agriculture and Forestry, 92d Cong., 1st Sess. (1971).

42 Senator Humphrey argued that the extent of nonfarm electric service claimed by the Administration (*see* note 28 *supra*) was exaggerated, because Administration density figures included highway and billboard lighting and failed to take into account the fact that a single farm may have several meters. 119 CONG. REC. S2918 (daily ed. Feb. 20, 1973).

43 Act of May 20, 1936, ch. 432, 49 Stat. 1363.

44 *House Hearings, supra* note 14, at 40 (statement of Mark Bonner, Pres., Ass'n of La. Elec. Coops).

45 *Senate Hearings, supra* note 11, at 197 (statement of William Mott).

46 *House Hearings, supra* note 14, at 24 (statement of A. H. Peterson); Act of May 7, 1971, Pub. L. No. 92-12, § 408(a), 85 Stat. 35.

taxes;[47] and interest costs account for only a small portion of overall operating costs.[48] Hence, even though the overall rate paid by borrowers of funds from both the REA and the CFC or the Rural Telephone Bank would increase under the Administration proposal, the impact upon most borrowers would not be severe. This is not to deny that low density, combined with adverse topographical conditions,[49] might make the operation of *some* rural utilities so tenuous that any increase in interest costs would wipe out their entire projected annual profit margin.[50] Nor does this deny that complete unavailability of CFC and Rural Telephone Bank loan funds might be sorely felt. But the existence of these potential hardships on a few marginal utilities should hardly be a bar to considering the desirability of reform, especially when special provision could easily be made for hardship cases.

B. *Legal and Historical Support*

In its efforts to achieve reform, the Administration was mindful of some prior efforts. There was a history of unsuccessful attempts to make REA interest rates conform to the actual financial capability of borrowers. One such effort was made during the Eisenhower Administration by Ancher Nelsen, Administrator of the REA from 1953 to 1956;[51] and another was made during the Johnson Administration by the U.S. Independent Telephone Association.[52] The Senate Committee on Agriculture and Forestry stated as early

47 A 1969 study found that while revenues per customer of investor-owned non-REA utilities were higher (1.66 times during the period 1962-66), so were operating expenses (1.56 times) and taxes (10.8 times), making the higher revenues necessary. Bickley, *REA—A Brief Study of a Federal Agency: Part II. Changes for Rural Electrification Are Called for*, 83 PUB. UTIL. FORT., Feb. 27, 1969, at 27.

48 In 1971 interest costs amounted to 4.3 percent of the operating revenue of rural electric distribution systems, which may be compared with the costs of purchased power, which amounted to 44.2 percent. 119 CONG. REC. S3083 (daily ed. Feb. 21, 1973) (remarks of Senator Helms).

49 Alaska is perhaps the most extreme case, facing "the entire spectrum of rural electrification difficulties": remoteness; sparseness of population; high cost of construction, fuel, and freight. *Senate Hearings, supra* note 11, at 389 (statement of Senator Stevens, R.-Alaska).

50 Even Administration spokesmen admitted this problem, pointing out that in extreme cases insured loans could be made at less than 5 percent, inasmuch as the Rural Development Act authorizes loans at rates "up to 5 percent." *House Hearings, supra* note 14, at 74 (remarks of John Knebel, General Counsel, USDA).

51 *Id.* at 88 (remarks of Representative Nelsen).

52 *Senate Hearings, supra* note 11, at 198 (statement of William Mott).

as 1962 that the REA "has a responsibility to see that Government funds are not loaned unnecessarily."[53]

In addition to these unsuccessful attempts to reform interest rates, there were somewhat more successful attempts at impoundment. During the eight years of the Kennedy and Johnson Administrations, Secretary of Agriculture Earl Butz discovered, some of the funds appropriated for REA loans were withheld in seven years, five times for the entire year.[54] Moreover, since the REA originally had been created by Executive Order, rather than by statute, the Administration regarded its modification by Administration action as less anomalous.[55]

The Administration also found support for its impoundment of REA loan funds within the language of the Rural Electrification Act itself. In the Act the Administration found no language mandating the expenditure of appropriated REA loan funds; instead there appeared four times the words "the Administrator is *authorized and empowered* to make loans."[56] Memoranda from the Department of Justice appearing in the *Congressional Record*[57] had stated that in evaluating impoundments it is necessary to determine "whether the pertinent legislation compels the obligation and expenditure of the full appropriation or leaves sufficient discretion to the Executive Branch to justify a Presidential directive to impound."[58]

Finally, the Administration found support in legislative history for a higher rate of interest. As originally enacted the Rural Electrification Act of 1936 provided for interest "at a rate . . . equal to the average rate of interest payable by the United States of America on its obligations, having a maturity of ten or more years after the dates thereof. . . ."[59] From 1937 to 1944 interest rates charged borrowers varied from 2.46 to 2.88 percent.[60] During World War II, however, when the Pace Act fixed interest rates at

53 S. REP. No. 1365, 87th Cong., 2d Sess. 24 (1962).
54 *Senate Hearings, supra* note 11, at 22.
55 119 CONG. REC. S3083 (daily ed. Feb. 21, 1973).
56 Rural Electrification Act §§ 2, 4, 201, 7 U.S.C. §§ 902, 904, 922 (1970) (emphasis added).
57 116 CONG. REC. 343-51 (1970).
58 *Id.* at 345.
59 Act of May 20, 1936, ch. 432, tit. I, §§ 4, 5, 49 Stat. 1365.
60 *Senate Hearings, supra* note 11, at 588 (remarks of Earl Butz).

2 percent, the prime rate dropped to its lowest level in over 100 years.[61] It appears, then, that the original intent of the Rural Electrification Act was to charge borrowers a rate roughly comparable to that paid by the government on its own obligations and that the Pace Act was intended to set a floor under this rate. The cost of money to the government having been since 1959 more than twice the 2-percent rate charged rural utilities and in recent years more than triple that figure,[62] it is difficult to contradict the Administration's argument that reform was overdue.

Critics were nevertheless quick to challenge the constitutionality of the Administration proposal.[63] They viewed it first as an encroachment on the power of Congress to appropriate funds,[64] for Congress had already appropriated funds to continue the REA direct loan program and now the President was unilaterally withholding them. Furthermore, the President had not exercised his general veto power[65] by rejecting the budget for the current fiscal year; instead he appeared to be exercising an unlawful item veto after the budget had become law. Finally, critics charged, the President was violating the duty imposed in Article II, Section 3, that he "shall take care that the laws be faithfully executed."

Whatever merit these charges may have had, however, was diminished considerably by a history of unchallenged impoundments, some directly affecting the REA; by the existence of authority for impoundment in the language of the Rural Electrification Act;[66] and especially by the repeated claim of the Ad-

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61 Bickley, *supra* note 19, at 20.

62 *Id.*

63 Several articles have considered constitutional aspects of impoundment. *E.g.*, Pine, *The Impoundment Dilemma*, 3 YALE REV. L. & SOCIAL ACTION 99 (1973); Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973).

64 U.S. CONST. art. I, § 8.

65 *Id.* § 7.

66 Two additional statutory supports for impoundment upon which the Administration could have relied are the Antideficiency Act § 1211, 31 U.S.C. § 665 (1970), and the Reorganization Act § 2, 5 U.S.C. § 901 (1970). The former arguably authorizes impoundments "to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available." 31 U.S.C. § 665(c)(2) (1970). The problem with relying on this provision is that neither the ability of rural electric and telephone systems to pay increased interest rates nor the enactment of the Rural Development Act of 1972 followed the appropriation of REA funds for fiscal year 1973.

The latter act provides:

ministration that it had not terminated the REA program, but merely provided an alternative source of loan funds.[67]

But even if constitutional arguments against the Administration proposal could be overcome, critics still had a strong case against using the Rural Development Act for reforming the REA loan program. Nothing in the legislative history of the Act indicates an intention to use its funds for rural electric and telephone service;[68] and both authors and cosponsors of the Act, speaking after its passage, vigorously denied such an intention.[69]

Even stronger evidence that the Rural Development Act was not intended to supplant REA direct loans is that applying the Act would subject rural electric and telephone borrowers to numerous difficulties. First, in order to qualify under the Act for an insured 5-percent loan, a borrower must prove that he cannot obtain funds elsewhere "at reasonable rates and terms."[70] This requirement clearly indicates that the 5-percent insured loan program is not coextensive with the 2-percent direct loan program the Administration proposed to replace. Second, borrowers under the Rural Development Act may be ordered to refinance whenever other funds become available.[71] This requirement deprives borrowers of long-term planning possible with the 35-year direct loans of the Rural Electrification Act. Third, loans would be subject to review by various local agencies,[72] an extra condition neither

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> The President shall from time to time examine the organization of all agencies and shall determine what changes therein are necessary to accomplish the following purposes: . . . (2) to reduce expenditures and promote economy to the fullest extent consistent with efficient operation of the Government; . . . (4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes; . . . (6) to eliminate overlapping and duplication of effort.

5 U.S.C. § 901(a) (1970). One must inquire whether the REA and Rural Development Act share major purposes. Moreover, such reorganization plans must be formally submitted to Congress where they may be disapproved by either House within 60 days. *Id.* § 906.

67 *See* note 12 *supra.*

68 119 CONG. REC. S650 (daily ed. Jan. 16, 1970) (remarks of Senator Humphrey). *See* S. REP. No. 734, 92d Cong., 2d Sess. (1972); H.R. REP. No. 1283, 92d Cong., 2d Sess. (1972); H.R. REP. No. 1175, 92d Cong., 2d Sess. (1972).

69 *House Hearings, supra* note 14, at 12 (letter of R. C. Partridge); *id.* at 136, 244 (remarks of Representative Denholm); *Senate Hearings, supra* note 11, at 187; 119 CONG. REC. S2918 (daily ed. Feb. 20, 1973) (remarks of Senator Humphrey).

70 7 U.S.C. § 1983(a) (Supp. II, 1972).

71 *Id.* § 1983(c).

72 *Id.* §§ 1982, 1983(b).

required by the drafters of the Rural Electrification Act nor conducive to rapid, efficient loan approval. Finally, unjustified discrimination would be introduced between cooperatives and commercial companies, since the latter would be eligible only for guaranteed loans at market rates and not for insured loans at 5 percent, even though they might be even more needy than cooperatives.[73]

The difficulties to be encountered under the Rural Development Act indicate hasty and inadequate planning of the Administration program. Even spokesmen for the Administration admitted to "a host of unresolved problems."[74] The existence of these problems should neither impugn the motives of the Administration nor indicate the absence of need for reform, but they did indicate that much work was needed in Congress to make reform succeed.

II. Response to the Administration Proposal in the Ninety-third Congress

Reaction in Congress to the Administration proposal was swift. In the Senate a single bill, S. 394, was introduced by Senators Hubert Humphrey (D.-Minn.) and George Aiken (R.-Vt.).[75] In the House an identical bill, H.R. 2276, was introduced by Representative Frank Denholm (D.-S.D.),[76] followed by 23 other bills between January 22 and February 27, most quite similar, in which a total of more than 100 Representatives joined.[77]

The goal of these bills was simple: merely "to reiterate and

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73 *See* text at notes 6 & 7 *supra*. Under Secretary of Agriculture J. Phil Campbell attempted to justify the discrimination against commercial borrowers by arguing that "if someone goes out to operate a business for profit, they must expect to be competitive in all fields." *House Hearings, supra* note 14, at 73. This argument is weakened by data showing that of the 262 REA telephone borrowers having fewer than 1,000 subscribers (and hence most in need of low-interest capital), 201 are commercial companies. *Id.* at 23 (statement of A. H. Peterson).

74 *House Hearings, supra* note 14, at 74 (remarks of John Knebel).

75 119 Cong. Rec. S625 (daily ed. Jan. 16, 1973).

76 *Id.* at H359 (daily ed. Jan. 18, 1973).

77 *Id.* at H384 (daily ed. Jan. 22, 1973) (H.R. 2555); H484-85 (Jan. 24) (H.R. 2812, 2829, 2832, 2855); H504-05 (Jan. 26) (H.R. 2964, 2972, 2986); H550-51 (Jan. 29) (H.R. 3058, 3121); H718-22 (Feb. 5) (H.R. 3594, 3614, 3615, 3642, 3653, 3724); H795-97 (Feb. 6) (H.R. 3793, 3837); H1011 (Feb. 20) (H.R. 4367); H1115-16 (Feb. 22) (H.R. 4609, 4615); H1200 (Feb. 27) (H.R. 4867, 4877).

reaffirm the original and continuing intent of Congress — that the rural electrification and rural telephone loan authority vested in the administration by the Rural Electrification Act of 1936 is mandatory in the amount appropriated each year."[78] To this end, the bills proposed that words in the Rural Electrification Act declaring that the REA Administrator is "authorized and empowered" to make loans, which the Administration had interpreted as making the loans discretionary, be replaced with the words "authorized and directed." Furthermore, the bills proposed to amend § 306(a)(11) of the Consolidated Farm and Rural Development Act to make clear the intention of Congress that loans under that Act be in addition to and not in lieu of those provided by the Rural Electrification Act of 1936.[79]

Hearings commenced before the Senate Committee on Agriculture and Forestry on February 1, 1973. Because the hearings touched on the effects of Administration impoundment on all Department of Agriculture programs, the rural electrification program received only limited attention. Most of the discussion focused on the constitutional issues raised by Chairman Herman Talmadge when the hearings began.[80] Passage of the bill, the committee concluded in favorably reporting it to the Senate on February 15, would assist Congress in "reasserting its constitutional powers" and "indicate that the Congress intends to call a halt to continued Presidential encroachments."[81]

Senate debate commenced on February 20, 1973, and continued on February 21.[82] Again much stress was laid on the constitutional issues, with speakers alternately declaring with boldness that "[i]t is the Congress duty to dispose. It is the President's duty to propose"[83] and lamenting "a Congress which is being ground into impotence by the heavy boot of unchecked Executive power."[84]

78 119 CONG. REC. S2916 (daily ed. Feb. 20, 1973) (remarks of Senator Humphrey).

79 *See* S. 394, 93d Cong., 1st Sess. § 5 (1973), in 119 CONG. REC. S650 (daily ed. Jan. 16, 1973).

80 Senator Talmadge began his list of issues with "(1) Whether the President has the constitutional authority to impound funds appropriated by Congress to carry out programs authorized by legislation passed by the Congress and signed by the President." *Senate Hearings, supra* note 11, at 1.

81 S. REP. NO. 20, 93d Cong., 1st Sess. 5 (1973).

82 119 CONG. REC. S2916 (daily ed. Feb. 20, 1973), S3072 (daily ed. Feb. 21, 1973).

83 *Id.* at S2923 (daily ed. Feb. 20, 1973) (remarks of Senator Humphrey).

84 *Id.* at S2924 (remarks of Senator McGee, D.-Wyo.).

But not everyone in debate proved oblivious to the possibilities for reform.

Senators Henry Bellmon (R.-Okla.) and James McClure (R.-Idaho) introduced amendments calling, respectively, for limiting the availability of 2-percent loan funds to borrowers suffering a specified low average subscriber density or to borrowers demonstrating particularly unfavorable earnings-to-debt-service-cost ratios or time-interest-earned ratios.[85] But despite Senator Clifford Hansen's (R.-Wyo.) admonition that "Congress seems only to be concerned with showing the President he cannot cut a program approved by Congress and get away with it — not with examining programs to see whether they can be revamped and made more responsive,"[86] both amendments were defeated and S. 394 was passed unchanged by a vote of 69 to 20.[87] However, defeat of the amendments did not mean the Senate had rejected the possibility of modifying the existing REA loan program. Senator George McGovern (D.-S.D.) no doubt spoke for many when he declared that after restoration of respect for the program, the Administration might then work out a different proposal and present it to a more willing Congress.[88]

Fortunately for the Administration, a present willingness to discuss reforming the REA loan program emerged during hearings before the House Committee on Agriculture. That the House hearings were longer than the Senate's and concentrated solely on the REA undoubtedly contributed to this reforming attitude by providing more opportunities to explore deficiencies in the existing program and feasible alternatives. To be sure, some feared that because the Senate had already enacted S. 394 any meaningful reform would be accompanied by substantial delay at the expense of REA borrowers currently without a source of funds.[89] But others felt that some delay, if not excessive, was well worth the cost.[90] Looming in the background was the specter of a presi-

85 *Id.* at S2931.
86 *Id.* at S2937.
87 *Id.* at S3087 (daily ed. Feb. 21, 1973).
88 *Id.* at S2927 (daily ed. Feb. 20, 1973).
89 *House Hearings, supra* note 14, at 11 (statement of Richard Dell, Director, Legislation and Communications Dep't, NRECA); *id.* at 139 (remarks of Representative Denholm).
90 *Id.* at 142 (remarks of Representative Zwach, R.-Minn.).

dential veto of any bill that merely reinstated the costly existing program.[91]

On February 28, Representatives W. R. Poage (D.-Tex.), Chairman of the House Committee on Agriculture, and Ancher Nelsen (R.-Minn.), a former REA Administrator, introduced a major compromise proposal.[92] In essence the Poage-Nelsen revision of the Rural Electrification Act (1) set up within the Treasury (instead of using the rural development insurance fund, as proposed by the Administration) an independent revolving fund for insured and guaranteed loans, into which would be channeled all monies previously appropriated for the REA direct loan program; (2) *authorized and directed* the REA Administrator to use all monies available in the fund for insured loans at 5-percent standard and 2-percent special rates; (3) provided for guaranteed loans at rates determined by the borrower and private lenders, with government mortgages subordinated to give private lenders an adequate security interest; and (4) increased the lending authority of the legislatively-created Rural Telephone Bank. This compromise proposal went a long way toward accommodating the Administration, for it brought interest rates "more in line with the cost of money on today's market" and the revolving fund substantially reduced the need for future appropriations.[93]

Unfortunately, several features in the Poage-Nelsen proposal were unacceptable to the Administration. It objected that for the current fiscal year the proposal's budgetary impact would be the same as that of the existing program.[94] The proposed revolving fund included all currently appropriated REA funds, which the Administration had impounded to keep the budget under its statutory ceiling.

The Administration also objected to the proposal's mandatory language and to the criteria proposed for awarding loans at the 2-percent special rate. The criteria were found wanting primarily because the proposed tests of need were independent, rather than cumulative. In other words, a borrower with a specified low sub-

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91 Committee Chairman Poage declared: "It is not going to do us any good to simply pass legislation here which does not become law." *Id.* at 53.

92 The proposal is printed in full in *id.* at 149-53.

93 *See* text at note 8 *supra*; note 5 *supra*.

94 *House Hearings, supra* note 14, at 202 (remarks of John Knebel).

scriber density or average revenue per mile would qualify regardless, for example, of the favorability of his debt-service-costs-to-earnings ratio. The criteria were so broad, the Administration charged, that some 47 percent of all cooperative borrowers would qualify for 2-percent loans.[95]

To overcome these deficiencies, the Administration suggested several modifications.[96] First, it proposed stricter, cumulative criteria which would exclude generation and transmission companies altogether but which would provide "authority to make a hardship loan in extenuating circumstances" to other borrowers (*i.e.*, to electric distribution systems and telephone systems). Second, for budgetary reasons, it proposed that the revolving fund exclude all currently appropriated but impounded funds, but that it include all payments of principal and interest on outstanding REA direct loans. Nevertheless the Administration continued to insist that lending authority be discretionary rather than mandatory, and that the revolving fund be the rural development insurance fund rather than a separate Treasury fund, which might grow so large that limiting its use to rural electric and telephone systems would be inefficient.[97]

Since interest and principal payments exceeded impounded funds[98] and since the chances of prevailing on the weighty constitutional generalizations which preoccupied the Senate were uncertain at best, an amendment to the Poage-Nelsen proposal was adopted on March 15 to eliminate impounded monies from

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95 *Id.* at 160 (remarks of Representative Poage).

96 *Id.* at 200 (statement of J. Phil Campbell).

97 Representative Teague best detailed the Administration's objections during House debate:

> [I]t is inconceivable under even the most generous estimate of loan need that the Administration could ever possibly lend the huge sums of money that would inviolately be locked in the fund. This is especially evident when it is remembered that under the insured loan approach at least 10 times as much money can be lent as the amount of cash available in the fund. With the fund being fed at the rate of approximately $27 million cash per month — the estimated collections for fiscal year 1973 are $329.5 million — the Administrator would have a mandate to loan at least $270 million each month or almost $3.3 billion each year. With repayments totalling some $2.2 billion during the current and next five fiscal years, it seems fantastic to envision a loan program of $22 billion.

119 CONG. REC. H2411 (daily ed. Apr. 4, 1973).

98 Representative Nelsen described this as "a pretty good horsetrade." *House Hearings, supra* note 14, at 180.

the revolving fund and tighten the 2-percent loan criteria to reduce the number of eligible borrowers by more than one-half.[99] However, in an admitted effort to appease some large power companies,[100] insured loans to generation and transmission companies were continued; and, more objectionable to the Administration, a separate Treasury fund, from which the Administrator was mandated to make loans, was retained, partly because of the variety of problems raised by the Rural Development Act and partly because of a fear expressed earlier in the hearings that the rural electric and telephone program would by sheer size swallow up other Rural Development Act programs.[101]

To provide a program more acceptable to the Administration, Nelsen broke with Poage in offering H.R. 5536,[102] which removed the mandate that the Administrator lend all available monies in the revolving fund. It also set loans to generation and transmission companies at the market rate, except in cases of extreme hardship, and employed the existing rural development insurance fund but with a separate account for electric and telephone funds and a pass-through to the Treasury of funds in that account in excess of borrower needs. The Nelsen proposal failed to gain sufficient committee support, however;[103] and Representative Denholm was instructed by a vote of 25 to 5 to introduce H.R. 5683 (the Poage-Nelsen compromise, as amended) as the House's suggested amendment to S. 394.[104]

Proponents of the Nelsen alternative did not easily accept defeat, however, sending to all Representatives a letter requesting support on the House floor,[105] printing dissenting "Supplemental Views" in the committee's report to the House on H.R. 5683,[106] and going unsuccessfully before the Rules Committee to obtain permission to introduce the Nelsen bill as an alternative to H.R.

99 *Id.* at 224-25.

100 *Id.* at 230 (remarks of Representative Poage).

101 *Id.* at 146 (remarks of Representative Poage).

102 119 CONG. REC. H1716 (daily ed. Mar. 15, 1973). The bill, which was introduced in the House by Representative Nelsen but presented to the committee by Representative Wiley Mayne (R.-Iowa) appears in *House Hearings, supra* note 14, at 235-36.

103 *House Hearings, supra* note 14, at 247.

104 *Id.* at 254; 119 CONG. REC. H1847 (daily ed. Mar. 15, 1973).

105 The letter is printed in 119 CONG. REC. H2415 (daily ed. Apr. 4, 1973).

106 H.R. REP. No. 91, 93d Cong., 1st Sess. 27-40 (1973).

5683.[107] Despite disappointment before the Rules Committee, supporters of the Nelsen proposal extensively argued its merits during the House debate on April 4, 1973;[108] but the proposal was defeated after a close vote.[109] After a final abortive attempt by Representative LaMar Baker (R.-Tenn.) to introduce an amendment deleting the mandatory language from H.R. 5683,[110] the bill was passed substantially as presented, as an amendment to S. 394, by a vote of 317 to 92.[111]

Not too surprisingly the Senate voted to disagree with the House amendment and appointed conferees.[112] The conference committee recommended that the Senate recede from its disagreement with the House amendment[113] and that the House and Senate then agree jointly to removal of mandatory language and allowance of a pass-through of excess monies in the revolving fund (which was to remain a separate fund and not be part of the rural development insurance fund) into the Treasury.[114] Removal of the mandatory language was accomplished through negotiations between Poage, serving as a member of the conference committee, and Secretary of Agriculture Butz, the latter pledging that in exchange for eliminating this objectionable language the REA would commit a specified minimum sum for loans at 2 percent to needy utilities.[115]

Sentiments of compromise and fears of presidential veto now triumphing over constitutional outrage, the Senate acceded on May 9 to the recommendations of the conference committee,[116]

107 119 CONG. REC. H2405 (daily ed. Apr. 4, 1973).

108 Debate commenced in *id.* at H2408.

109 *Id.* at 2421.

110 *Id.* at 2422-23.

111 *Id.* at 2424. A minor change was introduced by Representative John Rarick (D.-La.), who insisted that the bill contain language making it clear that no loan funds could be spent outside the United States or its territories. *Id.* at 2423. His specific fear was that rural electric and telephone funds might be used to aid North Vietnam.

112 119 CONG. REC. S6838 (daily ed. Apr. 6, 1973).

113 H.R. REP. No. 169, 93d Cong., 1st Sess. 1 (1973) (conference report).

114 *Id.* at 8.

115 *Id.* at 9-10.

116 119 CONG. REC. S8611 (daily ed. May 9, 1973). Senator McGovern stated: "I am convinced . . . that this bill will not be vetoed. I think it is the strongest possible rural electrification bill we can pass in the Senate that is veto-proof." *Id.* at S8609-10.

as did the House on May 10.[117] The enrolled bill was then presented to the President,[118] who, having achieved most of the desired budgetary and real savings by a means acceptable to Congress, signed it on May 11.[119]

III. The Amended Rural Electrification Act

A. *Terms of the Amended Act*

In final form the Act amends the Rural Electrification Act of 1936 in three major respects: it substitutes for the direct loan program a system of insured and guaranteed loans; it modifies certain details in the operation of the Rural Telephone Bank, partly to make its operation compatible with the new Act; and it replaces the preexisting pattern of annual budget appropriations with a "Rural Electrification and Telephone Revolving Fund." Together these changes are intended to achieve the Act's stated purpose of providing adequate funds for rural electric and telephone borrowers at a rate they can afford to pay, yet encouraging use of private lenders whenever possible.[120]

Insured loans authorized under the Act are similar to the former direct loans in that the borrower applies to and receives from the REA Administrator the funds he requires.[121] The Administrator charges either a 5-percent "standard rate" or a 2-percent "special rate," the latter available only if the borrower (1) has an average subscriber density of two or fewer per mile, or has an average gross revenue at least $450 per mile below that of average REA-financed systems, in the case of electric borrowers, or $300 in the case of telephone borrowers; *or* (2) in the judgment of the Administrator has experienced extenuating circumstances or extreme hardship, cannot in accordance with generally accepted management and accounting principles produce a net income at least equal to 150 percent of its interest costs on out-

117 *Id.* at H3546 (daily ed. May 10, 1973).
118 *Id.* at S8890 (daily ed. May 11, 1973).
119 *See* 9 Weekly Comp. Pres. Doc. 667 (1973).
120 7 U.S.C.A. § 930 (Oct. Supp. 1973).
121 *Id.* § 935.

standing and proposed loans with an interest rate greater than 2 percent, or cannot in accordance with the same principles provide service consistent with the objectives of the Rural Electrification Act without an excessive increase in rates to its subscribers. REA statistics indicate that 178 electric (19.2 percent) and 186 telephone borrowers (22.9 percent) will meet the criteria for the "special rate."[122] This in itself marks a considerable savings over the universal availability of 2-percent direct loans.

There is another difference between insured and direct loans. Whereas under direct loans the REA remained the creditor throughout the life of the loan, the REA under the insured loan system sells directly to the public (or to the Treasury for resale) the notes the borrowers have given it and agrees to pay (*i.e.*, insure) the difference between what the REA has charged the borrower and the rate demanded by the purchaser.[123] The proceeds from the sale of notes are then available for relending to subsequent rural electric and telephone loan applicants.

The guaranteed loan program[124] operates more simply. The borrower and a private lender negotiate directly for a loan at the market rate, but the ease of obtaining the loan and the favorability of the interest rate are enhanced by the government's guarantee against the borrower's default and the government's willingness to subordinate its security interests arising from previous REA loans.

While there appears to be no limitation on the availability of guaranteed loans, there are limits on insured loans. When the Administrator finds

> that the loan applicant is able to obtain a loan for part of his credit needs from a responsible cooperative or other credit source at reasonable rates and terms consistent with the loan applicant's ability to pay and the achievement of this chapter's objectives, he may request the loan applicant to apply for and accept such a loan concurrently with a loan insured at the standard rate . . . .[125]

The goal of this limitation on insured loans is, naturally, to en-

122 H.R. REP. No. 91, 93d Cong., 1st Sess. 9 (1973).
123 7 U.S.C.A. §§ 934(b), (c) (Oct. Supp. 1973).
124 *Id.* § 936.
125 *Id.* § 937.

courage use of the existing Cooperative Finance Corporation and Rural Telephone Bank. Guarantees are, of course, as useful to these alternative sources of loan funds as to private lenders.

To further strengthen the Rural Telephone Bank, the Act orders several changes in its operations. Lending authority is increased from 8 times to 20 times paid-in capital and retained earnings,[126] and it need no longer refuse borrowers who do not have outstanding REA loans.[127] A government guarantee is apparently provided for the Bank's debentures through repeal of the former requirement that each debenture certificate contain a disclaimer of such a guarantee.[128] The commercial and cooperative members of the Bank, presumably to prevent any of the discrimination that appeared in the Rural Development Act,[129] are given the right to an equal number of directors.[130] The rate of interest charged by the Bank, formerly variable from 4 to 8 percent,[131] is changed to the cost of money, but not less than 5 percent. It would, of course, have been no service to the Bank to keep its minimum rate below the new 5-percent "standard rate" to be charged by the REA on its insured loans.

Funds for the new insured and guaranteed loans are to come from a new and separate "Rural Electrification and Telephone Revolving Fund."[132] In accordance with the desires of the Administration, the fund does not include the monies previously appropriated for and impounded from the existing direct loan program, but does include all payments of principal and interest on outstanding REA loans. In addition, the fund includes proceeds from the sale by the REA of notes delivered by borrowers in connection with insured loans and such appropriations for interest subsidies and guarantees as may be required in the future.

Should the fund find itself temporarily in need of funds, it is authorized to borrow from the Treasury,[133] such loans being

126 *Id.* § 947(a).
127 *Id.* § 948(a).
128 *Id.* § 947(a).
129 *See* text at note 73 *supra.*
130 7 U.S.C.A. § 945 (Oct. Supp. 1973).
131 *See* text at note 33 *supra.*
132 7 U.S.C.A. § 931 (Oct. Supp. 1973).
133 *Id.* § 934(a).

specifically exempted from the federal budget process; but should it find itself with excess funds it must, upon request by Congress in an annual appropriation act, pass such funds through to the Treasury.[134] The expectation of the draftsmen, based particularly on the size of interest and principal payments on outstanding REA loans[135] and the outstanding repayment record of borrowers under the REA direct loan program,[136] was clearly that the need for replenishing the fund would be small.[137]

B. *Evaluation of the Act*

A staff study prepared for the Joint Economic Committee suggested two tests for evaluating subsidy programs: Is the subsidy "showing an overall excess of benefit over cost . . . yet partially wasteful in that it has been pushed somewhat too far and could be cut back somewhat with a decrease of cost greater than the decrease in benefit" and is the subsidy "the most efficient way of obtaining the desired end?"[138]

In the case of subsidies to rural electric and telephone systems, however, Congress considered only the first test — and could have considered it more fully. To determine whether the subsidies provide benefits in excess of their costs, Congress should not have considered the loan program by itself but in the context of such additional subsidies as an exemption from federal income taxes,[139] a generally lower level of state and local taxes,[140] and prior claim on power produced by federal agencies.[141] That Congress failed to consider these other subsidies is understandable, inasmuch as the Administration proposal to which Congress was responding did not address itself to them. And a conclusion by Congress, based on the existence of these other subsidies, that any kind

134 *Id.* § 935(a).

135 *See* note 97 *supra.*

136 With $5.399 billion loaned to 1,098 electric borrowers from 1935 to June 30, 1967, losses were only $46,967, including interest; and with $1.143 billion loaned to 850 telephone borrowers, there were no losses at all. Bickley, *supra* note 19, at 18.

137 H.R. REP. No. 91, 93d Cong., 1st Sess. 8 (1973).

138 STAFF OF JOINT ECONOMIC COMM., THE ECONOMICS OF FEDERAL SUBSIDY PROGRAMS, 92D CONG., 1ST SESS. 77 (Comm. Print 1972).

139 INT. REV. CODE OF 1954, § 115.

140 Bickley, *supra* note 19, at 24.

141 *See, e.g.*, 16 U.S.C. § 831k (1970) (Tennessee Valley Authority); *id.* § 832c (Bonneville Project).

of REA loan program was unnecessary, would hardly have satisfied those who saw in the situation a need for Congress to reassert itself against Administration encroachments.

Nevertheless the Congress did "cut back somewhat with a decrease in cost greater than the decrease in benefit." It did accomplish the Administration's goal of keeping REA loans out of the federal budget and, more important, it did manage to save a substantial amount of money.[142] Nor do these accomplishments appear to have been harmful to rural electric and telephone systems. Admittedly strong systems will merely be coming nearer to paying their own way and getting what some of them had said they most desired — continued assurance of adequate loan capital. Truly weak systems, moreover, which meet a strict and cumulative set of criteria, will survive and continue to receive funding at the previous 2-percent rate.

Even though interest costs to the majority of REA borrowers will increase, harm to subscribers and the general consuming public appears minimal. Since outstanding REA loans will be continued at a 2-percent interest rate, the increase in interest costs passed on to subscribers will be gradual. As loans at higher rates are added to and eventually replace the 2-percent loans, rates to subscribers will rise; but arguably the fastest-growing systems doing the most new borrowing will have an increasing number of subscribers to bear increased interest costs, reducing the impact on any individual. Consumers of food and fiber grown by farmer-subscribers might also have to bear increased costs; but such increases appear small, inasmuch as the cost of electric and telephone service is a small part of the farmer's cost of living and an even smaller cost of producing food.[143] Indeed, half of the nation's farmers already are receiving service from non-REA sources; and

142 For fiscal year 1973 Congress had appropriated $740 million for the REA direct loan program. Assuming a 5-year continuation of the present funding level, the total budget appropriation required for the program would be $3.7 billion. This is entirely eliminated by the switch to insured and guaranteed loans, except insofar as the government has to appropriate funds to make good on guarantees. Absolute savings are not this large, since the Treasury over the same 5-year period would be deprived of interest and principal payments on outstanding REA loans. Nevertheless the net absolute savings were estimated by the House Committee on Agriculture to be over $2.8 billion. H.R. REP. NO. 91, 93d Cong., 1st Sess. 7 (1973).

143 *Senate Hearings, supra* note 11, at 738-39 (remarks of Earl Butz).

such sources of course enjoy no interest subsidies, without noticeable impact.[144] In general, then, reduced government expenditures on the REA loan program and resulting increased expenditures of REA borrowers will be really burdensome to no one.

This is not to say, however, that Congress could not have saved still more money than it did without imposing undue burdens. For one thing, it might have looked much more closely at the provision of subsidized loans to electric generation and transmission systems, which, despite frequent opposition from Administration spokesmen in Congress, continue to be treated no differently from distribution systems. Such borrowers are among the REA's largest and strongest, and there is evidence of their building facilities where need does not realistically exist.[145] This illustrates the phenomenon observed by the staff of the Joint Economic Committee that "subsidy recipients are induced by a subsidy to take actions other than those they would have chosen, just in order to qualify for the subsidy."[146]

Congress could have eliminated this inducement by limiting generation and transmission companies to guaranteed loans at market rates or by incorporating into the Act the still-valid loan criteria of the first REA Administrator read into the *Congressional Record* in 1936 by Senator George Norris (R.-Neb.): (1) that energy not be available from any existing source, (2) that the proposed generating plant produces energy at lower cost than obtainable from any other source, and (3) that output of the proposed plant will be used mainly for supplying energy in rural areas.[147]

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144 *Id.* at 738.

145 *See* Western Colorado Power Co. v. Public Util. Comm'n, 159 Colo. 262, 411 P.2d 785 (1966); Benedict, *Colorado Case Shows REA Has Strayed from Original Aim*, Wall Street Journal, Mar. 29, 1966, at 18, cols. 3-4. The Rural Electrification Act provides that "no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained." 7 U.S.C. § 904 (1970). But the Colorado Supreme Court found that despite approval of the project at issue by the Colorado Public Utilities Commission, the project should not have been undertaken. A specific list of requisites for consent by the Public Utilities Commission, if provided in the Rural Electrification Act, might have prevented the controversy.

146 STAFF OF JOINT ECONOMIC COMM., THE ECONOMICS OF FEDERAL SUBSIDY PROGRAMS, 92D CONG., 1ST SESS. 70 (Comm. Print 1972).

147 80 CONG. REC. 2823 (1936).

Another item Congress might have considered is the use of REA loan funds for purposes other than providing rural electric and telephone service. For example, § 5 of the Rural Electrification Act,[148] which provides that REA funds may be made available for financing facilities of the borrower's subscribers, and which originally was used to cover the cost of wiring farmhouses for electricity, has in recent times been charged with being used to cover the financing of electrical equipment for industrial and commercial subscribers of REA borrowers.[149] Even more serious are reports that REA borrowers have been "sponsoring and promoting, and in some cases building, new houses, schools, parks, golf courses, swimming pools, hospitals, resorts and factories."[150] Congress certainly could have investigated these charges and eliminated any substantiated abuses.

Finally, Congress could in general have tightened REA loan criteria by requiring as a prerequisite to a subsidized loan a finding that the borrower is efficiently operated and that economies cannot be effected by merger, sale of the borrower's properties to another utility, service by another utility, or in some other way.[151] Such additional changes in the REA loan program as these would have enabled the REA to rise above charges that it has strayed from its statutory purpose of supplying central station power and telephone service to those without it. Clearly the creators of the REA did not intend to subsidize some favored distribution, generation, or transmission systems — or their subscribers — to the competitive detriment of private, taxpaying business enterprise.

Applying the second test suggested by the staff of the Joint Economic Committee, Congress could have asked whether there are alternatives to a loan program that will better provide rural electric and telephone service without burdensome cost. One suggestion has been to subsidize needy customers, either through a direct reimbursement to subscribers of part of their utility

148 7 U.S.C. § 905 (1970).
149 Bickley, *supra* note 47, at 30.
150 Tanner, *Branching Out: Rural Electric Systems Diversify in Attempt to Keep More Customers Down on the Farm*, Wall Street Journal, May 28, 1971, at 26, col. 1.
151 Bickley, *supra* note 47, at 33.

bills or through payments to rural utility systems for refunds to their customers.[152] Such a program would have the advantage of ending unneeded federal support of prosperous rural and suburban residents, as well as nonfarm businesses and commercial enterprises. On the other hand, its administrative costs might prove prohibitive.

To eliminate administrative costs altogether, Congress could instead create a tax exemption for revenue bonds of rural electric and telephone systems.[153] The tax exemption would attract borrowers at an interest rate much lower than the usual market rate — perhaps the same 5-percent rate as is "standard" under the newly-adopted insured loan program. The Treasury would get no income under this proposal; but the sizeable principal and interest payments on outstanding REA loans would continue to flow into the Treasury instead of a revolving fund, and no involvement by the government in the financing transactions would be required. The economic efficiency of tax-exempt bonds is not without controversy, however;[154] and Congress would cer-

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152 *Id.*

153 This proposal appeared in a letter to Senator Talmadge from J. H. Phillips, General Manager, Sebring (Fla.) Utilities Commission, which was reprinted without comment in *Senate Hearings, supra* note 11, at 433-36. The proposal was earlier advanced in Gray, *An Alternate Source of Financing for Electric Utility Cooperatives*, 88 PUB. UTIL. FORT., Aug. 5, 1971, at 29-31. Gray suggested that under INT. REV. CODE OF 1954, § 103(c)(4)(E), electric systems might already be eligible for tax-exempt financing. All he believed necessary was

> the creation by municipal ordinance or by special legislation of a financing authority at either the state or local level. Debt instruments of this financing authority would be sold as tax-exempt obligations under § 103(c)(4)(E) . . . . Funds secured thereby would be reloaned to local electric co-operatives with security in the utility plant and repayment from [in the words of the Code] "facilities for the local furnishing of electric energy."

154 *See, e.g.*, Surrey, *Tax Trends and Bond Financing*, 22 TAX LAWYER 123 (1968). Surrey states that "on each million dollar [tax-exempt] industrial bond the Treasury will lose more in taxes than the private concern will gain in interest saved." *Id.* at 129. The reason "is that the benefit to the concern is limited to the *interest differential* (reduced by 48 percent because of the deductibility of interest under the corporate income tax) whereas the Federal revenue loss is attributable to the fact that income tax on the *entire interest* on a taxable obligation is lost when a tax-exempt bond is issued instead. The measure of this loss depends on the *marginal* rate of the buyer of the tax-exempt bond, who must forego a taxable investment . . . to be able to buy the tax-exempt bond." *Id.* at 129 n.

It is hard to quarrel with the general validity of this statement; but the use of industrial development bonds, as opposed to the proposed rural electric and telephone bonds, does not involve such loss-offsetting features as eliminating an existing

tainly need detailed studies to determine whether losses in tax income would adequately be offset.

IV. Conclusion

Given the political situation out of which the Act of May 11, 1973, emerged, it is unreasonable to expect reforms greater than those accomplished. Despite legitimate objectives and weighty criticisms of the existing direct loan program, the Administration had terminated the program by means which, in the eyes of some Congressmen, were constitutionally dubious, and had proposed employing as a substitute a statute whose application was at least problematic. Congress naturally felt a need to assert itself; and the logical way was to restore the REA loan program, with sufficient modification to make it acceptable to the Administration.

One may speculate as to whether Congress would eventually have reexamined the REA direct loan program without the Administration prod, but it is difficult to rebut the Congressman who said, "Maybe we needed a little shock treatment to finally move toward what we should have been doing years ago."[155] It is nevertheless to be hoped that Congress has not now taken its last look at the REA, lest even today's ardent supporters be compelled someday to agree with a critic who has charged that "REA's a classic example of the fact that Government agencies don't fade away when their original purpose has been accomplished — they simply find something else to do."[156]

*James T. Easterling**

administrative apparatus or freeing other funds for channeling into the Treasury. Moreover, the benefit to the rural electric and telephone bond issuer is larger than that to the ordinary industrial concern, since the rural electric and telephone borrower is exempt from income taxation and could not profit by an interest deduction.

155 *House Hearings, supra* note 14, at 89.

156 Benedict, *supra* note 145, at 18, col. 4.

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IN PURSUIT OF A PRESS PRIVILEGE

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Introduction

The newsmen's privilege is a legislative issue which captured the attention of the 93d Congress in its first session. The problem is an old one, but the attention of Congress is something new.

This article attempts to explain why Congress was drawn to the press privilege issue and how Congress subsequently dealt with that issue. Part I describes the evolution of the controversy from before the beginning of the Republic to the opening of the 93d Congress in January 1973. It traces historical precedent, as well as the trappings of recent controversies, to give the reader a better understanding of why, after two hundred years of inaction, Congress was finally motivated to join the fray. Part II details the development of the issue once seized upon by Congress, focusing particularly on its treatment in the Senate.

The following, then, is not primarily a legal analysis, but a political one. It is a case study of the legislative process — of why and how Congress reacted to a crucial issue whose time, perhaps, had come.

I. THE PRIVILEGE CONTROVERSY UNFOLDS

A. *A Lingering Conflict*

In 1722, young Benjamin Franklin worked as an apprentice to his brother James, who was then publisher of the *New England Courant*, a Boston-based tabloid of religious and political satire. After several stinging pieces appeared which had allegedly libeled the government, young Franklin and his brother James were

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hauled before a committee of the Assembly and asked the source of their stories. As Franklin later wrote:

> One of the pieces in our newspaper on some political point, which I have now forgotten, gave offense to the Assembly. He [Brother James] was taken up, censured, and imprisoned for a month by the speaker's warrant, I suppose, because he would not discover the author. I too was taken up and examined before the council; but, though I did not give them any satisfaction, they contented themselves with admonishing me, and dismissed me, considering me, perhaps, as an apprentice, who was bound to keep his master's secrets.[1]

James Franklin's refusal to "discover the author" has often been repeated by other newsmen under similar conditions. The government, charged with the execution and administration of the law, frequently finds itself confronted by a member of the press who possesses information which could ease its investigative or prosecutorial burdens. When the member of the press has obtained the information by giving his pledge of confidentiality, a dilemma is posed: If the command of the government is obeyed and one's obligation as a citizen fulfilled, a confidence is betrayed and the ability to obtain confidential information in the future is impaired.

The dilemma for the press is compounded by its perception of its preferred position in a democratic society. Although the Constitution does not institutionalize a preferred position, the first amendment unquestionably contemplates the press as an informational link between the people and their government. "A popular Government without popular information, or the means of acquiring it," wrote James Madison, "is but a prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[2]

Thus, the press, while comprised of ordinary citizens with no special office, has an extraordinary function, tied to the heart of

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1 B. FRANKLIN, AUTOBIOGRAPHY 30 (H. Weld ed. 1848).

2 9 WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910) (to W. T. Barry, Aug. 4, 1822).

the democratic process. And this peculiar obligation to the public reinforces the reporter's determination to resist commands of the government which interfere with that obligation.

The problem faced by the Franklins has repeated itself many times between 1722 and 1972. Those newsmen who have adamantly refused to render information in their possession have typically sought relief in the courts, but few courts have been sympathetic.

In one of the early recorded cases, in 1857, *New York Daily Times* correspondent James Simonton, having written a story charging that bribes were being taken by members of the House of Representatives for their votes on certain land grant bills, was cited for contempt of Congress when he refused to disclose the source of his information to a House committee. Although the committee investigation subsequently substantiated Simonton's claims, he was held in contempt of Congress and placed in the custody of the Sergeant-at-Arms for the remainder of the session.[3]

An 1874 case involved an editor's refusal to name for a court the author of one of his newspaper's stories on the grounds that such disclosure would violate one of the newspaper's own regulations. The court rejected such a theory, suggesting that the newspaper's regulations were as ephemeral as the winds.[4]

Twelve years later, a Georgia court ruled that a newsman who was a defendant in a libel suit had no right to refuse to reveal his source. The newsman had written a story regarding a real estate agent whose tenant had described him as an "old skunk" who should be left "to himself to stink to death." The court stated that it was entitled to the reporter's testimony the same "as any other witness," and ruled that the newsman must reveal the source of the remark.[5]

In another episode involving Congress, reporters for the *Philadelphia Press* and the *New York Mail and Express* released a story alleging that certain "sugar trust" interests had bribed un-

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3 CONG. GLOBE, 34th Cong., 3d Sess. 413 (1857). *See also id.* at 274-77, 403-13, 426-32, 434-45, 630.

4 People *ex rel.* Phelps v. Fancher, 2 Hun. 226, 230 (N.Y. App. Div. 1874).

5 Pledger v. State, 77 Ga. 242, 248, 3 S.E. 320, 322 (1886).

named Senators to vote for certain amendments to the Wilson-Gorman tariff bill of 1894. When the reporters refused to reveal their sources to the subsequent investigating committee, they were cited for contempt and certified to the U.S. Attorney.[6]

Despite the occasional uproar which accompanied these incidents and the consistent refusal of the courts to provide relief, there was to this point no effort on the part of the press to seek legislative solutions. One can only surmise that the incidents were so scattered and of such relatively minor significance that the press was not strongly motivated to action. Not until 1896 did the first state, Maryland, enact a newsman's privilege statute, giving members of the press a limited testimonial privilege.[7] But the Maryland statute was not an impetus to other states. More than 35 years passed before the second such statute was enacted.[8]

During this period, the courts continued to demonstrate reluctance to recognize any testimonial privilege. In 1913, a New Jersey court ruled that a newspaperman who had written an article detailing graft in the town's board of trustees must reveal the source of his information. The court stated that the privilege claimed by the defendant found "no countenance in the law. Such an immunity . . . would be far-reaching in its effect, and detrimental to the due administration of law."[9]

Finding little sympathy in the courts, the American Newspaper Guild decided to "pull itself up by its own boot-straps," and in 1934 approved a canon which provided that a newspaperman must refuse to reveal his confidences before any court or investigative body.[10] The adoption of the canon may have occasioned some

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6 SEN. MISC. DOC. No. 278, 53d Cong., 2d Sess. 583-86, 797-877 (1894); 26 CONG. REC. 4848, 5451-52 (1894).

7 MD. ANN. CODE art. 35, § 2 (1971) (first enacted as ch. 249, [1896] Laws of Md. 437).

8 N.J. STAT. ANN. § 2A:84A-21 (Supp. 1973) (first enacted as ch. 167, [1933] N.J. Acts 349).

9 *In re* Grunow, 84 N.J.L. 235, 236, 85 A. 1011, 1012 (1913). For a list of other cases during this period, see People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936).

10 American Newspaper Guild, Code of Ethics, Canon 5 (1934). *See Hearings on Freedom of the Press Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st & 2d Sess. 567 (1972) (testimony of Charles E. Perlik, Jr., President, Newspaper Guild, AFL-CIO) [hereinafter cited as *1972 Hearings*].

activity in state legislatures,[11] but it did not move the courts to alter their previous posture in press privilege cases.[12]

In 1958, perhaps the most significant newsmen's privilege case before the current controversy, *Garland v. Torre*,[13] was decided by the Court of Appeals for the Second Circuit. This case was the first in which the reporter's refusal to reveal a confidential source was based on the first amendment guarantee of a free press. The plaintiff in the suit was singer Judy Garland, who claimed that she had been libeled by remarks printed by New York columnist Marie Torre. Miss Torre attributed the remarks to an executive of the Columbia Broadcasting System, but she refused to testify as to his identity. The Second Circuit, with then Judge Potter Stewart writing for a unanimous court, held that despite some abridgment of the freedom of the press occasioned by compelled disclosure, the right of the court to have evidence which went to the "heart of the case" was paramount:

> [W]e accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news . . . .
>
> But freedom of the press, precious and vital though it is to a free society, is not an absolute . . . .
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> . . . .
>
> [I]t too must give place under the Constitution to a paramount public interest in the fair administration of justice. . . .
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> . . . .
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> It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance

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11 Ten states adopted some form of privilege statute between 1935 and 1950: Alabama, 1935; Arizona, 1937; Arkansas, 1936; California, 1935; Indiana, 1941; Kentucky, 1936; Michigan, 1949; Montana, 1943; Ohio, 1941; Pennsylvania, 1937. *See* Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61 n.1 (1950).

12 *See, e.g.*, Brewster v. Boston Herald Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957); Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951); Clein v. State, 52 So. 2d 117 (Fla. 1950) (en banc); Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956); State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943) (construing statutory privilege narrowly); People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415 (1936) (collecting cases). *See generally* Annot., 7 A.L.R.3d 591 (1966).

13 Garland v. Torre, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

> or materiality. The question asked of [Miss Torre] went to the heart of the plaintiff's claim.[14]

The court, while refusing to excuse the columnist's failure to testify on constitutional grounds, did acknowledge some impairment of the newsman's ability to gather news when he could be forced to disclose his sources. The court implied that such impairment might not always be justified by the character of the information sought but, in the case before it, that evidence was crucial. The court, in short, seemed to adopt a balancing approach. Miss Torre spent a few brief but highly-publicized hours in jail, but never revealed her source.

The privilege issue presented itself to the courts with increasing frequency in the 1960's,[15] but no case captured national attention until 1970 when *New York Times* reporter Earl Caldwell was subpoenaed by a grand jury in San Francisco to appear and produce his tapes and notes of meetings he had had with members of the Black Panther Party.[16] In May 1971, the Supreme Court agreed to hear the *Caldwell* case along with two companion cases involving the newsmen's privilege.

The companion cases were *Branzburg v. Hayes*[17] and *In re Pappas*.[18] In *Branzburg* the issue was whether a reporter for the *Louisville Courier-Journal* was entitled to protection under the Kentucky newsmen's shield law. The reporter, Paul Branzburg, had refused to disclose to a grand jury the identity of two men whose activities in making the drug hashish he had witnessed and later reported. The question in *Pappas* was whether a television photographer could refuse to tell a grand jury what he had observed while preparing to film a police raid on a Black Panther

14 *Id.* at 548-50 (footnotes and citations omitted).

15 *See, e.g.*, Cepeda v. Cohane, 233 F. Supp. 465 (S.D.N.Y. 1964) (narrowly construing California privilege statute); *In re* Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961); Thompson v. State, 284 Minn. 274, 170 N.W.2d 101 (1969) (finding insufficient relevance in questions directed to reporter to compel disclosure); Beecroft v. Point Pleasant Printing & Publishing Co., 82 N.J. Super. 269, 197 A.2d 416 (1964) (narrowly construing New Jersey privilege statute); State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968); *In re* Taylor, 412 Pa. 32, 193 A.2d 181, 7 A.L.R.3d 580 (1963); State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971).

16 Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd*, 408 U.S. 665 (1972).

17 Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971), *aff'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

18 358 Mass. 604, 266 N.E.2d 297 (1971), *aff'd*, 408 U.S. 665 (1972).

headquarters in New Bedford, Massachusetts. This was the first time the high court had directly confronted the press privilege issue.

On June 29, 1972, the decision came down. By a 5 to 4 vote, the Court ruled that the first amendment did not entitle a newsman to refuse to reveal the identity of his confidential sources to a grand jury. Justice Byron White, writing for the majority, stated:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do . . . . [W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial . . . .
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> . . . .
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> . . . [W]e cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.[19]

The majority thus flatly refused to recognize any sort of testimonial privilege for newsmen, whatever the circumstances may be. Only the enigmatic concurring opinion of Justice Lewis Powell held out any promise:

> The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources . . . .
>
> . . . [N]o harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy . . . .
>
> . . . [T]he courts will be available to newsmen under cir-

19 Branzburg v. Hayes, 408 U.S. 665, 689-92 (1972) (citations and footnotes omitted).

> cumstances where legitimate First Amendment interests require protection.[20]

Filing separate dissents were Justices William O. Douglas and Potter Stewart. Justice Douglas found absolute testimonial immunity under the first amendment's guarantee of privacy in one's associations and beliefs. Justice Stewart, while not willing to concede absolute immunity, was willing to recognize a limited testimonial privilege based upon the first amendment guarantee of a free press:

> The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press . . . .
>
> . . . .
>
> A corollary of the right to publish must be the right to gather news . . . .
>
> . . . News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist . . . .
>
> . . . [W]hen a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[21]

Unfortunately for the press, the compelling arguments of Justice Stewart did not prevail. Technically, the decision applied only to newsmen who were subpoenaed before grand juries, but it was thought that the Court's decision would have a considerable impact on other judicial forums as well. The next move was up to the press, but the Court itself indicated what action might be taken. The Court, notwithstanding its refusal to recognize a constitutional privilege, stated that both Congress and the state

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20 *Id.* at 709-10.

21 *Id.* at 725-28, 743 (citations and footnotes omitted).

legislatures had the freedom to enact a statutory privilege if they found such privilege "necessary and desirable."[22]

Thus, with some desperation and much determination, the press turned to Congress. They found a body which had heretofore been reluctant to resolve this issue by statute,[23] but which had become increasingly aware that there was, indeed, a problem.

B. *The Issue Materializes*

Since colonial times, then, the issue of a newsmen's privilege has been with us but — to paraphrase Shakespeare — "not too much with us." The *Branzburg/Caldwell/Pappas* cases, decided in 1972, represented the first time that the Supreme Court had ever confronted the constitutional issue directly, even though the conflict had been lingering since the beginning of the Republic. While cases involving the issue had arisen sporadically at both the state and federal levels, relatively few states prior to 1969 had seen fit to enact statutes providing testimonial protection;[24] and the national legislature had until now refused to take the matter seriously.

The first question that begs to be answered is why now? After

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22 *Id.* at 706.

23 Newsmen's privilege bills have been introduced sporadically since Senator Arthur Capper of Kansas introduced S. 2175 on October 30, 1929, *see* 71 CONG. REC. 5832 (1929); but no action has been taken on any of the bills. *See also* Branzburg v. Hayes, 408 U.S. 665, 689 n.28 (1972). The Senate Subcommittee on Administrative Practice and Procedure published a 1966 analysis of proposed privilege legislation, *see* STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., THE NEWSMEN'S PRIVILEGE (Comm. Print 1966); but no legislative action ensued.

24 As of Nov. 1, 1973, 25 states had enacted some type of statutory shield for newsmen: ALA. CODE tit. 7, § 370 (Recomp. 1958); ALASKA STAT. § 09.25.150 (1973 Cum. Supp.); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1973); ARK. STAT. ANN. § 43-917 (1964); CAL. EVID. CODE ANN. § 1070 (West Supp. 1973); DEL. CODE ANN. tit. ____, § ____ (enacted as ch. 163, 59 Del. Laws ____ (1973)); ILL. REV. STAT. ch. 51, §§ 111-19 (1971); IND. CODE § 34-3-5 (1971) (*amended*, P.L. 319, 1973 Ind. Acts 1731); KY. REV. STAT. ANN. § 421.100 (1971); LA. REV. STAT. ANN. §§ 45.1451-54 (Supp. 1973); MD. ANN. CODE art. 35, § 2 (1971); MICH. COMP. LAWS ANN. § 767.5a (1968); ch. 735, 1973 Minn. Laws 2201 (*tentatively codified as* MINN. STAT. §§ 595.021.025); MONT. REV. CODES ANN. §§ 93-601 to -602 (1964); NEB. REV. STAT. §§ 20-144 to -147 (Supp. 1973); NEV. REV. STAT. § 49.275 (1971); N.J. STAT. ANN. §§ 2A:84A-21, -29 (Supp. 1973); N.M. STAT. ANN. § 20-1-12.1 (Supp. 1973); N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1973); N.D. CENT. CODE § 31-01-06.2 (Supp. 1973); OHIO REV. CODE ANN. § 2739.12 (Page 1954), § 2739.04 (Supp. 1972); ORE. REV. STAT. § 44.____ (1973) (section number not yet assigned); PA. STAT. ANN. tit. 28, § 330 (Supp. 1973); R.I. GEN. LAWS ANN. §§ 9-19.1-1 to -3 (Supp. 1972); TENN. CODE ANN. § ____ (provision enacted at 1973 session of General Assembly; citation unavailable).

two hundred years, why should this persistent but heretofore not impelling press-government conflict suddenly claim such widespread attention from the press, the public, courts, and legislatures? The answer probably lies in an understanding of the traditional relationships between press and prosecutor, and the abrupt change in that relationship that has come about in recent years.

In normal circumstances, conflicts between the two institutions tend to be resolved through a process of negotiation and accommodation. Prosecutors recognize the importance of the newsman's investigative work to their own criminal investigations. To compel a newsman to reveal his sources or his unpublished notes, they realize, might well compromise his future investigative work and, a fortiori, their own.

Another factor not to be ignored is the political power of the local newspaper. Prosecutors, whether elected or not, tend to have political ambitions. So do many local judges. They have strong interests in avoiding a public fight with the newspaper. For their part, reporters need the cooperation of the police and the district attorney's office to make their reporting successful. Police reporters often become literally just that. It would be a mistake to believe that the ordinary reporter on the crime beat thinks first about an abstract principle like the first amendment. More likely he is moved by the need to be on good terms with those officials he most relies on for his information.

Finally, one cannot disregard the difficult moral problem for the reporter who must choose between honoring his word and seeing that justice is done. Newsmen are often willing, when circumstances demand it, to provide information to solve crimes.[25] It is a source of great pride to a reporter to help "break" a case which has stumped the police.

So long as these influences encourage accommodation, the clash of irreconcilable principles, reflected in the Supreme Court's *Branzburg* opinion, remains only theoretical. A prosecutor might seek to avoid a conflict by exerting extra efforts to find alternative

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25 V. Blasi, Press Subpoenas: An Empirical and Legal Analysis, Apr. 24, 1972, at 29 (Study Report, Reporters' Committee for Freedom of the Press) [hereinafter cited as Study Report]. This study may also be found in 70 MICH. L. REV. 229 (1971).

sources of information or proof. The reporter, for his part, might quietly and unofficially disclose his sources. The results, if unpredictable, are generally satisfactory as far as the press is concerned. As William Thomas, editor of the *Los Angeles Times*, explained to the Subcommittee on Constitutional Rights:

> We always had an understanding, I think, with prosecutors [that] there were certain things they couldn't ask of us. They couldn't bring us into court, they couldn't make us serve as an agent of the court, and they couldn't get hold of our material. When they made feeble efforts to do so — that is all they were in those days — we told them they were not going to do it and that was the end of it. . . .[26]

In the late 1960's and early 1970's, this situation changed; and reporters across the country found themselves under subpoena from grand juries, courts, and even boards of education.

The press preferred to take its case to the courts. If the courts proved unreceptive, then perhaps the press could turn to Congress. But, clearly, the press was not anxious to have a legislative solution, if relief could be found in the courts.[27] It was not particularly interested in obtaining the hard and fast rules of a statute, but only some legal support for its bargaining position with prosecutors, who had recently become quite difficult to deal with. In the words of editor Thomas: "[W]hat we are simply asking for is a return to where we were before. . . ."[28]

What had caused this calamitous change in the status quo was basically a rather abrupt shift in the attitude of each institution toward the other. While there had once existed a type of natural adversary relationship between the government and the press, the relationship changed in the late 1960's. The government and the press found themselves performing fundamentally conflicting roles and holding fundamentally opposing views in regard to the critical issues dividing the country.

During these years, the country experienced widespread disenchantment with its established institutions and its established

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26 *Hearings on Newsmen's Privilege Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 292 (1973) [hereinafter cited as *1973 Hearings*].

27 *1972 Hearings*, *supra* note 10, at 20, 221, 226, 276, 335, 577.

28 *1973 Hearings*, *supra* note 26, at 291-92.

methods of treating social problems. This disenchantment manifested itself in the formation of numerous political, racial, and cultural groups. Some of these groups openly advocated violence as a means of achieving their goals, and a great many more utilized a rhetoric of violence. But disobedience to law was not only part of the prevailing rhetoric; it was too often a shocking segment of the evening news. Coupled with violence in the name of social change was violence in resistance to the war in Vietnam. Anti-war groups proliferated — some espousing violence; others, not.

The public by and large was befuddled. Here was disobedience, sometimes brutal disobedience, to the law carried out in the name of other supposedly transcendent values. But precisely what were these values? How pervasive was this movement? What dangers did it present?

The public looked to the press for answers. Reporters began investigating these groups to dig up information about their goals and activities and to verify their existence and size. They found, rather surprisingly, that members of these groups were quite willing to give out information to newsmen if they could be assured that their identities would not be divulged.[29]

The stories which followed found their way not only into the living rooms of the public, but into the offices of the local district attorney and the offices of the U.S. Attorney. Many of these prosecutors were involved in their own investigations of militant and radical groups.[30] The investigating reporter, whose by-line was prominently displayed, made a particularly tempting figure for government investigators to begin with. He was obviously knowledgeable, articulate, kept notes and other records of his experience — in short, he would make the perfect witness.

In early January 1970, subpoenas were served on CBS to produce all tapes, including unused portions, in its possession involved in the making of a documentary about the Black

29 Schmidt, *Beyond the* Caldwell *Decision: The Decision Is Tentative*, COLUM. JOURNALISM REV., Sept./Oct., at 26, in *1973 Hearings, supra* note 26, at 644.

30 *See* Committee on Federal Legislation, Ass'n of the Bar of the City of New York, Journalists' Privilege Legislation 1-2 (1973), in *1973 Hearings, supra* note 26, at 700-01. *Cf. 1972 Hearings, supra* note 10, at 338.

Panthers.[31] CBS, after an initial protest, turned over the requested materials.[32] The publicity created by the incident, however, brought to light other previous incidents. In October 1969, federal grand juries investigating the Weathermen faction of the Students for a Democratic Society subpoenaed the unedited files and unused pictures of *Time, Life* and *Newsweek* magazines.[33] A federal grand jury also subpoenaed, in 1969, the files of four Chicago newspapers which related to the activities of the Black Panthers and Weathermen.[34] Still other incidents surfaced.[35]

As the widespread use of the subpoena began to be appreciated, these revelations caused an uproar in the press. But the spate of subpoenas did not subside. Prosecutors, if anything, seemed encouraged to continue the practice in light of its demonstrated utility. From 1969 until July 1971, NBC and CBS and their wholly-owned affiliates were served with a total of 121 subpoenas, the majority involving network coverage of militant and anti-war groups, demonstrations, and campus disturbances.[36] More than 30 subpoenas were served on the newspapers of Field Enterprises from 1969 to 1971.[37] One *Chicago Sun-Times* reporter was subpoenaed to testify in 11 separate proceedings in the space of 18 months.[38] The *New York Times,* which received five subpoenas in the four years prior to 1968, received three in 1968, six in 1969, and 12 in 1970.[39]

The subpoenas were by no means confined to the larger press entities. Small newspapers, particularly of the college and underground variety, made tempting targets.[40] Nor did subpoenas to

31 N.Y. Times, Jan. 26, 1970, at 1, col. 1.
32 N.Y. Times, Jan. 27, 1970, at 87, col. 1.
33 N.Y. Times, Feb. 1, 1970, at 24, col. 1.
34 *Id.*
35 *See, e.g.,* N.Y. Times, Feb. 4, 1970, at 1, col. 1.
36 *1972 Hearings, supra* note 10, at 56. For a list of subpoenas issued to the news media, see Brief for *New York Times* as Amicus Curiae at Appendix, United States v. Caldwell, 408 U.S. 665 (1972). The Supreme Court was unmoved by these statistics. Branzburg v. Hayes, 408 U.S. 665, 699 (1972).
37 *Hearings on Newsmen's Privilege Before Subcomm. No. 3 of the House Comm. on the Judiciary,* 92d Cong., 2d Sess. 246 (1972) [hereinafter cited as *House Hearings*].
38 *Id.*
39 *1972 Hearings, supra* note 10, at 18.
40 *See, e.g.,* State v. Buchanan, 250 Ore. 244, 436 P.2d 729, *cert. denied,* 392 U.S.

the press issue only from courts and grand juries. Administrative agencies[41] and even a committee of the House of Representatives[42] used the subpoena device.

While a few press spokesmen decried the activism and personal involvement of their more rambunctious colleagues, who they felt were responsible for this situation,[43] the general reaction of the press to the rash of subpoenas was one of outrage and dismay. Mr. William M. Ware, then Chairman of the Freedom of Information Committee of the Associated Press Managing Editors Association, wrote in a letter of October 6, 1971:

> The subpena is a vital tool in the nation's judicial process . . . . But wrongfully, even if mistakenly employed, it can and does threaten to destroy the keystone of a free press . . . .
>
> In the last two years, this [subpoena] threat has assumed epidemic proportions. From an original highly-publicized attempt by the U.S. Justice Department to obtain information by this method, it has spread like wildfire to courts throughout the land, even to such diverse public bodies as boards of education and state boards of personnel review. . . . It is of the utmost importance that the citizens of the United States realize what is at stake.[44]

Thus, not only did the rash of subpoenas represent a serious departure from past press-government relationships, but it was seen as a threat to the very ability of the press to perform its job. If the press were forced to reveal the identity of its sources as a regular matter, potential sources would become reluctant to confide in reporters. If the press were forced to reveal its unpublished work product, its integrity would be compromised.

C. *The Subpoena Controversy in Perspective*

To many, the rash of subpoenas to newsmen was but the latest episode in the deteriorating relations between the government

905 (1968); State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971); *1973 Hearings, supra* note 26, at 317, 364-65; *1972 Hearings, supra* note 10, at 123-24, 264-65; Staten Island Advance, Dec. 30, 1970, at 1; Washington Post, Aug. 2, 1970, at D3, col. 1.

41 N.Y. Times, Sept. 2, 1971, at 12, col. 1.

42 H.R. REP. No. 92-349, 92d Cong., 1st Sess. 1, 109-11, 138-41 (1971) (subpoena issued by House Interstate and Foreign Commerce Committee to Dr. Frank Stanton and CBS in relation to *The Selling of the Pentagon*).

43 *1972 Hearings, supra* note 10, at 226-27.

44 *Id.* at 652-53 (letter to Senator Sam J. Ervin, Jr.).

and the press. The Citizen's Right to News Committee termed it "the latest chapter in a pervasive attempt to curb controversial and provocative reporting."[45]

The notion that government was consciously attempting to suppress news which was unfavorable to it gained widespread acceptance among the media during the 1960's.[46] Reporting from Vietnam was largely responsible for exposing the failures and the ultimate futility of the government's war policies.[47] The press was disillusioned by what it regarded as the deliberate efforts of the government to hide the truth from the public.[48] The term "credibility gap" became a household word to describe the variance between the Johnson Administration's statements and reality; and it was the press which had given it substance and popularity.

Newsmen further began to suspect that they were being manipulated. Administration spokesmen received immediate and widespread coverage from the media whenever they asked for it. Publicity was stimulated for those events which the Administration wanted covered; information was leaked when it suited the Administration's purposes. Commenting ruefully on his experience, Sander Vanocur, formerly of NBC and the Public Broadcasting Service, stated: "I have been a conduit for lies."[49] His resentment was shared by many colleagues.[50]

But the media's resentment stemmed from more than simply what it perceived as the devious motives of the Administration in power. The classification of information had increased dramatically during the 1960's; as a consequence, the newsman's access to information regarding government operations was drastically limited. A. M. Rosenthal of the *New York Times* recently described the phenomenon:

> [O]ur recent Governments have adopted an attitude of keeping secret as much as possible for as long as possible. It is

45 Citizens' Right to News Committee, Position Paper—Protection of Confidential Sources and Information, Mar. 12, 1973, in *1973 Hearings*, *supra* note 26, at 690.

46 Study Report, *supra* note 25, at 5.

47 *Cf.* Study Report, *supra* note 25, at 30.

48 *Id.*

49 *Id.*

50 *Id.* at 31.

> not just secrecy that is the issue but the attitude toward it. Secrecy has become something not to be avoided whenever possible but to be imposed whenever possible . . . .
>
> . . . .
>
> The whole classification policy is designed at least as much to keep information from the American public as from potential enemies . . . .[51]

Rosenthal concluded that "[i]t is precisely because of the secrecy mania, precisely because so much is hidden or obscured, that the press must be even more determined than ever."[52]

The press also often found itself at odds with police authorities during the 1960's. Professor Blasi reported that the police beatings of newsmen and photographers at the 1968 Democratic National Convention left indelible scars on the minds of many reporters.[53] Newsmen were also embittered by the use of police agents posing as members of the press to enable them to infiltrate dissident groups and observe demonstrations.[54] This practice, too, had become far more prevalent in the late 1960's and had begun to endanger the press' credibility with dissident groups.[55]

Few of these sources of friction were dampened when the Nixon Administration took office in 1969. In fact, this Administration seemed more inclined than ever to suppress unfavorable comment and otherwise to manipulate the press to its own advantage. It further seemed quite willing to clasp the security classification system to its bosom and, indeed, to add its own embellishments.[56]

Coupled with this reluctance to "open up" the operations of the executive branch was an unprecedented campaign of criticism and condemnation of both the print and broadcast media. Former Vice President Agnew began the onslaught with two speeches in November 1969. He made nine others in the Administration's first term which were substantially devoted to analyzing and

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51 Rosenthal, *The Press Needs a Slogan: "Save the First Amendment,"* N.Y. Times, Feb. 11, 1973, § 6 (Magazine), at 54.

52 *Id.* at 56.

53 Study Report, *supra* note 25, at 30.

54 *Id.* at 31; *1972 Hearings, supra* note 10, at 237, 259-63, 580-81.

55 *1972 Hearings, supra* note 10, at 166-67, 259, 584.

56 Dep't of Communication, American University, The Press Covers Government: The Nixon Years from 1969 to Watergate (National Press Club Report, 1973), in 119 CONG. REC. S11,059, S11,064-65 (daily ed. June 13, 1973) [hereinafter cited as National Press Club Report].

criticizing the work of the media.[57] Joining the Vice President were other high Administration officials who echoed the same criticisms: the networks and large newspapers held far too much power, for which they were not accountable; their reporting was tainted by a liberal bias; and the bad, rather than the good, was always emphasized.

The Administration often appendixed its rejoinders on specific issues with broadsides against the press. As Norman Isaacs recently noted:

> . . . No matter what the subject, the Administration's press agentry divisions maneuver with skill and imagination to make the press always a target. If it is the SST, Mr. Agnew's multiple warhead is aimed not only at Democratic senators but also at the *New York Times* for supposedly spearheading a general media drive; if it has to do with bank bombings, a Federal Reserve spokesman sprayguns freedom of the press, claiming it permits the dissemination of lies to incite people to illegal attack; if it has to do with Defense Department appropriations, General Bruce Holloway spreads a napalm attack on "the vast amount of information over television and other instant news media that, one way or another, is a disservice to the security of the country."[58]

The Nixon Administration, then, rather than cooling down the controversy which had begun in preceding Administrations, pursued a course which only exacerbated the conflict.[59]

A final factor contributing to the atmosphere of hostility was the rebirth of investigative journalism.[60] The severe testing of accepted ideas and assumptions that started with the domestic discontent over the Vietnam war affected reporters as well as other citizens. A new aggressiveness crept into journalism, manifesting itself in "advocacy journalism" as well as in the renewal of the investigative technique. No government likes to have its failures bandied about in the press, and our recent Administrations less than others. But to this aggressive, skeptical press,

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57 *Id.* at S11,063.

58 Isaacs, *Beyond the* Caldwell *Decision: There May Be Worse to Come from This Court*, COLUM. JOURNALISM REV., Sept./Oct., 1972, at 24, in *1973 Hearings*, *supra* note 26, at 624.

59 National Press Club Report, *supra* note 56, at S11,059-60.

60 Study Report, *supra* note 25, at 4-5.

exposing the failures of government was part of its calling; and it was particularly sensitive to any attempt on the part of government to diminish its prerogatives.

Whether or not the 1969-70 rash of Justice Department subpoenas was part of such an effort, it was certainly perceived as that by the press. It is fair to say, however, that the subpoena issue, albeit important, did not occupy center stage among the concerns of the press, even in 1970. It was considered by most as only one more battleground in the wide-ranging war with the White House, and not as the central point upon which to counterattack. In fact, as the discussion below shows, the subpoena issue seemed to be the one area of conflict where the Administration was willing to bury the hatchet.

D. *The Controversy Simmers*

The *cause célèbre* of the subpoena controversy was the issuance of a federal grand jury subpoena to *New York Times* reporter Earl Caldwell on February 2, 1970. Coming on the heels of the publicity surrounding the subpoena to CBS, the Caldwell subpoena seemed to confirm the seriousness of the newsman's plight. As previously described, Caldwell had been assigned to cover the activities of the Black Panther Party, headquartered in San Francisco, California. As a result of his stories, he was subpoenaed to appear before a grand jury and produce all "[n]otes and tape recordings of interviews covering the period from January 1, 1969, to date, reflecting statements made for publication by officers and spokesmen for the Black Panther Party concerning the aims and purposes of said organization and the activities of said organization. . . ."[61]

Caldwell announced he would not appear.

The *New York Times* applauded the decision, stating:

> . . . People whose jobs, associations, or reputations are at stake cannot be expected to speak freely on an off-the-record basis if they have reason to fear that both their identity and the totality of their remarks will be turned over to the police.
>
> The attendant and even more serious danger is that the entire process will create the impression that the press oper-

61 Branzburg v. Hayes, 408 U.S. 665, 675 n.12 (1972).

> ates as an investigative agency for government rather than as an independent force dedicated to the unfettered flow of information to the public. . . .[62]

Attorney General John Mitchell, reacting to this and other criticism from influential members of the press, attempted to calm their fears in a statement issued February 5, 1970:

> I regret that recent actions by the Department of Justice involving subpenas for members of the press and property of the press may have been the subject of any misunderstanding and of any implication that the Department of Justice is interfering in the traditional freedom and independence of the press.
>
> . . . .
>
> The Department has always recognized the particular sensitivity of the press in this area, especially with regard to confidential informants, and the special place occupied by the press under the Constitution.
>
> . . . .
>
> We are taking steps to insure that, in the future, no subpenas will be issued to the press without a good faith attempt by the Department to reach a compromise acceptable to both parties prior to the issuance of a subpena.[63]

Apparently as an indication of the Department's good intentions, it was revealed that Caldwell's appearance before the grand jury had been indefinitely postponed.[64]

Despite the apparent easing of tensions, the controversy stirred related action. In early March 1970, a group of concerned newsmen met to form the Reporters' Committee on Freedom of the Press, a group which was later to become instrumental in seeking shield legislation.[65] Also, on March 5, 1970, Senator Thomas H. McIntyre of New Hampshire, reacting to what he called "the recent wave of broad and sweeping subpoenas which have issued from the Justice Department," introduced S. 3552, a bill to create a testimonial privilege for newsmen.[66] It was the first legislative

62 N.Y. Times, Feb. 4, 1970, at 42, col. 2.

63 The Attorney General's statement was reprinted in N.Y. Times, Feb. 6, 1970, at 40, col. 4.

64 N.Y. Times, Feb. 11, 1970, at 18, col. 1.

65 Washington Post, Mar. 9, 1970, at A3, col. 1.

66 S. 3552, 91st Cong., 2d Sess. (1970); 116 CONG. REC. 6102 (1970) (remarks of Senator McIntyre and text of bill).

response to the current subpoena controversy. State legislatures were also spurred to action.[67]

Meanwhile, developments in the Caldwell case and in the Justice Department further relaxed tensions. On March 15, 1970, a second subpoena was issued to Caldwell but this new subpoena compelled only his appearance before the grand jury and not his work product. Caldwell's attorney moved to quash this subpoena as well, but Federal District Judge Alfonso J. Zirpoli denied this motion on April 3 and ordered Caldwell to appear. Judge Zirpoli, however, ordered that Caldwell could not be required to disclose confidential information unless there was a "compelling and overriding national interest that [could] not be served by alternative means."[68] This constituted the first time that such a limitation had been placed upon the government's ability to elicit confidential information from a newsman. Despite the judge's valuable concession, however, Caldwell appealed to the Ninth Circuit.

The Justice Department, in the meantime, again softened its previous position. Attorney General Mitchell, interviewed May 12, 1970, stated that he would not object to legislation protecting newsmen's notes.[69] In addition, staff members in the Department were preparing a series of guidelines for the issuance of subpoenas to newsmen. On August 10, 1970, they were introduced by Attorney General Mitchell in a speech before a meeting of the American Bar Association.[70]

In general, the guidelines reflected an appreciation of the press' need for confidentiality. Subpoenas were to be issued to newsmen only as a last resort, and only after negotiations. Final approval for all such subpoenas would rest with the Attorney General. In essence, the Attorney General's Guidelines sought to return the press and the prosecutors to the relationship they had before the controversy arose. As such, they were welcomed by most members of the press. Furthermore, the sudden reduction in the number

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67 *Cf.* A. Hanson, State Newsmen's Privilege Legislation and Cases Arising Thereunder (Am. Newspaper Publishers Ass'n Memorandum 1972), in *1973 Hearings*, *supra* note 26, at 748-49.

68 N.Y. Times, Apr. 4, 1970, at 1, col. 3.

69 Washington Post, May 13, 1970, at C9, col. 1.

70 N.Y. Times, Aug. 11, 1970, at 1, col. 6. The text of the guidelines was transmitted to all United States Attorneys on September 2, 1970. *See 1973 Hearings*, *supra* note 26, at 699 (Dep't of Justice Memorandum No. 692).

of federal government subpoenas which followed the issuance of the guidelines indicated that they had achieved the desired effect.[71]

Coupled with the Justice Department's guidelines was the decision of the Ninth Circuit Court of Appeals in the *Caldwell* case.[72] Announced on November 16, 1970, the decision was the first to lend constitutional validity to the press' claim of privilege. The court declared that the first amendment required that the government show "a compelling and overriding national interest" before the newsman need disclose his confidential sources to a grand jury or, indeed, before he could be compelled to appear. Significantly, the court also stressed the importance of maintaining confidential relationships with dissident groups:

> The need for an untrammelled press takes on special urgency in times of widespread protest and dissent. In such times the First Amendment protections exist to maintain communication with dissenting groups and to provide the public with a wide range of information about the nature of protest and heterodoxy.[73]

Despite the qualified nature of the privilege which the Ninth Circuit was willing to sanction, the decision was a significant departure from the past, and was greeted by the press with enthusiasm. Buoyed by this, and the agreeable operation of the Guidelines, the press' temper began to cool. The issue began to lose much of its ferocity.[74]

Only one bill to create a testimonial privilege for newsmen was introduced when the 92d Congress convened in January 1971,[75] and this bill met with a less than urgent response. In a survey conducted in the spring of 1971 by the Subcommittee on Constitutional Rights, where the bill was pending, the press indicated general approval, but adopted a "wait and see" attitude toward the legislation. The petition for certiorari in the *Caldwell*

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71 *See House Hearings, supra* note 37, at 21; Dep't of Justice, Requests for Subpoenas to Newsmen Since the Issuance of the Attorney General's Guidelines in August 1970 (Memorandum, March 1, 1973), in *1973 Hearings, supra* note 26, at 675.

72 Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd*, 408 U.S. 665 (1972).

73 *Id.* at 1084-85.

74 *See, e.g., 1972 Hearings, supra* note 10, at 23-24, 336-37.

75 S. 1311, 92d Cong., 1st Sess. (1971); 117 CONG. REC. 7370-72 (1971) (remarks of Senator Pearson).

case was then pending before the Supreme Court. In May, the Court agreed to hear the case.[76]

Also in May, President Nixon, in answer to a question directed by a reporter at a White House news conference, gave his views on the matter:

> Now, when you go, however, to the question of subpoenaing the notes of reporters, when you go to the question of Government action which requires the revealing of sources, then I take a very jaundiced view of that kind of action unless it is strictly — and this would be a very narrow area — strictly in the area where there was a major crime that had been committed and where the subpoenaing of the notes had to do with information dealing directly with that crime. . . . [A]s far as the subpoenaing of notes is concerned . . . I do not support that.[77]

Thus, with the President's apparent support and the Ninth Circuit opinion in its hip pocket, the press approached the Supreme Court confidently but cautiously. While a few major segments of the press urged the Court to recognize an absolute, unqualified testimonial privilege,[78] many of the most influential voices urged only the recognition of a qualified privilege.[79] In this respect, they were only reiterating the position of those newsmen whose cases were before the Court.

In hearings held before the Subcommittee on Constitutional Rights in September and October 1971 on the general state of press freedom, most press spokesmen who commented on the Pearson bill recommended that Congress proceed cautiously. Most urged that a statutory privilege be enacted only if the

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76 402 U.S. 942 (1971).

77 President's News Conference of May 1, 1971, in 7 WEEKLY COMP. PRES. DOC. 703, 705 (1971).

78 The American Newspaper Publishers Association, the *Washington Post*, *Newsweek*, the American Society of Newspaper Editors, Dow Jones and Co., Inc., and Sigma Delta Chi argued, as amici curiae in the *Branzburg/Caldwell/Pappas* cases, that the first amendment provided an absolute privilege to newsmen and/or to their information. The briefs are in *1973 Hearings*, *supra* note 26, at 1209-36.

79 The *New York Times*, NBC, CBS, ABC, the *Chicago Sun-Times*, the *Chicago Daily News*, the Associated Press Managing Editors, the Associated Press Broadcasters Association, and the Association of American Publishers, as amici curiae in the *Branzburg/Caldwell/Pappas* cases, argued that the first amendment provided a qualified privilege for newsmen.

Supreme Court refused to recognize a constitutional privilege.[80] Of the issues confronting the government and the press, the subpoena problem seemed to come last in the minds of most witnesses. The press was far more concerned with spying on newsmen, the Vice President's attacks on press bias, Federal Communications Commission and White House proposals to discourage TV criticism, and governmental secrecy.[81]

E. *The Supreme Court Decision and Its Aftermath*

The Supreme Court's decision of June 29, 1972,[82] came as a bombshell.[83] By a 5 to 4 vote, the Court ruled that the first amendment did not entitle a reporter to refuse to reveal the identity of his confidential sources to a grand jury. There was no testimonial privilege recognized or even hinted at, not even a qualified one. In the absence of statutory protection, newsmen were left to the mercy of prosecuting and defense attorneys. The balance had shifted, and the issue dropped into the lap of Congress.

Quite understandably, there was immediate — if not widespread[84] — reaction. Senator Alan Cranston, on the day following the decision, introduced a bill which provided an absolute testimonial privilege in both federal and state proceedings.[85] Editorial columns began to evidence the press' despair. The *Los Angeles Times* described the decision as "a heavy blow at the independence of the press of this nation."[86] The *Washington Evening Star* said it would "automatically inhibit the whole process of newsgathering."[87] The *Chicago Sun-Times* declared the "people's right to a free press has been impaired."[88]

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80 *See* note 27 *supra.*

81 *See, e.g., 1972 Hearings, supra* note 10, at 53 (testimony of CBC President Frank Stanton). *See generally id. passim.*

82 Branzburg v. Hayes, 408 U.S. 665 (1972).

83 *See, e.g., 1973 Hearings, supra* note 26, at 294 (testimony of NBC President Richard Wald), 359 (testimony of reporter Paul M. Branzburg), 398 (testimony of *Daily Tar Heel* editor Evans Witt).

84 Isaacs, *supra* note 58, at 23.

85 S. 3786, 92d Cong., 2d Sess. (1972); 118 CONG. REC. S10,933 (daily ed. June 30, 1972).

86 Los Angeles Times, July 2, 1972, at E2, col. 1.

87 Washington Evening Star, July 3, 1972, at A-10.

88 Chicago Sun-Times, July 2, 1972, at 11.

The press now had only Congress to appeal to, and it began mobilizing for an all-out effort. The heretofore inactive Joint Media Committee, consisting of representatives from the American Society of Newspaper Editors, the Associated Press Managing Editors Association, Sigma Delta Chi (the national journalism society), the National Press Photographers Association, and the Radio Television News Directors Association, suddenly revived for the purpose of drafting new legislation.[89] The bill which they agreed upon provided for a qualified or limited press privilege. It was introduced by Senator Walter Mondale (D.-Minn.) in slightly modified form on August 17 in the Senate, and by Congressman Charles Whalen (R.-Ohio) on September 5 in the House.[90] I had introduced another qualified privilege bill, S. 3925, on August 16.[91]

Because the 92d Congress was nearing adjournment and the Subcommittee on Constitutional Rights had held general hearings on the subject earlier in the year, no hearings were immediately scheduled in the Senate. A subcommittee of the House Judiciary, however, did open hearings in late September and heard from many press organizations.[92] Congress adjourned, nevertheless, without taking any formal action on the proposed bills. More hearings were promised.

Despite the concern of editors and the flurry of legislative activity which followed the Court's decision, the public's attention was not really drawn to the newsmen's privilege issue until several reporters were jailed for refusing to reveal confidential sources or information.

On October 4, 1972, Peter Bridge, who had been city hall re-

89 *See House Hearings, supra* note 37, at 202-16, esp. 204 (testimony of CBS Vice Presidents Richard W. Jencks and William J. Small). *See also* 118 CONG. REC. S13,778 (daily ed. Aug. 17, 1972). Mr. Small was chairman of the Joint Media Committee at the time and was instrumental in involving it in the free press imbroglio.

90 S. 3932, 92d Cong., 2d Sess. (1972); 118 CONG. REC. S13,765, S13,777-79 (daily ed. Aug. 17, 1972) (remarks of Senator Mondale); H.R. 16527, 92d Cong., 2d Sess. (1972); 118 CONG. REC. H8080 (daily ed. Sept. 5, 1972).

91 S. 3925, 92d Cong., 2d Sess. (1972); 118 CONG. REC. S13,603, S13,606 (daily ed. Aug. 16, 1972) (text of bill and remarks of Senator Ervin).

92 *See generally House Hearings, supra* note 37. These hearings, chaired by Representative Kastenmeier (D.-Wis.), cover five subcommittee sessions held between September 21 and October 5, 1972. The focus of the testimony received was on the 20 or more newsmen's privilege bills introduced in the House following the *Branzburg* decision.

porter for the now-defunct *Newark News,* entered the Essex County, New Jersey, jail to serve a sentence for contempt of the grand jury.[93] Bridge had written an article stating that a commissioner of the Newark Housing Authority had been offered a bribe to influence her vote on the appointment of an executive director. Bridge had used the name of the commissioner involved in his article, but refused to disclose to a grand jury any other information which he had received in the course of preparing his article, insisting that he would not violate his confidences. For his adamancy, he was cited for contempt and, after several unsuccessful appeals, was confined for 20 days.[94]

On November 27, 1972, another newspaperman, William T. Farr, was jailed in Los Angeles. Farr, who had been a reporter with the *Los Angeles Herald Examiner,* had written a story in the midst of the Manson murder trial in 1969 that one of the witnesses had told the prosecution that Manson had planned the murders of other celebrities. The story was printed after the trial judge had ordered that no one involved should comment to the press regarding the case. When Farr was subpoenaed to reveal who leaked the story, he refused. For that refusal, he spent 46 days in jail.[95]

Other reporters had gone to jail in the past to protect their sources, but these were the first after the Court's decision. Whether or not these were "good" cases,[96] they served to dramatize the issue for the public. When the jailhouse door closed behind these martyred newsmen, it closed amid the whirring of cameras and the scratching of pens on reporters' notebooks. The public was made a witness.

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93 *See id.* at 219-21.

94 *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3, *cert. denied,* 62 N.J. 80, 299 A.2d 78 (1972), *cert. denied,* 410 U.S. 991 (1973).

95 *See* Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342, *cert. denied,* 409 U.S. 1011 (1972). Following his failure to obtain relief through the state courts, Farr brought federal habeas corpus which was denied by the district court. Pending his appeal to the Ninth Circuit, he was released on his personal recognizance, after 46 days in jail, by order of Mr. Justice Douglas sitting as Circuit Justice. Farr v. Pitchess, 409 U.S. 1243 (Douglas, Circuit Justice, 1973). *See also 1973 Hearings, supra* note 26, at 752.

96 *See Who's Hobbling the Press?,* NEW REPUBLIC, Dec. 16, 1972, at 5, for a warning that the *Farr* and *Bridge* cases were such blatant examples of irresponsible reporting that they might convince legislators of the need to "hobble" the press.

It appeared from these and other cases which came to light[97] that the *Branzburg* decision may have been just the "green light" for prosecutors that the press had feared it would be. As a result, the attitude of the press began to harden in the fall of 1972; the number of newsmen urging an absolute, unqualified federal statute began to grow.[98] There was also the growing realization that the press would be more effective if it could unify behind one approach. Neither the Cranston bill of the previous summer nor the Joint Media Committee qualified bill seemed quite the vehicle.

As a result, a new cooperative venture was launched. In the early fall, a new press group, named rather anonymously the Ad Hoc Coordinating Committee, was organized under the auspices of the American Newspaper Publishers Association.[99] Comprised of legal representatives of both the print and broadcast media, it sought to draft a bill which the media as a whole could stand behind, if such a bill was possible.

In light of the well-publicized cases, the Joint Media Committee also began to reassess its previous position and found that the original qualified bill could no longer command a majority. In a statement issued on December 11, 1972, it declared:

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97 In Memphis, Tennessee, a reporter from the *Memphis Commercial-Appeal* was found in contempt of the state senate in November 1972 for refusing to identify an informant who had told him of incidents of child abuse in a state hospital for the mentally retarded. A Memphis radio announcer, who also reported on the matter, was likewise compelled to identify his source. *See 1973 Hearings, supra* note 26, at 241-46 (testimony of Joseph Weiler).

In Chattanooga, a television announcer was jailed in December 1972 for refusing to name a caller who had charged over the air that a recent grand jury investigation of a former city court judge had been a whitewash. State v. Thornton, No. 124544 (Hamilton County Crim. Ct.), *order stayed*, No. 368 (Tenn. Civ. App.). *See also 1973 Hearings, supra* note 26, at 722, 753.

In Milwaukee, three reporters were subpoenaed in October 1972 to disclose confidential sources of information which related to alleged improprieties of a county official. *In re* Nowakowski, Civil No. 72-C-534 (E.D. Wis. 1972), *order stayed*, No. 72-1845 (7th Cir. 1972). *See also 1973 Hearings, supra* note 26, at 753.

In Los Angeles, a radio news reporter was subpoenaed by a grand jury in December 1972 to produce tapes of interviews he conducted during an investigation of corrupt bail bond practices. *See id.* at 752.

98 Resolutions calling for enactment of an absolute privilege were passed by the American Society of Newspaper Editors and Sigma Delta Chi in November 1972, *1973 Hearings, supra* note 26, at 251, 301; and by the Radio Television News Directors Association and the American Newspaper Publishers Association in December 1972, *id.* at 354, 133.

99 *See id.* at 128-29.

> [E]vents have added new emphasis to the need for legislative relief. Peter Bridge of New Jersey and William Farr of California have been jailed for refusing to submit to questioning. Other cases have surfaced in recent months. Various journalism organizations have reacted strongly to the continuing abuse of the First Amendment.[100]

As press attitudes began to change, so it seemed did the Administration. In a highly-publicized letter to the American Society of Newspaper Editors on November 4, 1972, President Nixon indicated that he did not feel federal legislation was warranted "at this time."[101] This was not an easy pill for the inflamed media to swallow.

The press' tougher posture appeared to have the public's support. On December 3, a Gallup poll showed that 57 percent of those interviewed thought the press should not be compelled to disclose its confidential sources, as opposed to 34 percent who thought it should.[102] In a poll which followed a December 7 public television debate on *The Advocates*, the vote was 77 percent in favor of a press privilege.[103] In addition to the favorable responses in public opinion polls, the cause of the press received considerable boosts in statements by some well-known public figures, notably Governor Rockefeller of New York.[104] Clearly, the matter was building toward the convening of the 93d Congress.

To add further stimulus, yet another newsman went to jail just prior to the new year. On December 19, 1972, John Lawrence, Washington Bureau Chief of the *Los Angeles Times*, was jailed briefly for his failure to produce unpublished tapes of an interview conducted under a pledge of confidentiality by another *Times* reporter. An attorney for one of the defendants in the Watergate criminal case had requested the unpublished tapes

100 Statement on file with the Subcomm. on Constitutional Rights, Senate Judiciary Comm.

101 Washington Post, Nov. 10, 1972, at A10, col. 3.

102 N.Y. Times, Dec. 3, 1972, at 48, col. 1.

103 Following airing of the program on December 7, 1972, the nationwide audience was asked to respond by mail to the following question: "Should newsmen be allowed to keep secret their information or their sources of information without fear of jail?" There were 3737 responses received: 2880 "yes," 849 "no," and 8 "other." These figures were provided by the producer of *The Advocates*, WGBH, Boston, Massachusetts.

104 N.Y. Times, Nov. 30, 1972, at 1, col. 7.

of an interview with the prosecution's star witness. The judge agreed and ordered the production of the unpublished materials.[105] When Lawrence, who had custody of the tapes, refused, he was sent to jail. Shortly thereafter he was released on bail pending appeal and, several days later, the case was dropped. The prosecution's witness, who was the subject of the interview, agreed to the newspaper's releasing it, and the *Times* did so.[106]

These incidents, however short-lived and tenuous they may have been as persuasive illustrations of the newsman's need for a testimonial privilege,[107] did serve to stir the controversy on the eve of the new Congress.

II. Congress Seizes the Privilege Issue

A. *The Initial Reaction*

In response to the steadily-building pressure, a multitude of bills and resolutions to create a testimonial privilege for news-

105 United States v. Liddy, 354 F. Supp. 208 (D.D.C. 1972) (Sirica, J.).

106 *See 1973 Hearings, supra* note 26, at 287-91, 753.

107 In the *Bridge* case newsman Bridge had actually named his source in his published news article. This source, a commissioner of the Newark Housing Authority, had confirmed under oath Bridge's story that she had been offered a bribe; but her statement differed in other respects from Bridge's account. Bridge agreed to respond to some of the questions from the ensuing grand jury, but refused to respond to all of them. The courts decided that he had waived his privilege under the New Jersey shield law. Bridge subsequently declined to specify his reasons for refusing to cooperate. For many press spokesmen, the case proved something of an embarrassment; and they studiously avoided using it as a selling point.

The *Farr* case was not much better. While he was technically not subject to the court's order not to leak information about the Manson trial, many of his press brethren thought he was irresponsible for doing so. Further, Farr was thought to have compromised his stand by telling the judge that his source had been one of the six attorneys in the case, all of whom had been bound by the judge's order. The court and the lawyers involved were outraged at being frustrated in any effort to preserve their integrity. The case had another unexpected consequence. The California Supreme Court not only rejected Farr's arguments, but also stated in dicta that to allow a privilege on the facts of the *Farr* case would be an unconstitutional usurpation of the judicial function by the legislative branch. 22 Cal. App. 3d at 69, 99 Cal. Rptr. at 348 (1972).

Even the *Lawrence* case was less than ideal. The interview by the *Times* reporters had been published almost in full. The unpublished portion was held back by the *Times* on the basis of its prior promise to the subject of the interview not to publish what he had not specifically approved. The *Times* caved in when that approval was eventually obtained. It did not continue to withhold it as unpublished work product, even though such action would have been consistent with the position the press was taking. But what amounted to capitulation was not perceived as such by the public or, for that matter, by many legislators. For examples of a similar perception, see note 96 *supra*; *1973 Hearings, supra* note 26, at 81.

men was rapidly introduced in both Houses at the beginning of the 93d Congress. It was becoming increasingly evident that the press saw legislation as its best chance for public support against the attacks of the White House. Within a month of Congress' convening, there were eight bills and one joint resolution before the Subcommittee on Constitutional Rights.[108] Thirty-two Senators formally committed themselves to some kind of legislation by cosponsoring a bill.[109] In the House, 56 bills providing some type of privilege were introduced, and almost a third of the membership showed support for them.[110]

But as impressive as these numbers might appear, they demonstrated several serious weaknesses. First, while the commitment of 32 Senators and over 100 Congressmen was not insignificant, it was by no means overwhelming in light of the strong public interest which had been generated over the previous six months. Furthermore, only five of the 32 Senate cosponsors were members of the Judiciary Committee, which would have to report a bill to the floor. Whatever the ultimate strength in the Senate, it would be worth little if a majority of the Judiciary Committee could not be enlisted as supporters. Finally, the great number of proposals demonstrated disagreement within the ranks of those supporting the concept. Without agreement on the basic approach of legislation among those who favored a privilege, it mattered little that the headcount was large.

The divergence among legislators only reflected the divergence in the press. The Ad Hoc Drafting Committee which was seeking

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108 S. 36, S. 158, S. 318, S. 451, S. 637, S. 750, S. 870, S. 917, S.J. Res. 8, 93d Cong., 1st Sess. (1973). The texts of the measures are in *1973 Hearings, supra* note 26, at 407-55.

109 The sponsors of the measures noted in note 108, *supra,* are as follows:

S. 36: Senator Schweiker
S. 158: Senators Cranston and Kennedy
S. 318: Senators Weicker, Bible, Brooke, Cannon, Cook, Fannin, Javits, Moss, Pell, Taft, and Young
S. 451: Senators Hatfield, Cook, McGovern, Mansfield, Metcalf, and Young
S. 637: Senators Mondale, Burdick, Haskell, Humphrey, McGovern, Mansfield, Pell, Proxmire, and Williams
S. 750: Senators Byrd and Bentsen
S. 870: Senator Eagleton
S. 917: Senators Ervin, Jackson, and Pearson
S.J. Res. 8: Senator Hartke.

110 The bills and their sponsors are listed in *Hearings on Newsmen's Privilege Before Subcomm. No. 3 of the House Judiciary Comm.,* 93d Cong., 1st Sess. 585-87 (1973).

a universally acceptable approach drafted not one, but six bills for the press to rally behind.[111] These bills, and others suggested by press organizations, indicated not only that the press had differing ideas as to the best approach which should be taken, but that they had differing estimates of what could possibly get through Congress.

While most of the press favored — at least privately — an absolute testimonial privilege, it was generally felt that it was impossible to get an absolute privilege through Congress.[112] Press support thus went to some form of qualified approach. The combinations were almost infinite. Some advocated a privilege which only applied to investigatory proceedings like grand juries and legislative committees, but did not apply to courts. Some supported a privilege which could not be claimed to prevent testimony about serious crimes or any crime. Some thought a privilege should be divested if there was an "overriding national interest" involved or the "interests of justice" would not be served by the newsman's remaining silent.[113]

Another issue was whether a newsman should be able to claim a testimonial privilege in a libel suit in which he was the defendant. Some members of the press felt that if the privilege did not apply in civil suits, libel actions would be filed solely to discover the identity of a source. On the other hand, it was unquestionable that to allow a newsman to claim the privilege when he was a libel defendant seemed to make him totally unaccountable for what he wrote. Politically, the failure to include an exception for libel suits would weaken any bill's chances for acceptance.

Another issue posed by the legislation was the basic one of who should be entitled to claim the testimonial privilege. This too carried political overtones. Given the fear that the privilege would be abused if too broadly defined, some felt that only a privilege limited to established, professional journalists could pass Congress. Some of the bills were written to accomplish this.[114] Others were

111 Only one of these, S. 158, was introduced. *See 1973 Hearings, supra* note 26, at 129.

112 *See, e.g., id.* at 374-75, 388.

113 *See* Staff of Subcomm. on Constitutional Rights, Senate Judiciary Comm., Synopsis of Newsmen's Privilege Legislation, in *1973 Hearings, supra* note 26, at 758-60.

114 S. 318, 93d Cong., 1st Sess. (1973) ("legitimate member of the professional news media"); S. 750, 93d Cong., 1st Sess. (1973) ("professional newsman").

drafted with broader definitions of "newsmen," but even these were limited to some provable class of information processors.[115]

Still another issue involved in the pending legislation was whether a new procedure to control the issuance of press subpoenas was required in addition to the substantive privilege itself. The idea that there should be a judicial hearing before the issuance of a subpoena to a newsman was advanced by Professor Amsterdam of Stanford Law School[116] and was implemented in some of the bills introduced.[117] The purpose of the pre-subpoena screening process was to prevent frivolous or harassing subpoenas to newsmen and give them the protection of a special hearing proceeding. While the concept was interesting, it nevertheless represented a new, complicated, and untested legal innovation, which reduced its political acceptability in Congress.

The newsmen's privilege legislation, therefore, posed a complex and confusing problem for the subcommittee, not only in terms of achieving a workable approach but in terms of achieving an acceptable one. Things were hopeless, but not yet serious.

B. *The Subcommittee Prepares*

I had given the staff an indication in the summer of 1972 that in view of the *Branzburg* decision, more hearings on the subject of newsmen's privilege might be called for. Staff members then set about familiarizing themselves with the issues and points of view involved. Letters were sent to the Justice Department and various spokesmen for the media requesting their positions with respect to such legislation. Articles and news stories regarding the subject were read.

The subcommittee soon found itself acting as a clearinghouse for the public, the press, and interested legislators. As interest grew in the fall of 1972, hundreds of letters, calls, and personal

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115 *See, e.g.*, S. 36, 93d Cong., 1st Sess. § 2 (1973); S. 158, 93d Cong., 1st Sess. § 6(3) (1973); S. 870, 93d Cong., 1st Sess. § 7(a) (1973).

116 *See 1973 Hearings, supra* note 26, at 179-81 (testimony of Professor Anthony G. Amsterdam).

117 *See* S. 870, 93d Cong., 1st Sess. §§ 4, 5 (1973). *See also* S. 637 and S. 158. Senator Cranston had introduced S. 158 on request, and it did not contain the pre-subpoena screening procedures. Obviously impressed with this approach, however, he amended the original bill by proposing a substitute which incorporated a screening procedure. In doing so, he left those legislators and organizations who had supported his original S. 158 with a bill but without a sponsor.

inquiries were received. Some asked for factual information; others wanted an assessment of the issue's political status or a statement of the subcommittee's intentions. Numerous draft legislative proposals were brought to the staff's attention. Frequently, staff members were called upon by those outside Congress to assist in drafting or evaluating such proposals. On occasion, the subcommittee acted as a conduit for such proposals to legislators seeking new ideas on the subject.

The quantity of legislative drafting was uncommonly great. For a subject as popular as this one, and yet so constitutionally and legally complex, the subcommittee staff was one of the few places other Senators could come for help. Almost every one of the Senate bills on the subject introduced in the 93d Congress was influenced, directly or indirectly, by members of the Constitutional Rights Subcommittee staff.

On occasion, this type of situation can place committee staff aides in an anomalous position. While nominally responsible to all members of the subcommittee and especially the majority members, the subcommittee chairman is commonly understood as first among equals to whom the staff is responsible. This can prove awkward when the chairman has taken a position on a particular bill and the staff is called upon by other Senators for assistance in formulating a different approach. The staff must play two conflicting roles — to defend and lobby for support of the chairman's bill, and yet offer any technical assistance requested by others. This was not a particular problem for subcommittee staff members on this issue since I had not introduced legislation prior to the hearings and my own views remained open. But the subcommittee aides were keenly aware that the problem of coalescing support behind any one of the many proposals crossing their desks was going to be a formidable one.

The primary concern of the staff prior to the hearings was the selection of witnesses. These hearings, as is often true of hearings, constituted an important forum, and one of the few official ones, for discussing the issues involved. Witnesses therefore had to be chosen to insure that those issues were presented fairly and comprehensively. This entailed identifying not only the issues but the spokesmen for them. Beyond these basic considerations, witnesses

were sought who were authoritative and articulate, who would attract media coverage, who represented large segments of opinion, or who could lend unique insights.

The number of individuals and organizations which wished to testify was large. Not only were there many legislators who wished to appear, but there were many factions within the press community, each having its own particular reason for seeking public exposure on the issue. Each had a legitimate claim. To invite one meant that others would demand equal time. To cite one instance at a prior hearing, the decision to hear one TV network executive prompted the other two to request an appearance. A Senator, and even more the subcommittee staff, is hard put to accept one important personage and then refuse others of equal claim.

Still, given a limited amount of time for hearing testimony, choices must be made. The subcommittee invited some of those requesting appearances — primarily pro-privilege media groups. Other invitations went to reporters, editors, professors, and public figures who had been involved in some aspect of the controversy, and who were felt could contribute more than simply another voice to the growing chorus calling for a shield law. In some cases, witnesses were invited only after their positions or experiences had been verified.

In all cases, the invitations indicated in a general way the nature of the testimony which the subcommittee was interested in hearing. Where a number of witnesses might be expected to present essentially the same arguments, they might be encouraged to stress others not as well espoused. If a point appeared not to be brought out or a problem with the legislation not discussed, it was possible to suggest to certain witnesses that they direct their testimony to those aspects. The ACLU, for example, while supporting the legislation, stressed the application of newsmen's privilege to criminal defendants' rights under the sixth amendment and the issue of libel.[118] Coordinating testimony and suggesting issues is one way the staff seeks to ensure a complete presentation on the subject.

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118 *See 1973 Hearings, supra* note 26, at 113-23 (testimony of Joel M. Gora and Brit Hume for the ACLU).

Identifying witnesses who would oppose the privilege legislation became a difficult problem. More than simply a man-off-the-street opinion was needed. The subcommittee sought witnesses who would criticize the proposals from a professional or institutional point of view. At this stage, such witnesses were scarce. Even newsmen who had expressed doubts about such legislation before the *Branzburg* decision seemed to have shifted their position in light of the *Bridge* and *Farr* cases. Subcommittee members who were thought to be opposed to the legislation were asked to come up with witnesses to support their positions, but they were hard pressed to do so.

As the hearings grew closer, it became a major preoccupation to find opposition witnesses. Without some, the hearings would be vulnerable to an attack as being stacked. Equally serious, it was necessary to give open voice to the latent opposition to the proposal to test the depth, nature, and seriousness of the expected opposition. In the end, it is far preferable to precipitate open debate by encouraging the opposition to speak out than to have the opponents of legislation remain silent. Only in that way can proponents consider approaches to mute or satisfy skeptics.

C. *The Subcommittee Deliberates*

When the hearings opened on February 20, only three of the 30 witnesses then scheduled were thought to be hostile to the newsmen's shield.[119] While the subcommittee did not view "balance" in terms of numbers on one side or the other, there was concern that not enough dissenting voices would be heard from. The opening statement which I delivered attempted to fill some of the void by sketching out the arguments both for and against the newsmen's privilege. To some of the press lobbyists in attendance, the statement seemed almost hostile. One remarked to my aide, "Hey, whose side is he on?"

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119 The subcommittee expected the Justice Department, the National Association of District Attorneys, and columnist James J. Kilpatrick to testify in opposition to legislation. The NADA, in fact, testified in favor. *See 1973 Hearings*, *supra* note 26, at 229 (testimony of William Cahn, former President of the NADA), 236 (testimony of John J. O'Hara, President-Elect, NADA). Even the Justice Department and columnist Kilpatrick, while advising against passage of privilege legislation, did not declare themselves opposed on principle to such a testimonial privilege. *Id.* at 332

His surprise was not totally unwarranted. The fact that a committee chairman calls for hearings on a particular subject may only indicate that he feels there exists a problem which requires congressional attention. However, from this many often infer his sympathy for a legislative solution — an inference that is not always unjustified. An unsympathetic chairman does not call hearings or seek to bring a matter which he opposes into the legislative process if he can avoid doing so. I scheduled hearings on the newsman's privilege because I was sympathetic to the problems the *Branzburg* decision had created for newsmen, but I was undecided as to the specific approach the legislation should take. I was certain that no absolute privilege bill would pass, and only a bill which was both simple and direct stood much chance for acceptance.

Before the Supreme Court ruled in the *Branzburg* case, I felt the privilege issue should be left to the courts. Like many others, I believed a case-by-case evolution of the privilege was far preferable to rigid statutory language, especially in view of the many drafting and definitional problems Congress would face. As I had remarked in the 1971-72 hearings:

> I have an open but somewhat confused mind on the question of the phraseology of this particular statute, because, since the First Amendment is rather broad in scope, I am inclined to . . . have more confidence in the linguistic ability of the Founding Fathers than I do in my own and that of my associates in Congress.[120]

The Supreme Court decision removed what to me was the best approach — the so-called qualified or balancing approach adopted by the Ninth Circuit.[121] After the decision, however, I became convinced that legislation of some type was necessary. I introduced a bill in the latter days of the 92d Congress which provided a limited privilege for confidential sources.[122] Under its provisions

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(testimony of Assistant Attorney General Robert G. Dixon), 80-81 (testimony of James J. Kilpatrick).

120 *1972 Hearings, supra* note 10, at 343.

121 *See* United States v. Caldwell, 434 F.2d 1081 (9th Cir. 1970), *rev'd*, 408 U.S. 665 (1972).

122 S. 3925, 92d Cong., 2d Sess. (1972).

a newsman was still required to give testimony regarding events which he personally observed.

On the day the subcommittee hearings opened, I introduced a similar bill.[123] It applied the privilege to both confidential sources and unpublished information, and it retained the exception for testimony which related to events which the newsman personally witnessed. I was not fully satisfied with this new effort, however, and hoped the hearings might provide further enlightenment.

Most observers of Congress agree that legislative hearings can be worthwhile educational experiences.[124] Usually their worth is proportionate to the interest and participation of the committee members involved. Most Senators who attend such hearings are at the outset necessarily dependent on the preparation done by members of their staff. As witnesses are heard, however, Senators themselves become more familiar with the issues involved. Questioning becomes sharper, and the Senators' positions become more defined. Sometimes a Senator may change his mind.

The newsmen's privilege hearings were a case in point. I had taken the position prior to the hearings that any privilege which Congress might create should only apply to federal forums, and not to the states. Neither of the two bills which I had drafted applied to the states, and I had publicly stated my opposition to such broad coverage. In fact, my opening statement warned proponents against biting off more political opposition than they could handle by trying to legislate for the states. I pointed out serious constitutional issues that must be overcome in such a "pre-emptive" provision.

Nonetheless, the testimony at the first days of hearings, especially that of the Reporter's Committee on Freedom of the Press, persuaded me that unless such a privilege did apply to the states as well as the federal government, its utility as a means of encouraging sources of information to come forward would be drastically limited.[125] I alluded to this change of mind during the

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123 S. 917, 93d Cong., 1st Sess. (1973); 119 CONG. REC. S2838 (daily ed. Feb. 20, 1973) (remarks of Senator Ervin).

124 *See, e.g.*, E. S. GRIFFITH, CONGRESS: ITS CONTEMPORARY ROLE 37 (4th ed. 1967); M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 477-78 (2d ed. 1973).

125 *See 1973 Hearings, supra* note 26, at 65-68.

course of the hearings, and then introduced a new bill which did apply to both state and federal governments.[126]

This bill, S. 1128, took a different approach than the ones I had drafted previously. It provided a general privilege for confidential sources and for unpublished information. The information in question must only have been received by the newsman during the course of his occupation as a result of his express or implied pledge of confidentiality. The only exception made to this general privilege was testimony to a crime committed in the newsman's presence. I felt such an exception was necessary, not only for passage of the bill, but to accommodate the legitimate interests of society in enforcing its laws.

This new bill did not provide for any extraordinary screening procedures, other than the right to appeal from a determination on the issue of privilege made by a grand jury to the court in whose jurisdiction the grand jury sat. The bill set minimum standards for the states.

The introduction of S. 1128 in the course of the subcommittee hearings had a noticeable effect. While earlier witnesses had stressed the desirability of a shield law which applied to the states, few did so after the bill was introduced. The focus of attention became instead the "eyewitness-to-a-crime" exception contained in the new bill.

The tone and substance of hearings was also affected by events outside Congress. On February 26, after three days of hearings, it was reported that a dozen subpoenas had been issued for reporters and news executives in a libel action filed by the Committee to Re-Elect the President relating to the bugging of the Democratic National Headquarters in June 1972.[127] The subcommittee hearings then in progress were a natural forum for the reactions of both Senators[128] and witnesses.[129] Moreover, the arguments of many of the earlier witnesses seemed to be confirmed by the episode.

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126 S. 1128, 93d Cong., 1st Sess. (1973); 119 CONG. REC. S4142-43 (daily ed. Mar. 8, 1973) (remarks of Senator Ervin).

127 N.Y. Times, Feb. 27, 1973, at 1, col. 1.

128 *See, e.g., 1973 Hearings, supra* note 26, at 258 (remarks of Senator Tunney).

129 *See, e.g., id.* at 302 (statement of Sigma Delta Chi President William C. Payette).

By the time the hearings formally adjourned on March 14, 1973, a persuasive case had been made that, indeed, newsmen did have a problem. No consensus emerged, however, as to the best means of resolving the problem by statute. The fragmented press did not coalesce behind one approach, and the subcommittee was left with most of its legislative questions unresolved.

The House subcommittee, chaired by Representative Kastenmeier, concluded its hearings on the same note.[130] Kastenmeier opined that it would be politically impossible to obtain a blanket, absolute privilege; but he was not prepared to hazard a further guess as to the shape of any subsequent subcommittee bill.[131] It did seem clear that unless the press groups themselves could achieve some unanimity on the issue, it was likely to fail without any effort from its opponents.

D. *The Controversy Polarizes and Subsides*

Contact by press groups with the subcommittee was minimal immediately after the conclusion of the hearings. In large part, this was probably because the press had just presented its case and wanted to give Congress an opportunity to react. It also undoubtedly realized that there would likely be considerable haggling, necessarily time-consuming, before a consensus was reached. In any case, interest appeared to lag and few inquiries were received.

The subcommittee staff, meanwhile, set about trying to obtain a consensus for some sort of statutory approach. Initially, staff members contacted the staff aides of Senators on the subcommittee who had indicated they favored some type of privilege. These low-level staff negotiations lasted into May and some proposed additions were suggested to the bill I introduced in March. It was clear, however, that even with the addition of these changes, problems remained.

Certain Senators on the subcommittee, who favored the enact-

130 *See* note 110 *supra*. The House subcommittee concluded its hearings on March 20, 1973.

131 Washington Post, Mar. 21, 1973, at A16, col. 5. *See also* N.Y. Times, Mar. 21, 1973, at 18, col. 4; N.Y. Times, July 1, 1973, at 22, col. 1.

The House subcommittee did finally adopt, by a vote of 5 to 3, H.R. 5928, 93d Cong., 1st Sess. (1973), as its suggested measure for the full Judiciary Committee's consideration. *See* 31 CONG. Q. WEEKLY REP. 1609 (1973). No further action was taken on this bill. *See* text accompanying notes 150-52 *infra*.

ment of a strong statutory privilege, did not think the bill which I proposed created sufficient protection. In this respect, they only echoed the criticisms of the influential press lobbyists.[132] Specifically, they were concerned that the "eyewitness-to-a-crime" exception in S. 1128 would leave newsmen vulnerable to subpoena in a great number of cases. Furthermore, they were concerned with the absence of any pre-subpoena screening process, which they felt was necessary to give adequate protection to the newsman. Those favoring such changes argued that the bill reported from the subcommittee should be the strongest possible legislation, in view of the expected opposition and the need for eventual compromise. Those supporting the current draft believed, on the other hand, that it met all of the important press interests and stood the best chance of surviving debate in the full committee and on the floor.

With the legislation percolating in subcommittee, there were signs of a shift in sentiment in some segments of the press. Faced with the warnings of Chairman Kastenmeier and me that an absolute privilege was politically impossible to obtain, newsmen began speculating whether any sort of qualified privilege was worth supporting. They feared that any qualification which would be susceptible of judicial interpretation must necessarily confuse newsmen as to their legal status and confuse sources as to the worth of the newsmen's assurances of confidentiality. These doubts, coupled with a fear that what Congress gives, Congress may one day take away, began to cause many newsmen to reconsider the legislative alternative.[133] Was a qualified statutory privilege really better than nothing? James J. Kilpatrick, the noted columnist, had earlier eloquently argued the point before the subcommittee:

> I believe the situation, in time, if we are patient, will cure itself. . . . I don't like the harassment of the past two or three years, but I have been around long enough to have learned

132 Both the Joint Media Committee and the Reporters Committee on Freedom of the Press, in letters to me following introduction of my bill on March 8, criticized the bill as providing insufficient protection.

133 Such fears are not necessarily unfounded. Senator Edward Gurney (R.-Fla.) suggested at the hearings that any newsmen's privilege legislation enacted by Congress should also contain provisions bearing on libel suits against public officials and establish a government commission on press responsibility. *See 1973 Hearings, supra* note 26, at 25-26.

> the wisdom that was chiseled in the philosopher's stone: "This, too, shall pass away." My hunch is that we are experiencing no more than a muscular spasm in the body politic. It is painful but it will subside. We will err, I believe, if we embark upon a cure that could be worse than the disease.
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> . . . If we of the press yield to temptation — if we ask and get a statutory shield law, and make such a law our chief protection — we will find ourselves mousetrapped one of these days. We ought not to rely upon a statute, which may prove as ephemeral as the winds. We ought instead to rely upon the Constitution itself, which is a rock. I am aware, of course, that in *Caldwell* the rock proved not as solid as we had hoped, but *Caldwell* is not necessarily the last word . . . . Since [that decision], we fettered watchdogs have raised a fearful howl, and judges are not deaf. I believe that as time passes, the courts will acquire a much better understanding of the problem as we newsmen see it.[134]

The court decisions involving newsmen's privilege which followed *Branzburg* indicated that Mr. Kilpatrick may indeed be a gifted prognosticator. The Eighth Circuit Court of Appeals, one month after *Branzburg*, held that a reporter did not have to reveal the confidential source of allegedly libelous statements unless the libel plaintiff made a concrete showing that such identification would lead to persuasive evidence on the issue of malice.[135] The Supreme Court declined to review the case and thereby let the decision stand.[136]

The Second Circuit ruled in December 1972 that a writer for the *Saturday Evening Post* did not have to reveal the sources of a story about discriminatory real estate practices in Chicago. The suit was civil in nature and arose under the civil rights acts. The court ruled that the identity of the sources did not go to the heart of the case, and the public's interest in a free press must prevail.[137] Again the Supreme Court refused to review the decision.[138]

District Judge John Sirica, presiding at the criminal trial of the Watergate bugging defendants, was willing to concede partial

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134 *Id.* at 80-81.
135 Cervantes v. Times, Inc., 464 F.2d 986, 991-92 (8th Cir. 1972).
136 409 U.S. 1125 (1973).
137 Baker v. F & F Investment Co., 470 F.2d 778 (2d Cir. 1972).
138 411 U.S. 966 (1973).

protection to a newsman. Although, as pointed out above, he did order the production of a verbatim tape in the possession of the *Los Angeles Times*, he refused a request of defense counsel to obtain the personal notes of the reporter who had conducted the interview.[139]

Finally, in March 1973, Judge Charles Richey, presiding in the civil suits between the Democrats and Republicans, granted a motion to quash the dozen subpoenas for depositions which were sent to newsmen and editorial executives regarding the Watergate affair. He held that the first amendment protected them against even having to appear at depositions.[140]

On the other hand, the Supreme Court on two subsequent occasions refused to reconsider its *Branzburg* decision,[141] and there was at least one instance where the reporter's testimony was compelled before a state grand jury investigating a crime to which the reporter may have been an eyewitness.[142] By and large, however, the decisions following *Branzburg* have indicated a willingness on the part of the courts to recognize the right of newsmen, under certain circumstances, to shield their sources.[143]

Furthermore, prosecutors themselves have begun to demonstrate a similar restraint. Since the jailing of the Washington bureau chief of the *Los Angeles Times* in December 1972, there have been no jailings of newsmen which have attracted widespread public attention. Joseph Califano, Washington attorney and former assistant to President Johnson, writes: "[I]t is interesting that public prosecutors have not stayed on the *Branzburg* bandwagon. This may not reflect a respect for the First Amendment . . . so much as their recognition of the fact that their public careers rise or fall at least somewhat on the way the press treats

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139 *See* United States v. Liddy, 354 F. Supp. 208, 212 (D.D.C. 1972).

140 Democratic Nat'l Comm. v. McCord, Civil Nos. 1233-72, 1847-72, 1854-72 (D.D.C., filed Mar. 22, 1973), reported in *1973 Hearings, supra* note 26, at 537.

141 *See* Lightman v. Maryland, 15 Md. App. 713, 294 A.2d 149, *aff'd per curiam*, 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973); *In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3, *cert. denied*, 62 N.J. 80, 299 A.2d 78 (1972), *cert. denied*, 410 U.S. 991 (1973).

142 *In re* Dan, Civil No. 18 (App. Div., 4th Dept., N.Y., filed Feb. 23, 1973). *See also 1973 Hearings, supra* note 26, at 752.

143 *See* Califano, *The First Amendment Is Enough Shielding the Press*, NEW REPUBLIC, May 5, 1973, at 21-23.

them."[144] I would also add that prosecutors are no more immune from the publicity and subsequent controversy surrounding this issue than are other citizens.

In any case, the willingness of the courts to limit the Supreme Court decision under certain circumstances, plus the apparent change of heart by prosecutors, served to muffle the hue and cry in Congress. Also, the public lost interest. Paradoxically, the monumental revelations of the press during the course of the Watergate scandals, while overwhelmingly supported by the public,[145] apparently demonstrated that the press could do its job without the benefit of a statutory privilege. Senator Alan Cranston (D.-Calif.), one of the Senate's leading proponents of the privilege, conceded: "Watergate, I think, improved the general attitude toward the press, but, on the other hand, it was all done without a shield law, so why do we need one?"[146]

The declining sense of urgency surrounding the shield proposals was further demonstrated by the decision of the National Conference of Commissioners on Uniform State Laws to postpone further consideration of a model state statute for at least a year.[147] The American Bar Association, at its annual meeting in August, followed a similar course and postponed further consideration of the privilege issue until its February 1974 meeting.[148]

Thus, the year-long push for shield legislation which followed the *Branzburg* decision was, for a number of reasons, beginning to fizzle in the summer of 1973.[149]

Despite the lull outside Congress, Representative Kastenmeier's House subcommittee had diligently labored in repeated executive sessions to arrive at an agreeable compromise. After several months of deliberation, it agreed on June 13, 1973, with no excess of enthusiasm, to report a qualified bill to the full committee.[150] In the words of Chairman Kastenmeier, the committee-designed bill was meant "to move the issue off dead center."[151]

144 *Id.* at 23.
145 Washington Post, July 2, 1973, at A4, col. 1.
146 N.Y. Times, July 1, 1973, at 22, col. 1.
147 Washington Post, July 28, 1973, at A5, col. 1.
148 N.Y. Times, Aug. 8, 1973, at 13, col. 1.
149 However, the subpoenas issued to newsmen during criminal proceedings against then Vice President Spiro T. Agnew aroused a brief flurry of renewed interest in the issue. *See* N.Y. Times, Oct. 6, 1973, at 1, col. 6.
150 *See* note 131 *supra*.
151 N.Y. Times, July 1, 1973, at 22, col. 1.

After the bill was reported, Kastenmeier asked for the press' reaction. In a hastily-arranged meeting of influential media representatives on July 6 in Washington, the response came back in the negative.[152] The subcommittee's diligently-conceived bill could not command a majority of those present. The outlook for action by the full House Judiciary Committee was considerably darkened.

III. Conclusion

As of this writing, the inaction of the last seven months appears to some to signal the unreported death of this legislation. But seven months, or even a year, is not a particularly long time as subcommittee deliberations go. Time is needed to permit those inside and outside Congress to ponder their positions, consider compromises, and evaluate the politics of the bill.

The fact that attention was drawn from the newsmen's privilege by the dramatic events of 1973 does not mean that it cannot and will not be revived. Nor does congressional inaction at the height of the frenzy necessarily mean that no action will be forthcoming. The fortunes of such legislation may actually be enhanced if considered in a less frenetic atmosphere.

At this relatively early stage in the legislative process, it would be reckless to predict the final outcome. Whether the controversy will turn out to be only a "spasm," as James Kilpatrick suggests, or will find its peace in the perpetuity of the United States Code, it is too early to tell. For now, the press, and the public it seeks to inform, must simply be content with what they have.

As far as the newsman's legal status is concerned, he can expect to be compelled to reveal, under most circumstances, confidential information and sources to criminal courts and grand juries. In the absence of a state statutory shield, only in a criminal proceeding where compelling the newsman's testimony smacks of prosecutorial harassment, or where better evidence is available elsewhere, can the newsman expect to find any judicial sympathy. In civil

152 The members of the Senate Judiciary Subcommittee on Constitutional Rights were informed of this meeting privately. It was not publicly announced. Chairman Kastenmeier has subsequently solicited the views of a wide spectrum of the media on his bill, so the July 6 meeting may not indicate the final response to his bill.

courts and administrative tribunals, on the other hand, the decisions since *Branzburg* indicate he can expect more protection.

The inhibitions now felt by sources in the wake of *Branzburg* present perhaps a greater obstacle to the free flow of information than the newsman's legal quandary. The impact of court decisions, even Supreme Court decisions, is difficult to ascertain. In the case of former sources who will now not talk to newsmen in view of the Court's delineation of the newsman's legal position, the impact is evident, at least to some newsmen.[153] But not even newsmen can know how many potential sources will decide not to come forward with information for fear of subsequent exposure if and when their confidant is faced with jail. To be sure, there are many pressures upon potential sources other than the threat of ultimate disclosure. A future subpoena to the newsman is but one factor in the source's calculations, and not necessarily the most important one at that.

I suspect, in any case, that the impact a decision of the Supreme Court has on the public's conduct is due, not to the prestige which accompanies such a ruling, but rather the publicity which surrounds it and the subsequent applications which catch the public eye. Sources find out more about what happens when they talk to a newsman by witnessing a reporter marching off to jail on their television screens than by reading the *Supreme Court Reports.* Given this phenomenon, the impact of the *Branzburg* case on sources is likely to diminish as fewer newsmen are sent to jail. While this view is difficult to document with precision, it seems reasonably sound.

Thus, even with *Branzburg* on the books, the free flow of information might not be stifled if the parties concerned are willing to restrain themselves. Simply because the *Branzburg* case is law, the district attorney should not begin every grand jury investigation with the newsman who covered the event under investigation.[154] Courts should also continue to show restraint — hampering the news-gathering process is not always justified by the court's need for information, despite the *Branz-*

153 *See, e.g., 1973 Hearings, supra* note 26, at 88-89, 91-92, 359-60.

154 On October 16, 1973, then Attorney General Richardson issued amended guidelines for the Justice Department's relations with the media. They were generally very favorable to the press. *See* N.Y. Times, Oct. 19, 1973, at 22, col. 1.

burg ruling. And the newsman himself must exercise restraint and cooperate with courts and prosecutors as fully as he finds professionally possible. Every tidbit of confidential information does not warrant a newsman's making a martyr of himself. In such an atmosphere of restraint, an equilibrium can be reached. The *Branzburg* decision will still be lurking in the wings, but its inhibiting effects on the free flow of information can be considerably diminished.

This same restraint will be necessary even if Congress does enact a statutory privilege. Undoubtedly a statutory shield would add another weapon to the newsmen's legal arsenal, but unless prosecutors and courts are willing to interpret the statutory language, however precise, with restraint and understanding, its value to the newsman would be considerably undermined. It is interesting to note that most of the celebrated newsmen's privilege cases have arisen in states which have statutory shield laws.[155] A shield law is only as valuable as those who enforce and interpret it will permit.

In saying this, I do not mean to denigrate the efforts of Congress to arrive at a legislative solution to the problem. But I view the role of Congress in this entire venture, not only as that of a lawmaker, but that of a healer. It is a forum where the prior equilibrium can be restored, where the frustrations of all sides can be aired, where sensitivities can be sharpened.

I am therefore inclined to view success here in terms of an agreeable resolution of the conflict and not necessarily by the passage of a law. The congressional furor, despite its failure thus far to result in legislation, has performed a valuable function. Without it, the controversy may well have become more exacerbated; the sides, more polarized. The reconciliation so critical to resolving this conflict — regardless of whether newsmen ultimately obtain statutory protection — would have otherwise been more difficult.

A great truth is embodied in the original constitution of my state, which was drafted in December 1776: A frequent recourse to

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155 *Caldwell* and *Farr* arose in California; the *Bridge* case arose in New Jersey; the *Lightman* case, in Maryland; the *Branzburg* case, in Kentucky; the *Dan* case, in New York. Each of these states has a shield law. *See* note 24 *supra*.

fundamental principles is absolutely necessary to preserve the blessings of liberty."[156] In the case of the newsmen's privilege, it may be that only recourse to the first amendment will be necessary to restore the prerogatives of the press. In this, the 93d Congress will have had a part.

156 N.C. CONST. art. 1, § 35.

THE PRESUMPTION OF COMMITTEE OPENNESS UNDER HOUSE RULES

BOB ECKHARDT*

Introduction

Congressional procedural reform has its ebbs and flows. Even the most deserving procedural reforms are rarely enacted in the absence of a rather widespread movement for change. This article studies the reform of a rule of the House of Representatives governing committee proceedings. The rule originally provided that certain proceedings, those in which the detailed redrafting of legislation is carried out, would be closed to the public. The rule was altered to establish a presumption that these committee proceedings would be open. Only a majority vote taken in open session and publicly recorded can override this presumption. Although this change has had a significant effect on committee proceedings, it is only part of a larger effort to open more congressional activities to public scrutiny.

Three broad topics are covered in the following pages. Part I outlines the prior House rule and committee practices, analyzes the initial attempt in 1970 to change the rule, and describes the activity of those primarily responsible for the introduction of H. Res. 259[1] in the 93d Congress. Part II examines the text of the resolution and the effect of the amendments added on the House floor. Part III attempts to evaluate the impact of the new rule on committee practices. Finally, the article concludes with some comments on the importance of opening committee actions to public scrutiny.

An analysis of this specific reform is only part of the story. Without general pressure for procedural reform the House rule on committee proceedings could not have been revised. One factor that contributed to the reform was the change in the relative

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1 H. Res. 259, 93d Cong., 1st Sess. (1973) (text as introduced), in 119 CONG. REC. H1442 (daily ed. Mar. 7, 1973). This resolution authorized the change in the House rules discussed in this article.

strength of the two parties in Congress. The 89th Congress was so heavily Democratic that institutional reform was neither necessary to pass a wide range of "Great Society" legislation nor even, from the perspective of the overwhelming majority, desirable. In the 90th Congress, to which this writer was first elected, that substantial Democratic majority had been lost. During the preceding Congress House Speaker John McCormack had been an ideal instrument of diplomacy for the activist President and the progressive Democratic majority. But as Speaker in a Congress with a substantially reduced majority, John McCormack's decorous and affable gentlemanliness, which served so well to salve wounded Republican pride in the preceding Congress, was not the quality of character needed to hold diverse Democrats together.

The powerful barons who chaired the committees, a plurality of them Southerners, were on the whole friendlier with Republicans than was tolerable if a Democratic administration program was to be enacted. The enemy was not in the ranks but in the general's staff.

It became apparent to a small but growing group of Democrats that procedural reforms must be instituted to bring to the surface the process previously performed in the subterranean recesses of the committees: the detailed process of hammering out legislation.[2] Most of President Johnson's program had a large measure of popular appeal but considerable lobby opposition; and the lobby, always primarily destructive of legislation, could undercut that program best out of the sunlight.

The procedural reforms that had been germinating for four years did not begin to ripen into law until the Nixon Administration took office and began to dismantle the programs that the majority party in Congress had put together and to impound funds from which grants for Congressmen's constituencies must come. It was not until then that Congress began to feel its impotence before a President willing to assert his power. Only then

2 Among the first to come to this awareness was the so-called Tuesday Club, an informal group of progressive House Democrats, which included in its somewhat floating membership Representatives William D. Hathaway of Maine, Brock Adams of Washington, Patsy Mink of Hawaii, James J. Howard of New Jersey, and eight or 10 other Representatives.

did Congress commence to reassert its role vis-à-vis the Presidency in the formation of national policy.

Part of that reassertion has been direct and has occurred quite recently, for example, the anti-impoundment legislation[3] and the law aimed at limiting the President's war powers.[4] Another important part of the congressional response has been to put its own house in order. There have been two aspects of this effort: reform of internal party organizations such as the Democratic Caucus,[5] and revision of Senate and House procedures. This article examines one aspect of the second area: the continuing process of reforming House procedure.

I. Prologue to H. Res. 259

A. *Pre-1970 Rules and Practices*

Before the passage of the Legislative Reorganization Act[6] in the fall of 1970, the proceedings of House committees fell into two distinct groups with respect to openness for public observation. Most committees held open hearings[7] in which two or more members sat to hear witnesses, typically including congressional proponents, spokesmen of affected governmental agencies, lobbyists for special interest groups, and any spokesmen for the public who wanted to appear. The second type of proceeding was the markup session, in which only members of the committee, committee staff, and sometimes particularly informed or concerned representatives of governmental agencies participated. In a markup session the committee members, after amending or "marking up" the bill, pass it on to the next level of legislative action, provided the bill

3 Impoundment Control and 1974 Expenditure Ceiling, S. 373 (H.R. 8480), 93d Cong., 1st Sess. (1973).

4 War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

5 *See* 31 Cong. Q. Weekly Rep. 136, 419 (1973).

6 Pub. L. No. 91-510, 84 Stat. 1140 (1970) (codified in scattered sections of 2, 31 U.S.C.).

7 There have always been some exceptions. Hearings held by the Committee on Appropriations and the Committee on Foreign Affairs have usually been closed. In addition, the Armed Services Committee has taken much of its testimony in closed sessions.

is not permitted to die by failure of the committee or subcommittee to move it. Before the Legislative Reorganization Act was passed, these sessions were almost invariably closed.[8]

Both proceedings were governed by Rule XI, clause 26(g) of the House of Representatives, which read: "All hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session."[9] This rule envisaged an open hearing, unless a majority of the committee ordered an executive session. Sessions for marking up bills, however, were denominated "executive sessions"; and the rule simply assumed they would be closed. A conviction that hearings should normally be open and markups should always be closed was deeply ingrained in the views of committee chairmen.

The House rule did not explicitly require this difference in treatment. Each chairman, as a matter of practice, exercised wide discretion to close either type of proceeding. Theoretically the chairman could be directed to open the meeting, in the case of the hearing at least, by a majority of the committee; but this was seldom, if ever, done.

To legitimize the practice of closing hearings without a vote, a chairman frequently secured passage of a committee rule authorizing him to make the initial determination to close the hearing. The rule of the Committee on Armed Services demonstrates the common practice of that time:

> The meetings of the committee for the purpose of the transaction of business or the holding of hearings will be in open session unless the Chairman of the committee determines it is in the national interest to hold such a meeting in closed session; his decision, however, is subject to reversal, if a majority of the committee determines otherwise.[10]

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8 The Committee on Education and Labor was an exception; its markup sessions have been open since 1967. Closed markups were common in other committees.

9 JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. No. 529, 89th Cong., 2d Sess. 366 (1967) [hereinafter cited as 1967 HOUSE RULES]. The quoted language remained unchanged between 1946 and 1970, although the number of the rule varied slightly during that time. The citation to the 1967 rules is given merely as an example.

10 JOINT COMM. ON CONGRESSIONAL OPERATIONS, 93D CONG., 1ST SESS., RULES

This writer has personally observed how the chairman of the Armed Services Committee closed and opened hearings at will. In 1969 while I was testifying at hearings on MIRV weapons, Chairman Rivers (D.-S.C.) entered the chamber for the first time at that session, noticed that the doors were shut, asked why they were closed, and ordered the session opened without consulting any member of the committee. The other members might have wanted to ask questions with sensitive national security implications, but they were given no voice in the decision to open the meeting.

In reaction to such lordly treatment by the barons of the great committees, the members began to gather in informal groups to discuss procedural reforms which would increase their participation in the control of committee proceedings and ultimately of the final legislative product. The reduction of committee secrecy was one such reform.

During the 91st Congress, the House had under consideration the Legislative Reorganization Act,[11] a comprehensive reform bill making broad changes in the organization and procedures of Congress. By the commencement of the second session, the Democratic Study Group (DSG), composed of the more progressive Democratic members of the House, was pushing for broader, more significant reforms than those proposed in the committee bill. In late May of 1970, Richard Conlon, Staff Director of the DSG, met with Democratic Study Group officers Don Fraser (D.-Minn.), John Brademas (D.-Ind.), and James Corman (D.-Calif.).[12] They agreed that the DSG would give top priority to the adoption of several "anti-secrecy amendments," including proposals for recorded teller votes and open committee meetings.

Two weeks later, John Dellenback (R.-Ore.) and William Steiger (R.-Wis.)[13] (members of "Rumsfeld's Raiders," Republican reform activists in the previous Congress) met with the DSG leadership. The "Raiders" and DSG leaders agreed to launch a bipartisan effort for congressional reform. Subsequently, they held several

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ADOPTED BY THE COMMITTEES OF CONGRESS 15 (Comm. Print 1973) [hereinafter cited as COMMITTEE RULES].

11 Pub. L. No. 91-510, 84 Stat. 1140 (1970) (codified in scattered sections of 2, 31 U.S.C.).

12 Representative Sam Gibbons (D.-Fla.) later joined the drive.

13 Representative Barber Conable (R.-N.Y.) was invited, but was unable to attend.

meetings during which the amendments to the Legislative Reorganization Act were developed.

B. *The Legislative Reorganization Act of 1970*

On October 26, 1970, the Legislative Reorganization Act of 1970 became law.[14] This comprehensive measure had several objectives, including, among others, to expedite House proceedings, to improve congressional scrutiny of the federal budget, to provide for recorded teller votes in the House, and to open more committee meetings to public view.[15] As one means to the latter objective, section 103(b)[16] of the Act was designed to change the essentially automatic practice of holding *open* hearings and *closed* markup sessions. It provided that "[m]eetings for the transaction of business of each standing committee shall be open to the public except when the committee, by a majority vote, determines otherwise."[17]

This language was more ambiguous than it first appears, and the ambiguity was not wholly unintentional. This is suggested by the debate on an amendment supported by the reform coalition, but defeated in the House. Representative William Hathaway (D.-Me.)[18] proposed that committee meetings be governed by the following rule:

> Each meeting for the transaction of business of each standing committee shall be open to the public unless the committee,

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

15 For a general account of the purposes and provisions of the Legislative Reorganization Act, see 26 CONG. Q. ALMANAC 447-61 (1970).

16 Since this article deals with three different versions of a House rule, they must be clearly labeled. The 1946-1970 version can be found in *Jefferson's Manual and Rules of the House of Representatives* for any of the congressional sessions during those years. *See, e.g.*, note 9 *supra*. The version established by the Legislative Reorganization Act of 1970 will be cited in the text as "section 103(b)." It can be found in Rule XI, clause 26(f) of the 1971 House Rules. *See* note 17 *infra*. The present version will be cited in the text as "H. Res. 259"; it can be found in Rule XI, clause 26(f) of the 1973 House Rules. *See* note 34 *infra*.

17 JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. No. 439, 91st Cong., 2d Sess., 376 (1971) [hereinafter cited as 1971 HOUSE RULES]. The full text of Rule XI, clause 26(f) was as follows: "Meetings for the transaction of business of each standing committee shall be open to the public except when the committee, by majority vote, determines otherwise. This paragraph does not apply to open committee hearings which are provided for by paragraphs (f)(2) and (g)(3) of clause 27 of this Rule."

18 Now U.S. Senator from Maine.

> in open session and with a quorum present, determines, by rollcall vote, that all or part of the remainder of that meeting on that day shall be closed to the public.[19]

Supporting this amendment on the broad ground that committee meetings should be open to the public, Representative Hathaway argued:

> Woodrow Wilson once wrote that Congress in its committee rooms is really the Congress at work. The committee system is still the crux of the legislative process and is still the basis for congressional action. Laws are not really made here on the floor of the House or on the floor of the other body. They are only revised here. Ninety percent of all legislation that has been passed was passed in the form reported by the committee to the floor. . . .
>
> This means most legislative battles have been fought and have been resolved in secret, away from public scrutiny. This seems incompatible with our democratic philosophy and democratic system, for openness is really the essence of democracy. . . .[20]

The committee chairmen and their supporters focused their criticism on the amendment's potential effect on markup sessions and did not object seriously to the virtually identical amendments covering hearings. They argued that a bill can be more efficiently and more freely amended in the absence of lobbyists and reporters. "[Y]ou cannot write legislation with a lobbyist sitting at every member's elbow," said Representative Wayne Hays (D.-Ohio).[21]

Representative Hathaway replied that closed meetings had the opposite effect because "when you have a secret meeting, . . . only the lobbyists can have access to the Members."[22] In other words, precisely because lobbyists have numerous opportunities for informal contact with Congressmen, it is vital that the public participate in the legislative process through public proceedings.

Because of the opposition of the committee and subcommittee chairmen, specifically Representatives George Mahon (D.-Tex.) (Appropriations), L. Mendel Rivers (Armed Services), Emanuel Celler (D.-N.Y.) (Judiciary), and their followers, the Hathaway

19 116 CONG. REC. 24,044 (1970).
20 *Id.*
21 *Id.* at 24,049.
22 *Id.*

amendment was defeated.[23] Nevertheless, the language of the Legislative Reorganization Act seems to mean that an affirmative step must be taken before a given meeting (either a hearing or a markup session) may be closed. But the legislative history, showing rejection of the language referring to closing meetings "on that day," weakens the argument for this interpretation; and, as we shall see, the language was ultimately interpreted differently.

Despite what appeared to be the basic intent of section 103(b), the chairmen sought to effectuate a policy of closed markup sessions without violating the House rule. Rule 2(b) approved by the Interstate and Foreign Commerce Committee was typical:

> Hearings or other proceedings of the committee and any subcommittee thereof which are called to take testimony and receive evidence shall be open to the public unless the committee or subcommittee, as the case may be, by a majority vote determines to close such meeting. Other meetings of the committee and its subcommittees shall be closed to the public, unless the committee, or the subcommitee involved, by majority vote, determines otherwise.[24]

The second sentence creates a presumption that markups will be closed. This seems to conflict with the House rule, which presumes that markups will be open.

The conflict surfaced in the summer of 1971, when the Interstate and Foreign Commerce Committee voted to recommend that the House cite CBS and its president, Frank Stanton, for contempt.[25] The issue concerned the right of a television network to film programs without congressional review of the outtakes[26] to determine the "fairness" of the network presentation. At the commencement of that meeting, the doors were closed and the public and reporters were excluded from the room. Representative Brock Adams (D.-Wash.) moved that the meeting be open. Under the prevailing rules the matter was settled with little more than per-

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23 *Id.* at 24,049-51. The vote was 102 to 132. *Id.* at 24,053.

24 JOINT COMM. ON CONGRESSIONAL OPERATIONS, 92D CONG., 1ST SESS., RULES ADOPTED BY THE COMMITTEES OF CONGRESS 55 (Comm. Print 1971).

25 Ultimately, on July 13, 1971, the House voted to recommit H. Res. 534, thereby killing the recommendation.

26 "Outtakes" means film that is taken, but which is not included in the final edited production.

functory argument followed by a successful vote to table Adams' motion.[27]

The legitimacy of this practice had been questioned before the meeting. But the Parliamentarian advised that the House rule permitted a committee, by a majority vote, to adopt a general rule that certain kinds of meetings would be closed unless the committee voted to open them.[28] Rule 2(b) of the Interstate and Foreign Commerce Committee was thus declared valid, and the presumption of closed markup sessions was effectively reinstated. The effects were significant, for many of those who voted to table Adams' motion would probably have been reluctant to defend publicly their votes for committee secrecy. If the issue had been considered in an open meeting, several members might have taken a different position.

The Parliamentarian's ruling solidified the power of the committee chairmen vis-à-vis the other members in three ways. First, committee rules are usually approved as a matter of formality at the organizational meeting of the committee at the beginning of a congressional session; consequently, the question was not considered in a factual context, and committee members naturally hesitated to oppose the chairman before they had been assigned to a subcommittee. Second, once the general rule had been passed, it could only be overturned by a majority; a tie vote would not suffice. Third, under the ruling of the Parliamentarian the meeting would be closed during the period when a motion to open it was being considered. Therefore, the argument concerning the right of the public to know what happened in committee proceedings could not be made publicly.

Whatever progress section 103(b) might have achieved toward more open proceedings was largely nullified by the chairmen's continuing predisposition toward closed markups and the Parliamentarian's approval of committee rules creating a presumption that markups would be closed.[29]

27 House Committee on Interstate and Foreign Commerce, 92d Cong., 1st Sess. Book 1 (1971) (Minutes of Meeting on July 1, 1971) (unpublished material on file with the committee).

28 This ruling was given to Representative Eckhardt by telephone by Mr. Lewis Deschler, House Parliamentarian, on June 30, 1971. The meeting in which Representative Adams made his motion was held the next day.

29 The point may be statistically supported. The Legislative Reorganization

C. *Clamor for Change*

The enactment of the Legislative Reorganization Act did not diminish the general interest in congressional reform. The clamor for change in committee procedures could still be heard both inside and outside the House. Common Cause was most outspoken in the pursuit of committee openness. In a survey of membership priorities, interest in the "functioning of government" was listed as the third most important priority. Therefore, Common Cause suggested that one of the three questions its members should ask candidates in the 1972 elections was "whether the candidates will support an end to secret committee proceedings."[30]

Public interest in this issue paralleled action in the cloakrooms. The Congressmen who thought they had dealt a lethal blow to secrecy for secrecy's sake found they had "scotched the snake, not killed him." They set about to finish the task. The DSG task force on congressional reform, headed by Representative Jonathan Bingham (D.-N.Y.), began meeting during the summer of 1972 to determine the priorities of the DSG for the 93d Congress. The task force developed four reform proposals, including one for open committee meetings.

The political problem was how to get around the deeply ingrained feeling of committee chairmen and many other Congressmen that at least some markup sessions should be closed. In drafting a tentative restatement of the rule, this writer adopted the compromise position that was ultimately reflected in H. Res. 259. It provided that hearings would always be open, subject to narrow, specified exceptions, and that markups would be open, unless a vote was taken to close a proceeding on a particular subject. The vote would have to be a record vote in open session. As will be seen, certain minor changes were made on the House floor.

A sweeping rule requiring all meetings to be open had no

Act passed in late October 1970 and thus did not substantially affect the 1970 session. In that session, 41 percent of the committee meetings were closed. During the 1971 session, 36 percent were closed, a drop of only 5 percentage points. *Committee Secrecy: Minor Impact of Reform Act*, 30 CONG. Q. WEEKLY REP. 301-03 (1972). If the rule had remained, one might have predicted that the figure would increase as committee chairmen learned to evade the rule.

30 2 Common Cause, *Open Up the System*, Report from Washington, No. 10, October 1972, at 5.

chance of passage. On the other hand, if both hearings and markups could be closed by a majority vote for any reason, no advance in opening more hearings to public view would have been achieved.[31]

The draft of the reform proposal was carefully rewritten to incorporate any desirable conditions and exceptions in the existing rules. Representative Phillip Burton (D.-Calif.) was concerned about the legal rights of witnesses appearing before committees. Therefore, section 2 of H. Res. 259 was written so that hearings could be closed if disclosure of testimony "would violate any law or rule of the House of Representatives."[32] Representative Hays did not want to discuss the hiring of committee staff in public, and so section 1 makes the presumption of openness inapplicable to "any meeting that relates solely to internal budget or personnel matters." Representative Dante Fascell (D.-Fla.), who had long championed the cause of committee openness, played an important role in integrating all these considerations; and he took the lead in presenting the resolution on the floor.[33] Representative Tom Foley (D.-Wash.) joined as a cosponsor and effective proponent of the rule change.

While DSG leaders formulated the wording of the amendment, they cultivated the suggestions and support of the Democratic Caucus Reform Committee. The fact that DSG executive committee members Phillip Burton, Frank Thompson, and James O'Hara were also members of the caucus reform committee facilitated cooperation between the groups.

II. H. Res. 259

A. *Major Provisions*

As a result of all this activity — lobbying, consulting, drafting, compromising, and redrafting — H. Res. 259 was introduced sub-

31 Under the House rule in effect at that time, committee hearings could be closed by majority vote for any reason. Rule XI, clause 27(f)(2) provided: "Each hearing conducted by each committee shall be open to the public except when the committee, by majority vote, determines otherwise." 1971 House Rules, *supra* note 17, at 383.

32 See text accompanying notes 36-37 *infra*.

33 The highest credit belongs to the excellent legislative technicians on the DSG staff, notably Ms. Linda Kamm, who phrased language to effect the various accommodations without compromising the major purpose of the resolution.

stantially in the form that it passed the House on March 7, 1973. The resolution was designed to preclude the interpretation made of the prior rule by the Parliamentarian. Instead of referring to "meetings," the resolution referred to "each meeting . . . including the markup of legislation."[34] Each meeting must be open to the public except when the committee or subcommittee "determines by rollcall vote that all or part of the remainder of the meeting shall be closed to the public . . . ."[35]

This paragraph of the rule covering "each meeting" does not apply to open committee hearings, which are generally governed by House Rule XI, clause 27(f)(2).[36] Hearings are treated differently from markup sessions. A markup may be closed for any reason, provided the action is taken by rollcall vote in open session. But there are only two grounds on which a hearing can be closed: when "disclosure of testimony, evidence, or other matters to be considered would endanger the national security," or when disclosure "would violate any law or rule of the House of Representatives."[37]

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34 JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. No. 384, 92d Cong., 2d Sess. 376 (1973) [hereinafter cited as 1973 HOUSE RULES]. Rule XI, clause 26(f) reads:

> Each meeting for the transaction of business, including the markup of legislation, of each standing committee or subcommittee thereof shall be open to the public except when the committee or subcommittee, in open session and with a quorum present, determines by rollcall vote that all or part of the remainder of the meeting shall be closed to the public: *Provided, however*, That no person other than members of the committee and such congressional staff and such departmental representatives as they may authorize shall be present at any business or markup session which has been closed to the public. This paragraph does not apply to open committee hearings which are provided for by paragraphs (f)(2) and (g)(3) of clause 27 of this rule; or to any meeting that relates solely to internal budget or personal matters.

35 *Id.*

36 *Id.* Rule XI, clause 27(f)(2) reads:

> Each hearing conducted by each committee or subcommittee thereof shall be open to the public except when the committee or subcommittee, in open session and with a quorum present, determines by rollcall vote that all or part of the remainder of that hearing shall be closed to the public because disclosure of testimony, evidence, or other matters to be considered would endanger the national security or would violate any law or rule of the House of Representatives.

Id. at 383.

37 *Id.* at 383. The reference to "any law or rule of the House" was included to ensure the continued vitality of House Rule XI, clause 27(m)(1), which requires a committee to take evidence or testimony in executive session whenever such

Since in the past committee chairmen had often opened and closed hearings at will,[38] the question of who should decide when these exceptional situations exist was of major importance. The answer given by H. Res. 259 was that the decision to close a hearing must be taken "by rollcall vote." Thus, the decision is for the members of the committee, not for the chairman acting alone. The same is true of markups.

B. *Floor Amendments to H. Res. 259*

As we have seen, the practice of treating markups differently from hearings was a necessary accommodation to the deeply held convictions of committee chairmen. But the difference in treatment raised two problems. First, although the language "each meeting" precluded adoption of committee rules applicable to a *type* of committee proceeding, the word "meeting" is itself ambiguous. It might refer, for example, to a single day's session or to a proceeding on one subject held over several days or even weeks. Second, if the openness of the hearing is to be effectively protected, there must be a provision in the rule to prevent closed hearings in the guise of markups. These two problems were treated in the two amendments to H. Res. 259 approved by the House.

1. What Is a Meeting?

Under the original language of the resolution, meetings could be closed only when a majority decided by rollcall vote that all or part of the remainder of the meeting *on that day* would be closed.[39] During the debate in the House of Representatives, Representative Ichord (D.-Mo.) offered an amendment striking the words "on that day."[40] After debate his amendment passed by a narrow margin.[41]

The effect of the amendment was to permit a committee to

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information "may tend to defame, degrade, or incriminate any person . . . ." *Id.* at 386. *See* text accompanying note 32 *supra.*

38 *See* text at note 10 *supra.*

39 H. Res. 259, 93d Cong., 1st Sess. (1973), in 119 CONG. REC. H1442 (daily ed. Mar. 7, 1973).

40 119 CONG. REC. H1443 (daily ed. Mar. 7, 1973).

41 *Id.* at H1447.

close any proceeding covering more than one day on or before the first day's session.[42] This procedure had two advantages. First, it eliminated the need to take a separate vote on each day of a proceeding covering several days. Daily votes would have required the presence of a quorum at the start of each session.[43] Second, by allowing a vote to be taken before the first session of the proceeding, the amendment permitted advance notice to the press and public that a proceeding would be open or closed.[44]

When the amendment was proposed, this writer was concerned that it might permit "meeting" to be interpreted to cover a series of proceedings on different subjects over several weeks or months. But Representative Ichord agreed that the amendment did not purport to enlarge the term "meeting" to embrace anything more than a succession of sessions dealing with a specific subject matter noted for action by the committee.[45]

Since the Ichord amendment is somewhat ambiguous, it is worthwhile to note how the rule is being applied. Since the adoption of H. Res. 259 no committee has tried, to this writer's knowledge, to expand the meaning of the word "meeting." In a questionnaire from Chairman Julia Hansen (D.-Wash.) of the House Democratic Caucus Committee on Organization, Study, and Review,[46] committee and subcommittee chairmen were asked for their interpretation of the rule on this point. Twenty-four of those replying interpreted "meeting" to mean "any markup session, regardless of whether or not it extends over a period of more

42 *See id.* at H1444 (remarks of Representatives Archer and Cederberg).

43 Technically, no business can be done in a markup without a quorum present; and any action taken under such circumstances is subject to a point of order on the House floor when the bill is considered, provided the point was raised during the markup. But frequently, particularly on less important committees, action is taken on noncontroversial bills by only a few members, far less than a quorum; and no point of order is raised.

44 119 CONG. REC. H1444 (daily ed. Mar. 7, 1973) (remarks of Representatives Eckhardt and Cederberg).

45 *Id.* at H1446-47 (remarks of Representatives Eckhardt and Ichord).

46 House Democratic Caucus Committee on Organization, Study, and Review, Draft of Report on Hansen Questionnaire (unpublished typewritten manuscript on file with the *Harvard Journal on Legislation*, 9 pp., undated) [hereinafter cited as Hansen Questionnaire]. In September 1973, Representative Julia Hansen, chairman of the cited Democratic Caucus committee, sent a questionnaire designed to measure the effects of H. Res. 259 to 145 standing committees and subcommittees of the House of Representatives. Completed questionnaires were returned by 83 of the recipients.

than one day." This is in accord with the legislative history of the resolution. Fifteen of the respondents interpreted "meeting" to mean "each day on which a meeting is held." However, H. Res. 259 does not prevent a committee from adopting a rule more favorable to public disclosure than the House rule. Obviously, full compliance with the House rule exists if votes are taken on each day that a committee holds closed proceedings. The rule of the Committee on Interior and Insular Affairs adopts this procedure:

> Each hearing conducted by the Committee or any of its Subcommittees shall be open to the public except when the Committee or Subcommittee, in open session and with a quorum present, determines by roll call vote that all or part of the remainder of that hearing *on that day* shall be closed to the public.[47]

One committee has gone even further. Rule 1(d) of the Committee on Education and Labor provides that "[a]ll legislative meetings of the committee and its subcommittees shall be open."[48] Since 1967, that committee has held all its sessions, hearings and markups alike, in open session.[49]

2. Hearings Disguised as Markup Sessions

A more difficult problem is to protect open hearings by preventing them from being disguised as markup sessions. For example, it would be possible for the Armed Services Committee to hear evidence from nonmilitary witnesses in public and reserve for the markup session the crucial testimony about military equipment and procurement given by witnesses from the armed services. Obviously, such a procedure would frustrate the intent of the House rules to require all hearings to be open unless they fall within the narrow exceptions discussed above.[50]

That is why H. Res. 259 originally provided, with respect to

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47 COMMITTEE RULES, *supra* note 10, at 54 (emphasis added). It is noteworthy that the Senate Committee on Banking, Housing, and Urban Affairs, though subject to the more lenient provisions of the Legislative Reorganization Act of 1970, and not to H. Res. 259, has adopted the strict requirement that meetings can be closed only "on that day" that a vote is taken. *Id.* at 139.

48 *Id.* at 29.

49 Questionnaire completed by the committee for Hansen survey. *See* note 46 *supra.*

50 See text accompanying note 37 *supra.*

markups, "[t]hat no person other than members of the committee and such congressional staff as they may authorize shall be present at any business or markup session which has been closed to the public."[51]

Representative Martha Griffiths (D.-Mich.), a senior member of the Ways and Means Committee, raised a serious problem with this provision. She explained that when Ways and Means was considering formulas for the distribution of federal funds, "we had the Treasury there with computers." She continued:

> [S]omeone would make a suggestion for a change in the formula, and at that point you had to have the Treasury there to help you. I would presume from what you are saying that we have to open it all up, talk to him for 10 minutes and figure it out, and then we have to throw him out and go back into private session, talk a while longer, and decide whether we will do it that way. Then . . . in a few minutes somebody suggests another formula — so what do we do in that case? Get the Treasury back in and then close the meeting?[52]

The authors of the resolution suggested that although the original language barred agency officials from markup sessions, it would not prevent the members from obtaining their advice after the proceeding had begun. This writer pointed out that markups on his committee were often temporarily recessed to consult with SEC attorneys.

> [W]e have in the past and we can in the future simply call in the lawyer for the SEC and discuss it with the whole group present, but after recessing the markup session. . . . However, we do not mark up the bill in the presence of the executive department, and I think it is bad policy to do that.[53]

The danger is that even if the markup session is recessed temporarily, such informal consultation with SEC attorneys or Treasury people "with their computers" or generals with technical information about weapons may become de facto hearings. In-

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51 H. Res. 259, 93d Cong., 1st Sess. (1973), in 119 CONG. REC. H1442 (daily ed. Mar. 7, 1973).

52 119 CONG. REC. H1435 (daily ed. Mar. 7, 1973).

53 *Id.*

formal discussions of this kind would undoubtedly take place behind closed doors without advance public notice.

An amendment proposed by Representative Stratton (D.-N.Y.) opened the markup to include "such departmental representatives" as the committee may authorize.[54] This was desirable if it did nothing more than meet the problem raised by Representative Griffiths. If the departmental representatives are essential to provide technical information, they ought to be included. If they are not needed for that purpose or if they are actively interested in the content of the bill, they ought to be excluded. Although H. Res. 259 does not require markup sessions to be kept open to the public whenever departmental representatives are admitted, that policy is most consistent with the principle of maximum public disclosure of legislative proceedings.

On at least one occasion since the adoption of the new rule, the Stratton amendment has permitted a practice which appears contrary to the thrust of the rule. In October 1973 the House Rules Committee began a markup session on legislation establishing new congressional procedures for handling budgetary matters. The committee voted to close its first markup session, thereby locking out not only representatives of outside groups but congressional staff and other Congressmen. However, they allowed a representative of the Office of Management and Budget, the President's budgetary arm, to remain in the room during the markup. What technical expertise does an OMB official possess that would be essential to a committee drafting legislation to establish internal congressional procedures for evaluating the President's budget proposals? The President obviously has a major policy interest in such legislation. In these circumstances the Executive's opinions should be presented in public, not behind closed doors.

III. The New Rule in Practice

A. *Committee Experience*

H. Res. 259 has had a marked effect on the way many House committees conduct their business. But the new rule has not pro-

54 *Id.* at H1443.

duced uniform practices with respect to committee proceedings. The following examples illustrate the range of permissible practices under H. Res. 259.

Appropriations: Before the passage of the rule the Appropriations Committee customarily excluded the public from both its hearings and markup sessions.[55] Under the new rule the committee has held its hearings in open sessions and has closed its markups by a rollcall vote.

Ways and Means: Prior to the passage of H. Res. 259, the Ways and Means Committee held its markups in executive session. Since the new rule became effective, the Ways and Means Committee has, in general, held both its hearings and markups in open sessions. However, the committee's time has been heavily occupied by the Trade Reform Bill, which was marked up in closed sessions with Chairman Wilbur Mills (D.-Ark.) presiding. Recently, markup sessions have been open under the direction of Representative Al Ullman (D.-Ore.).[56]

Foreign Affairs: The rules of the Committee on Foreign Affairs in effect prior to H. Res. 259 authorized the chairman "to make the initial determination that a meeting [including hearings and markups] shall be closed," subject to reversal by the full committee.[57] This rule is still on the books of the Foreign Affairs Committee and therefore constitutes a violation of the House Rules.[58] The committee has, however, adhered to the new House rule. The effect on its conduct of committee meetings has been dramatic. Before this session of Congress virtually all committee meetings, both hearings and markups, were closed. By contrast, since the beginning of this session 33 of the 34 meetings of the committee

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55 An exception was the hearings on the overview of the budget held by the full committee after passage of the Legislative Reorganization Act, which required that open hearings be held on this subject. Pub. L. No. 91-510, § 242(c), 84 Stat. 1172 (1970). Other hearings were held by subcommittees and were closed.

56 Representative Ullman assumed many of the chairman's duties while Representative Mills was absent due to illness.

57 COMMITTEE RULES, *supra* note 10, at 42.

58 House Rule XI, clause 27(a) authorizes committees to adopt written rules "not inconsistent" with the Rules of the House. 1973 HOUSE RULES, *supra* note 34, at 377.

have been open. The single exception was the organizational meeting.[59]

Interstate and Foreign Commerce: Before H. Res. 259 this committee held open hearings and closed markups. Under the new rule the committee has exercised its discretion concerning markup sessions. In the absence of a compelling reason for closing the markup, the committee has usually voted down a motion to meet in executive session. But if a closed session would expedite the meeting, or is desirable for other reasons, the committee usually closes the session.[60]

Perhaps the best way to illustrate the factors affecting a decision to close a markup session is to give examples relating to two important bills before this committee. The committee closed the markup sessions on the Regional Rail Reorganization Act of 1973.[61] The primary reason was that a great many private interests were intensely concerned with the details of the bill. Different railroads took conflicting positions on many of the issues involved. The bill contained several technical provisions affecting labor relations, such as the manner in which employees of a bankrupt railroad may be folded into a new corporation. Shippers, creditors, and many other groups had a stake in various provisions. Finally, parts of the bill raised disputes along sectional lines.

An open markup would have encouraged prolonged defenses of those regional or special interests most important to the member or his constituents. There would also have been a greater temptation for members to explain their views at length to attract press coverage. In addition, if the private lobbyists had been in a position to hear the arguments between the members, they would have been encouraged to propose amendments seeking special, and sometimes trivial, advantages for their clients. The bill was so long and complex that an open markup would have either precluded enactment this year or crowded out other important legislation on the committee's agenda.

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59 Questionnaire completed by the committee for Hansen survey. *See* note 46 *supra*.

60 The author is a member of the House Committee on Interstate and Foreign Commerce.

61 H.R. 9142, 93d Cong., 1st Sess. (1973).

Because of these practical considerations markup sessions should be closed at the discretion of the committee, as H. Res. 259 provides. But hearings should never be closed, unless they come within the narrow exceptions in the resolution. The public is entitled to know the facts on which legislation is based. The right to know these facts springs from the same public policy source as the public's interest in knowing how these facts are weighed and applied in the committee process. Therefore, markups should be closed only when it is clear that the committee's work would otherwise be seriously impeded.

The mere fact that a bill is complex is not grounds for closing a markup. The National Energy Emergency Act,[62] which came before the Interstate and Foreign Commerce Committee late in 1973, on very short notice and in an extremely imperfect condition, affords an example. The bill contained major amendments of the Economic Stabilization Act,[63] the Emergency Petroleum Allocation Act,[64] and the Clean Air Act.[65] It also involved less extensive amendments of several other acts, including the Sherman and Clayton Antitrust Acts. During the markup session, about 125 amendments were offered and 75 were adopted. Issues of the utmost complexity were involved: *e.g.*, questions relating to oil production, refining and distribution; coal supply; the effect of industry allocation agreements on the anti-trust laws; pollution from both automobile exhausts and plant emissions.

As with the Rail Reorganization Act, private interests were intensely concerned with the details of the bill. However, the markups were open; and a hundred or more representatives of oil and coal companies, airlines, auto manufacturers, and other vitally affected interests sat in the audience. The broad issue involved was of such grave and pervasive importance that it was desirable for the public to know precisely what was being done.

All of the reasons for closing the Rail Reorganization legislation markup were present in this case. But this writer did not observe any serious problems created by leaving the markup open. Indeed, special interest paranoia, which was rampant, would have been

62 H.R. 11450, 93d Cong., 1st Sess. (1973).
63 12 U.S.C. § 1904 n.
64 Pub. L. No. 93-159, 87 Stat. 627 (1973).
65 42 U.S.C. § 1857 (1970).

increased by holding the meetings behind closed doors. Since only 18 legislative days elapsed between the beginning of the hearings and passage of the bill in the House,[66] the open meetings did not create undue delay.

Though it is good that markups are presumed to be open to maximize public disclosure, it is also proper that they be closed on those rare occasions when the principle of openness conflicts seriously with congressional effectiveness. One such occasion in my own experience arose during the 92d Congress when the Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce closed the markup sessions on the Consumer Product Safety Act, H.R. 15003.[67] There was intense disagreement between the Administration and the majority Democrats over numerous provisions of the bill. However, during the markup the Republicans on the subcommittee agreed to accept an independent consumer agency rather than one established as part of the Department of Health, Education and Welfare. In return, the Democrats ceased to insist on a citizen's ombudsman as part of the bill. Consequently, a sound bill emerged with solid subcommittee support.

I doubt that this compromise could have been achieved if Administration officials and Ralph Nader's representatives had been present during the meeting. Legislators are, after all, frequently the best practitioners of the art of achieving the possible. When the alternative appears to be legislative stalemate, they should, on those exceptional occasions, be allowed to practice that art behind closed doors.

B. *The Hansen Questionnaire*

House committees and subcommittees have been operating under H. Res. 259 for most of 1973. It is difficult at the present time, and presumably will always be difficult, to isolate and evaluate the impact of the new rule on House proceedings. Yet, if the opinions of Congressmen themselves are taken as a guide, it

66 Hearings on H.R. 11450 began on November 14. 31 CONG. Q. WEEKLY REP. 3037 (1973). The bill was passed by the House on December 14. 119 CONG. REC. H11,451-52 (daily ed. Dec. 14, 1973).

67 Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified in scattered sections of 5, 15 U.S.C.).

is clear that none of the dire consequences that some imagined have come about. It should be noted that few if any Congressmen objected to greater public exposure of hearings and markups as undesirable in itself. The principal objections were that open markups would create delay and discourage compromise.

The results of the survey conducted by Chairman Julia Hansen of the House Democratic Caucus Organization, Study, and Review Committee suggest that neither fear has been realized.[68] Of the committees and subcommittees that replied, 45.6 percent (38) indicated that markups had generally been closed under the previous rule.[69] Yet when asked a general question about the impact of the rule on the activity of the committee, virtually every respondent either believed the rule had a very slight impact or felt that its effects had been favorable.[70] When specifically asked to comment on the "most negative aspect of compliance with the rule," only 12 percent (10) of those replying complained about added delay;[71] and only about 10 percent (8) gave answers which implied that compromise was hindered by the rule.[72] A much larger group, 43.4 percent (36) could discern no negative effect of the new rule; and 24 percent (20) failed to answer the question.

In response to a question concerning the level of lobbying activity under the new rule, 68.7 percent (57) of the committees reported no change from the previous practice. Most also reported

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68 Note 46 *supra.*

69 This percentage is the sum of 36 percent (30) who reported that the committee held closed markup and executive session meetings, 4.8 percent (4) who indicated that all meetings were closed, and 4.8 percent (4) who replied that meetings were generally closed. The overall percentage of closed markups was probably significantly higher, because 30 percent (25) of the respondents did not even mention the committee's practice on markups, and no more than 14.4 percent (12) gave answers clearly indicating that markups were usually open.

70 On this point the replies broke down as follows: 49 [*sic*—should be 47] percent (39) saw no impact or a very slight impact; 21.7 percent (18) reported a generally favorable impact; 10.8 percent (9) felt the impact was "good," "beneficial," etc.; and a few others registered scattered favorable responses.

71 This figure is derived from the 6.0 percent (5) who complained of a tendency of members to use committee meetings as a forum for speeches, the 3.6 percent (3) who complained of longer sessions, and the 2.4 percent (2) who felt that work was delayed.

72 This figure is derived from the 7.2 percent (6) who reported they felt members were reluctant to speak openly and candidly and the 2.4 percent (2) who believed too much direct pressure on the members had been created.

no change in the type of lobby activity under the new rule. However, five of the seven who reported a change indicated increased activity by environmental, consumer, or "citizen" groups.[73]

IV. Conclusion

The Hansen questionnaire was not an elaborate, scientific study of attitudes toward H. Res. 259. Nevertheless, it produced rather strong evidence that the new rule has not had the undesirable consequences, such as hindering compromise or creating delay, that its detractors predicted.

The flexibility of H. Res. 259 may account for its widespread acceptance. Markup sessions can be closed, when necessary, by rollcall vote of the members. Whenever the complexity of the bill or the passions of its proponents and opponents are much greater than usual, the twin dangers of delay and inflexibility become more serious. Since congressional reform involves both public participation and efficient, responsible lawmaking, there are times when markups should be closed.

But this should be the rare occasion, not the common one. It is axiomatic that legislators respond to pressure. Pressure is most effectively applied by those with an intense, well articulated interest and a long memory. The lobby has these characteristics. The public, with a fleeting interest and a short memory, tends to have less influence on legislators unless its great potential power is somehow marshalled and brought to bear on a specific issue or bill. This can occur only when the public is exposed to the issue by the media and its interest is aroused. Public exposure of the mechanics of the legislative process serves at least two purposes: to educate the public through the media about the actual alternatives legislators are debating, and to expose legislators' actions on specific amendments and votes at crucial moments before a bill reaches the House floor.

Since the value of these two purposes is not easily disputed,

73 Of the seven who reported a change, two mentioned increased activity by consumer groups; two reported the same from "citizen groups"; one, from environmental groups; and two indicated an increase by "special interest groups."

Congressmen will probably hesitate before voting to close a committee proceeding. The result should be to maximize public disclosure of committee activities. That is why the presumption of openness is so important and why it was rightfully extended to markups.

BUDGET REFORM LEGISLATION: REORGANIZING CONGRESSIONAL CENTERS OF FISCAL POWER

ALLEN SCHICK*

Introduction

During 1973 legislation to establish a congressional budget process advanced in both Houses of Congress. H.R. 7130 passed the House on December 5 by a vote of 386 to 23.[1] S. 1541 was approved by the Senate Committee on Government Operations on November 8,[2] then was referred to the Committee on Rules and Administration,[3] and is likely to be considered on the floor during the 1974 session.

Common features of the two bills include the formation of budget committees in the House and Senate, the establishment of a congressional budget staff, an October 1-September 30 fiscal year with a deadline on new authorizing legislation, and, most important, a congressional budget process for determining spending totals and priorities, relating revenues to expenditures, and controlling backdoor spending. In brief, the new budget process would commence each year with adoption of a concurrent resolution on the budget that sets total revenue, spending, and debt levels; allocates the expenditures among budget categories; and determines the appropriate level of budget surplus or deficit. Congress then would go through a somewhat altered appropriations process in which it

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1 119 CONG. REC. H10,719 (daily ed. Dec. 5, 1973).

2 S. REP. No. 579, 93d Cong., 1st Sess. 96 (1973).

3 The Senate Committee on Rules and Administration has jurisdiction over matters "relating to parliamentary rules," STANDING RULES OF THE SENATE, Rule XXV, ¶ 1(p)(1)(E) (1973), and because of the rules changes that would be made by S. 1541, the committee can claim jurisdiction. Senators Percy (R.-Ill.) and Ervin (D.-N.C.) attempted on the Senate floor to persuade Rules and Administration to waive jurisdiction. This was rebuffed by Senator Byrd (D.-W.Va.), the Majority Whip of the Senate and a member of Rules and Administration. *See* 119 CONG. REC. S21, 364-67 (daily ed. Nov. 29, 1973).

would consider each money bill with an eye on the allocations set in the initial budget resolution. The congressional budget process would conclude with a final determination of revenue and spending levels and, if necessary, a reconciliation between these levels and the individual appropriation bills.[4]

Significantly, while recent efforts to establish temporary limitations on expenditures have been in the form of legislative enactments (bills or joint resolutions), the permanent controls provided in H.R. 7130 and S. 1541 would operate through concurrent resolutions, which are not signed by the President. This means that the limitations would apply only to Congress and would have no direct effect on executive actions. Accordingly, any ceiling imposed on itself by Congress might be exceeded by the executive branch if "uncontrollable" factors[5] (such as interest on the public debt) force expenditures above their budgeted levels.

Support for congressional budget reform has been substantial both on and off Capitol Hill. It has been generated by a growing consensus that present procedures have not worked; Congress has not been able to cope with its constitutional responsibility for the federal fisc.[6] As responses to this consensus, H.R. 7130 and S. 1541 have reflected the two dominant (and sometimes conflicting) concerns of Congress in budget reform: the need to create an effective, workable budgeting system, and the need to make that system's reallocation of budgetary power acceptable to the incumbent powerholders in Congress. This article will attempt to examine the effect of these two considerations on the 1973 budget reform legislation.

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4 Both bills also allow "permissible revisions" via the same budget resolution process any time during the fiscal year. *See* H.R. 7130, 93d Cong., 1st Sess. § 122(c) (1973); S. 1541, 93d Cong., 1st Sess. § 302(b) (1973). Unless otherwise designated, all citations to H.R. 7130 refer to the bill approved by the House, and all citations to S. 1541 refer to the bill reported by the Senate Government Operations Committee.

5 Although it has sometimes been used in congressional enactments, the term "uncontrollable" has no precise definition. The official phrase used by the U.S. Office of Management and Budget is "relatively uncontrollable under present law." *See* THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1974, at 333 (1973) [hereinafter cited as THE BUDGET].

6 "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." U.S. CONST. art. I, § 9, cl. 7.

I. The Course of Congressional Action

A. *A Brief History of Budget Reform*

Concern over how Congress exercises its spending power takes two forms. One worry is that effective control of the purse has gravitated to the President and his budget aides; the other, that Congress is not capable of acting responsibly and consistently on fiscal matters.[7] While these have been recurrent concerns, Congress has not often given consideration to budget reform, and when it has the outcome usually has been change in executive rather than legislative practices. The 1973 effort thus departs from the approach taken throughout this century by Congress to deal with the inadequacies of the budget system.

Prior to 1921, the United States Government had no executive budget system. Agencies negotiated directly with the appropriate congressional committees and there was no significant presidential involvement in the process. This arrangement was satisfactory as long as federal expenditures were modest and varied little from year to year. Except in wartime, government revenues ordinarily were sufficient to cover costs. The main and recurring budget issue was the preference of the executive branch for broad spending discretion versus the desire of Congress to maintain tight control over executive actions.[8] As the budget grew in size and scope Congress was impelled to yield more and more discretion to the executive. With the relaxation of spending control came increased utilization of deficiency appropriations as agencies exploited their discretion and expended their funds at rates that forced Congress to provide additional money during the fiscal year. In response, Congress passed Antideficiency Acts in 1905 and 1906[9] which required agencies to apportion their funds over the full fiscal year.[10]

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7 *See generally* S. Horn, Unused Power: The Work of the Senate Committee on Appropriations (1970); J. Saloma, The Responsible Use of Power (1964); R. Wallace, Congressional Control of Federal Spending (1960).

8 *See generally* L. Wilmerding, The Spending Power 118-79 (1943).

9 Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1258; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27.

10 The Antideficiency Act was amended in 1950 to authorize the establishment of budgetary reserves "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency

Budgetary growth also incited the fragmentation of the budget process within Congress. Until 1865 each House had a single committee to handle both revenue and spending bills (the House Ways and Means and the Senate Finance Committees), but in that year an Appropriations Committee was formed in the House of Representatives. A similar move was made in the Senate two years later. Ever since this split, Congress has lacked a committee process for relating revenue and spending policies.

Congressional budget procedures were further fragmented in the period between 1880 and 1920 as powerful legislative committees successfully wrested control over various money bills from the Appropriations Committees. Appropriations retained jurisdiction over deficiencies and some (generally minor) supply bills, but most of the important spending measures were processed through various legislative committees. More than half a dozen committees in each House were involved in the determination of spending policy.[11] Fragmentation was compounded by the absence of any comprehensive budget process in the executive branch.[12]

In 1921 Congress sought to remedy its own budget inadequacies by bolstering the budget power of the President. The Budget and Accounting Act of 1921 set up the executive budget system that has functioned for the past half century.[13] The President was made responsible for preparation and submission to Congress of an annual budget, and agencies were barred from presenting any estimates directly to Congress except by request of either House.[14] To discharge his much enlarged responsibilities, the President was given a Budget Bureau which at the time was placed in the Treasury Department but immediately forged for itself a special relationship with the President.[15] The entrenchment of executive budgeting was accomplished with comparatively few changes in the congressional budget process. The House and Senate returned

of operations, or other developments." Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765 (codified at 31 U.S.C. § 665 (1970)).

11 *See* R. FENNO, THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS 42-46 (1966); S. HORN, *supra* note 7, at 52-57.

12 For a concise review of the pre-1921 situation, see A. SMITHIES, THE BUDGETARY PROCESS IN THE UNITED STATES 49-66 (1955).

13 Act of June 10, 1921, ch. 18, 42 Stat. 20, *as amended*, 31 U.S.C. ch. 1 (1970).

14 Budget and Accounting Act § 206, 31 U.S.C. § 15 (1970).

15 *See* C. DAWES, THE FIRST YEAR OF THE BUDGET OF THE UNITED STATES ix-xi (1923).

jurisdiction over all money bills to their Appropriations Committees,[16] and the General Accounting Office was created.[17] Though it never has been formally designated a part of the legislative branch, the GAO serves as a staff agency for Congress.[18]

The executive budget system has operated with few legislative changes since 1921, but significant modifications have been achieved through executive orders,[19] reorganization plans,[20] and other administrative actions.[21] Over the years the President has extended his budget power to the control and management of the federal bureaucracy, and he has converted the Budget Bureau (now the Office of Management and Budget) into a powerful policymaking organization.[22]

As the budget power of the President has grown, Congress has attempted very few changes in its own operations. The most ambitious was the provision in the Legislative Reorganization Act of 1946 that Congress adopt a legislative budget fixing the maximum amount to be appropriated each year.[23] The legislative budget was tried in 1947 and 1948, but its failure led to its abandonment in subsequent years.[24] In 1950 Congress tried a more modest approach, consolidating all appropriations into a single measure.[25] The omnibus appropriations bill was successful in the sense that the single bill was enacted without much delay, but the omnibus

16 RULES OF THE HOUSE OF REPRESENTATIVES, Rule XI, cl. 2 (1973) (originally adopted June 1, 1920); STANDING RULES OF THE SENATE, Rule XXV, ¶ 1(c) (1973) (originally adopted Mar. 6, 1922).

17 31 U.S.C. § 41 (1970).

18 GAO lists as the first of its "basic purposes": "assist the Congress, its committees, and its Members to carry out their legislative and overseeing responsibilities consistent with its role as an independent nonpolitical agency in the legislative branch." U.S. GOVERNMENT MANUAL 1973/74, at 44 (1973).

19 In particular, Exec. Order No. 8248, 3 C.F.R. 1938-43 COMP. 576; Exec. Order No. 11,541, 3 C.F.R. 1966-70 COMP. 939.

20 Reorganization Plan No. 2 of 1970 converted the Bureau of the Budget into the Office of Management and Budget and altered the functions of the successor agency. 84 Stat. 2085 (codified at 31 U.S.C. § 16 note (1970)).

21 These have included the attempt to develop a Planning-Programming-Budgeting System (PPB) for the Federal Government. *See* 1 WEEKLY COMP. PRES. DOC. 141 (1965).

22 *See* Schick, *The Budget Bureau That Was: Thoughts on the Rise, Decline, and Future of a Presidential Agency*, 35 LAW & CONTEMP. PROB. 519-39 (1970).

23 Act of Aug. 2, 1946, ch. 753, § 138, 60 Stat. 812.

24 *See* Leiserson, *Coordination of Federal Budgetary and Appropriations Procedures Under the Legislative Reorganization Act of 1946*, 1 NAT'L TAX J. 118 (1948).

25 *See* Nelson, *The Omnibus Appropriations Act of 1950*, 15 J. POL. 274-88 (1953).

device was disliked by Appropriations subcommittee chairmen and it has not been tried again. During the 1950's and 1960's, drives were mounted in the Senate to establish a joint budget committee, but this move was resisted by House leaders who feared that a joint committee would infringe upon the initiative of the House in revenue and spending bills.[26] The Legislative Reorganization Act of 1970 contained a number of provisions to upgrade the budget information available to Congress, but it did nothing about the basic budget structure.

Why has Congress been unwilling or unable to change its budgetary methods? If its persistent, almost ritualistic, expressions of discontent are any indication, Congress has not been satisfied with the status quo since World War II or earlier. Members of Congress tend to believe that there is an unfortunate mismatch between the legislative and executive branches. This imbalance usually is expressed in terms of staff and data, but the complaint goes deeper, to the role and independence of Congress and its power over the purse. Why, then, has it not been possible to translate the pervasive despair into legislative action?

A full response would have to reckon with the accumulation of bureaucratic and political power by the Presidency, a trend which until recently was applauded by most opinion leaders in America. The shift in budget control is part of a much larger 20th century story of governmental reform biased in favor of centralized executive power. Perhaps nowhere was this bias more pronounced or persuasive than in the executive budget movement that swept all levels of American government in the first decades of this century. A generation of administrative reformers came of age with the belief that Congress — any legislative body — is a defective organization for making budgetary decisions. In the words of a leading reformer, "to be a budget it must be prepared and submitted by a responsible executive."[27]

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26 *See* Fisher, *Proposal for a Legislative Budget*, in SUBCOMM. ON BUDGETING, MANAGEMENT, AND EXPENDITURES OF THE SENATE COMM. ON GOVERNMENT OPERATIONS, 93D CONG., 1ST SESS., IMPROVING CONGRESSIONAL CONTROL OVER THE BUDGET 236-48 (Comm. Print 1973) [hereinafter cited as IMPROVING CONGRESSIONAL CONTROL].

27 Cleveland, *Evolution of the Budget Idea in the United States*, 62 ANNALS 17 (1915). Mr. Cleveland served as chairman of President Taft's Committee on Economy and Efficiency, which was influential in developing and campaigning for the executive budget system.

Swayed by the ideology of executive budgeting, Congress in 1921 assented to a great augmentation of presidential power. It did so in the expectation that the new budget process would enable it to assert effective control over the spending agencies. All agency estimates would have to go through the budgetary sieve, and Congress would thereby be relieved of direct pressure from the agencies. The President's budget would have no more force than that of a recommendation, and Congress would still decide how much to spend and for what. The concept of an executive budget as an instrument of congressional power prevailed during the 1920's as both branches of government were interested in disciplining the spending appetites of federal agencies. But the New Deal changed the balance of incentives, and the emergence of an active, expansionist Presidency converted the budget process into an instrument of presidential power.

Since the New Deal era, Congress has been in search of a budgetary role. The mission assigned by the Constitution — to control expenditures — no longer fits the reality of a legislative body that vies with the White House to propel more money into the pipeline. Nowhere is the passing of old roles more evident than in the impoundment confrontation between Congress and the President. It is the legislative branch that now presses for more spending against a recalcitrant President. Congress, however, is not institutionally prepared to become arbiter of both macrobudgetary policies and program priorities. Nor is there consensus within Congress as to what its new role should be. Considerable ambivalence derives from the tension between Congress' mandate to guard the treasury and its instinct to open the coffers to favored interests. From this ambivalence has come a failure to revamp the budgetmaking procedures of Congress to bring them into harmony with contemporary conditions.

B. *Wellsprings of Legislation*

The "battle of the budget" between a Republican President and Democratic Congress stimulated reform efforts. The triggering event was a demand voiced by President Nixon on July 26, 1972, that outlays for fiscal 1973 be held to $250 billion, almost $4 billion higher than his original budget estimate, but some $10 billion

below the amount the President estimated might be spent in the absence of a ceiling.[28] This demand was coupled with an attack against the "hoary and traditional procedure of the Congress, which now permits action on the various spending programs as if they were unrelated and independent actions."[29] The President contrasted his own fiscal responsibility with the profligacy of Congress, a theme which he successfully exploited throughout the 1972 election campaign.

The issue came to a boil during the last days of the 92d Congress. Both the House and the Senate approved ceilings on 1973 expenditures, but they were unable to reconcile differences over how much discretion the President should have in enforcing the ceiling, and the matter was dropped in conference.[30] However, the confrontation brought to the surface widespread feelings that Congress has lost control over spending. The rejection of a ceiling was based on unwillingness to cede more power to the President, not on satisfaction with the status quo. Recognizing its own budgetary disabilities, Congress established a joint committee (later known as the Joint Study Committee on Budget Control) to recommend "procedures which should be adopted by the Congress for the purpose of improving Congressional control of budgetary outlay and receipt totals."[31]

Long before the 1972 confrontation, there were signs of a breakdown in the appropriations process. One symptom was the growing reliance on continuing resolutions to keep federal agencies and programs in operation when regular appropriations have not been enacted by the start of the fiscal year. Typically, continuing resolutions are necessary for at least half of the appropriation bills. In fiscal 1973, no appropriation bill was enacted for foreign assistance or for the Departments of Labor and Health, Education, and Wel-

28 8 WEEKLY COMP. PRES. DOC. 1176 (1972).

29 In his 1974 budget message, President Nixon claimed that without his efforts to reduce expenditures, fiscal 1973 spending would have reached $261 billion. THE BUDGET, *supra* note 5, at 7. In his budget the President claimed some $11.2 billion in savings. For an analysis of the Administration's budgetary mathematics, see E. FRIED, A. RIVLIN, C. SCHULTZE & M. TEETERS, SETTING NATIONAL PRIORITIES: THE 1974 BUDGET 444-46 (1973) [hereinafter cited as FRIED].

30 A succinct and balanced review of the spending ceiling issue is presented in 30 CONG. Q. WEEKLY REP. 2907-10 (1972).

31 Act of Oct. 27, 1972, Pub. L. No. 92-599, § 301(b), 86 Stat. 1324.

fare.[32] While continuing resolutions are not as disruptive or dysfunctional as editorial writers and some Congressmen believe, their use is a visible indicator of congressional failure.

A second trouble spot is the portion of the budget officially listed as uncontrollable. In fiscal 1974, 75 percent of all expenditures are reported as "relatively uncontrollable under existing law," up 10 points from the corresponding percentage in fiscal 1969.[33] In dollar terms uncontrollable spending grew from $116 billion to $200 billion during this 5-year period. Uncontrollables now are the fastest rising portion of the budget and according to one conservative estimate they will be at least $50 billion higher in fiscal 1979.[34] The rise of uncontrollable expenditures means that the situation portrayed by Aaron Wildavsky a decade ago in *The Politics of the Budgetary Process*[35] does not fit the current budget condition. Where Wildavsky regarded the "base" (existing programs) as generally uncontrollable and the "increment" as the portion of the budget subject to political judgment, nowadays most of the increment also is beyond meaningful control. Much of the year-to-year climb in spending is the result of past actions taken by Congress or by the executive branch. In effect, Congress exercises current political power by foregoing future budget control.

A third and related problem is that Congress has no direct voice over how much is to be spent in a particular year. The appropriations power of Congress reaches only to budget authority — the authority to enter into obligations — not to cash outlays or expenditures.[36] Unlike the practice of state legislatures, Congress ap-

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32 This unusual situation in fiscal 1973 was due to executive-legislative conflict rather than to a breakdown in the appropriations process. President Nixon vetoed two HEW-Labor appropriations bills passed by Congress. Congress was unable to adopt a foreign assistance authorization bill because of a deadlock over United States involvement in Indochina.

33 THE BUDGET, *supra* note 5, at 333; THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1969, at 15 (1968).

34 Unpublished memorandum prepared by John Braden, Congressional Research Service (Oct. 16, 1973). Braden's calculations do not estimate how much might be uncontrollable in 1979 because of carryover obligations from prior years. The $50 billion increase is estimated primarily for "open-ended" programs.

35 A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (1964).

36 Of course, Congress has means outside the appropriations process to control outlays. One such device is the spending ceiling applied on a year-to-year basis. In the case of certain appropriations (for example, for salaries and operations),

propriates an amount sufficient to cover annual obligations, not the amount that will be expended during the fiscal year.[37] Once the obligation has been incurred, Congress has no control over when the actual expenditure will be made. With carryover balances now in excess of $300 billion, a sizeable portion of current expenditures derive from past congressional actions. In fact, almost $100 billion — more than 35 percent — of total 1974 outlays result from prior year carryovers.[38] This huge overhang not only weakens congressional control over spending; it also strips Congress of an incentive to take a hard look at requests for new budget authority. In many cases, added budget authority will cost very little in current year outlays; conversely, a reduction in requested budget authority often will not yield a comparable reduction in current outlays.

Another measure of budgetary inadequacy is the growing authorizations-appropriations gap, the discrepancy between the amounts authorized and appropriated by Congress. This gap first became significant during the late 1960's as Congress underfunded many of the new Great Society programs. The Advisory Commission on Intergovernmental Relations computed this gap for programs with fixed authorizations (many programs have open-ended authorizations) at more than $8 billion in fiscal 1970. That is, Congress had authorized $24 billion but appropriated less than $16 billion for various domestic programs.[39] Although more recent data are not available, the discrepancy between authorized and appropriated levels probably is considerably wider now than it was a few years ago. One byproduct of this gap has been the transformation of the authorizations process from an evaluation of on-

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there is a close relationship between obligations and outlays; and when appropriations are made to "liquidate contract authority," see text following note 41 *infra*, the connection is direct.

37 The Second Hoover Commission recommended that appropriations be made on an "accrued expenditure basis," that is, for the goods and services to be received in a fiscal year. The proposal has not been implemented. *See* COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON BUDGET AND ACCOUNTING 33-40 (1955); COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, BUDGET AND ACCOUNTING: A REPORT TO THE CONGRESS 17-25 (1955).

38 *See* THE BUDGET, *supra* note 5, at 32.

39 U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE GAP BETWEEN FEDERAL AID AUTHORIZATIONS AND APPROPRIATIONS: FISCAL YEARS 1966-1970, at 1 (1970).

going programs and the determination of new policies into a forum for the advocacy of higher spending by program supporters in Congress. The chasm between authorizations and appropriations is a barometer of the division in Congress between those who want higher spending levels and those who prefer lower budgets.

Another measure of this split is the increased use of backdoor spending methods to circumvent the regular appropriations process.[40] The term "backdoor" refers to funding devices in which new budget authority is provided by Congress outside the appropriations process.[41] One popular backdoor device is contract authority, which gives agencies power to enter into contracts in advance of appropriations. The appropriation is made at a later date, when cash is needed to liquidate the obligation. At this stage the appropriation is a perfunctory, uncontrollable act, for Congress must supply funds to cover the obligation which it previously authorized. A second type of backdoor spending is loan authority, permission granted by Congress to federal agencies to borrow from the Treasury or other sources. In terms of financial impact, the loan has the same effect as a direct expenditure, but it ordinarily is not authorized through the appropriations process.[42] In recent years, the most significant form of backdoor spending has been the mandatory entitlement of certain benefits to designated persons or governments. These entitlements often are provided through open-ended or permanent appropriations in which the funds needed to cover the entitlements are automatically appropriated without any current action by Congress.

Not only is backdoor spending supplied via a different route, it also receives preferred treatment compared to regular appropriations. Thus, during the 1969-73 fiscal years, Congress appropriated some $30 billion less than the President requested but added

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40 *See* Schick, *Backdoor Spending Authority*, in IMPROVING CONGRESSIONAL CONTROL, *supra* note 26, at 293-302.

41 The term "backdoor" sometimes is applied only to funding which is not processed through the Appropriations Committees, but here it is used in a broader sense to cover any item which skirts the appropriations process even if it goes through these committees.

42 Loan authority generally is used for commercial-type operations where an agency has receipts of its own such as the Postal Service or the Commodity Credit Corporation. The receipts sometimes are used to repay the Treasury, but more often they go into a revolving fund.

an equal amount through the backdoor.[43] Because backdoor programs receive more favorable handling, there is considerable incentive in Congress to use this route even though it generates more fragmentation in the congressional budget process. Thus "backdoors" proliferate; the Joint Study Committee has estimated that 56 percent of all new budget authority for fiscal 1974 will not go through the Appropriations Committees.[44]

The piecemeal and diffuse spending process means that at no time is Congress on record as to the total amount of expenditures that are to be made in any fiscal year. The total is merely the arithmetic summation of numerous decisions, some made during the current session, some made years ago, some contained in one of the dozen or more regular appropriations bills, some provided through backdoor methods. Along with its inability to specify the spending totals, Congress lacks a capability to relate these totals to overall revenues and to the surplus or deficit that will be produced in the budget. These budgetary aggregates are key determinants of the condition of the economy, yet they are accomplished without any direct or specific decision of Congress. The budget totals simply happen, though their economic impact is not lessened by the absence of congressional intent.

This lack of control over the budget aggregates has been a special concern of Congress in recent years. During the five years from 1969 to 1973, the budget deficit on a federal funds basis (that is, the budget minus trust accounts) exceeded $100 billion, while on a unified budget basis the deficit was about half that amount. In its annual assessment of the federal budget, the Brookings Institution in 1972 estimated that the budget would remain

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43 JOINT STUDY COMM. ON BUDGET CONTROL, RECOMMENDATIONS FOR IMPROVING CONGRESSIONAL CONTROL OVER BUDGETARY OUTLAY AND RECEIPT TOTALS, H.R. REP. NO. 147, 93d Cong., 1st Sess. 39 (1973) [hereinafter cited as JOINT STUDY REPORT]. The latter amount includes "mandatory" as well as "backdoor" spending. An appraisal of congressional actions which keeps score on a static year-to-year basis cannot supply a truly accurate account of the impact of congressional actions on the President's budget. For example, if Congress were to establish a new program to begin in the next fiscal year, not only would it not be "charged" for the cost in the current year, but to the extent that the President's budget will show the costs for the next year, the new expenditures would be attributed to him rather than to Congress. In other words, a multiyear accounting scheme is necessary for an accurate score of congressional actions.

44 *Id.* at 10.

in a deficit position even if revenues increased and no new programs were authorized.[45] This bleak fiscal prognosis was partly the result of a series of tax cuts enacted by Congress during the preceding 10 years which had the effect of reducing fiscal 1973 revenues $50 billion below what they otherwise would have been.[46]

The legislative divorcement of tax and spending policy has made it easy for Congress to lower taxes at the time that it has raised spending, but this practice has led to standstill budgets (in terms of programs) and persistent deficits. While Congress in the late 1960's tried to control spending by reducing taxes (in the expectation that expenditures would have to be in line — though not in strict balance — with revenues), the experience of the early 1970's showed that spending was driven upwards by uncontrollable forces. In its 1972 confrontation with the President, Congress was faced with dual adversities — unwanted deficits and little margin for program innovation. The unprecedented rash of presidential impoundments gave further urgency to the plight of Congress and fueled its interest in new budgetary methods.

C. *Budget Reform in Committee*

The budget predicament of 1973 was not the product of congressional ineptitude or irresponsibility but of the institutional imperative of Congress as a political body which gives voice to diverse interests and viewpoints. Congress has taken the budget apart because its comparative advantage vis-a-vis the executive is the sharing of power, and this quality has produced a fragmented and often inconsistent budget posture. If Congress were to have a centralized and cohesive budget machine, it would be an executive in legislative disguise. It was this characteristic of Congress which long ago led reformers to seek budgetary unity in the executive branch.

While critics now press for change on the grounds that Congress has lost power to the President, the overhaul of legislative processes ordinarily has much more to do with the distribution of power and position within Congress than with relations between the two branches. Because it often is difficult to take power from

45 FRIED, *supra* note 29, at 414.
46 JOINT STUDY REPORT, *supra* note 43, at 42-43.

the executive without also taking from some members and committees,[47] the drive for legislative reorganization frequently encounters resistance from threatened powerholders. The tension between enlarging and redistributing legislative power was omnipresent during consideration of the budget control legislation. The outcome would have to bring substantive improvement without depriving established powers of the benefits they derive from the status quo. Congress had to find coordination, but not centralization; it had to continue to give many interests a part of the budget power, but also to harmonize these interests into a reasonably consistent budget policy. The task was complicated by the sure knowledge that no reform could be truly neutral in its impact on future budgetary outcomes. The debate would be waged over rules and procedures, but at stake would be the programs and interests whose fate is decided in the budget process.

All members of Congress must have an interest in budgeting, even if they shy away from the technical and accounting details. Yet the 1973 legislative drive did not engage the membership at large, but only certain committees which have special interests in budget matters. While committees always are the crucial arena for legislation, they were even more decisive in budget reform. Members who were displeased with the overall concept of budget improvement or with certain particulars had to work through committees. It is not easy to oppose budget reform on the floor of the House or Senate. The shape of the budget legislation was strongly influenced by the committee environment in which it was fashioned.

1. The Joint Study Committee

This fact of congressional life helps to explain why the budget control bills which have passed the House and a Senate committee differ significantly from the legislation proposed in April 1973 by the Joint Study Committee on Budget Control.[48] The Joint Study

47 One reason for this condition is that the executive power often is accumulated and maintained with the assistance of allies in Congress.

48 Identical bills to implement the Joint Study Committee's recommendations were introduced in the House as H.R. 7130, 93d Cong., 1st Sess. (1973) (which in substantially altered form was reported by the Rules Committee and approved by the House) and in the Senate as S. 1641, 93d Cong., 1st Sess. (1973). For purposes of clarity, all citations to the Joint Study Committee bill will be to S. 1641.

Committee did not have to consider the potential effects of budget reform on all the relevant interests in Congress. Its composition dictated that the interests of the revenue and spending committees would predominate. Twenty-eight of the 32 members of the Joint Study Committee were drawn from the House and Senate Appropriations Committees, House Ways and Means, and Senate Finance. Only four came from the rest of the House and Senate. Moreover, the cochairmen and staff of the Joint Study Committee were from the revenue and spending committees.[49]

Although they are the most potent stakeholders in the budget process, these two sets of committees have had reason to be displeased with fiscal trends within Congress. The Appropriations Committees have suffered an erosion of their power as authorizing committees have devised new backdoor spending schemes. An end to backdoors was probably the number one objective of the Appropriations Committees members. This goal ran counter to the jurisdictional claims of the House Ways and Means and Senate Finance Committees, which handle all social security legislation as well as other backdoor programs. Shortly before the Joint Study Committee was established, the two Appropriations Committees lost floor battles in the House and Senate over the backdoor financing of revenue sharing,[50] and they were in no position to challenge Ways and Means and Finance over the issue of budget control. However, the authorizing committees (which had no direct representation on the Joint Study Committee) were more vulnerable to a raid on their backdoor practices.

Another problem which long has irked Appropriations Committee members is the late enactment of authorizing legislation, which in turn is a prime reason for the habitual failure of Congress to clear appropriation bills before the start of the fiscal year. Here again the Appropriations representatives were able to advance their case with no overt opposition from the affected authorizing committees.

One matter of some concern to the Appropriations members related to congressional control over outlays. As explained earlier,

49 The cochairmen were Representative Jamie Whitten (D.-Miss.) and Representative Al Ullman (D.-Ore.), the second-in-command Democrats on House Appropriations and Ways and Means, respectively.

50 *See* Schick, *supra* note 40, at 296.

the appropriations process is pegged to new budget authority rather than annual expenditures. As much as they may covet control over outlays, the Appropriations Committees have had little experience with the specialized accounting and cost estimation techniques that would have to be used for this purpose. They were familiar with data pertaining to new budget authority but somewhat unsure of their ability to specify the amounts of outlay that would be spent in a particular year. Yet the lack of direct congressional control over expenditures has been widely regarded as one of the deficiencies of the existing budget process and it was the precipitating issue in the creation of the Joint Study Committee. Accordingly, the Joint Study Committee had to find a way to move Congress toward outlay controls but without compromising the reliability of the appropriations process.

The Joint Study Committee posed one potential threat to the scope of the Appropriations Committees. Although it was set up to recommend procedures for coping with budget totals, early in its deliberations the committee decided that budget controls would have to reach to the various subtotals or components of the budget as well. In the view of many Congressmen, the abortive legislative budgets of 1947 and 1948 offered telling evidence that no ceiling could be enforced unless Congress also went on record regarding the maximum allocation for each budget category. The problem, however, was that any new control over budget categories would trespass on the jurisdiction of the Appropriations Committees and their subcommittees. Nevertheless, the Appropriations members of the Joint Study Committee subscribed to a unanimous recommendation in favor of budget subceilings, but the issue was revived during later consideration of budget control legislation.

While the budgetary power of Appropriations has waned in recent years, the House Ways and Means and Senate Finance Committees have bolstered their positions. The backdoor spending authority under their control accounts for an increasing share of the budget. The revenue committees were not faced with a major threat to their power in the Joint Study Committee, yet some of their leading members were concerned about the fiscal condition of the Federal Government, in particular the steep deficits that have plagued recent budgets. The revenue committees tended to

favor tough control over expenditures and the linkage of tax legislation to the overall condition of the budget. Given the composition of the Joint Study Committee, it was not difficult to secure these objectives.

The legislation that emerged from the Joint Study Committee reflected the domination of the spending and tax committees. The fundamental decision of the Joint Study Committee was to layer a new congressional budget process over the existing revenue and appropriations processes of Congress. There is no indication that the Joint Study Committee gave serious consideration to proposals that would merge the authorizations and appropriations processes.[51] Whatever disadvantage might inhere in an added layer of budget procedures, there is one overriding virtue: no congressional committee would suffer a direct loss of jurisdiction.[52] The road to congressional budget reform would be through an expansion of the process.

The charter of the Joint Study Committee did not authorize it to report legislation, and as a consequence the bills introduced pursuant to its report were referred to standing committees of the House and Senate.[53]

2. In the House of Representatives

H.R. 7130 was handled by the Rules Committee,[54] which differs from most of the other standing committees of the House in four ways bearing on its consideration of the budget bill. First, it is an exclusive committee and most of its 15 members serve on no other House committee. Any interests other committees may have had in

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51 For an outline of such a scheme, see the testimony of Charles L. Schultze in *Hearings on Budget Control Act of 1973 Before the House Comm. on Rules*, 93d Cong., 1st Sess. 319-21 (1973) [hereinafter cited as *House Rules Hearings*].

52 Although no committee jurisdiction would be directly infringed by the establishment of a new congressional budget process, some committees would lose because of other features of the legislation, *e.g.*, the control over backdoor spending.

53 In the House resolutions were introduced by Representative John B. Anderson (R.-Ill.) to enable the Joint Study Committee to report legislation, but no action was taken on it. H. Con. Res. 178, H. Con. Res. 179, 93d Cong., 1st Sess. (1973); 119 CONG. REC. H2537-38 (daily ed. Apr. 9, 1973).

54 When referred to the Rules Committee, the title of H.R. 7130 read in part, "A bill to amend the Rules of the House of Representatives and the Senate . . . ." As reported by the committee and approved by the House, the title was amended to strike these words. 119 CONG. REC. H10,720 (daily ed. Dec. 5, 1973).

the bill could not be effectively channeled through overlapping memberships. Second, Rules has no subcommittees. This meant that each member had standing to participate at an early stage and that the legislation was refined through a succession of committee prints rather than through sequential consideration by subcommittee and full committee. Third, Rules does not often have original jurisdiction over legislation. Most often it serves as the traffic regulator of the House, determining whether and the conditions under which legislation is considered on the floor. The committee generally considers bills "whole" rather than section by section, and it has had little experience with the detailed markup of legislation.

Finally, and of utmost significance, in recent years the House Rules Committee has become an arm of the Democratic Party leadership in the House. As the agent of the party leadership, the Rules Committee would have to report a bill that would be more than the viewpoint of a single committee. It would have to be a consensus bill which could attract support from all factions within the Democratic Party and would not provoke serious challenge on the House floor. The Rules Committee would not report a bill that might require Republican support in order to win House approval. Nor did it want a bill which would become identified as a partisan effort and which might expose the Democratic Party to the charge that it had abandoned genuine budget reform.

Fortuitously, the position sought by the Rules Committee came close to that staked out by the Appropriations Committee. In addition, liberal Democrats who preferred minimal new spending controls could make common cause with Appropriations even though they long had regarded the Appropriations Committee as a bastion of fiscal conservatism. From the liberal point of view, it would be better to fund their preferred programs through the appropriations process than to run the gamut of two layers of control — appropriations and budget.

While the House Appropriations members of the Joint Study Committee had endorsed the original H.R. 7130, their interest was concentrated in selected provisions rather than in the bill as a whole. In appearances before the House Select Committee on

Committees during June[55] and before the Rules Committee in August,[56] Chairman Mahon (D.-Tex.) of the Appropriations Committee employed the tactic of applauding the work of the Joint Study Committee but singling out the few items that he really wanted. Chief among these were an end to backdoors and a deadline on authorizing legislation.[57]

The first alternative to the Joint Study Committee approach to emanate from Appropriations came from one of its junior members, Representative David R. Obey (D.-Wis.), who had also directed a Democratic Study Group task force which had attacked the original H.R. 7130. In testimony before the Rules Committee, Mr. Obey proposed that a reconstructed budget process be centered on the work of the Appropriations Committees.[58] Stopping short of the omnibus appropriation device that was used in 1950, Mr. Obey advocated a more cohesive process within Appropriations including expanded overview hearings, more input from the authorizing committees, floor action on the individual spending bills during a compressed time frame, and reconsideration by Appropriations of the various bills after all have been approved by the House. The net effect would have been the transfer of some power from the subcommittees to the full Appropriations Committee. Mr. Obey argued that creating a new and separate budget process would undermine the Appropriations Committees. "Why not eliminate the Appropriations Committee entirely and within the limits set down by the budget committee let the authorizing committees do the appropriating?"[59]

While Mr. Obey's position may have represented the optimal outcome for Appropriations and liberal Democrats (for neither group was enthusiastic about new budget committees), sentiment in favor of these new committees was strong in other quarters.

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55 *Hearings on Committee Organization in the House Before the Select Comm. on Committees*, 93d Cong., 1st Sess., vol. 1, pt. 2, at 616-34 (1973) [hereinafter cited as *House Organization Hearings*].

56 *House Rules Hearings, supra* note 51, at 125-30.

57 *House Organization Hearings, supra* note 55, at 623-24.

58 *House Rules Hearings, supra* note 51, at 287-97, and in particular, 289-90. Representative Obey (D.-Wis.) was joined in his statement by Representative William Steiger (R.-Wis.).

59 *Id.* at 288.

Appropriations itself could not supply the macroeconomic guidance and opportunity for a debate on national priorities sought by those who favored a separate budget process. Appropriations would have to accept new budget committees, but not with the scope specified by the original H.R. 7130.

The preference of Appropriations was unveiled in a bill introduced on October 16, 1973, by Representative Jamie Whitten (D.-Miss.), who had served as cochairman of the Joint Study Committee. The Whitten bill, H.R. 10961, would have confined the budget committees to a macroeconomic advisory role, a capability which Appropriations lacked. The budget committees would report a resolution dealing only with spending totals which would guide but not constrain subsequent action on the individual appropriation bills. The Whitten bill was in many ways similar to a committee print of a revised H.R. 7130 that had been prepared by the Rules Committee. The main difference was that the committee print would have allocated the spending total among budget categories while there were no suballocations in the Whitten bill.[60]

H.R. 10961 was introduced as the Rules Committee began its markup of the budget legislation. In order for Rules to report a bill, it was necessary to reconcile the three dominant points of view: the Joint Study proposal which itself had been modified by Representative Ullman (D.-Ore.),[61] the Rules Committee print, and the Whitten bill. Inasmuch as the primary differences were between Whitten and the Joint Study bill, any agreement between these two parties was likely to be acceptable to the Rules Committee. The compromise which was worked out tilted more toward Whitten. In the give and take, it was necessary to recognize the salient interest of Appropriations in preserving its jurisdiction over spending matters, and as a consequence less affected parties bowed to its claim.

Although the compromise version was the product of consultations among Democratic Congressmen, it was not difficult to obtain general support from Republican members, and the revised

60 H.R. 10961, 93d Cong., 1st Sess. § 121(b) (1973); Comm. Print No. 3 [of the House Rules Committee], 93d Cong., 1st Sess. § 121(b) (1973).

61 *House Rules Hearings, supra* note 51, at 55-59. The modifications proposed by Mr. Ullman were unanimously endorsed by the House members of the Joint Study Committee.

H.R. 7130 was reported unanimously by the Rules Committee, but several Republicans and one Democrat reserved the right to offer amendments on the floor.[62] In two days of floor debate on December 4 and 5, 1973, the reported bill withstood a number of attempts to change certain provisions. Only two amendments concerning the layover period (between committee report and floor consideration of the budget resolution) were approved; all others were turned aside.[63] All the parties to the compromise joined in a successful effort to win approval of the version they had accepted. When the final vote was taken, many members who may have had misgivings about particular provisions voted in favor of H.R. 7130. With only 23 votes in opposition, budget control legislation had cleared one of the formidable obstacles to enactment.

3. In the Senate

The road has been substantially different in the Senate, in part because the Government Operations Committee had original jurisdiction and in part because the leadership structure of the Senate differs from that of the House. Not being one of the major committees,[64] Government Operations nonetheless has a number of leading Senators among its members. For almost two decades its chairman was John McClellan (D.-Ark.), who relinquished that post in 1972 to become chairman of Senate Appropriations. Mr. McClellan maintained an interest in budget reform during the 1950's and 1960's, but he did not participate actively in the consideration of the budget control legislation.[65] The new chairman of Government Operations was Senator Sam Ervin (D.-N.C.), who

62 Minority Views (opposing title II's impoundment controls) were presented by four committee Republicans, Representatives Martin (Neb.), Quillen (Tenn.), Latta (Ohio), and Clawson (Calif.). Separate Views were submitted by Representative Anderson; and Additional Views, by Representative Matsunaga (D.-Hawaii). H.R. REP. No. 658, 93d Cong., 1st Sess. 87-94 (1973).

63 One amendment provided that Saturdays, Sundays, and holidays would not be counted in computing the layover period from committee report to floor consideration; another extended the layover period from five to 10 days. 119 CONG. REC. H10,682-83 (daily ed. Dec. 5, 1973).

64 Government Operations is classified as a major committee. STANDING RULES OF THE SENATE, Rule XXV, ¶¶ 2, 6 (1973). But politically it has less stature than many other major committees.

65 During markup Senator McClellan's main interests were his joint budget committee idea and opposition to a large OMB-type congressional budget office. . . .

though actively engaged in the Watergate investigations introduced S. 1541, which became the bill which was marked up by the committee.[66] Another important participant was Senator Lee Metcalf (D.-Mont.), chairman of a new Subcommittee on Budgeting, Management, and Expenditures, to which S. 1541 was referred.

The Metcalf subcommittee's work stretched from March 1973, shortly after it was organized, until August, when it reported a revised S. 1541. Unlike the members of the House Rules Committee, the Senators on Government Operations did not have to balance the various interests in the Senate as a whole. But every member of the subcommittee also serves on at least one authorizing committee, with the result that they, more than their House counterparts, were alert to the potential impact of budgetary change on other congressional committees. This sensitivity explains why the Metcalf subcommittee achieved near unanimity in some of its deviations from the recommendations of the Joint Study Committee. For example, the Joint Study Committee had recommended allocating memberships on the new budget committees proportionately among three groups: the Appropriations Committees, Senate Finance and House Ways and Means, and the membership at large.[67] The Metcalf group voted to remove these quotas, thereby expanding the opportunities for appointment of Senators who are not on the Finance or Appropriations Committees. Another decision was to establish a Congressional Office of the Budget to serve all members and committees rather than a joint budget staff which would work only for the budget committees.

On the issue of spending control, however, the subcommittee was split 5 to 4 between those who wanted an early adoption of ceilings and subceilings on expenditures and those who insisted that the initial budget determination be in the form of a target that would not limit later congressional action.[68] The majority who supported ceilings favored a budget process that would inhibit the ability of Congress to adopt new spending programs in

66 S. 1541, 93d Cong., 1st Sess. (1973), was introduced on April 11, 1973, one week before the Joint Study Committee issued its final report. Nevertheless, many of the concepts in the initial version of S. 1541 were based on the proposals formulated by the Joint Study Committee.

67 The quota recommendation is discussed in the text following note 71 *infra*.

68 *Budget Reform: Action Likely Before 1974*, 31 CONG. Q. WEEKLY REP. 2448, 2451 (1973).

excess of a fixed ceiling. The minority who supported budget targets were Senators who were either inclined to higher spending levels or concerned that a binding process would prove to be unworkable and unacceptable to Congress.

Despite the wide difference between their positions, both sides had reason to want a compromise. A 5 to 4 division in subcommittee does not augur well for the legislation in full committee or on the floor. An additional incentive for compromise was that the main spokesmen for the divergent positions in the subcommittee were Senators Percy (R.-Ill.) and Muskie (D.-Maine), both of whom wanted to be identified with reform of the budget process. An attempt was made to reconcile the differences before the subcommittee reported S. 1541, but the effort did not succeed. Nevertheless, staff representatives met during the August recess and when the full committee took up S. 1541 late in September it was presented with an accommodation acceptable to Senators Percy and Muskie. The details of this compromise will be discussed later, but what it did was to retain a ceiling on total spending while allowing subtargets for individual budget categories.

This compromise formed the basis for markup of the legislation in the full committee. Although it did not please all members of the committee, the compromise remained intact and S. 1541 was reported unanimously in November — though with reservations by some Senators.[69] At the insistence of the majority whip, Senator Robert C. Byrd (D.-W. Va.), the legislation then was referred to the Senate Committee on Rules and Administration.

The final stage in the development of budget control legislation will have to be a House-Senate conference to iron out what are likely to be dozens of big and small differences. Some of these differences will derive from institutional competition between the House and the Senate, but some of the groundwork for compromise already has been laid in H.R. 7130 and S. 1541.

If there are no intractable hitches in the Senate or in conference, budget reform should be enacted in 1974 with an effective date no later than the 1976 fiscal year. This would mean an elapsed

69 Senator Metcalf and former Senator Saxbe (R.-Ohio) argued for less stringent budget control procedures and Senator Roth (R.-Del.) favored more rigid controls. S. REP. No. 579, 93d Cong., 1st Sess. 97-104 (1973).

time of barely two years from initiation to operationalization of a congressional budget system. Given the diverse stakes involved in budget control, the speed of congressional action attests to the broad agreement in Congress to do something about the budget.

II. Major Provisions of the Legislation

What happens when budget problems bump into budget interests can be seen in an examination of the main provisions of the budget control legislation. This and the succeeding sections will consider (a) budget committees and staffing, (b) the timetable of the budget process, (c) the congressional budget process, (d) rules and procedure, (e) tax policy, and (f) backdoor spending.[70]

A. *Budget Committees and Staffs*

1. The Budget Committees

During the markup of S. 1541 by Senate Government Operations, Senator McClellan unsuccessfully renewed his plea for a joint budget committee. There appears to be a consensus that separate House and Senate committees offer the most acceptable approach to budget reform. With separate committees, the House and the Senate can go their own ways on committee composition and procedures. As a matter of comity, each House will defer to the other on the composition of its budget committee. Thus, S. 1541 is silent on the makeup of the House Budget Committee, while H.R. 7130 is silent on the composition of the Senate Budget Committee.[71] Presumably each House will be able to write its own preference into the final legislation.

The Joint Study Committee initially proposed identical percentage quotas for the House and Senate Budget Committees. Under the original formula, one-third of the positions on each committee would go to Appropriations, one-third to Ways and

70 Title II of H.R. 7130, which deals with impoundment control, incorporates the provisions of H.R. 8480, 93d Cong., 1st Sess. (1973), which passed the House on July 25, 1973. 119 Cong. Rec. H6626 (daily ed. July 25, 1973). Impoundment control is not discussed in this article.

71 H.R. 7130, 93d Cong., 1st Sess. § 112 (1973) (blank section omitted in printing); S. 1541, 93d Cong., 1st Sess. § 102(a) (1973).

Means or Finance, and one-third to the membership at large. In addition, the chairmanships of the two committees would alternate between the spending and taxing committee members. For this purpose, existing House and Senate rules or policies limiting membership on major committees or the number of chairmanships which a member may hold would have been waived.[72]

From the start, committee composition was the most controversial feature of the budget legislation. The Democratic Study Group charged that the quota system was a retreat from the committee reforms promoted in recent Congresses by the House Democratic Caucus. It was concerned that the new congressional budget process would be dominated by fiscal conservatives from House Appropriations and Ways and Means and that it would be difficult for the membership at large to gain a fair hearing for its views.[73] The allocation of two-thirds of the positions to Appropriations and Ways and Means was defended by Al Ullman, cochairman of the Joint Study Committee, on the ground that

> the functions of the Budget Committee — to the extent they are performed by House and Senate committees at all — are presently performed by the appropriations and tax committees. As a result, it seems essential to me that there be a close coordination between the appropriations and tax committees and the new budget committee itself in order to make a legislative budget work.[74]

Nevertheless, Mr. Ullman offered to split the House Budget Committee 50-50 between the money committees and the membership at large.[75]

The compromise worked out by the House Rules Committee and approved by the House went further than the Ullman concession. As provided in H.R. 7130, the House Budget Committee would have 23 members; five each from Appropriations and Ways

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72 No Senator may serve as chairman of more than one standing committee. STANDING RULES OF THE SENATE, Rule XXV, ¶ 6(f) (1973). In the House the limitation on chairmanships is a matter of caucus policy rather than House rule.

73 *See* Democratic Study Group Special Report, Recommendations of the Joint Study Committee on Budget Control (May 10, 1973).

74 *House Rules Hearings, supra* note 51, at 57.

75 *Id.* The Ullman proposal called for a 20-member Budget Committee: five from Ways and Means, five from Appropriations, and 10 from the other legislative committees.

and Means, 11 from the membership at large, and one each from the Democratic and Republican leaderships. The net effect is to reduce the quota of the two money committees from the 67 percent proposed by the Joint Study Committee to about 44 percent.[76]

A number of other changes also are likely to curb the influence of Ways and Means and Appropriations. First, the 10 members from these committees would be selected by party caucuses rather than by the committees they represent. Second, there would be a modified rotation of membership, with no one permitted to serve more than two Congresses in any 10-year period.[77] Third, H.R. 7130 stipulates that Budget Committee selections are to be made without regard to seniority. Fourth, the chairman would not have to be one of the Appropriations or Ways and Means members and, under prevailing House policy, the same person could not serve as chairman of the Budget Committee while also chairing either of the other two committees. Finally, the party leaderships would be directly involved in setting congressional budget policy.[78]

With this unusual makeup, the Budget Committee would resemble no other committee of the House. In some ways (rotation and seniority) this makeup moves in the direction of giving the party caucuses a greater say in determining committee memberships, but in other ways (quotas) it tends to restrict the power of the caucuses. In assessing the possible impact of this unique arrangement, two features must be kept in mind. One is that the Ways and Means Committee doubles as the committee on committees for House Democrats, and it will make the selections (subject to caucus approval) for the House Budget Committee. Second, although the composition of the Budget Committee would be set in legislation, its status would be governed by the House rules. Accordingly, a majority of the House would be able to alter the structure of the Budget Committee. One possibility would be

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76 H.R. 7130, 93d Cong., 1st Sess. § 111(a) (1973).

77 *Id.* Membership on the Budget Committee during part of a year would be disregarded in computing the 4-year limitation.

78 At one point, the Rules Committee considered casting the Budget Committee into a committee directly controlled by the leadership. Under this scheme, all members of the Budget Committee would have been appointed by the Democratic and Republican leaderships. It was decided, however, that party and budgetary harmony would be better served by giving the leadership a voice in, but not control over, the committee.

for liberal Democrats to try to get their House caucus at the opening of a new Congress to instruct all Democrats to vote for a rules change. Inasmuch as liberal Democrats in recent years have been stronger in caucus than in the House as a whole, such a tactic might succeed.

In the Senate Government Operations Committee, an early decision was made that the Senate Budget Committee should have the same status as any other Senate committee. Hence, S. 1541 specifies only the number of members (15), but is completely silent on the manner of selection.[79] In markup Government Operations rejected a proposal that members of the Budget Committee serve for staggered terms and voted to establish a standing committee under paragraph 2 of rule XXV of the Senate.[80] That rule limits Senators to service on two major committees, and unless it were suspended or modified it would require most of the members appointed to the Budget Committee to resign one of their other committee assignments.

Much of the controversy over the Budget Committees has been tinged with the expectation that they would become elite or supercommittees. Yet the committees likely to be established would have significantly less power than was originally envisioned for them. The major slippage is due to the conversion of the budget resolution from a ceiling to a target (H.R. 7130) or modified ceiling (S. 1541). Moreover, the rigorous rules proposed by the Joint Study Committee for floor consideration of the budget resolution have been abandoned or substantially relaxed. The initial version of the bills would have made it difficult to alter the Budget Committee's recommendation on the floor, but the versions that have moved toward passage have fewer encumbrances on floor amendments.[81] In the Joint Study Committee proposal, the initial budget resolution would have been the most critical part of the congressional budget process; in the bills that have passed the House and a Senate committee, the crucial stage comes at the end, in a reconciliation

79 S. 1541, 93d Cong., 1st Sess. § 101(b) (1973).

80 S. REP. No. 579, 93d Cong., 1st Sess. 95 (1973). The vote in favor of making the Senate Budget Committee a standing committee was 7 to 1, with Senator Percy in dissent. *Id.*

81 The main change is the relaxation or abandonment of a "rule of consistency" for floor amendments. *See* part II(D) *infra*.

process that is largely controlled by the appropriations and revenue committees. As reported by subcommittee, S. 1541 gave the Budget Committees control over backdoor spending, but the bill reported by the Government Operations Committee places backdoor spending under the jurisdiction of the Appropriations Committees.

2. Congressional Budget Staffs

The future status of the Budget Committees will hinge in good part on the extent to which they are given control over a new legislative budget staff. While most discussions of budget staffing concentrate on the mismatch between executive and congressional resources, the most important impact of the new staff will be on the distribution of power within Congress rather than between the two branches. In budgeting, knowledge is power, and so too is others' ignorance. If the many are kept in the dark about budgetary data, alternatives, and outcomes, the few who are knowledgeable have a substantial advantage. On the other hand, if budgetary intelligence is widely shared, fiscal power would be similarly dispersed.

In the budget control legislation, one issue being debated is whether Congress should create a separate budget office or one tied to the new Budget Committees. S. 1541 opts for a Congressional Office of the Budget (COB), and gives it broad power to obtain services and information from executive agencies as well as from other congressional agencies (the Library of Congress, General Accounting Office, and the Office of Technology Assessment).[82] Section 202(a) vests the new office with the responsibility for assisting the House and Senate Budget Committees, while § 202(b) authorizes the budget office to assist other committees and members "to the extent practicable." Although the Congressional Office of the Budget would serve Congress as a whole, the Government Operations Committee in its report on S. 1541 anticipates "that a close relationship between the Budget Committees and the COB will be developed."[83] To foster this relationship the Budget Committees would "review, on a continuing basis, the

82 S. 1541, 93d Cong., 1st Sess. § 201(e) (1973).
83 S. REP. No. 579, 93d Cong., 1st Sess. 32 (1973).

conduct of its functions and duties by the Congressional Office of the Budget."[84]

A number of provisions of S. 1541 are likely to work against a close relationship, however. As standing committees, the new Budget Committees will be able to establish staffs of their own. There is consequently a real possibility that Congress, which has been criticized for a lack of budget staffs, soon will have two entirely new sets of staff in the budget office and in the Budget Committees, while retaining the existing committee staffs which now deal with the budget (Appropriations, Finance, Ways and Means, Joint Economic Committee, and Joint Committee on Internal Revenue Taxation).[85] Moreover, the Budget Committees would have no special role in the appointment of the Director of the Congressional Office of the Budget, nor would they have much control over the several statutory responsibilities vested in COB by S. 1541.[86]

The Senate Committee is forthright in its explanation of why it favors a new budget office: "The central reason is the Committee's strong belief that all Members of Congress and all committees should have ready access to expert assistance on fiscal and budgetary matters."[87] Yet H.R. 7130 proceeds in a different direction with a Legislative Budget Office to assist the House and Senate Budget Committees. The Director of the Office would be appointed by the Speaker upon the recommendation of the House Budget Committee.[88] However, in a concession to those who want a budget staff for Congress as a whole, § 173 provides that "any information and data readily available in the files of the Legislative Budget Office, and related technical assistance, may be furnished upon request to committees and Members of the House and Senate."

As conceived in H.R. 7130, the Legislative Budget Office would

84 S. 1541, 93d Cong., 1st Sess. §§ 101(a)((r)(2)(D)), 102(b)(5)(h)(4)) (1973) (identical language).

85 The Senate bill would abolish the Joint Committee on Reduction of Nonessential Federal Expenditures and transfer its duties and functions to the Congressional Office of the Budget. *Id.* § 202(c).

86 In particular, § 304 gives the Congressional Office of the Budget a major role in determining the effects of floor action on the consistency of the budget resolution, while § 307 gives it a similar role in determining the compliance of appropriation measures with the budget resolution.

87 S. REP. No. 579, 93d Cong., 1st Sess. 31 (1973).

88 H.R. 7130, 93d Cong., 1st Sess. § 171(a) (1973).

be a hybrid, neither a regular committee staff nor a separate GAO-type office. The Budget Office would have considerable discretion in determining whether to serve non-Budget Committee clients, but it would not be merely a committee staff such as was proposed by the Joint Study Committee.[89] Would the Budget Committees be able to establish their own staffs should they so desire? H.R. 7130 seems to allow this option, but in a colloquy during floor debate Representative Bolling (D.-Mo.) was asked whether the Legislative Budget Office would function as the staff of the Budget Committees. He replied: "That is the intent of the language. That is the only staff that I know of. His [Legislative Budget Office Director] would be the staff presumably for both committees, the House Committee and the Senate Committee."[90]

Both the House and the Senate bills specify that the budget staffs are to be professional and nonpartisan. If this posture were maintained, it might offer some inducement to the Budget Committees to develop their own staff capabilities. Or the Budget Office might come to resemble the Joint Committee on Internal Revenue Taxation, which manifests close fidelity to the committees it serves (House Ways and Means and Senate Finance) while preserving a reputation as a nonpartisan, expert staff.[91]

B. *Timetable of the Congressional Budget Process*

Time is a scarce and influential factor in budgetmaking. The press of deadlines limits both bold departures from past decisions and analytic explorations of alternative courses of action. Appropriation bills often are reported shortly after necessary authorizations have been enacted, and are swiftly considered on the floor within a few days after the committee has reported. Failure to enact all appropriations when the fiscal year begins is accepted by Congress as an indicator of its budgetary inadequacy.

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89 JOINT STUDY REPORT, *supra* note 43, at 27. The Joint Study Committee's concept was designed to find a middle ground between those who wanted separate House and Senate committees, and those who wanted a single committee. There would be two committees, but they would share the same staff.

90 119 CONG. REC. H10,700 (daily ed. Dec. 5, 1973).

91 Although it serves both the House and Senate committees, the Joint Committee on Internal Revenue Taxation appears to have had a closer relationship with House Ways and Means than with Senate Finance. This may be due in large part to the differing roles of the two committees in tax matters.

The congressional budget process would complicate the time problem by interposing a new layer of decisions between the authorization and appropriation stages and by attaching a reconciliation sequence at the end of the process. Nevertheless, neither the Joint Study Committee nor the Senate or House committees in their early consideration of the budget reform legislation proposed a change in the fiscal year. The Joint Committee on Congressional Operations had examined the issue in 1971 and recommended against a change.[92] Key congressmen such as Chairman Mahon of House Appropriations were skeptical of the value of a fiscal year shift, and there was much apprehension that a change would adversely affect state and local governments whose budget processes have been keyed to a July 1-June 30 fiscal year.

As the House Rules Committee and Senate Government Operations Committee proceeded to mark up the budget legislation, they both became convinced it was desirable to alter the fiscal calendar. An October 1-September 30 fiscal cycle was proposed by Comptroller General Staats in testimony before the Rules Committee.[93] An October 1 start would be acceptable to state and local officials and it would allow completion of the budget process before the biennial elections.

The October 1-September 30 fiscal timetable is incorporated into H.R. 7130 and S. 1541,[94] but these bills still differ about some components of the annual budget schedule. H.R. 7130 sets a March 31 deadline on new authorizing legislation, while the date is fixed at May 31 in the Senate bill.[95] H.R. 7130 also provides that the deadline could be waived in the House by an emergency resolution reported by the Rules Committee and adopted by the House.[96] S. 1541 contained an emergency waiver provision when it was reported by the subcommittee, but the provision is gone in the version reported by the full Government Operations Committee.[97]

92 H.R. REP. No. 614, 92d Cong., 1st Sess. 1 (1971).

93 *House Rules Hearings, supra* note 51, at 220.

94 H.R. 7130, 93d Cong., 1st Sess. § 151 (1973); S. 1591, 93d Cong., 1st Sess., tit. 5 (1973).

95 H.R. 7130, 93d Cong., 1st Sess. § 143(a) (1973); S. 1541, 93d Cong. 1st Sess. § 403 (1973).

96 H.R. 7130, 93d Cong., 1st Sess. § 143(b) (1973).

97 The waiver would have been a statement by the committee reporting the legislation that conditions warrant an extension beyond the deadline. An alternative possibility is for a resolution of waiver to be introduced by the majority leader

The shift to an October 1 fiscal calendar will not by itself put an end to continuing resolutions. This goal might be achieved through other features of the legislation such as the deadline on authorizations and the establishment of a budget process. Both bills bar the adjournment of Congress until all phases of the budget process (including a final reconciliation) have been completed;[98] if this provision is enacted Congress would not be able to take its customary adjournment while some appropriations are being funded on a continuing basis. However, if Congress is stalemated on an appropriation measure, it might prefer to suspend its anti-adjournment rule than remain in session in a futile effort to break the deadlock.[99]

C. *The Congressional Budget Process*

The proponents of budget reform have sought a process for the determination by Congress of total revenues, total expenditures, and the budget surplus or deficit. For many, the objective also is a new congressional capability to debate and decide the spending priorities of the Federal Government. In short, the purpose is to create a budget process for Congress, paralleling in many ways the budget process that has been available to the President since 1921. While the establishment of a congressional budget process undoubtedly will have great implications for the executive branch, there has been little sentiment expressed during consideration of this legislation to curb the President's powers or to alter directly the budgetary behavior of the executive branch. The aim has been to give to Congress, not to take from the President.

But reform must reckon with those who are not eager to receive, especially those in the entrenched centers of congressional power.

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and approved by the Senate. Some consideration was given in Senate Government Operations to allowing the Appropriations Committees to waive the requirement that appropriations be previously authorized and to report appropriations lacking authorization after the deadline. But it would be difficult to distinguish between programs which lack authorizations because they have expired and those which are new and have never been enacted by Congress.

98 H.R. 7130, 93d Cong., 1st Sess. § 123 (1973); S. 1541, 93d Cong., 1st Sess. § 309(g) (1973). The latter also bars a recess after September 30 for more than three days unless the reconciliation requirements have been fulfilled.

99 Of course, a "must" deadline sometimes helps break what otherwise might be an intractable deadlock.

One result is that both H.R. 7130 and S. 1541, out of deference to the money committees, seek reform by interposing yet another layer of committee decisionmaking. Each bill also adds a final reconciliation process. Reform by expansion results in a process that requires more work and more time. The new budget process would consist of three linked but distinct stages: initial budget determination, appropriations, and reconciliation. Each of these is here considered in turn. Three related issues are also raised: control over budget subtotals, control over outlays, and provision for contingencies.

1. Initial Budget Determination

Under both H.R. 7130 and S. 1541, early each year Congress would adopt a concurrent resolution setting forth total budget authority, outlays, revenues, surplus or deficit, and debt. In the House bill, this action would be completed by May 1 and it would have the status of a "tentative congressional budget,"[100] whose "targets" could be superseded by later congressional action. In contrast, S. 1541 would have the first budget resolution prescribe "ceilings" on total budget authority and outlays, as well as any recommended changes in the level of federal revenues or debt. Adoption of the first budget resolution would be by July 1, some two months later than the date allowed in H.R. 7130. This later date was part of the Muskie-Percy compromise and was selected to allay the apprehension of some Senators that Congress would not have an opportunity to consider new spending priorities prior to adoption of the budget resolution. Another feature of that compromise was the softening of the budget subtotals from firm ceilings to "appropriate levels" or targets.

While it has come to symbolize the divergent positions on budget control, the ceilings-versus-targets difference may not be what it appears to be. A target can function as a psychological ceiling, while a ceiling is apt to be a movable target. Once Congress has adopted a target, it must bear political costs in raising the total; on the other hand, no ceiling can withstand changing circumstances or a change in congressional attitudes. Thus the difference

100 This is the term applied to the first budget resolution in H.R. 7130, 93d Cong., 1st Sess. § 121 (1973).

is essentially one of degree, not of kind, at least insofar as the appropriations part of total expenditures is concerned. Year after year, total appropriations enacted by Congress are below the totals recommended by the President.[101] The portion of the budget which spills over the initial target consists either of truly uncontrollable items such as interest payments or of backdoors mandated by Congress. Concerning these types, it is not realistic to expect significant restraint from an early budget resolution.

The choice between ceilings and targets is still significant, however. By abandoning strict ceilings, Congress would shift emphasis from its initial to its final determinations. To the extent that Congress feels flexible within targets, the influence of the Budget Committees (which report on initial totals) will suffer. And the flexing will be done by others, most notably the Appropriations Committees.

2. Control over Subtotals

Budgetary conflict during consideration of the first budget resolution probably would be concentrated on how to allocate the total among programs and agencies. At this point Congress would have a priorities debate, deciding how much for defense, how much for education, how much for each category within the budget. Both H.R. 7130 and S. 1541 provide for the allocation of budget totals among subcategories, but they define the subcategories differently. In S. 1541 the allocations are to be made on the basis of committees, and they "may be further subdivided among the subcommittees of such committees or on the basis of major program groupings."[102] Under this formula there would be one target for each of the 13 regular appropriation bills Congress handles each year. H.R. 7130 provides for allocations among the "functional categories" set forth in the President's budget. At the present time there are 14 such categories and they diverge in many instances from the appropriation categories used by Congress.[103]

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101 *See* JOINT STUDY REPORT, *supra* note 43, at 36.

102 S. 1541, 93d Cong., 1st Sess. § 301(a)(2) (1973).

103 H.R. 7130, 93d Cong., 1st Sess. § 121(b) (1973). The categories in the President's budget are national defense, international affairs and finance, space research and technology, agriculture and rural development, natural resources and environ-

There is active dispute over whether subtotals should be included at all. The case for inclusion is based on the asserted need for a unified priorities debate. Proponents of subtotals argue that Congress should be forced to make explicit choices among programs. Another argument has been that a decision on total expenditures would have little effect unless it was tied to specific allocations to budget categories.

Many interests in Congress are unreceptive to subtotals precisely because they would prefer to avoid such explicit choices. Fear that debates over priorities would interfere with the macroeconomic function of the initial budget resolution is another reason advanced in opposition to subtotals.

House-Senate differences over how subtotals should be arranged are more than a purely organizational concern. Subtotals by committees and subcommittees could inhibit the discretion of the Appropriations Committees as they consider each bill. Subtotals by functional categories, insofar as they must be broken up and reshuffled to fit the bills, leave Appropriations more latitude.

There is some uncertainty as to how the functional targets would operate. It is not difficult to reconcile functional and appropriation accounts, but quite another matter to control appropriations on the basis of functional decisions.

3. The Appropriations Process

After passage of the initial budget resolution Congress would be able to act on the individual appropriation bills in a manner that is not substantially different from existing practice. S. 1541 provides that at each stage of the appropriations process, Congress is to be informed of how its actions — on the individual bills and in the aggregate — compare to the budget targets.[104] Moreover, each appropriation bill would have to contain a provision that it would

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ment, commerce and transportation, community development and housing, education and manpower, health, income security, veterans benefits and services, interest, general government, and general revenue sharing. THE BUDGET, *supra* note 5, at 67. H.R. 7130, 93d Cong., 1st Sess. § 145 (1973), provides that changes in these functional categories may be made only in consultation between OMB and the Budget Committees.

104 S. 1541, 93d Cong., 1st Sess. § 307 (1973).

not take effect until any required reconciliation has been completed by Congress.[105]

H.R. 7130 also keys its appropriation bills to the reconciliation bill, but it allows all such bills which are within the targets allocated in the initial budget resolution to move to final enactment. However, any bill which provides new budget authority in excess of the amounts allocated in the budget resolution would not be enrolled or sent to the President until any required reconciliation has been accomplished.[106]

The difference between the two procedures, then, is that under S. 1541 when the appropriations are transmitted to the President he would not be sure whether the amounts contained in them would be the amounts actually triggered by the reconciliation, while under H.R. 7130 the bills he receives would show the amounts actually appropriated. But inasmuch as H.R. 7130 provides for the subsequent rescission of appropriations by Congress, there still would be a possibility of final appropriations below the amounts initially enacted into law.[107]

H.R. 7130 contains two features designed to induce a more coordinated appropriations process within Congress. One is that no bills would be reported by the House Appropriations Committee until it has completed action on all the regular appropriation bills; the other, that the committee report would compare the amounts provided in these bills with the appropriate levels set in the budget resolution.[108] These changes would promote a modest shift in power within Appropriations from the individual subcommittees to the full committee, but they would stop far short of the cohesive process provided by an omnibus bill.

4. The Reconciliation Process

Possibly the most important modification made by H.R. 7130 and S. 1541 in the budget legislation is the elaboration of a reconciliation stage during which firm budget decisions would be

105 *Id.* § 308(b).

106 H.R. 7130, 93d Cong., 1st Sess. § 127 (1973).

107 Due to some ambiguity as to whether the Appropriations Committees possess jurisdiction over rescissions, the House and Senate bills both specifically accord them jurisdiction. *Id.* § 144; S. 1541, 93d Cong., 1st Sess. § 404 (1973).

108 H.R. 7130, 93d Cong., 1st Sess. § 131 (1973).

made. The Joint Study Committee had recommended a second budget resolution and a wrap-up appropriation-tax bill prior to adjournment, but this was not conceived of as a major reexamination of the budget condition.

The purpose of the reconciliation (called ceiling enforcement in S. 1541) is to ensure that the individual appropriation actions are consistent with the totals prescribed in the budget resolution. But reconciliation in S. 1541 has an important additional function: to make it politically onerous for Congress to raise the ceilings set in the initial budget resolution.

As formulated in H.R. 7130, reconciliation would begin with adoption by September 15 each year of a "final" budget resolution (subject to permissible revision by Congress) setting budget totals and directing the appropriate committees to report whatever tax, debt, or spending legislation is necessary to implement the resolution.[109] If the amounts previously appropriated totaled in excess of the initial budget resolution, Congress would have a number of options. It could raise the authorized total in the second budget resolution to the aggregate level of the appropriations, and if this were done some further reconciliation might be necessary to bring revenues and debt into line with the amounts anticipated in the budget resolution. An alternative procedure would be to reduce spending levels (through rescission of enacted appropriations or amendment of the bills held up pending reconciliation). In other words, any combination of actions that make appropriations, total spending, debt limits, and revenues consistent with one another would be permitted.

S. 1541 has a multilayered reconciliation process, with a prescribed sequence of events.[110] As mentioned earlier, all appropriation bills would be sent to the President in the regular manner, but their new budget authority would not become effective until enactment of triggering legislation. If total appropriations were within the ceiling fixed by the initial budget resolution, Congress would adopt this legislation, the new budget authority would be-

109 *Id.* § 122(b). The title of this section is "Final Determination of Congressional Budget."

110 S. 1541, 93d Cong., 1st Sess. § 309 (1973). The complex reconciliation process is explained in S. REP. No. 579, 93d Cong., 1st Sess. 21-23 (1973).

come available, and the congressional budget process would be complete.

If appropriations were above the budget ceilings, Congress first would be required to consider a ceiling enforcement bill rescinding an amount of new budget authority to bring the appropriations into line with the previously established ceilings. Thus, the first option during reconciliation must be budget cuts; only if this failed could Congress adopt a new budget resolution with higher ceilings to cover all or part of the excess appropriations.[111] After adoption of this revised budget resolution, Congress would once again consider a ceiling enforcement bill to achieve consistency between appropriations and the budget resolution. Finally, if Congress failed to adopt either a second budget resolution or a ceiling enforcement bill, the Appropriation Committees would be required to report a bill making pro rata rescissions in all but uncontrollable appropriations.

This multilayered process is justified by the Government Operations Committee as a means to ensure "(1) that an effort will be made to keep spending within the limits set by Congress as part of a comprehensive budget and (2) [that] if those limits are to be exceeded, that will occur in the form of a comprehensive revision of the budget in all of its facets, and not simply as the result of upward spending pressure."[112] But difficulties might arise in the application of these complex procedures. For one thing, the entire process must be compressed into the few days between enactment of appropriations and the start of the fiscal year. It is unclear what constitutes an uncontrollable expenditure, and though pro rata cuts are authorized only as a last resort, they might come into play before Congress is stalemated on the budget.[113] Moreover, the whole process could be short-circuited by adoption of a budget

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111 The bare words of § 309(e) may generate some confusion, for they say that the ceiling enforcement bill reported after adoption of the second budget resolution "shall rescind amounts of new budget authority or other budget authority so that the total new budget authority and outlays for the fiscal year do not exceed the limitations set forth in the second concurrent resolution." But if the second budget resolution raised the ceiling to the level of budget authority previously provided, rescission would be unnecessary.

112 S. REP. No. 579, 93d Cong., 1st Sess. 22 (1973).

113 However, the Senate committee report expresses the hope "that the pro rata rescission will never be needed." *Id.* at 23.

resolution pursuant to § 302(b), which authorizes the revision of the initial budget resolution any time during the fiscal year.

5. Control of Outlays

The congressional interest in budget reform was ignited by a dispute over how much money should be *spent* in a fiscal year. Accordingly, it was taken for granted by the Joint Study Committee that budget controls should cover outlays as well as budget authority. As recommended by the Joint Study Committee and provided in S. 1541, outlay controls would be applied at three points in the budget process. First, the budget resolution would set outlay ceilings for the budget and targets for each appropriation or program category.[114] Second, whenever required by the budget resolution, appropriation bills would specify the amount of outlays allowed under both new and carryover budget authority.[115] These outlay limits would be harmonized with the levels set in the budget resolution through the reconciliation process. Third, Congress would impose outlay limitations on programs funded under permanent budget authority (authority which becomes available without current action by Congress).[116]

Even if Congress can develop the capability to estimate the cash expenditures to be incurred during a particular fiscal year, it is not likely that limitations on permanent budget authority will have much force. Such authority generally is open-ended and Congress is not inclined to deny funds needed to pay federal obligations. If social security or interest costs exceed the budget limitations, the odds are that Congress would boost the limits. Thus the outlay limitations are most likely to be utilized where they are least needed: where there is a close link between outlays and budget authority and where Congress has effective control over expenditures.

H.R. 7130 deletes the specification of outlays in appropriation bills and the control over permanent budget authority. But it retains outlay targets in the budget resolution and requires the reconciliation of total outlays with those which will result from the

114 S. 1541, 93d Cong., 1st Sess. § 301(a)(2) (1973).

115 *Id.* §§ 301(a)(9), 401.

116 *Id.* § 401(a)(2). There is a discrepancy between the heading and the content of this section. The heading refers to "Action by Budget Committees," but the action actually would be taken by the Appropriations Committees.

individual appropriation bills.[117] It is not clear how this requirement would be enforced, inasmuch as appropriation bills would not have outlay levels.

6. Provision for Contingencies

Unanticipated events are a recurring fact of budgetary life. Over the past decade, Congress has enacted an average of three supplemental appropriation bills containing $10 billion in new budget authority each year. Under the July 1-June 30 fiscal cycle, Congress ordinarily adopts two supplementals, one before annual adjournment and another before the fiscal year ends.

The Joint Study Committee proposed two reserve funds: an emergency reserve (not to exceed 2 percent of appropriations) to be allocated by the Appropriations Committees, and a contingency reserve for new programs and expansions to be allocated by a pre-adjournment budget resolution.[118] Under this arrangement the first budget resolution would have been oriented primarily to continuing programs, thereby moving toward the institutionalization of incremental budget rules.[119] The 2-percent emergency reserve would have given some measure of flexibility to the Appropriations Committees, and further flexibility (in the form of a 1-percent margin) was proposed by Representative Ullman in his August testimony before the Rules Committee.[120]

All reserves and contingencies have been dropped from S. 1541 and H.R. 7130. In addition, the Senate bill specifically provides that supplementals and deficiencies must be within the budget ceilings.[121] The reserves have been eliminated because there is no way for Congress to set aside meaningful amounts of money for unexpected occurrences. Any reserve is likely to be preempted by known claims on the budget, and Congress would not set a budget level higher than the President's merely to be prepared for later developments.

Both bills do make allowance for permissible revisions of the

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117 H.R. 7130, 93d Cong., 1st Sess. §§ 122, 127 (1973).

118 S. 1641, 93d Cong., 1st Sess. § 121(b)(5) (1973).

119 *See generally* Wildavsky, *The Annual Expenditure Increment*, in *House Organization Hearings, supra* note 55, vol. 2, pt. 2, at 636-58.

120 *House Rules Hearings, supra* note 51, at 59.

121 S. 1541, 93d Cong., 1st Sess. § 311 (1973).

budget resolution any time during the fiscal year. If the unexpected occurred, Congress would have to revise the budget and appropriate additional money to make new funding available. Presumably Congress would also have to adopt a new budget resolution prior to passage of its regular supplemental appropriations. But the shift in the fiscal calendar may make it possible to manage with a single regular supplemental each year. Should uncontrollables zoom above expected levels, the spending might occur even if Congress takes no action. Thus the Federal Government might find itself with two different budget totals: actual expenditures and those anticipated by Congress in its budget resolutions.

D. *Rules and Procedures*

For a number of reasons, the Joint Study Committee formulated special rules and procedures to govern the new congressional budget process. One reason is that unless the various budget actions proceed through the legislative labyrinth without disruption, Congress might be unable to meet the deadlines. Inasmuch as it would not be in order to consider appropriation bills until the initial budget resolution was adopted,[122] there is a danger that any logjam at the budget stage would block action on the appropriations. To avert this possibility, both H.R. 7130 and S. 1541 give the budget resolutions privileged status and bar certain motions which might be used to delay consideration of these resolutions.[123]

Another set of rules devised by the Joint Study Committee was designed to ensure consistency in the budget resolution. No floor amendment would have been allowed if its effect would have been to make the budget resolution inconsistent.[124] This "rule of consistency" meant that if a member proposed to increase the allocation for one budget category, he also had to propose an offsetting decrease in another category or an increase in budget totals. The

122 Each bill has an exception to this prohibition. H.R. 7130, 93d Cong., 1st Sess. § 126(b) (1973); S. 1541, 93d Cong., 1st Sess. § 305(b) (1973). These sections exempt "new budget authority which first becomes available in a fiscal year following the fiscal year to which the concurrent resolution applies."

123 H.R. 7130, 93d Cong., 1st Sess. § 124(b) (1973), deals with floor procedure in the House; the section dealing with Senate procedure is to be supplied by the Senate. S. 1541, 93d Cong., 1st Sess. § 304 (1973), provides identical floor procedures for the Senate and the House.

124 JOINT STUDY REPORT, *supra* note 43, at 25.

net effect of this rule would have been to render it somewhat difficult — but not impossible — for amendment on the floor.

The consistency rule was criticized by the Democratic Study Group on the ground that it would work against increased spending for domestic programs and that many amendments might be out of order because of a House rule barring amendments in the third degree.[125] H.R. 7130 discards all rules of consistency except for one relating to the amendment of the budget resolution to achieve mathematical consistency prior to final adoption.[126] S. 1541 retains a modified rule of consistency with the obligation of consistency shifted from the member moving an amendment to the House or Senate as a whole. There would not be any bar to floor amendments, but the House or the Senate would not be permitted to adopt an inconsistent budget resolution. The Senate bill prescribes conditions under which the budget resolution would be recommitted to the Budget Committee with instructions to report a consistent resolution.[127]

The Joint Study Committee also formulated special rules to ensure absolute compliance with the budget resolution during consideration of appropriation bills.[128] Amendments proposing to decrease budget authority or outlays would be considered first, and only after these were decided would amendments providing increases be considered. With the conversion of the subtotals to targets, these special rules no longer have a place in the budget legislation.

S. 1541 follows the Joint Study Committee in providing that the new budget rules may be waived or suspended only by two-thirds vote of the House or Senate.[129] This two-thirds requirement (which also would be applied to overruling points of order) sparked protests from some critics who feared that it would thwart the will of a majority of Senators or Representatives, and it is not

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125 RULES OF THE HOUSE OF REPRESENTATIVES, Rule XIX (1973). In practice four amendments may be admitted: an amendment, an amendment to the amendment, a substitute amendment, and an amendment to the substitute. CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. No. 384, 92d Cong., 2d Sess. 459 (1973).

126 H.R. 7130, 93d Cong., 1st Sess. § 124(b)(3).

127 S. 1541, 93d Cong., 1st Sess. § 304(c) (1973).

128 S. 1641, 93d Cong., 1st Sess. § 144 (1973).

129 S. 1541, 93d Cong., 1st Sess. §§ 1005(b), (c) (1973).

contained in H.R. 7130. Yet the two-thirds rule may not be as formidable as appears on the surface. Both the House and the Senate already have two-thirds rules,[130] and yet both manage to waive their rules frequently each year — the Senate by recourse to unanimous consent agreements; the House, by a resolution of waiver reported by the Rules Committee and approved by majority vote. An unsettled parliamentary question is whether the two-thirds rule provided in S. 1541 could be set aside by majority adoption of a waiver resolution in the House.

In contemplating the potential effects of the various special rules, it bears remembering that after adoption of the budget legislation, either House would be able to unilaterally change the rules as they apply to it. Given the vastly different traditions of the House and the Senate, there is a good chance that they will go their separate ways in the matter of budget procedure. A move in this direction was taken in H.R. 7130, which establishes floor rules for the House and leaves to the Senate the determination of its own procedures.[131]

In the aggregate, the main effect of the special rules might be to arm a determined minority in the House or the Senate with the capability to block the chamber from considering various proposals. This is particularly true of S. 1541, which allows points of order at numerous stages of the congressional budget process.[132]

E. *Tax Policy*

During consideration of the budget control legislation, most of the attention has been riveted on the expenditure side of the budget. This bias reflects general budget practice. Tax laws tend to be

130 Senate Rule XL, which deals with amendment, suspension, or modification of Senate rules, does not mention any two-thirds requirement; but the official interpretation of that rule is: "The standing rules of the Senate may be amended by a majority vote, but a two-thirds vote of the Senators present, a quorum being present, is required for their suspension . . . ." C. WATKINS & F. RIDDICK, SENATE PROCEDURE, S. Doc. No. 44, 88th Cong., 2d Sess. 640 (1964). House Rule XXVII provides that "[n]o rule shall be suspended except by a vote of two-thirds of the Members voting, a quorum being present."

131 As provided in H.R. 7130, 93d Cong., 1st Sess. § 124(b)(3) (1973), floor considerations would be in the Committee of the Whole under the 5-minute rule provided in paragraph 5 of House Rule XXIII.

132 Until parliamentary precedents are established, one cannot be certain how the new congressional budget system will operate.

permanent and remain in effect until changed; most expenditures have to be renewed each year. Nevertheless, the tax side has equal force in terms of economic consequences and national priorities.

At one point, the Joint Study Committee considered automatic adjustments in tax rates to achieve a desired budget condition, but this was discarded in favor of procedure that would have impelled Congress to enact a tax surcharge whenever the estimated surplus was below, or the deficit above, the level specified in the second budget resolution.[133] In H.R. 7130 the preadjournment tax action is built into the reconciliation process.[134] S. 1541 does not specifically provide for tax changes as part of reconciliation (probably because it is oriented to expenditure reductions), but Congress may direct House Ways and Means and Senate Finance to report legislation changing tax rates.[135] However, S. 1541 does not address the issue of what would happen if these committees failed to report or if Congress failed to adopt the tax measures called for in the budget resolution.

In recent years, there has been growing awareness of federal subsidies and benefits furnished through provisions of the tax laws rather than through direct expenditures. These have come to be known as tax expenditures and they amount to many billions of dollars.[136] Some authorities have advocated that they be treated as regular expenditures and be subjected to annual review by Congress.[137] The consideration of budget reform legislation during 1973 provided a good opportunity for advancing this view. If tax expenditures were incorporated into the new budget process, Congress would be able to evaluate them each year.

The congressional budget process established in H.R. 7130 would not extend to tax expenditures, but the President would be

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133 *See* STAFF OF JOINT STUDY COMM. ON BUDGET CONTROL, 93D CONG., 1ST SESS., PRELIMINARY DRAFT OF RECOMMENDATIONS FOR IMPROVING CONGRESSIONAL CONTROL OVER BUDGETARY OUTLAY AND RECEIPT TOTALS 7 (Comm. Print 1973).

134 H.R. 7130, 93d Cong., 1st Sess. § 139 (1973).

135 S. 1541, 93d Cong., 1st Sess. § 301(a)(7) (1973).

136 According to estimates prepared by the Treasury Department and the Joint Committee on Internal Revenue Taxation, in calendar year 1972 tax expenditures totaled $59.8 billion. *See* House Comm. on Ways and Means, *Estimates of Federal Tax Expenditures*, in *House Organization Hearings*, *supra* note 55, vol. 2, pt. 3, at 610, 615.

137 *House Organization Hearings*, *supra* note 55, at 126-47 (testimony and statement of Stanley S. Surrey).

required to include a list of these items in his annual budget.[138] During floor consideration in the House, an amendment was offered to impose the new budget controls on tax expenditures, but it was withdrawn when assurances were given to the sponsors that the matter would be sympathetically considered in conference.[139]

S. 1541 would provide for an itemization of tax expenditures in the budget resolutions as well as for reports by committees handling tax expenditures.[140] But this additional information would not be accompanied by additional controls, so Congress would be permitted to enact tax expenditure legislation inconsistent with its budget decisions.

F. *Backdoor Spending*

As one of the perceived ills of the prevailing budget process, backdoor spending (referred to as "spending authority" in H.R. 7130 and as "advance budget authority" in S. 1541) has been a prime target of the 1973 budget reform legislation. Both the Senate and the House bill would impose two new controls on backdoors. First, all backdoors would be included in the new budget process and the allocations provided in the budget resolutions; second, funding for backdoors (other than those exempted by the legislation) would have to come through the appropriations process.[141] In effect, backdoors would have the same status as authorizing legislation.

Both bills exempt certain types of backdoor spending. S. 1541 would apply the new funding controls only to new backdoors (including additions to existing programs). H.R. 7130 would exempt existing backdoors only until September 30, 1978,[142] thereby pro-

138 H.R. 7130, 93d Cong., 1st Sess. § 146(a) (1973).

139 119 CONG. REC. H10,677 (daily ed. Dec. 5, 1973) (remarks of Representatives John Anderson, Bolling, Reuss (D.-Wis.), and Ullman).

140 S. 1541, 93d Cong., 1st Sess. §§ 301(a)(5), 307(d), 601 (1973).

141 *Id.* § 402(a); H.R. 7130, 93d Cong., 1st Sess. § 142(a) (1973). The Senate section is not entirely clear, for it states that backdoors are "to be exercised for any fiscal year only to such extent or in such amounts as are provided for such fiscal year in appropriation Acts or other laws . . . ." What seems to be intended is that backdoors go through the Appropriations Committees but not necessarily through the appropriations process. *See* § 404(a), which would amend the Senate rules to give Appropriations jurisdiction over backdoors. S. 1541 refers to "the exercise of" rather than "the funding of," because in early versions the bill would have given jurisdiction over backdoors to the Budget Committees.

142 H.R. 7130, 93d Cong., 1st Sess. § 142(b) (1973).

viding a lengthy transitional period and ensuring that the 5-year revenue sharing program enacted in 1972 would not be affected by the new controls. H.R. 7130 contains four other exemptions, the most important of which is for self-financing trust funds such as the social security and highway trusts.[143] Other exemptions would apply to existing loan guaranty and insurance programs, the transactions of certain government corporations, and gifts to the United States.

The backdoor spending issue involves the most direct confrontation between the Appropriations Committees and the authorizing committees. An end to backdoors would return to Appropriations much of the power that has been chipped away over the past half century and would reduce the authorization committees to mendicants for funds for their favored programs. This struggle between the two sets of committees has been going on for over a century — almost from the very day spending power was given to the Appropriations Committees. The budget control legislation cannot end that clash of interest; at most it may temporarily reverse somewhat the trend toward fragmentation in Congress.

As a practical matter the new controls might not operate with equal effect on all types of backdoor spending. The key question is whether Congress, when it considers funding for authorizations which once had backdoor status, would feel bound to appropriate up to the authorized level or whether it would feel free to appropriate lesser amounts. Congress probably will be most disposed to control contract authority, and this once-advantaged device may begin to experience the same authorizations-appropriations gap that for years has existed for many regular programs. Least likely to be affected are mandatory entitlements for designated beneficiaries. In the case of entitlements to state and local governments, Congress already underfunds certain programs such as aid to impacted areas and social service grants.[144] But when the entitlements

143 *Id.* § 142(c)(2). Revenue sharing operates through a trust fund, but because it is not self financing, it would not be excepted from the controls by the trust fund exemption.

144 Thus, the Act of Oct. 20, 1972, Pub. L. No. 92-512, § 301, 86 Stat. 91 (1972) (codified at 42 U.S.C. § 1320b (Supp. II, 1972)), placed a $2.5 billion ceiling on the previously open-ended social services grants which had entitled states to three federal dollars for each dollar they contributed. In the case of aid to impacted areas, a formula determines each school district's entitlement, but how much the district

are authorized for persons, Congress might consider itself obligated to appropriate up to the full authorization.

Conclusion: Centers of Fiscal Power

Conflict is an omnipresent ingredient in all budgeting, and it occurs over both the substance of budget decisions and the processes by which they are made. Too much is at stake for budgeting to be a conflict-free process. But strife cannot be allowed to cripple the activities of government. Budgeting must allow for the play of conflicting forces but also provide for the resolution of disagreements — if only through deferment or other tactics.

The tension between allowing all interests to be heard and getting the budget enacted is an example of the constant tension in Congress between the centralization and dispersion of power. In the evolution of budget control legislation, the initial stages moved further in the direction of centralized budget control than Congress was likely to adopt. Consequently, the measure approved by the House as well as the bill reported in the Senate disperse budget power much more widely.

The two main changes made by the House and Senate committees relate to the jurisdictions of the new budget committees and of the Appropriations Committees. As the legislation progressed in both bodies, the budget committees were shorn of any "super" or "elite" status; some members even see them as helpless outsiders, with little more power or involvement in economic or priorities policymaking than the Joint Economic Committee has. The Appropriations Committees have been able to regain some controls over backdoor spending, but the exemptions contained in the House and Senate bills circumscribe their jurisdictional claim in this area. As a result, the authorizing committees will retain considerable budgetary muscle and the characteristic of Congress as an institution in which power is divided will be preserved.

The tension between budgetary unity and budgetary fragmentation also cropped up in the relationship between the parts and the whole of the budget. Because of the competing pressures it faces,

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receives depends on the size of the annual appropriation for this purpose. If the appropriation is less than the total entitlement, each district's share is prorated downward.

Congress has difficulty holding to a consistent budget policy. While some Congressmen may favor a lid on total spending, others may be inclined to act on individual items in a way that precludes control over the totals.

The budget control legislation forges a compromise that allows Congress to express its sense as to the totals, but to proceed in a contrary manner when it acts on individual spending bills. The pieces would be reconciled at the termination of the budget process and it is at this point that the procedure specified in H.R. 7130 and S. 1541 may result in prolonged strife or deadlock.

When competing pressures are felt, a common strategy is to paper over differences with ambiguities which will have to be confronted at some later date. The budget control bills have a substantial share of these ambiguities and for this reason it is unproductive to speculate on how the new process might work. Much of the story of budget reform will have to be written in congressional practice rather than in legislative words.

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NOTE

CONGRESS VERSUS THE EXECUTIVE: THE ROLE OF THE COURTS

Introduction

Friction between Congress and the executive branch is an inevitable feature of our form of government. Congress, in jousting with the executive, traditionally has used such weapons as its power over appropriations,[1] its power of confirmation of high-level executive branch appointments,[2] and its ability to marshal public opinion. In recent months, however, the friction has escalated into open conflict, frequently erupting in the hitherto unfamiliar judicial forum.[3]

Recent congressional courtroom attacks on the executive may be divided into four rough categories:

1. suits to adjudicate disputes in the never ceasing effort of legislators to get information from the executive[4] (in this category of suits the rights of Congress or its committees, as well as the rights of individual members, may be involved);

2. suits to redress executive refusal to perform duties owed Congress as an institution, *e.g.*, a suit contesting the legality of a pocket veto;[5]

3. suits to review the legality of executive actions not involving any institutional interest of Congress, *e.g.*, a suit to review a par-

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1 *See* R. FENNO, THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS (1966).

2 U.S. CONST. art. II, § 2; *see* J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE (1953).

3 Two congressional publications collect information on many of these suits, including some unreported decisions. JOINT COMM. ON CONGRESSIONAL OPERATIONS, 92d CONG., 2D SESS., COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS (Comm. Print 1973); JOINT COMM. ON CONGRESSIONAL OPERATIONS, 93D CONG., 1st SESS., COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS (Comm. Print 1973) (cumulative to June 30, 1973) [hereinafter cited as COURT CASES II].

4 *E.g.*, EPA v. Mink, 410 U.S. 73 (1973); Senate Select Comm. on Pres. Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

5 Kennedy v. Sampson, 364 F. Supp. 1075 (D.D.C. 1973).

ticular agency decision assertedly within agency discretion[6] (here the member sues primarily as an aggrieved citizen, though status as a Congressman may be invoked); and

4. suits to vindicate personal rights guaranteed to members of Congress by the Constitution or statutes, *e.g.*, a suit to determine the extent to which the speech and debate clause[7] protects the activities of a Senator's aides.[8]

These categories may not be mutually exclusive, and they are not intended to draw bright-line distinctions. However, they do expose difficulties facing courts and Congress as a result of the proliferation of congressional suits against the executive branch.

This Note first discusses possible reasons for the increasing congressional use of courts and elaborates the problems associated with the four categories set out above. The Note then examines each category in terms of judicial willingness to decide the merits. To get a decision on the merits, Congressmen must overcome three principal barriers: jurisdiction, standing, and the political question doctrine. The discussion of these issues also notes the effects of certain proposed legislation on them. The Note concludes that these congressional suits should be subject to a careful analysis that no court has yet provided.

I. Why Courtroom Confrontation Is Increasing

The use of courts by members of Congress to adjudicate the legality of actions or omissions by executive agencies and officials is a recent development, with few, if any, suits before the 1970's. This sudden appearance naturally raises questions of causation. The mere fact that the Presidency and Congress are controlled by opposing parties is an insufficient explanation, for this situation has occurred in the past without an accompanying flurry of courtroom activity. The factors leading to the executive-legislative confrontation in the courtroom promise to occupy historians and

6 *E.g.*, Reid v. Price Comm'n, Civil No. 72-CIV-1704 (S.D.N.Y., filed Apr. 26, 1972).

7 U.S. Const. art. I, § 6.

8 Gravel v. United States, 408 U.S. 606 (1972), *vacating and remanding* 455 F.2d 753 (1st Cir. 1972).

political scientists for years to come. However, a brief discussion of possible reasons for the sudden increase in such confrontation provides a useful background.

Plausible reasons are not difficult to find. First, the expanding role of the federal government and the proliferation of administrative agencies in response to the needs of a growing and increasingly complex society have multiplied the opportunities for congressional-executive conflict by increasing the volume and complexity of governmental activity and by blurring the line between the executive and legislative roles in our framework of separated powers. But this has occurred gradually over decades and cannot alone account for the sudden increase in conflict.

Second, information, if not itself power, at least frequently actuates power within the framework of our political system. The increasing complexity of government and society and the burgeoning role of government have multiplied the body of information and its potential for power actuation. The significance of this factor lies in the widespread belief that the executive branch has more and better information available to it than does Congress. Many believe this information disparity, coupled with the executive's ability and desire to withhold information from Congress, cripples congressional ability to make effective policy judgments.[9] But again this problem has been growing for years and seems not to explain the sudden interest of Congressmen in taking the executive to court. Perhaps the experiences from the war in Indochina which are now coming to light — arguable deception of Congress and the public upon entry into a significant combat role,[10] unwillingness to disclose the Pentagon Papers study of our role in the war,[11] and deliberate deception regarding the bombing of Cambodia[12] — have increased congressional awareness of the problem and precipitated action on a front much wider than war-related concerns.

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9 *See* S. REP. No. 612, 93d Cong., 1st Sess. 2-3 (1973) (Congressional Right to Information Act).

10 *See generally Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess. 157-320 (1973).

11 *See* United States v. Doe, 332 F. Supp. 930 (D. Mass. 1971), *aff'd as modified*, 455 F.2d 753 (1st Cir.), *vacated and remanded sub nom.* Gravel v. United States, 408 U.S. 606 (1972).

12 *1970 Bombing of Cambodia*, 31 CONG. Q. WEEKLY REP. 1995 (1973).

Another reason for increased congressional use of the courts against the executive is the recent broadening of the law of standing.[13] Paralleling the liberalization of the standing rules has been the rise of so-called public interest organizations[14] willing and able to make use of the rules to make the lawsuit a political weapon. The atmosphere surrounding government actions is much more litigious than in the past[15] and the changed atmosphere may have inspired some congressional use of the courts.

One clear cause of the congressional-executive conflict in the courts is the loss of congressional ability to impose a negative constraint on the executive. Congress ordinarily—at least commencing with the New Deal—could bargain with the executive on one issue by threatening to cut appropriations somewhere else. Such congressional bargaining power has been severely dissipated because the Nixon Administration has sought to use impoundment to curb the growth of the federal government.[16] However, Congressmen opposed to the Nixon program themselves have an essentially negative immediate objective—to hold the line, as opposed to proposing new initiatives. Courts are much better suited to maintaining the status quo than they are to implementing new initiatives. Thus the loss of the negative constraint has a dual impetus for the increased use of the courts—loss of one congressional weapon against the executive and a simultaneous increase in the appropriateness of the conflict for judicial resolution.[17]

Another possible factor behind the increase in congressional-executive courtroom confrontation is the unusual level of antag-

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13 *See* cases cited note 152 *infra*.

14 *E.g.*, Common Cause and Ralph Nader's Public Citizen, Inc.

15 *Cf.* O'Brien v. Brown, 409 U.S. 1 (1972) (disputes over delegate seating at 1972 Democratic National Convention).

16 *See* Brown v. Ruckelshaus, 364 F. Supp. 258 (C.D. Cal. 1973); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973), *appeal docketed*, Nos. 73-1837, 73-1838, 73-1839, D.C. Cir., June 1973; *Impoundment: Administration Loses Most Court Tests*, 31 CONG. Q. WEEKLY REP. 2395 (1973); *Impoundment of Funds: Constitutional Crisis Ahead*, 31 CONG. Q. WEEKLY REP. 213 (1973).

17 This rationale was implicit in remarks by Senator Mondale (D.-Minn.) that in recent years there "has been a greater awareness on the part of Members of Congress—and the American people—of the dangers of illegal executive branch actions, and the potential of court challenges as a means of correcting such illegality." 119 CONG. REC. S19,039 (daily ed. Oct. 11, 1973).

onism which has developed between the Nixon Administration and Congress. Of course, some antagonism between a Republican President and a Democratic majority in Congress is inevitable, particularly given the present policy differences regarding the appropriate role of the federal government in American society. Whatever the causes, this unusual antagonism is demonstrated by serious consideration,[18] for the first time in more than a century, of impeachment of the President, the ultimate constitutional weapon for congressional battle with the executive.[19]

II. A Functional Analysis of Recent Suits

A. *To Obtain Information*

Congressional plaintiffs have repeatedly gone to court to obtain from the executive information not produced in response to congressional request. While such suits make the courts referees in disputes between Congressmen and agency officials, raising separation of powers problems,[20] utilization of the judiciary in this manner seems appropriate.[21] Both Congress and the executive concede that Congress needs access to the executive's information to fulfill its legislative functions responsibly, and that some documents, particularly those which record the exchange of thoughts among officials leading up to a policy decision, ought to remain confidential.[22] Consequently, a genuine dispute often may exist about the character of a particular document. In such cases courts serve a useful function by weighing the merits of each side's arguments, as is done, for example, with discovery requests. Moreover, unlike an individualized judicial directive, most of the sanc-

18 H. Res. 702, 93d Cong., 1st Sess. (1973), in 119 Cong. Rec. H10,058-68 (daily ed. Nov. 15, 1973).

19 U.S. Const. art. II, § 4: "The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

20 *See* Mink v. EPA, 464 F.2d 742, 744 (D.C. Cir. 1971), *rev'd on other grounds*, 410 U.S. 73 (1973).

21 See text following note 226 *infra*.

22 S. Rep. No. 612, 93d Cong., 1st Sess. 6-7 (1973) (Congressional Right to Information Act). This point involves the much-discussed issue of executive privilege. *See, e.g.*, R. Berger, *Executive Privilege v. Congressional Inquiry* (pts. 1-2), 12 U.C.L.A.L. Rev. 1043, 1287 (1965); Note, *Executive Privilege and the Congressional Right of Inquiry*, 10 Harv. J. Legis. 621 (1973).

tions available to Congress in the face of executive refusal to disgorge information, such as a reduction in appropriations, are poorly suited to compel production of information on a continuing basis.[23]

Members of Congress have used the courts in actions under the Freedom of Information Act (FIA)[24] and to enforce a Senate committee subpoena. Suits to obtain information pursuant to the FIA have been by far the most common. Five separate suits involving congressional plaintiffs were instituted against the executive between late 1971 and mid-1973.[25] The congresional plaintiffs have not fared well in these suits.[26] Plaintiffs failed to compel disclosure of a report by a committee of departmental under secretaries on the advisability of the controversial underground nuclear test at Amchitka Island, Alaska.[27] They failed to compel production of the Pentagon Papers.[28] They failed to compel release of the Special Collection of the Colonel Oleg Penkovsky Papers, which allegedly detail Soviet military concepts and strategy.[29] And they failed to obtain the Peers Commission Report, the Department of the Army Review of the Preliminary Investigation into the Mylai Incident.[30] Still pending is a suit to compel disclosure of reports and information regarding administration of Medicaire and Medicaid Programs and to force the Department of Health, Education, and Welfare to promulgate regulations to deal promptly with requests for information pursuant to the Freedom of Information Act.[31]

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23 Note, *Executive Privilege and the Congressional Right of Inquiry*, 10 HARV. J. LEGIS. 621, 654-63 (1973).

24 5 U.S.C. § 552 (1970).

25 Mink v. EPA, 464 F.2d 742 (D.C. Cir. 1971), *rev'd*, 410 U.S. 73 (1973); Aspin v. Department of Defense, 348 F. Supp. 1081 (D.D.C. 1972), *aff'd*, 474 F.2d 1265 (D.C. Cir. 1973); Ashbrook v. Laird, Civil No. S-CIV-72-40 (S.D. Ill., July 17, 1972), *aff'd*, Civil No. 72-1783 (7th Cir., June 8, 1973); Dellums v. HEW, Civil No. 181-72 (D.D.C., filed Jan. 28, 1972); Moss v. Laird, Civil No. 1254-71 (D.D.C., Dec. 7, 1971).

26 Consideration of the merits of the individual cases is beyond the scope of this Note.

27 Mink v. EPA, 464 F.2d 742 (D.C. Cir. 1971), *rev'd*, 410 U.S. 73 (1973).

28 Moss v. Laird, Civil No. 1254-71 (D.D.C., Dec. 7, 1971).

29 Ashbrook v. Laird, Civil No. S-CIV-72-40 (S.D. Ill., July 17, 1972), *aff'd*, Civil No. 72-1783 (7th Cir., June 8, 1973).

30 Aspin v. Department of Defense, 348 F. Supp. 1081 (D.D.C. 1972), *aff'd*, 474 F.2d 1265 (D.C. Cir. 1973).

31 Dellums v. HEW, Civil No. 181-72 (D.D.C., filed Jan. 28, 1972).

Significantly, the congresional plaintiffs have not been differentiated from private citizens in suits under the FIA; thus their status as members of Congress has been irrelevant to their chances of success on the merits. In three of the suits there were one or more private plaintiffs in addition to one or two congressional plaintiffs; plaintiffs made no claim to special status by virtue of being Congressmen.[32] A fourth suit was by a Congressman and one of his employees so perhaps a claim that the information was sought for congressional purposes other than dissemination to the public might have been made, but no such claim was made.[33] Only in *Mink v. EPA*[34] did Congressmen sue explicitly as Congressmen. There, 33 Representatives sued both in their capacities as members of Congress and as private citizens. The case eventually reached the Supreme Court, the only case involving the Freedom of Information Act yet to do so. The Court, however, did not consider the status under the FIA of members of Congress in their official capacity, for the plaintiffs did not appeal the district court dismissal of that issue on the ground that members of Congress could not state a justiciable cause of action because of the separation of powers doctrine.[35]

This failure to distinguish congressional from private plaintiffs is far from surprising; indeed, it seems inevitable under the FIA. The Act, passed in 1966[36] as a revision of the public disclosure section of the Administrative Procedure Act to allow greater public access to government records,[37] was aimed at disclosure of information to the general public, not to Congress. Indeed, the only mention of Congress in the Act was the specification that the nine exemptions from disclosure to the public,[38] enacted to prevent disclosure of information properly kept confi-

32 Ashbrook v. Laird, Civil No. S-CIV-72-40 (S.D. Ill., July 17, 1972), *aff'd*, Civil No. 72-1783 (7th Cir., June 8, 1973); Dellums v. HEW, Civil No. 181-72 (D.D.C., filed Jan. 28, 1972); Moss v. Laird, Civil No. 1254-71 (D.D.C., Dec. 7, 1971).

33 Aspin v. Department of Defense, 348 F. Supp. 1081 (D.D.C. 1972), *aff'd*, 474 F.2d 1265 (D.C. Cir. 1973).

34 464 F.2d 742 (D.C. Cir. 1971), *rev'd*, 410 U.S. 73 (1973).

35 *Id.* at 744.

36 Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250. In 1967 these provisions were recodified by Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codified at 5 U.S.C. § 552 (1970)).

37 *See* Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

38 5 U.S.C. § 552(b) (1970).

dential, such as national security information, do not apply to Congress.[39] This provision was designed to prevent a backhanded statutory justification for executive information hoarding.[40] Thus, while Congressmen may see access to information as necessary to their duties, the FIA will not help them much; the member of Congress who sues under it seems like an agent for his constituents, with no greater right to information than his principals.

The other major congressional attempt to obtain information from the executive by use of the courts occurred in *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[41] an attempt to obtain some of the celebrated Watergate tapes of presidential conversations. When informal attempts to obtain the tapes failed, the Select Committee directed two subpoenas duces tecum to the President.[42] The President refused to comply with the subpoenas on the basis of the separation of powers doctrine and purported to assume sole possession of the tapes,[43] thus removing the possibility of obtaining them through subpoena of another person.

The Select Committee chose not to pursue either of the normal remedies for refusal to comply with a subpoena by a congressional committee — a contempt proceeding[44] or the common law remedy of having the Sergeant at Arms forcibly secure attendance.[45] Instead, the committee sued the President, asking the court for declaratory relief, a mandatory injunction, and a writ of mandamus. The court treated the complaint as an ordinary civil action. Thus, although it arose pursuant to a committee subpoena, the case is instructive in the broader context of the difficulties of Congress' using the courts to obtain information from the executive.

The suit was dismissed for lack of subject matter jurisdiction. The committee's primary effort to sustain jurisdiction was necessarily under the federal question jurisdiction statute,[46] but the

39 *Id.* § 552(c).
40 S. REP. No. 813, 89th Cong., 1st Sess. 10 (1965).
41 366 F. Supp. 51 (D.D.C. 1973).
42 *Id.* at 54.
43 *Id.*
44 2 U.S.C. § 192 (1970).
45 Senate Select Comm. on Pres. Campaign Activities v. Nixon, 366 F. Supp. 51, 54 (D.D.C. 1973).
46 28 U.S.C. § 1331(a) (1970).

amount in controversy requirement could not be met because the value of the information sought was unquantifiable. Several more tenuous arguments for jurisdiction based on other statutory provisions were also rejected by the court. In response to this failure, Congress enacted a statute granting the District of Columbia federal district court jurisdiction over suits to enforce subpoenas by the committee.[47]

More significantly, the Senate has passed the Congressional Right to Information Act,[48] which establishes a right of legislative access to most executive documents and sets up a procedure by which any committee, with the concurrence of its parent House, can seek judicial enforcement of subpoenas for executive branch information. The requirement that the parent House concur in an enforcement action under the Right to Information Act is responsive to a problem which will recur throughout the remainder of this Note, the ability of an individual member of Congress to assert an institutional prerogative of Congress without the consent of at least one House.

A formal approval procedure seems advisable for two reasons. First, institutional affirmation of the congressional information prerogative seems desirable to prevent a plethora of unreasonable congressional requests for information. Such requests might come from a Congressman harboring a grudge against a particular official or agency or seeking publicity. Second, Congress operates on the basis of compromises between members, committees, and Houses, and with the executive. If one member may assert an institutional right of action which may upset these working arrangements without specific approval of the membership as a whole, then the ability of Congress to function may be impaired.

In the case of information, however, a countervailing consideration is that well-informed individual gadflies, not liked by a majority, may perform a valuable function in questioning preconceived beliefs. Such benefits would be maximized if access to information were a right personal to each member of Congress, without the need of persuading a congressional or House majority.

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47 Act of Dec. 18, 1973, Pub. L. No. 93-190, 87 Stat. 736.

48 S. 2432, 93d Cong., 1st Sess. (1973); 119 CONG. REC. S23,191 (daily ed. Dec. 18, 1973).

The right of congressional inquiry, though, appears constitutionally vested in each House as a whole, and must be specifically vested in committees, albeit committees of one member.[49]

B. *Suits to Redress Obstruction of Congressional Rights*

Less frequent, but highly significant, are suits in which congressional plaintiffs challenge the validity of executive actions that allegedly violate a duty owed Congress. These actions generally arise from the plaintiffs' disagreement over the substance of Administration policy, but the plaintiffs also assert interference with the role of Congress or its Houses in contravention of the executive-legislative relations established by the Constitution.

Several major cases have arisen in this area. *Kennedy v. Sampson*[50] was a suit by Senator Kennedy (D.-Mass.) alleging that a President cannot pocket veto a bill during a short vacation recess of Congress and that a failure to return the bill to the House originating it for an opportunity to override the President's veto results in the bill's becoming law in 10 days without his signature.[51] The particular dispute concerned the Family Practice of Medicine Act,[52] which the President declared to be pocket vetoed during a 6-day recess in 1970.[53] After overcoming defendants'

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49 Watkins v. United States, 354 U.S. 178, 200-01 (1957).

50 364 F. Supp. 1075 (D.D.C. 1973).

51 U.S. CONST. art. I, § 7, cl. 2 provides:

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

52 S. 3418, 91st Cong., 2d Sess. (1970).

53 On December 14, 1970, S. 3418 was presented to President Nixon for his consideration. On December 22 Congress adjourned for Christmas. During the recess the Secretary of the Senate was authorized to receive messages from the President and the House of Representatives, and the President pro tempore was authorized to sign duly enrolled bills. On December 24 the President issued a

preliminary objections,[54] the court declared that the bill had become law and ordered its publication as such.[55] The government has appealed.[56]

Williams v. Phillips[57] was a successful action by four Senators,[58] including the chairman of the Labor and Public Welfare Committee, to remove Howard J. Phillips as Acting Director of the Office of Economic Opportunity (OEO), because the President had not submitted his name to the Senate for confirmation as Director, thus denying the plaintiff Senators the opportunity to pass on Phillips' qualifications to be head of OEO.[59] The court held that in the absence of legislation providing for interim appointments of an OEO head, the constitutional procedure[60] for the submission of the name of an agency head to the Senate for its advice and consent must be followed.

Memorandum of Disapproval, announcing he would withhold his signature from S. 3418. The Senate returned on December 28; the House, on December 29.

The question was whether the congressional holiday recess, which extended for one or two days (depending on whether Sunday was counted) beyond the 10th day the President had within which to sign or return the bill, prevented him from returning the bill within the 10-day period provided in article I, § 7, clause 2 of the Constitution, thereby validating the pocket veto. On the theory that the veto was valid, the Chief of White House Records refused to transmit the bill to defendant Administrator of the General Services Administration for publication in the Statutes at Large and defendant Administrator refused to print the bill as a validly enacted law. The President's apparent strategy was simple. The bill had been passed by such large majorities in both Houses (64 to 1 in the Senate, 116 CONG. REC. 31,508 (1970), and 346 to 2 in the House, *id.* at 39,380) that there was obvious danger that an ordinary veto would be overriden. A pocket veto, however, is not subject to reconsideration by Congress.

54 *See* text at note 167 *infra.*

55 On January 29, 1974, Senator Kennedy filed a second suit against the same defendants challenging the constitutionality of President Nixon's attempt to pocket veto H.R. 10511. Kennedy v. Jones, Civil No. 74-194 (D.D.C., filed Jan. 29, 1974). The bill, which would have eased some of the restrictions in the Urban Mass Transportation Act of 1964, by enabling buses purchased under its provisions to be used for charter bus services, passed the 93d Congress in the closing days of the first session and was sent to the President on December 22, 1973. Congress adjourned the first session the same day. Senator Kennedy's position is essentially that taken in his first action, *i.e.*, that the legislation became a validly enacted law on January 3, 1974, without the President's signature, in accord with article I, § 7, clause 2 of the Constitution.

56 Telephone interview with staff member in Senator Kennedy's office by Raul Tapia, Nov. 6, 1973.

57 360 F. Supp. 1363 (D.D.C. 1973).

58 Senators Hathaway (D.-Maine), Mondale, Pell (D.-R.I.), and Williams (D.-N.J.).

59 For a discussion of the ability of the court to hear the case, see text at notes 142 (jurisdiction) and 165 (standing) *infra.*

60 U.S. CONST. art. II, § 2.

Several suits by congressional plaintiffs dealt with alleged executive usurpation of Congress' power under the Constitution to declare war.[61] Though the plaintiffs' substantive aims were to terminate U.S. military participation in Indochina, these actions were nevertheless based in part on the contention that the President was conducting a war without submitting a declaration of war upon which Congress could vote.

Five suits involving congressional plaintiffs were filed in attempts to enjoin U.S. military activities, declare the conflict illegal, or both, before direct American participation in the hostilities was halted on August 15, 1973.[62] Two were still pending at that time and have been dropped.[63] A third, brought by two Senators and 21 Representatives as both citizens and members of Congress, was dismissed virtually without discussion on the grounds that plaintiffs lacked standing in both capacities for failure to show an "injury in fact," that the legality of the war was a nonjusticiable political question, and that the suit was one against the United States without its consent.[64] The two remaining suits, however, produced judicial statements of major importance to the ability of members of Congress to challenge the executive despite their inability to mobilize Congress itself to action.[65]

Mitchell v. Laird,[66] one of the two latter cases, was a suit by 13 Representatives seeking an injunction against the war in Indochina unless Congress authorized the war within 60 days and a declaratory judgment that the war was unconstitutional. The district court dismissed the case following a 5-minute oral hearing,[67] but the Court of Apepals had a more difficult time. The court rejected a claim of mootness and found that the plaintiffs had standing, but affirmed the lower court's dismissal on political question grounds.[68]

61 *Id.* art. I, § 8, cl. 11.

62 *See* Second Supplemental Appropriations Act, Fiscal Year 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99 (1973); Continuing Appropriations Act, Fiscal Year 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130 (1973).

63 Stark v. Schlesinger, Civil No. C-73-0852-AJZ (N.D. Cal., filed June 12, 1973); Dellums v. Richardson, Civil No. C-73-0853 (N.D. Cal., filed May 23, 1973).

64 Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972).

65 Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Holtzman v. Richardson, 361 F. Supp. 544 (E.D.N.Y.), *stay denied sub nom.* Holtzman v. Schlesinger, 94 S. Ct. 1, 8, 11 (1973).

66 488 F.2d 611 (D.C. Cir. 1973).

67 COURT CASES II, *supra* note 3, at 20.

68 488 F.2d 611 (D.C. Cir. 1973).

The courts in *Holtzman v. Richardson*[69] went further yet. Representative Holtzman (D.-N.Y.) filed an action seeking a determination that the President's orders to bomb Cambodia unconstitutionally usurped Congress' warmaking powers.[70] Plaintiff asserted that he right to an undiluted vote upon the declaration of hostilities was impaired by presidential action in engaging in extensive combat without congressional authorization. The court held that Representative Holtzman had standing,[71] relying in part upon *Mitchell v. Laird.* More significantly, the court held that the controversy was *not* a nonjusticiable political question —a conclusion apparently no other court had reached with regard to the conflict in Indochina.[72]

Though none of these suits had official congressional approval, differing degrees of congressional approbation can be inferred. In *Kennedy* the effect of the executive action was to emasculate recently passed legislation, so the sense of Congress was probably clear on the desirability of challenging the executive with a law suit. Much the same could be said of *Williams,* although the legislative program there had been established some years earlier and its efficacy was subject to considerable dispute. The stop-the-war cases, however, present a considerably different picture. Nothing Congress had done was being overthrown; indeed, Congress had regularly voted to support the war. Moreover, the war had been a matter of congressional debate for some time, with opponents of the war unable to prevail in Congress. These actions, then, might be called "end runs" around the Congress, attempts to turn failure in Congress into success in court.

It may at times be difficult to distinguish a question of institutional concern to Congress from a mere attempt to seek judicial review of the legality of a particular executive action. Presidential impoundment of funds is a case in point.[73] *Brown v. Ruckelshaus*[74] was an impoundment suit by Representative Brown (D.-Calif.) on behalf of himself and all other California residents seeking to

69 361 F. Supp. 544 (E.D.N.Y. 1973).
70 U.S. CONST. art. I, § 8; *see* 361 F. Supp. at 549.
71 361 F. Supp. at 550.
72 *Id.* at 550-52.
73 *See generally* Note, *Impoundment of Funds,* 86 HARV. L. REV. 1505 (1973).
74 364 F. Supp. 258 (C.D. Cal. 1973).

compel the Administrator of the Environmental Protection Agency to allot funds authorized by Congress in the Federal Water Pollution Control Act Amendments of 1972.[75] Representative Brown apparently did not allege with great particularity the injury peculiar to his congressional status. The court held that he lacked standing both as resident of California and as Congressman, and went on to indicate that the claim also failed on the merits.

If one regards the President's actions as an assertion that the President has an inherent right to treat a congressional appropriation of funds as a mere expenditure ceiling (thus leaving the President discretion to spend less than the ceiling amount),[76] it might seem that the President has made an institutional challenge against the congressional appropriation power. On the other hand, an executive claim that the language of a specific statute leaves the level of spending to executive discretion (up to the ceiling) would not present an institutional challenge. Such a claim would be similar to the questions of statutory interpretation usually decided by courts.[77] Thus perhaps *Brown* belongs in the following section, which discusses suits not involving an institutional interest of Congress. This example illustrates the difficulty in drawing the line between the two functions.

Recourse to the courts by a party representing a purely congressional interest seems proper. Private plaintiffs in suits challenging the actions of agency officials may not raise issues of direct concern to Congressmen. In a suit[78] decided prior to *Williams v. Phillips*,[79] the private plaintiffs successfully argued that the *substance* of several of Acting Director Phillips' actions were illegal and did not raise the issue of the President's failure to submit his name to the Senate. Similarly, in a case concerning a pocket veto Congress has an interest in avoiding the need to repass legislation allegedly pocket vetoed. No useful purpose seems served by awaiting a private lawsuit by a putative beneficiary under allegedly pocket-vetoed legislation to determine the validity of the Presi-

75 33 U.S.C. §§ 1251-376 (Supp. II, 1972).

76 *See* Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1513 (1973).

77 *See* National Treasury Employees Union v. Nixon, No. 72-1929, slip opinion at 30 (D.C. Cir., Jan. 25, 1974).

78 Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973), *appeal docketed*, Nos. 73-1837, 73-1838, 73-1839, D.C. Cir., June 1973.

79 360 F. Supp. 1363 (D.D.C. 1973).

dent's action. On the other hand, the cases aimed at ending Indochina military activity demonstrate the possibility that recourse to the courts may be a substitute for the exercise of legislative power. These latter cases suggest that institutional challenges to the executive should not be permitted without an institutional commitment to assert the challenge. As will be more fully discussed below,[80] courts should consider refusing to adjudicate such suits unless and until Congress sets up a method for ratifying them.

C. *Suits Not Involving an Interest of Congress*

The use of the courts by members of Congress to review executive action which does not impinge on any institutional prerogative of Congress is a major aspect of the congressional-executive litigation explosion. Such suits challenge executive actions allegedly contrary to a statute or the Constitution, either as direct violations of a legal mandate, or as abuses of discretion concededly vested in the officials. The suits have included claims that agency rules were invalid because of lack of statutory authority to promulgate them[81] and failure to follow the proper rulemaking procedure,[82] that Price Commission allowance of telephone rate increases was invalid,[83] that a proposed disposition of government property was contrary to law,[84] that an officer of the executive was improperly discharged,[85] and that either executive allowances of chrome imports or the statute authorizing them illegally violated our treaty obligations.[86]

This Note's assertion that these suits do not involve an institutional interest of Congress requires some explanation. Congressmen obviously are concerned both that the laws they pass are constitutional and that they are properly enforced by the executive. The first concern terminates as an institutional concern with

80 See text at notes 178-82 *infra*.

81 Public Citizen, Inc. v. Sampson, Civil No. 781-73 (D.D.C., Jan. 17, 1974).

82 *Id.*

83 Reid v. Price Comm'n, Civil No. 72-CIV-1704 (S.D.N.Y., filed Apr. 26, 1972).

84 Murphy v. General Serv. Administration, Civil No. 71 C 1013 (E.D.N.Y., Nov. 29, 1971), *aff'd mem.* (2d Cir., May 18, 1972).

85 Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).

86 Diggs v. Shultz, Civil No. 773-72 (D.D.C., June 26, 1972), *aff'd*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

the passage of legislation, that is, Congressmen should have the Constitution in mind during the legislative process, and the passage of legislation should be considered the institutional verdict that it is constitutional. Individual Congressmen may disagree on constitutionality, but their role qua Congressmen is solely to make their views felt during the march to enactment. Subsequently, their interests are no different from those of private citizens.

The second concern, though, is a bit troublesome. Suits by Congressmen qua Congressmen must be predicated on a belief that they have a judicially cognizable interest in seeing that the executive fulfills its obligation to "take Care that the Laws be faithfully executed."[87] It could be argued that the refusal of the executive to fully comply with a law operates as a functional veto, negating members' votes for a bill, and thereby offending an institutional interest of Congress. While no court has held such an interest suffices to give a member standing, some courts have recognized a general legislative interest in the legality of executive action which approaches that position.

Nader v. Bork[88] illustrates this phenomenon. The suit was by Ralph Nader, two Representatives,[89] and one Senator[90] to declare the discharge of Archibald Cox from the office of Special Prosecutor and the temporary abolition of that office to be illegal. The court dismissed the suit as to Nader for lack of standing, but entertained the claims of the Congressmen and found for them on the merits. The congressional plaintiffs' standing was based on the supposed need of Congressmen to establish the legality of executive action to determine whether remedial laws are needed or whether the responsible official should be impeached (hereinafter referred to as the legislative interest rationale).[91] It is noteworthy that the Congressmen were litigating the effect of executive branch regulations having nothing to do with the mechanics of executive-congressional relations. Because the court found that the "explicit and detailed commitments given to the Senate"[92] by Elliot Rich-

87 U.S. CONST. art. II, § 3.
88 366 F. Supp. 104 (D.D.C. 1973).
89 Bella S. Abzug (D.-N.Y.) and Jerome R. Waldie (D.-Calif.).
90 Frank E. Moss (D.-Utah).
91 For a criticism of this rationale see text at note 192 *infra*.
92 366 F. Supp. at 109.

ardson at the time of his confirmation as Attorney General "had no legal effect,"[93] the plaintiffs were, in effect, simply litigating their interest that the laws (in this case, regulations having the force of law promulgated pursuant to statute) be faithfully executed.

To vindicate this interest Congress traditionally has exercised its "oversight function" of supervising executive action through investigative hearings and the passage of new legislation, sometimes using the latter power to grant or withhold favors or threaten unwanted statutory changes as a means of influencing executive behavior.[94] The Supreme Court has recognized that the ability to conduct investigations into the administration of present laws as well as into the need for new ones is inherent in Congress' legislative powers, but at the same time the Court noted that Congress is "not a law enforcement agency."[95] To the extent Congressmen substitute a judicial forum for the hearing room or House or Senate floor as a means of reviewing executive administration, they will drastically alter the character of the legislative process by decreasing the necessity for hard political decisions and for interaction with the executive branch.

At the same time, use of courts may well have a deleterious effect on the judicial process by making the courts extended forums for political struggles. Thus it seems wise on these grounds to conclude that there is no judicially cognizable congressional interest in executive performance[96] and that a legislator's legislative function formally ends upon enactment of a bill.

Frequently no institutional interest is even alleged by congressional plaintiffs. Suits in which Congressmen were plaintiffs also involved private plaintiffs[97] or were class actions[98] or found the

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93 *Id.*

94 *See, e.g.*, Krasnow & Shooshan, *Congressional Oversight: The Ninety-second Congress and the Federal Communications Commission*, 10 HARV. J. LEGIS. 297 (1973).

95 Watkins v. United States, 354 U.S. 178, 187 (1957).

96 The situation changes if the executive interferes with a duty owed Congress.

97 Public Citizen, Inc. v. Sampson, Civil No. 781-73 (D.D.C., Jan. 17, 1974); Murphy v. General Serv. Administration, Civil No. 71 C 1013 (E.D.N.Y., Nov. 29, 1971), *aff'd mem.* (2d Cir., May 18, 1972); Dellums v. Powell, Civil No. 2271-71 (D.D.C., filed Nov. 11, 1971).

98 Brown v. Ruckelshaus, 364 F. Supp. 258 (C.D. Cal. 1973); Reid v. Price Comm'n, Civil No. 72-CIV-1704 (S.D.N.Y., filed Apr. 26, 1972); Murphy v. General Serv. Administration, Civil No. 71 C 1013 (E.D.N.Y., Nov. 29, 1971), *aff'd mem.* (2d Cir., May 18, 1972); Dellums v. Powell, Civil No. 2271-71 (D.D.C., filed Nov. 11, 1971).

congressional plaintiffs explicitly asserting rights as both citizens and Congressmen.[99] If congressional plaintiffs sue as citizens rather than as members of Congress, their ability to secure judicial determination of the merits of the dispute is the same as that of any other citizen with the same relationship to the dispute.

One interpretation of the increase in congressional-executive litigation, then, is that members of Congress, traditionally ombudsmen for their constituents in disputes with federal agencies, have begun to serve as legal ombudsmen as well. The role superficially seems appropriate, for Congressmen are usually regarded as community leaders, may have staff able to undertake legal work, and are familiar with the operation of federal agencies. Nevertheless, for the reasons suggested above, Congressmen should resist the temptation to become public interest law firms for their states or districts.

Suits attempting to vindicate the will of Congress are not the only suits in this category. There are also the end-run suits, in which Congressmen who lost a legislative battle or fear that they will lose one challenge executive action (and perhaps a statute) as unconstitutional or otherwise invalid. Although the motive of a member in filing a suit should not be relevant to a judicial analysis of standing (excepting such abuses of the judicial process as deliberate harassment), motive is nevertheless important to the functioning of the congressional process.

One attempt by individual Congressmen to circumvent the will of Congress through the courts was made in *Diggs v. Shultz*,[100] in which 13 Representatives and several other individual and organizational plaintiffs sought an injunction against importation of metallurgical chromite from Southern Rhodesia and related relief. The activity plaintiffs sought to prevent had been clearly authorized by the so-called Byrd Amendment to the Military Procurement Act of 1971.[101] The congressional plaintiffs apparently did not assert their status as members of Congress, for neither court discussed this issue.[102] Clearly, in such a case a member of

99 Dellums v. Powell, Civil No. 2271-71 (D.D.C., filed Nov. 11, 1971).

100 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

101 50 U.S.C. § 98h-1 (Supp. II, 1972).

102 Several plaintiffs were held not to have standing due to the absence of any "personal individualized injury" to meet the "injury in fact" requirement. 470

Congress suffers no injury peculiar to that status, for the executive had carried out the intent of Congress as an institution by acting in accordance with an option permitted by statute and, in this case, intended by Congress to be exercised. The suit was dismissed — as to some plaintiffs for lack of standing and as to others for failure to state a cause of action because Congress is free to abrogate our treaty obligations by passing statutes that conflict with them.

Another case illustrates the end run at a different stage of the legislative process. In *Moss v. CAB*[103] Representative Moss (D.-Calif.) and 31 other Congressmen successfully challenged the legality of a Civil Aeronautics Board (CAB) procedure for "suggesting" air fares without going through the rulemaking proceeding required in "setting" them. The congressional plaintiffs had been parties to the CAB actions and so were able to seek judicial redress under the statute providing for review of adverse CAB action by parties.[104] While the suit superficially reaffirms the will of Congress by halting illegal agency practices, it appears that the motive of the initial congressional plaintiffs, junior Congressmen and others who were unable to influence the appropriate oversight committees, was to affect the conduct of the CAB in spite of their inability to persuade the committees of their view[105] and possibly to affect their bargaining power within Congress itself.

D. *Suits to Vindicate Members' Personal Privileges*

A much rarer variety of congressional-executive clash is alleged executive infringement of rights peculiar to members of Congress as individuals, not involving Congress as a whole or any formal collective subparts of it (except in the sense that anything affecting a single member affects the entire institution). Certainly the most likely, if not the only, sources for such controversies are the constitutional provisions for congressional compensation, privi-

F.2d at 464 n.1. The court of appeals held others had standing by virtue of such injuries as being refused entry to Rhodesia by the Rhodesian government. *Id.*

103 430 F.2d 891 (D.C. Cir. 1970).

104 49 U.S.C. § 1486 (1970).

105 Telephone interview by Richard Levine with congressional staff member, Feb. 6, 1974.

leges from arrest, and speech or debate without being questioned.[106]

The recent upsurge of legislative-executive conflict in the courts has appeared here, too.[107] In *Gravel v. United States*[108] Senator Gravel (D.-Alaska) sought to quash the subpoena of one of his aides to testify before a grand jury[109] investigating disclosure of the Pentagon Papers. Although the Senator himself had not been subpoenaed, he was allowed to intervene to raise the privilege. In another case, one aspect of a multifaceted suit arising from the November 11, 1971, arrest of 1200 persons on the steps of the House of Representatives was the claim by Representative Dellums (D.-Calif.) that the United States Attorney General had interfered with the discharge of Dellums' constitutional duties as a member of Congress.[110] And Senator Hartke (D.-Ind.) has sued to prohibit searches of his person and property at airports pursuant to antihijacking procedures on the grounds that such searches violate the article I § 6 privileges and immunities of members of Congress.[111]

An individual Congressman should be able to allege infringement of constitutional rights pertaining solely to Congressmen as individuals. There would be no difficulty in adjudicating an issue raised defensively by a member of Congress in a criminal proceeding. But an assertion of such rights by a Congressman as plaintiff in federal court would have to be predicated on the federal question jurisdiction statute,[112] and the amount in controversy requirement could prove troublesome in asserting the privileges to be free from arrest and interference with speech and debate.[113]

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106 U.S. CONST. art. I, § 6.

107 *See, e.g.*, United States v. Brewster, 408 U.S. 501 (1972).

108 United States v. Doe, 332 F. Supp. 930 (D. Mass. 1971), *aff'd as modified*, 455 F.2d 753 (1st Cir.), *vacated and remanded sub nom.* Gravel v. United States, 408 U.S. 606 (1972).

109 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 101, at 151 (1969) (powers of grand jury).

110 Dellums v. Powell, Civil No. 2271-71 (D.D.C., filed Nov. 11, 1971).

111 Hartke v. FAA, Civil No. 2012-73 (D.D.C., Feb. 14, 1974), in Washington Star-News, Feb. 15, 1974, at A-10, col. 4.

112 28 U.S.C. § 1331 (1970).

113 *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 547 (1972).

III. Access Barriers

A. *Jurisdiction*

Legislative-executive conflicts clearly are matters arising under federal law and are thus within the jurisdictional provisions of the Constitution. The constitutional grant of jurisdiction, however, is not self-executing, and the federal courts have only that jurisdiction provided by statute.[114] Congress has never provided for original jurisdiction of the federal courts in all questions of federal law; indeed, until 1875 the lower federal courts had no original federal question jurisdiction.[115] Thus, congressional actions against the executive are not necessarily within the jurisdiction of the federal courts. The only present problem in this regard is the $10,000 amount in controversy requirement of the federal question jurisdiction statute.[116]

This barrier to jurisdiction, of course, need not be permanent for congressional plaintiffs because Congress is free to amend the statute to confer jurisdiction over congressional-executive disputes.[117] But Congress has yet to act and, as will be seen, the amount in controversy requirement occasionally is an insurmountable access barrier for congressional plaintiffs attempting to challenge the executive in federal court.

The amount in controversy problem may sometimes be avoided by basing jurisdiction on some statute other than the federal question provision, *e.g.*, a specific agency review statute.[118] However, in attempts to review action under the Administrative Procedure Act (APA)[119] without recourse to a specific statute granting review, the $10,000 requirement may have to be met. Many courts do not consider jurisdictional amount once the APA is involved.[120] But

114 *See* C. Wright, Law of Federal Courts 22-26 (2d ed. 1970).

115 H. Hart & H. Wechsler, The Federal Courts and the Federal System 846-47 (2d ed. P. Bator, P. Mihskin, D. Shapiro & H. Wechsler 1973) [hereinafter cited as Hart & Wechsler].

116 28 U.S.C. § 1331 (1970).

117 Legislation growing out of a 1968 American Law Institute study and currently before Congress would eliminate the amount in controversy requirement from the federal question jurisdiction provision. S. 1876, 93d Cong., 1st Sess. §2(c)(1)(1311) (1973).

118 *E.g.*, Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970); text at note 104 *supra*.

119 5 U.S.C. § 702 (1970).

120 *See* K. Davis, Administrative Law Treatise § 23.02 (Supp. 1970).

the District of Columbia Circuit apparently does not regard the APA as a wholly independent basis for jurisdiction.[121] Finally the federal mandamus statute[122] appears to be an independent grant of jurisdiction without any jurisdictional amount requirement.[123]

Congressional plaintiffs may be able to *force* the executive into court — perhaps even federal court — if they are unable to surmount jurisdictional barriers to federal court. The state (and District of Columbia) courts of general jurisdiction are available to hear federal question cases; indeed, the restrictions on federal court jurisdiction demonstrate a congressional intent to force many such cases into the state courts.[124] State court adjudication could be ineffective in some cases, for it is doubtful whether state courts may grant certain relief, such as writs of mandamus[125] and injunctions,[126] against federal executive officers. Aside from this, state court trial of suits against the executive by congressional plaintiffs is not particularly disturbing when the plaintiffs sue essentially as private citizens, claiming no special status by virtue of congressional membership. But when congressional plaintiffs assert rights against the executive branch which are peculiar to them as Congressmen or to Congress as an institution, state courts are particularly likely to question the propriety of deciding the case[127] on the discretionary ground of federal-state comity or the nondiscretionary ground of lack of jurisdiction — it may be inappropriate in our federal system for state courts to decide issues of the relations between the national executive and legislative branches.[128]

121 Senate Select Comm. on Pres. Campaign Activities v. Nixon, 366 F. Supp. 51, 58 (D.D.C. 1973) (collecting cases).

122 28 U.S.C. § 1361 (1970).

123 *See* Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory Review" of Federal Administrative Action*, 81 HARV. L. REV. 308, 330 (1967).

124 *See* HART & WECHSLER, *supra* note 115, at 330-32.

125 *E.g.*, McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821).

126 *See* Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964).

127 *Cf.* Mink v. EPA, 464 F.2d 742, 744 (D.C. Cir. 1971) (district court held adjudication of request under Freedom of Information Act by members of Congress as such was barred by separation of powers doctrine, but permitted same suit by members in their private capacity).

128 These federal-state problems would arguably not be present in suits initiated in the District of Columbia Superior Court, which was created by Congress in the D.C. Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 473. Its judges are appointed by the President with the advice and consent of the Senate. 11 D.C. CODE § 1501 (1973).

The obvious solution to all of this is removal. If a suit is brought in a state court, the plaintiffs might still end up in federal court because officers or agencies of the United States named as defendants in state court actions may remove the action to federal court.[129] But removal may not work for two reasons. First, given the ill will inherent in the parties' presence in court, the executive branch defendants conceivably would not remove. The plaintiffs would be without a forum if the state court refused to hear the case on either comity or jurisdictional grounds. If a state court lacks original jurisdiction, a federal court apparently cannot take jurisdiction on removal.[130] Thus plaintiffs may have a federal right without a remedy. However, the $10,000 requirement may be invalid if a state court is unable to grant the appropriate relief in a federal question action.[131]

Assuming that the congressional plaintiff will not or cannot sue the executive in state court and cannot predicate federal jurisdiction on some other statute, the amount in controversy barrier of the federal question jurisdiction statute must be hurdled to challenge the executive in court. Just what the statute requires in suits for relief other than money damages is a murky area of case by case determination. For example, when a suit involves an injunction to restrain federal behavior that violates a person's constitutional rights, some courts value the right generously,[132] though others have suggested the value of not being erroneously drafted may be below $10,000.[133] The problem of congressional plaintiffs in meeting the jurisdictional amount requirement is twofold — tying the particular dispute to a federal spending program and tying their alleged injury as Congressmen to the government spending (virtually always more than $10,000) contemplated by the program at issue, spending which obviously would not be

129 28 U.S.C. § 1442 (1970).

130 *See* Pennsylvania Turnpike Comm'n v. McGinnes, 179 F. Supp. 578 (E.D. Pa. 1959), *aff'd per curiam*, 278 F.2d 330 (3d Cir. 1960).

131 *See, e.g.*, Cortright v. Resor, 325 F. Supp. 797, 809 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

132 *Id.*

133 *See* Ostereich v. Selective Serv. Sys. Local Bd. No. 11, 393 U.S. 233, 239 (1968); C. WRIGHT, LAW OF FEDERAL COURTS 108-10 (2d ed. 1970). The D.C. Circuit appears to be taking a middle ground. *See* Gomez v. Wilson, 477 F.2d 411, 420 n.56 (D.C. Cir. 1973).

for the direct benefit of Congressmen since they would not receive the funds.

1. Suits to Obtain Information

The jurisdictional amount barrier seems particularly formidable in nonstatutory congressional attempts to obtain information from the executive branch. The intrinsic value of information might never be quantifiable. And information seldom, if ever, could be deemed in advance to play such a determinative role in legislative decisions regarding spending programs as to warrant a definite price tag. Thus individual members of Congress seem to be relegated to the FIA.[134]

Congressional entities armed with subpoena power are theoretically better off, for they can issue a subpoena and bring an action for contempt to enforce it,[135] but as a practical matter committees might hesitate to invoke the weapon against high-ranking members of the executive branch. The Select Committee deliberately eschewed seeking a contempt citation of President Nixon.[136] And the theoretical common law power to dispatch the Sergeant at Arms to enforce a committee subpoena is wholly unrealistic when officers of the executive branch are involved.

The practical unavailability of such theoretical remedies was the undoing of the Select Committee in its first attempt to compel production of the Watergate tapes, for the court ruled that the action did not meet the jurisdictional requirement of $10,000.[137] Looking to the value of a disposition either granting or denying production of the presidential tapes, the court rejected several analyses by which plaintiffs argued existence of the required minimum value could have been established. The court dismissed as an unacecptable means of computing the jurisdictional amount both the added cost of committee work to ferret out the desired

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134 5 U.S.C. § 552 (1970). This is apparently an independent grant of jurisdiction for the purposes of review under the Administrative Procedure Act, 5 U.S.C. § 702 (1970). EPA v. Mink, 410 U.S. 73 (1973), does not refer to the need to establish a jurisdictional amount.

135 2 U.S.C. § 192 (1970).

136 Senate Select Comm. on Pres. Campaign Activities v. Nixon, 366 F. Supp. 51, 54 (D.D.C. 1973).

137 *Id.* at 59-61.

information and the Select Committee's appropriation.[138] The suggestion that the rights and responsibilities of legislators exceeded the monetary minimum was rejected on the ground that such rights were not quantifiable in dollars and cents. The court stated that there must be some financial loss or gain directly associated with sustaining, rejecting, or declaring the right in question.[139] Finally, in considering whether the jurisdictional amount could be met by examining the controversy from the defendant's vantage point, the court found no basis on which the requirement could be satisfied.[140]

The proposed Congressional Right to Information Act cures this problem by conferring jurisdiction on the U.S. District Court for the District of Columbia, without regard to the amount in controversy, to issue any decrees necessary to enforce, modify, or set aside a duly authorized subpoena for executive information.[141]

2. Suits to Redress Obstruction of Congressional Rights

These suits seem to face a significant barrier in the amount in controversy requirement, for the quantifiability of such congressional rights as passing on the qualifications of executive branch officers and having the opportunity to override presidential vetoes is not immediately apparent. The results to date, however, suggest that the problem may be more apparent than real. In *Williams v. Phillips*[142] the plaintiff Senators succeeded in persuading the court that denial of their opportunity to consider defendant's qualifications for the position of Director of OEO, and hence his right to administer a program with an appropriation of over $790 million for fiscal 1973, met the amount in controversy requirement.[143]

One wonders what the result would be if the act or program involved in the executive infringement did not contemplate direct federal spending, for example, a criminal statute (with minimal fines). Of course, if the courts are willing to reach far enough, virtually any government action involves more than $10,000 — full-

138 *Id.* at 60.
139 *Id.* at 61.
140 *Id.*
141 S. 2432, 93d Cong., 1st Sess. § 2(a)(344(a)) (1973).
142 360 F. Supp. 1363 (D.D.C. 1973).
143 *Id.* at 1365.

time employment of two persons, for example, could suffice. But this is a way of saying that the amount in controversy requirement should be ignored in such cases, as perhaps it should be.

3. Suits Not Involving an Interest of Congress

The jurisdictional barrier is not affected by the type of interest — private or institutional — asserted by the congressional plaintiff. The special importance of the amount in controversy requirement in suits challenging the legality of government action remains.[144] However, jurisdiction for many challenges to agency action is afforded by special statutes, and challenges arising under any statute regulating commerce — which covers an enormous part of the federal government's authority — may be brought under 28 U.S.C. § 1337 regardless of the amount in controversy.[145]

One might expect that courts faced with congressional actions purporting to represent institutional interests but actually not doing so would strictly construe the jurisdictional amount requirement. In recent suits, however, some courts have given the requirement the same liberal reading as in suits plainly filed to redress congressional rights obstructed by the executive. For example, the requirement was not even mentioned in *Nader v. Bork*.[146] Perhaps the federal spending involved sufficed, but this is far from obvious, particularly since the end result of the executive's actions was merely to substitute one Special Prosecutor for another.[147] A better explanation may be that the "pressing need to declare a rule of law that will give guidance for future conduct with regard to the Watergate inquiry"[148] overrode the requirement.

4. Suits to Vindicate Members' Personal Privileges

The jurisdictional hurdle is highest when a Congressman sues to vindicate his rights under the freedom from arrest clause or the

144 HART & WECHSLER, *supra* note 115, at 1158-62.
145 *See* C. WRIGHT, LAW OF FEDERAL COURTS § 32, at 108 (2d ed. 1970).
146 366 F. Supp. 104 (D.D.C. 1973).
147 The discharged Special Prosecutor could have met the amount in controversy requirement based on his "lost" salary.
148 366 F. Supp. at 106.

speech and debate clause.[149] Of course, these congressional privileges ordinarily would only be called into play in proceedings initiated against a Congressman, in which he could raise the privilege defensively. But in some cases, that might not be a realistic alternative — for example, if proceedings were not contemplated but a pattern of harassment was taking place.[150]

It is also possible that no proceeding would occur unless the member of Congress took further action that might exceed his privilege. For example, a Congressman objecting to airport searches would have no way to vindicate his rights because no proceeding is contemplated. He could force a proceeding to be brought by resisting, but resistance probably would entail a breach of the peace, which falls outside the scope of the privilege against arrest.[151]

B. *Standing*

The standing of congressional plaintiffs to litigate is the most perplexing issue yet to surface in the wave of congressional-executive litigation. Long a significant access barrier to the federal courts on federal law issues of a "public" nature, standing has become much less so in a series of decisions beginning in 1968.[152]

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149 U.S. CONST. art. I, § 6.

150 *Cf.* Giancana v. Johnson, 335 F.2d 366, 369 (7th Cir. 1964) (action to enjoin FBI harassment dismissed for failure to allege jurisdictional amount).

151 *Cf.* Hartke v. FAA, Civil No. 2012-73 (D.D.C., Feb. 14, 1974), in Washington Star-News, Feb. 15, 1974, at A-10, col. 4.

152 Flast v. Cohen, 392 U.S. 83 (1968), stated that standing concerns "only . . . whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," and "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 101, 102.

The next case in the series, Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970), reaffirmed the need for the plaintiff to have suffered injury in fact, economic or otherwise, to bring the matter within the article III requirement that federal courts adjudicate only "cases" or "controversies." *Data Processing* then laid down the additional test for standing to review administrative actions under the Administrative Procedure Act of "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. The meaning of this phrase is the subject of much controversy. *See, e.g.*, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971).

In Sierra Club v. Morton, 405 U.S. 727 (1972), the Court reiterated the injury in

The law of standing is generally in a state of flux, and particularly so regarding congressional-executive disputes. The Supreme Court has not spoken on the standing of congressional plaintiffs to challenge the executive branch. Some lower court opinions, if taken at face value, seem to be an extraordinary invitation to endless congressional-executive courtroom confrontation. The following discussion will be concerned primarily with standing achieved by congressional plaintiffs solely because of their congressional status; the expansion of standing in general may in many instances enable either Congressmen or private citizens to challenge the executive in court and that may materially affect the incidence of congressional-executive litigation.

1. Suits to Obtain Information

Standing should rarely be a problem for congressional plaintiffs attempting to extract information from the executive. Congressmen need access to information to perform their duties; they clearly are appropriate plaintiffs in actions to obtain information which can be related to their duties.

The standards established by the Supreme Court for determining standing[153] support this conclusion. The need for information means that denying access to it constitutes "injury in fact" to the congressional ability to function effectively. The second test — "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"[154] — obviously would be met by a statute creating a cause of action for obtaining information, *e.g.*, the proposed Congressional Right to

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fact requirement, but a footnote opened the door to wide statutory discretion over standing:

> Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions . . . or to entertain "friendly suits" . . . or to resolve "political questions" . . . because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a "proper party to request an adjudication of a particular issue" . . . is one within the power of Congress to determine.

Id. at 732 n.3.

153 See note 152 *supra*.

154 Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 153 (1970).

Information Act[155] or the Freedom of Information Act[156] (although the latter does not give Congressmen any rights beyond those granted to the general public). Arguably, even without such statutes the interests of congressional plaintiffs are "within the zone of interests to be protected" by the constitutional grant of the legislative power to Congress.[157]

The congressional right to investigate, however, appears not to be personal, but rather vested in each House or in a committee or subcommittee to the extent it has jurisdiction to investigate the matter at issue.[158] Therefore a congressional plaintiff seeking information from the executive would have an interest protected by article I's grant of legislative power to Congress only if he was seeking judicial relief under the authority of a specific congressional grant of power, either by statute or resolution.[159] The problem of discerning abuse would still appear in the form of determining whether the request for information was within the scope of the authority approved by Congress (either directly or indirectly in defining the scope of a committee which in turn authorized the specific request), but abuse would be less likely the greater the institutional approval required.

2. Suits to Redress Obstruction of Congressional Rights

Standing has been an important and unsettled issue in congressional challenges to alleged executive interference with Congress' institutional rights. By distinguishing between congressional suits which do and do not deal with executive challenges to institutional rights of Congress, the previous analysis[160] implies that Congress, or, individual Congressmen, do suffer injury in fact when the President short-circuits the congressional-executive interchange inherent in the legislative process, as by failing to return a bill vetoed while Congress was still in session, by failing to submit the name of an agency head by declaring him to be serving in an

155 S. 2432, 93d Cong., 1st Sess. (1973).
156 5 U.S.C. § 552 (1970).
157 U.S. CONST. art. I, § 1.
158 *See* Watkins v. United States, 354 U.S. 178, 200-01 (1957).
159 *See* Senate Select Comm. on Pres. Campaign Activities v. Nixon, 366 F. Supp. 51, 56 n.8 (D.D.C. 1973).
160 See parts II(B), (C) *supra*.

interim capacity, or by waging war without seeking congressional authorization. Congress is injured as an institution because the President effectively prevents it from participation in these elements of the governing process and individual Congressman lose their individual right to vote (or have their votes count) on the issue in question.

The cases demonstrate the confusion over standing. *Mitchell v. Laird*[161] relies entirely on the congressional plaintiffs' legislative interest to support standing. The court specifically rejected plaintiffs' "explicit reliance upon defendants' alleged duty not to interfere with . . . 'plaintiffs' Constitutional right, as members of the Congress . . . to decide whether the United States should fight a war' " (the view taken by this Note) on the ground that it implicitly assumes "that the Constitution gives to the Cougress the *exclusive* right to decide whether the United States should fight *all* types of war," while in fact "there are some types of war which, without Congressional approval, the President may begin to wage . . . ." The decision appears undesirable on both points. The holding on standing is right, but the wrong reason. First, plaintiffs' standing rationale is not affected by the fact that the President may sometimes make war without congressional authorization, for so long as part of the warmaking power is constitutionally lodged in Congress, the President could injure Congress by usurping it. Which kind of situation this is, is a question of the merits of the case, not a standing question. Second, the court's legislative interest rationale[162] is tantamount to granting standing for the sole purpose of rendering an advisory opinion on the legality of the war.[163] The opinion is of major importance because several other cases relied heavily upon its legislative interest rationale.

The court in *Holtzman v. Richardson*[164] seemed to place heavy reliance on *Mitchell*'s legislative interest rationale. But plaintiff alleged, and the court also relied on, direct injury from executive usurpation of Congress' warmaking power. *Williams v. Phillips*[165]

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161 488 F.2d 611, 613 (D.C. Cir. 1973).

162 This rationale is examined in the text at notes 192-98 *infra*.

163 *See* text at note 196 *infra*.

164 361 F. Supp. 544 (E.D.N.Y.), *stay denied sub nom.* Holtzman v. Schlesinger, 94 S. Ct. 1, 8, 11 (1973).

165 360 F. Supp. 1363 (D.D.C. 1973).

relied heavily on the legislative interest doctrine, but also held that the four plaintiff Senators suffered injury in fact because the failure of the President to submit Acting Director Phillips' name to the Senate deprived them of the opportunity to vote on his fitness to head OEO. The court did not mention the need for compliance with the "protected interest" standard.[166] Presumably it would have found plaintiffs within the zone of protecion of article II's requirement that the heads of agencies be confirmed by the Senate unless a statute provides otherwise.

In *Kennedy v. Sampson*[167] the court stated regarding injury in fact:

> The precise injury of which he claims is that the President's exercise of the Pocket Veto to disapprove S. 3418 was an unconstitutional act that rendered plaintiff's vote in the Senate for the bill ineffective and deprived him of his constitutional right to vote to override the Presidential Veto in an effort to have the bill passed without the President's signature. This claim of nullification of his vote for the bill and deprivation of his right to vote to override the veto, and thus inhibiting him in the performance of his Senatorial duties, is a clear allegation of injury in fact.[168]

The "protected interest" test was satisfied because "[t]he maintenance of the effectiveness of his vote in the Senate . . . is certainly arguably within the zone of interests to be protected by article I, § 7 of the Constitution[169] and supplies the logical nexus between his status as a Senator and the claim sought to be adjudicated."[170]

In *Brown v. Ruckelshaus*[171] plaintiff alleged merely that the denial of funds would result in a reduction of the number of water treatment work projects to be constructed in California[172] and thus the waters in the affected areas would continue to deteriorate, depriving him of the environmental and recreational benefits that Congress intended to secure by passage of the Federal Water Pollution Control Act Amendments of 1972.[173] While

166 This standard is discussed in note 152 *supra.*
167 364 F. Supp. 1075 (D.D.C. 1973).
168 *Id.* at 1078.
169 For the text of this section see note 51 *supra.*
170 364 F. Supp. at 1078.
171 364 F. Supp. 258 (C.D. Cal. 1973).
172 *Id.* at 260.
173 33 U.S.C. §§ 1251-376 (Supp. II, 1972).

plaintiff did not specifically allege injury in his status as Congressman, he did claim in his complaint that defendant's alleged breach of his ministerial duty to allot funds was contrary to the constitutional provisions that Congress shall have the power to establish policy, pass laws, and appropriate funds[174] and that the President shall faithfully execute the laws,[175] thus alleging the legislative-executive conflict. That is an implicit assertion of injury to plaintiff in his congressional status,[176] but the court held that he lacked standing both as a citizen of California and as a member of Congress because he suffered no injury in either capacity.[177]

Given the pleading imperfections, the outcome in *Brown* was correct. Presidential impoundment is not necessarily an institutional injury to Congress,[178] and plainiff failed to make clear whether he was asserting institutional injury. It was suggested above[179] that, aside from the oversight function, a legislator's legislative functions end upon enactment of a bill. Once enacted, responsibility for the administration of the law is vested in the executive. Hence, failure of the executive to carry out laws, while perhaps functionally as effective as an unjustified pocket veto, does not really cause Congressmen qua Congressmen injury, because no legislative function is affected. Moreover, it seems strained to read the "faithfully execute" clause as including the legislator within its "zone of protected interests." The prospective beneficiaries of impounded funds, or others actually injured by executive violation of an allegedly mandated duty, clearly are within the protected zone, so the executive's actions are not beyond challenge.

The *Brown* result is correct and each of the other decisions is doubtful because, despite the appearance of injury in fact, it is by no means obvious that individual Congressmen should have standing to assert institutional claims of Congress. The question

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174 U.S. CONST. art. I, § 8; *id.* § 9, cl. 7.

175 *Id.* art. II, § 3.

176 Note that the court in *Mitchell v. Laird* rejected plaintiffs' standing on the grounds they asserted, but found standing on other grounds not asserted by plaintiffs. *See* text at note 161 *supra.*

177 364 F. Supp. 258, 263-64. Brown lacked standing as a citizen because he could show no injury in fact.

178 *See* text at notes 73-77 *supra.*

179 See text at notes 94-96 *supra.*

is whether the "zone of interests" (if that language is helpful) of the constitutional provisions and may be asserted by only Congress as an institution, or whether they extend to or may be asserted by individual Congressmen. That individual plaintiffs lost an opportunity to vote surely is not dispositive.

Analysis of the interests at stake may lead to the conclusion that one Congressman conducting a suit without the necessity for consultation with the other members of Congress or with his House's leaders ought not to have standing to litigate fundamental questions involving the duties one branch owes another. If a majority of Congress wishes to accommodate rather than confront the executive, it seems a gross violation of interbranch comity for a court to entertain a suit by a sole member the result of which would function to adjudicate that branch's institutional duty to Congress.

End runs by Congressmen defeated in their own institution,[180] as in *Mitchell* and *Holtzman*, for example, could create particularly undesirable situations. What if a majority of Congressmen were to request intervention and take a position inconsistent with the original plaintiff, explicitly stating satisfaction with current institutional arrangements? What if only 20 percent asked to intervene in opposition? Which position should the court decide was the genuine congressional position? Rather than leaving themselves potentially liable to such situations, courts should hold that the interbranch duties owed Congress institutionally do not create a "protected interest" on behalf of members individually. As Professor Jaffe has observed:

> The "majesty of the law" does not require that every alleged breach be rectified. . . . If the interests which the law chooses to protect are satisfied with the status quo though it may involve an alleged violation, why should a stranger [who has suffered an injury] have a right to insist on enforcement?[181]

While an individual congressman is not a stranger, he may yet be able to upset an institutional consensus. Jaffe properly suggests discretion in allowing standing. A reasonable solution would be for courts to decline to hear such suits until Congress establishes a mechanism for formal sanction of institutional suits. This might

180 For an example of an end run (*Diggs*), see text at note 100 *supra*.
181 Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 637 (1971).

indeed leave certain violations unremedied, but it would help preserve the nature of Congress as a political body.[182]

If the suggested approach is not adopted, it would be desirable for courts to discriminate in finding that congressional plaintiffs have standing to sue the executive for alleged institutional injury. For example, the appropriateness of standing would seem to be stronger if the dispute is likely to be repeated frequently in the future, if congressional support for the suit appears to be broad and nonpartisan, and if the institutional concern is clear rather than dubious.[183] Another factor in favor of standing would be the likelihood that the dispute between Congress and the executive would not or could not be resolved in the normal course of litigation by private plaintiffs against the executive.

Two recent bills attempt to establish an institutional procedure.

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182 Coleman v. Miller, 307 U.S. 433 (1939), could be an obstacle. In that case the Supreme Court granted standing to Kansas state legislators in an appeal from a state court regarding controversies surrounding the legislature's approval of the Child Labor Amendment. *See* H.J. Res. 184, 68th Cong., 1st Sess. (1924), 43 Stat. 670. The amendment passed the state senate by the Lieutenant Governor's breaking a tie vote. The opponents sued in state court, contending that for the purposes of article V the Lieutenant Governor was not a member of the state legislature. Joined by some state representatives, they also contended that a prior rejection of the amendment by the legislature precluded its subsequent ratification and that the period in which the amendment could be ratified had expired. The Court said that the 20 senators "whose votes against ratification have been . . . virtually held for naught" by the allegedly unlawful vote of the Lieutenant Governor had sustained injury enough to permit standing. *Id.* at 438. The Court did not discuss how that injury related to the ability of plaintiffs to challenge the other alleged improprieties, nor did it discuss the representatives' standing. On the merits the Court split 4 to 4 as to whether the capacity of the Lieutenant Governor to break a tie was a political question, and the Court held the other allegations to be political questions.

The case is distinguishable on two major grounds. First, insofar as the Lieutenant Governor purported to be a member of the legislature, the suit represented an action wholly within the legislature and represented an oppression of the 20 by a purported majority in violation of the formers' article V "rights." Thus, the suit would be analogous to Powell v. McCormack, 395 U.S. 486 (1969), in which a Representative protested his exclusion from the House by a majority in violation of article I.

Second, and more important, the Kansas courts had granted standing, though they declined to rule on the merits. Presumably the local courts saw no state constitutional problem in hearing the suit, and interbranch comity in Kansas would seem no business of the Supreme Court. *See* Dreyer v. Illinois, 187 U.S. 71, 84 (1902). Thus, there would be no conflict between a Supreme Court policy allowing state legislators to bring institutional suits if permitted by state courts and a policy of declining to hear institutional suits by Congressmen without congressional authorization.

183 The confirmation and pocket veto cases discussed in the text at note 78 *supra* are examples of cases meeting these criteria.

S. 373, a bill designed to regulate executive impoundments of funds, gives the Comptroller General power to bring civil actions "as the representative of Congress" to remedy violations of the bill's provisions.[184] The bill is unusual in that it grants to one person the responsibility of representing the institutional interests of Congress in court. As suggested by this Note,[185] it is not clear whether the executive has a specific duty to Congress to faithfully execute the laws. If there is no such duty it is questionable whether Congress can statutorily imply that it is owed such a duty and therefore that it suffers an injury capable of supporting an article III case or controversy. Injury in fact seems to be constitutionally required to maintain standing. A court thus might strike down a statute granting Congress standing without injury or declaring that Congress is injured when the President fails to execute the laws, if the court also ruled that the President has no such obligation to Congress under the Constitution. Nevertheless, the Comptroller General may have standing to enforce the Impoundment Control Act in his own right. As the head of an independent agency of the United States, appointed by the President,[186] he might be granted power to sue in his own right[187] or in the name of the United States, and a court might construe his authority as such.[188]

S. 2569 gives Congress, through an Office of Congressional Legal Counsel, a legal division with broad powers.[189] The Legal Counsel

184 S. 373, 93d Cong., 1st Sess. § 8 (Senate version), § 106 (House version) (1973). The bill passed the Senate on May 10. 119 CONG. REC. S8871 (daily ed. May 10, 1973). The House passed an amended version on July 25. 119 CONG. REC. H6628-30 (daily ed. July 25, 1973). The measure is now in conference. The House repassed its version as an amendment to its budget control act, with a new provision requiring congressional approval for each suit by the Comptroller General. H.R. 7130, 93d Cong., 1st Sess. § 206 (1973); 119 CONG. REC. H10,671-720 (daily ed. Dec. 5, 1973).

185 See text following note 195 *infra*.

186 31 U.S.C. § 42 (1970).

187 *See* ICC v. Chatsworth Coop. Marketing Ass'n, 347 F.2d 821 (7th Cir.), *cert. denied*, 382 U.S. 938 (1965).

188 However, 28 U.S.C. §§ 516, 518 (1970), may require the Attorney General to conduct litigation on behalf of the United States unless a statute specifically provides otherwise. *See* Senate Select Comm. on Pres. Campaign Activities v. Nixon, 366 F. Supp. 51, 56 (D.D.C. 1973).

189 S. 2569, 93d Cong., 1st Sess. (1973). The Congressional Legal Counsel would be required to render legal opinions upon questions arising under the Constitution and laws of the United States. *Id.* § 3(a)(1). He also would be empowered to advise and consult with private noncongressional parties bringing civil actions against the

would be required to issue an opinion on the legality of any executive action upon the request of either House, a committee, or not less than 3 Senators or 12 Representatives.[190] If in his opinion the questioned actions are illegal, he is to institute a remedial action upon the request of a House, a committee, or not less than 6 Senators or 24 Representatives.[191] The provisions for less than full-House authorization of institutional suits would exacerbate the potential problems associated with an end-run attempt by a minority. Conceivably, a majority of Congressmen could petition for intervention in opposition to an official suit, though the Legal Counsel might change his mind about the illegality of the questioned action in such a case. Also, to the extent that such "enforcement" suits were not limited to remedying a violation of an executive obligation owed to Congress, constitutional objections similar to those voiced above with respect to S. 373 might be present.

3. Suits Not Involving an Interest of Congress

In many suits in this category Congressmen have sued merely as citizens. Standing is then determined without regard to plaintiffs' congressional status and thus is of no concern here, except for the fact that the liberalizaion of standing requirements enables congressional as well as private plaintiffs to sue the executive on a broadening range of issues.

Suits of this type also illustrate the overbreadth of the legislative interest rationale for congressional standing. The fountainhead of the novel and peculiar "legislative interest" rationale is

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executive, *id.* § 3(a)(2)(A); to intervene or appear as amicus curiae in appropriate situations, *id.* § 3(a)(2)(B); to represent Congress or any subunit, including a single member, in a suit placing in issue the validity of any official proceeding or action of Congress or any subunit, *id.* § 3(a)(3); and to bring a civil action in a federal court to require an executive employee to act in accordance with the Constitution and laws of the United States if the Counsel had in a formal opinion determined executive or agency action illegal, *id.* § 3(a)(4). The bill also confers certain statutory rights of the Attorney General on the Congressional Legal Counsel, *id.* §§ 3(b), 4(c), and attempts to relax certain jurisdictional obstacles previously encountered by Congressmen, *i.e.*, amount in controversy and nonconstitutional standing requirements, *id.* § 3(a)(4), 4(b). H.R. 11101, 93d Cong., 1st Sess. (1973), is identical. No action has been taken on either bill.

190 S. 2569, 93d Cong., 1st Sess. § 3(a)(1) (1973).

191 *Id.* § 3(a)(4).

Mitchell v. Laird.[192] The court found that congressional plaintiffs had standing to obtain a decision regarding the constitutionality of the Indochina war because such a decision

> would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities, such as raising an army or enacting other civil or criminal legislation.[193]

Similar grounds for standing were expressed in *Holtzman v. Richardson,*[194] also an antiwar suit:

> Plaintiff *qua* Congresswoman does not merely suffer in some indefinite way in common with the people generally. She is a member of a specific and narrowly defined group — the House of Representatives. As a Congresswoman, plaintiff is called upon to appropriate funds for military operations, raise an army, and declare war. Additionally, plaintiff has a continuing responsibility to insure the checks and balances of our democracy through the use of impeachment. When a plaintiff is a member of a narrowly defined group, which has been more directly affected by the conduct in question than has the general population, the test for standing should be met. . . . The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the federal government.[195]

The legislative interest rationale for standing proves far too much. First, consider the argument that the general legislative duties of Congressmen are sufficient to confer standing. Whenever the executive branch acts, or for that matter the judicial branch

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192 488 F.2d 611, 614 (D.C. Cir. 1973). This case is discussed in text at notes 66 and 161 *supra.*

193 *Id.* Interestingly, the court went out of its way to find standing, for it rejected plaintiff's contentions and substituted the quoted grounds. *Id.* Its rationale for congressional standing has been followed by other courts. Nader v. Bork, 366 F. Supp. 104, 106 (D.D.C. 1973); Kennedy v. Sampson, 364 F. Supp. 1075, 1079 (D.D.C. 1973); Holtzman v. Richardson, 361 F. Supp. 544, 550 (E.D.N.Y.), *stay denied sub nom.* Holtzman v. Schlesinger, 94 S. Ct. 1, 8, 11 (1973).

194 361 F. Supp. 544 (E.D.N.Y. 1973). This case is discussed in text at notes 69 and 164 *supra.*

195 361 F. Supp. at 549.

or private parties within the reach of Congress' legislative power, Congressmen are "members of a narrowly defined group, which has been more directly affected by the conduct in question than has the general population." They are "more directly affected" precisely because Congress exists to consider what to legislate and to pass the legislation it deems appropriate. That is the peculiar province of Congress in our system of separation of powers; the judiciary has no place in the process.

The reasoning in *Mitchell* and *Holtzman* suggests that a Congressman should be able to obtain a declaratory judgment on the legality of any activity — executive, judicial or private — within the legislative power of Congress. The job of Congress, when unhappy with ongoing activity, has been thought to be to pass legislation to channel that activity in the direction it considers desirable. Then the courts are available to test the legislation and determine its applicability to particular factual situations. The procedure implicit in *Mitchell* and *Holtzman* puts the court before Congress. If the Constitution is being violated, it is clearly desirable to have a judicial determination to that effect so the activity may be halted, but it is difficult to see how a congressional plaintiff sustains any injury in such cases. Far more appropriate would be a challenge by someone directly affected by the activity; involuntary draftees, soldiers sent to fight, even taxpayers who must finance the war, seem far more appropriate plaintiffs than Congressmen qua Congressmen.

The traditional judicial refusal to render advisory opinions[196] is also relevant. To decide a case in which the plaintiffs' *only* basis for standing is their duty to consider legislation dealing with the controversy and in which the plaintiffs are technically indifferent to the outcome and merely wish to have the dispute resolved one way or another clearly appears to be to give an advisory opinion regarding what legislation should be enacted. That is a matter solely for Congress.

The alternative argument founding standing upon the congressional duty to consider impeachment is equally unsound. If Congress ever has a duty to consider impeachment, surely it cannot be

196 Flast v. Cohen, 392 U.S. 83, 96-97 (1968); *see* C. WRIGHT, LAW OF FEDERAL COURTS § 12, at 36-38 (2d ed. 1970).

a legally enforceable duty. In deciding cases in which plaintiffs' standing derives from their duty to consider whether impeachment should be invoked, courts would be rendering advisory opinions on impeachment, which presumably are as unacceptable as other advisory opinions.[197] This objection cannot be avoided on the grounds that the dispute is over actions already taken or being taken continuously by the executive, because these actions have no effect upon Congress (the members of which are not called upon to fight a war or in any way bear greater burdens than the general public) other than arguably to invoke the "conscience" of Congress. This argument for standing also means that the controversy could not be mooted so long as impeachable officers who were involved in the questioned acts still were in office.

Nader v. Bork[198] is particularly interesting on the standing issue both as an illustration of the legislative interest rationale and because it presented three kinds of plaintiffs seeking precisely the same relief for the same executive action — the firing of Archibald Cox as Watergate Special Prosecutor. Mr. Nader, suing as a private citizen, was summarily dismissed as a plaintiff for lack of standing.[199] The congressional plaintiffs, two Representatives[200] and a Senator,[201] were held to have standing on the authority of *Mitchell v. Laird*.[202] The impeachment duty could apply only to the Representatives as the Senate has no role until the House votes a Bill of Impeachment[203] and thus has no interest until that time. But Senator Moss was found to have standing too, apparently on the basis of this assertion: "I am severely hampered in my ability to discharge my duties because of uncertainty which exists with respect to the legality of Special Prosecutor Cox's dismissal and the abolition of his office," since there are numerous pending bills "which attempt to insulate the Watergate inquiries and prosecutions from Executive interference."[204]

This pure legislative interest rationale is objectionable for the

197 *See* note 196 *supra*.
198 366 F. Supp. 104 (D.D.C. 1973).
199 *Id.* at 106 n.1.
200 Representatives Abzug (D.-N.Y.) and Waldie (D.-Calif.).
201 Senator Moss (D.-Utah).
202 488 F.2d 611 (D.C. Cir. 1973).
203 U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6.
204 366 F. Supp. at 106 & n.2.

reasons discussed at length above. There are no immediately apparent alternative routes to congressional standing in this case. The court noted that

> Mr. Cox served subject to congressional rather than Presidential control. . . . The Attorney General derived his authority to hire Mr. Cox and to fix his term of service from various Acts of Congress. Congress therefore had the power directly to limit the circumstances under which Mr. Cox could be discharged . . . and to delegate that power to the Attorney General. . . . Had no such limitations issued, the Attorney General would have had the authority to fire Mr. Cox at any time and for any reason. However, he chose to limit his own authority . . . .

In short, Congress could have but did not restrict the authority to fire Mr. Cox. The court explicitly rejected as not legally binding the commitments Elliot Richardson gave the Senate when he was confirmed.

Once the legislative interest rationale is rejected, the congressional plaintiffs seemingly lack standing for want of any injury. Thus the holding that the congressional plaintiffs had standing seems to be clearly erroneous. The congressional plaintiffs are no better off than Ralph Nader or any other interested American citizen. But of course dismissal of this suit would not have insulated the executive action from review — Archibald Cox obviously had standing to sue because he was dismissed, thereby suffering economic injury.[205]

The legislative interest rationale might be used to grant Congressmen standing qua Congressmen in cases far more dubious than *Nader*. There, a substantial congressional consensus probably existed as to the desirability of challenging, in some manner, the executive action. But the rationale also seems to cover end runs by congressional plaintiffs,[206] cases in which the lack of congressional standing would logically be absolute.

The proposed Congressional Legal Counsel Act[207] would permit suits to be brought by a Congressional Legal Counsel to compel

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205 *See* Humphrey's Executor v. United States, 295 U.S. 602, 618 (1935).

206 *See, e.g.*, Diggs v. Shultz, Civil No. 773-72 (D.D.C., June 26, 1972), *aff'd*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

207 S. 2569, 93d Cong., 1st Sess. (1973). See text at note 189 *supra*.

executive or agency officials "to act in accordance with the Constitution and laws" as interpreted by the Counsel, if such suits were authorized by 6 Senators or 24 Representatives.[208] The bill also attempts to waive any nonconstitutional standing requirements in these actions.[209] As this Note suggests, the propriety of official suits brought by a small number of members and of congressional suits to regulate the conduct of executive officials in general is dubious.

4. Suits to Vindicate Members' Personal Privileges

Standing could never be a barrier to a Congressman asserting his constitutional rights as an individual Congressman against the threat of executive usurpation. There can be no more appropriate plaintiff than one seeking to assert rights regarding his person which appear threatened by executive action.[210]

C. *Political Question and Separation of Powers*

Judicial mediation of disputes between the other two branches may raise the issue of whether the suit is nonjusticiable under the political question doctrine, a concept intimately bound up with that of separation of powers. The principle of separation of powers, though, was never intended to eliminate friction among the three branches.

> 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.[211]

The Supreme Court has deemphasized the political question doctrine in recent years.[212] Moreover, the recent executive claims

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208 S. 2569, 93d Cong., 1st Sess. § 3(a)(4) (1973).

209 *Id.* § 4(b).

210 *See* note 152 *supra.*

211 Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

212 *E.g.*, Powell v. McCormack, 395 U.S. 486 (1969); Baker v. Carr, 369 U.S. 186 (1962).

on separation of powers grounds to authority not subject to review have not been favored by the lower federal courts.[213]

One facet of the political question-separation of powers controversy is the amenability of the President to suit. The Presidency unquestionably is entitled to considerable respect; it is the pinnacle of the executive branch, it involves wider ranging responsibilities than any other government office, and its occupant is the nationally elected Head of State, as well as Head of Government. The need to summon the President to court seldom arises, though, for other officers of the executive branch are usually involved, and their defense of suits is no so stark a challenge to the independence of the executive branch. For example, the issue in *Kennedy v. Sampson*[214] was the validity of a purported presidential pocket veto. Defendants had argued that a bill becomes law only when promulgated and published by joint action of the President and the Administrator of General Services.[215] The court, however, coupled the requirements of the Constitution[216] with the remainder of the statute cited by defendants[217] to find that once the 10-day period expired the President's options were closed and all that remained was "for other Federal officers . . . to carry out their ministerial, non-discretionary duty of publishing Acts that have

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213 *E.g.*, National Treasury Employees Union v. Nixon, No. 72-1929 (D.C. Cir., Jan. 25, 1974) (direct presidential action to withhold federal pay increase); Nixon v. Sirica, 487 F.2d 700, 715 (D.C. Cir. 1973) (executive privilege not absolute); Brown v. Ruckelshaus, 364 F. Supp. 258, 261 (C.D. Cal. 1973) (impoundment of water pollution funds).

214 364 F. Supp. 1075 (D.D.C. 1973).

215 The defendants cited this statutory language:

> Whenever a bill, order, resolution, or vote of the Senate and House of Representatives, having been approved by the President, or not having been returned by him with his objections, becomes a law or takes effect, it shall forthwith be received by the Administrator of General Services from the President . . . .

1 U.S.C. § 106a (1970).

216 U.S. CONST. art. I, § 7, cl. 2.

217 [W]henever a bill, order, resolution or vote is returned by the President with his objections, and, on being reconsidered, is agreed to be passed and is approved by two-thirds of both Houses of Congress, and thereby becomes a law or takes effect, it shall be received by the Administrator of General Services from the President of the Senate, or Speaker of the House . . . in whichsoever House it shall last have been so approved . . . .

1 U.S.C. § 106a (1970).

become laws of the United States."[218] The court ruled that the relief requested did not require jurisdiction over the President.

It is quite a jump, however, from the undisputed premise that the courts should not unnecessarily assert jurisdiction over the President to the conclusion that the President is beyond the reach of the courts. Nor does that conclusion follow from the undisputed premise that some actions taken by the executive branch are nonjusticiable political questions, even if it be conceded that the President likely would be directly involved in actions to which the political question doctrine is appropriately applied. There remains a questionable area in which presidential involvement cannot be avoided by summoning subordinates, but in which the challenged activity is not, absent presidential involvement, a nonjusticiable political question. The issue is whether judicial resolution of a controversy is barred whenever the President is an indispensable party, even though it would not be if the same activity had taken place with less direct involvement of the President.

The answer must be no. Otherwise the President could entirely negate judicial review by publicly asserting his responsibility for and approval of the questioned action. For example, the presidential veto provision[219] would be superfluous and the congressional override provision[220] nugatory. In *National Treasury Employees Union v. Nixon*[221] the court dealt with these issues, holding that the President has a constitutional duty to grant to federal employees a congressionally mandated[222] pay raise which he had refused to order. The court rejected the political question defense on the ground that otherwise "a President could render every legal issue 'political' by publicly expressing his opinion on the same issue before that issue reached the courts."[223] The court did stop short of granting the requested writ of mandamus to the President out of respect for the office of the Presidency, but if the President fails to execute his judicially declared constitutional

218 364 F. Supp. at 1080.
219 U.S. CONST. art. I, § 7.
220 *Id.*
221 Civil No. 72-1929 (D.C. Cir., Jan. 25, 1974).
222 Federal Pay Comparability Act of 1970, 5 U.S.C. §§ 5301-08 (1970).
223 National Treasury Employees Union v. Nixon, No. 72-1929, slip opinion at 35 (D.C. Cir., Jan. 25, 1974).

duty, mandamus plainly will lie. Presidential involvement must give courts pause in proper deference to the Presidency, since courts must avoid needless confrontation with the Executive. But presidential involvement does not automatically insulate executive action from judicial review and the rule of law.[224]

The President apparently can be sued for failure to enforce a statute and the federal courts can order him to enforce it. If private plaintiffs may sue the President, it seems that the political question doctrine is not an insurmountable barrier to congressional plaintiffs either.

1. Suits to Obtain Information

Suits by private plaintiffs or by congressional plaintiffs suing as private citizens pose no problem. The exceptions to disclosure embodied in the Freedom of Information Act[225] are sufficiently broad to obviate executive resort to the political question doctrine. But the FIA may not always provide the degree of access to executive information which congressional plaintiffs believe is necessary for effective performance of their duties.[226] What happens if

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224 *See* Nixon v. Sirica, 487 F.2d 700, 709 (D.C. Cir. 1973) (comity requires that courts direct actions to lower federal officials if possible, but courts may maintain action against President if necessary; President had taken "personal possession" of subpoenaed tapes).

225 The disclosure requirements of the Act do not apply to matters that are:

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b) (1970).

226 *See* text following note 36 *supra*.

Congress, one House, a committee, a subcommittee, or a Congressman claims a need for access to information to discharge congressional duties and the executive balks on grounds of executive privilege? The Constitution is remarkably devoid of any explicit reference to this problem. Congress has never been sufficiently exercised to pass a statute dealing with it, perhaps more out of fear that it would circumscribe its plenary constitutional power or that the courts would strike it down as infringing the executive's plenary constitutional power than out of satisfaction with the status quo. The debate over congressional ability to extract information from the executive remains vigorous, and the political question doctrine is a major element.

> The secrecy of documents in the Executive Department has been a bone of contention between it and Congress from the beginning. . . . The problem looms large as one of separation of powers. . . . That is a concern of the Congress. It is, however, no concern of the courts, as I see it, how a document is stamped in an Executive Department or whether a committee of Congress can obtain the use of it. The federal courts do not sit as an *ombudsman,* refereeing the disputes between the other two branches.[227]

Justice Douglas' view suggests that, at least in the present state of constitutional and statutory silence, the battle over information might be a nonjusticiable political question. But by saying that the problem "is a concern of the Congress" he implies that passage of legislation providing standards for dealing with the problem might change matters.

Professor Berger, a scholar of executive privilege, concludes:

> In sum, the political question doctrine . . . interposes no obstacle to judicial determination of the rival legislative-executive claims to receive or withhold information. The power to decide these claims plainly has not been lodged in either the legislative or executive branch; equally plainly, the jurisdiction to demark constitutional boundaries between the rival claimants has been confided to the courts. The criteria for judging whether a claim of "executive privilege" is maintainable are a familiar staple of judicial business. And the framing of a remedy is attended by no special difficulty but

227 Gravel v. United States, 408 U.S. 606, 637-40 (Douglas, J., dissenting).

> rather falls into familiar patterns. Each of the parties seeks powers allegedly conferred by the Constitution and each maintains that interference by the other with the claimed function will seriously impair it, the classic situation for judicial arbitrament.[228]

Examination of the criteria articulated in *Baker v. Carr*[229] for determining nonjusticiability on political question grounds also suggests that judicial resolution of congressional-executive battles over information should not be foreclosed. There is no "textually demonstrable constitutional commitment of the issue to a coordinate political department,"[230] for the Constitution says nothing explicit on the issue. There is no "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,"[231] for the courts regularly deal with evidentiary privileges, issues of discovery,[232] and even executive privilege in litigation between the executive and private plaintiffs.[233] There is no "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"[234] and there is no "potentiality of embarrassment from multifarious pronouncements by various departments on one question,"[235] for the other two branches are already locked in combat and in need of a disinterested arbiter to settle their disagreement. There is no "unusual need for unquestioning adherence to a political decision already made,"[236] for the issue pertains solely to relations between two branches which have been unable to settle their differences.

Finally, it seems that there is no "lack of judicially discoverable and manageable standards for resolving"[237] the dispute, given that courts regularly interpret privileges, even those involving the

228 Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1287, 1357 (1965).
229 369 U.S. 186 (1962).
230 *Id.* at 217.
231 *Id.*
232 FED. R. CIV. P. 26(b)(1); *see* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2019 (1970).
233 *See* United States v. Reynolds, 345 U.S. 1 (1953).
234 369 U.S. at 217.
235 *Id.*
236 *Id.*
237 *Id.*

President.[238] However, difficulty with this last standard is raised by the sheer volume of congressional-executive contacts regarding exchange of information. Judicial cognizance of disputes over information, in the present standards vacuum, might invite a deluge of congressional suits, and that might justify a refusal to entertain suits on political question grounds. That problem, though, can be mitigated by legislation. The proposed Congressional Right to Information Act, though discouraging frivolous actions by requiring full House approval of information suits, does not entirely rectify the situation, for it deliberately contains no standards and leaves development of an interbranch privilege doctrine to the courts.[239]

2. Suits to Redress Obstruction of Congressional Rights

Applicability of the political question doctrine depends not on the nature of the rights asserted but on the nature of the activities involved in the merits of the controversy. Hence, it seems that characterizing executive action as an infringement upon the institutional rights of Congress would not advance the inquiry into the applicability of the political question doctrine to a particular controversy. Thus, the political question issue was not prominent in cases dealing with impoundment,[240] the pocket veto,[241] and the confirmation power.[242] Only in cases dealing with the Indochina conflict was the political question doctrine an insurmountable barrier for congressional plaintiffs.[243] And Presidential conduct of military operations is the epitome of the political question doctrine.[244]

238 *See* Nixon v. Sirica, 487 F.2d 700, 712-16 (D.C. Cir. 1973) (extent of governmental privileges is ultimately for courts to decide).

239 S. 2432, 93d Cong., 1st Sess. (1973); S. REP. No. 612, 93d Cong., 1st Sess. 8-11 (1973); *see* text at note 48 *supra*.

240 Brown v. Ruckelshaus, 364 F. Supp. 258, 261 (C.D. Cal. 1973).

241 Kennedy v. Sampson, 364 F. Supp. 1075, 1081 (D.D.C. 1973) (by implication).

242 Williams v. Phillips, 360 F. Supp. 1363 (D.D.C. 1973) (issue not discussed).

243 *E.g.*, Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

244 *See, e.g.*, C. WRIGHT, LAW OF FEDERAL COURTS 45 (2d ed. 1970). Holtzman v. Richardson, 361 F. Supp. 544 (E.D.N.Y.), *stay denied sub nom.* Holtzman v. Schlesinger, 94 S. Ct. 1, 8, 11 (1973), held that plaintiff's attempt to halt the bombing of Cambodia after the Vietnam peace agreement and the prisoner-of-war return was not barred by the political question doctrine, apparently the only court to so hold in the plethora of stop-the-Vietnam-War suits. The court obviously thought the timing of the suit was important. The issue was mooted on appeal by the August

Despite the limited relevance of the political question doctrine, both the distinction suggested by this Note between suits to vindicate institutional rights and those to vindicate noninstitutional rights,[245] and the analysis of the propriety of standing in terms of the institutional impact of the suits are permeated with the kinds of considerations inherent in the principle of separation of powers. Analyzing the propriety of congressional use of the courts against the executive in terms of standing seems appropriate because the courts have seen the issue in those terms and because it seems anomalous to say that a substantive challenge of particular executive action can be maintained by private plaintiffs (*e.g.*, the right to receive funds as intended beneficiaries of government programs[246]) but cannot be maintained by congressional plaintiffs as a dispute between two political branches. In short, outside of the foreign policy area the issue seems to be the desirability of the plaintiff, not the nature of the disputed action.

3. Suits Not Involving an Interest of Congress

The ability of Congressmen to sue executive branch officials qua Congressmen when no institutional challenge is alleged is primarily a question of standing. By use of the legislative interest rationale, criticized above,[247] some courts have gone out of their way to rule on the merits of actions instituted by congressional plaintiffs. Abandoning that doctrine and more rigorously evaluating the appropriateness of congressional participation in such lawsuits would obviate the need to invoke the more vague political question doctrine.

4. Suits to Vindicate Members' Personal Privileges

Congressional plaintiffs suing to vindicate their rights as individual Congressmen will rarely, if ever, be faced with an insur-

15, 1973, bombing halt. The applicability of the political question doctrine to stop-the-war suits (or to other patricular subjects) is beyond the scope of this Note. *See generally* Scharpf, *Indirect Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Tigar, *Judicial Power, the "Political Question Doctrine" and Foreign Relations*, 17 U.C.L.A.L. REV. 1135 (1970). For a defense of judicial discretion in the area, see A. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962).

245 See parts II(B), (C) *supra*.

246 *Cf.* The Pocket Veto Case, 279 U.S. 655 (1929).

247 See part III(B)(3) *supra*.

mountable political question barrier. Such suits seldom arise because the rights may be asserted defensively in proceedings brought against the Congressman. If such rights are asserted offensively, the political question issue would rarely arise because the challenged actions would involve executive coercion of Congressmen as individuals and the rights claimed are specifically granted to Congressmen by the Constitution.

IV. Concluding Comments

During the past few years, members of Congress in increasing numbers have used the courts as a forum to review the validity of executive branch action. Whether this phenomenon results from a temporary deterioration of relations between the legislative and executive branches or represents a more fundamental shift in Congressmen's perceptions of their ability to influence governmental action through traditional political means remains unclear.[248] If the trend continues and legislators come to see resort to the courts as an integral part of their official duties, the functioning of our tripartite system of government will be affected in several ways.

First, the importance of the judiciary would be increased. Cast as the ultimate arbiter of disputes between Congress and the executive, courts might come to be viewed as the most competent institution to resolve fundamental issues of national policy. Such a role, if acceped by the courts, would result in judicial resolution of basically political disputes. The inevitable outcome would be increased politicization of the courts,[249] to the ultimate detriment of both the courts and the nation. Perhaps this is what Justice Douglas, who suggests that wild animals and places of natural beauty be granted standing in environmental cases,[250] had in mind when he stated that courts should not become ombudsmen for Congress in its disputes with the executive.[251]

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248 See part I *supra*.

249 *Cf.* Comment, *Judicial Role in Mediating Political Convention Seating Disputes*, 86 Harv. L. Rev. 218, 223 (1972).

250 Sierra Club v. Morton, 405 U.S. 727, 752 (1972) (Douglas, J., dissenting).

251 Gravel v. United States, 408 U.S. 606, 639-40 (1972) (Douglas, J., dissenting).

Second, the relationships between Congress and the executive will become more formal and less subject to the give and take of political interaction. The legal brief may become the substitute for the negotiated compromise. No doubt, Congress' bargaining power may be enhanced if the executive realizes that congressional threats may be backed up by judicial writ. The need for such congressional suits is dubious, however, for private plaintiffs have been able to prevent effectuation of inappropriate claims of presidential discretion, as in the case of impoundment.[252] At the same time, the executive may interpret increasing congressional resort to the courts as institutional weakness, for if Congress were able to engage in an ongoing political struggle with the President, members presumably would not feel the need to run to the courts for help at the first sign of executive intransigence.

Third, the use of the courts has several implications for Congress. If junior or otherwise less influential members of Congress utilize courts to overcome the frustration of their legislative efforts,[253] the ability of Congress to take a unified position is undermined. This result is good if one thinks that the congressional consensus serves merely to perpetuate an unsatisfactory status quo; it is bad if one feels that congressional effectiveness can be anhanced through centralization of power in the congressional leadership of the party caucus. Moreover, increasing resort to the courts will change the role of the Congressman from that of legislator and political advocate to that of a public interest litigator who sees the courtroom as as much a part of his appropriate environment as the Well of the House. The effects of this transformation are difficult to evaluate, but they should be analyzed thoroughly.

Increased congressional litigiousness has been aided by several courts. While jurisdiction may be an insurmountable barrier when judges view the amount in controversy requirement strictly,[254]

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252 National Treasury Employees Union v. Nixon, No. 72-1929 (D.C. Cir., Jan. 25, 1974) (mandamus proper to compel President to effectuate pay raise); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973), *appeal docketed,* Nos. 73-1837, 73-1838, 73-1839, D.C. Cir., June 1973 (severe curtailment of OEO programs unlawful); *Impoundment: Administration Loses Most Court Tests,* 31 CONG. Q. WEEKLY REP. 2395 (1973).

253 For an example of this use of the courts, see text at note 100 *supra.*

254 See part III(A) *supra.*

standing[255] and the political question doctrine[256] are currently decreasing obstacles. Of course, recent decisions liberalizing standing have expanded the ability of congressional plaintiffs to sue as citizens. But a few seem to permit Congressmen almost unlimited standing to review executive action. The "legislative interest" doctrine, which in effect permits Congressmen to seek advisory opinions on matters which bear on their votes on future legislation or impeachment, is legally dubious and should be rejected.[257] Similarly, claims of standing on the theory that Congressmen are injured when the executive fails to faithfully execute the laws should be carefully scrutinized.

Courts have not rigorously evaluated the propriety of suits by individual Congressmen to enforce executive duties that are interwoven into the legislative process and arguably owed to Congress as an institution only.[258] Such individual suits without congressional authorization may place the judiciary in the position of adjudicating hard constitutional questions that a majority of Congressmen do not regard as appropriate for resolution. Worse yet, courts may find themselves deciding an "institutional" suit with a majority of Congressmen filing an amicus brief opposing the original plaintiff. Courts presumably would prefer to avoid refereeing such intramural disputes, but unless they recognize the distinction between obligations owed a Congressman individually (which a majority of a House may not deny him) and those owed to him institutionally, they are inviting such an eventuality.

Similarly critical analysis should be made of proposed legislation to institutionalize congressional access to the courts. The Congressional Right to Information Act, with its requirement for a House's approval of a committee's suit,[259] is clearly on the right track. The provisions of impoundment control bills giving the Comptroller General power to sue "as the representative of Congress" raise more severe problems concerning the propriety of Congress' becoming a law enforcement agency.[260] The proposal

255 See part III(B) *supra.*
256 See part III(C) *supra.*
257 See text following note 195 *supra.*
258 See part II(B) *supra.*
259 See text at note 48 *supra.*
260 See text at note 185 *supra.*

to create an Office of Congressional Counsel[261] with vast powers creates far more problems, for it is inappropriate that a small group of Congressmen should be able to sue in Congress' name. While Congress does need a way to preserve its real institutional privileges, much more reflection must occur before Congress takes further steps out of the political arena and into the courts. As one judge put it: "The law was not intended to be nor is it suited to be a mere substitute for politics."[262]

*Raul Robert Tapia**
*John P. James***
*Richard O. Levine***

261 See text at note 189 *supra*.

262 Atlee v. Laird, 347 F. Supp. 689, 707-08 (E.D. Pa.) (Adams, C.J.), *aff'd*, 411 U.S. 911 (1972).

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BOOK REVIEW

THE DANCE OF LEGISLATION. By *Eric Redman*, New York: Simon and Schuster, 1973. Pp. 295, index. $7.95.

*Reviewed by Michael L. Parker**

From idea to law, *The Dance of Legislation* traces through Congress the erratic course of the National Health Service Corps. The idea was simple: to use U.S. Public Health Service doctors to bring medical care to rural and urban poverty areas. The chief proponent of the idea was Abe Bergman (pp. 30-33), a Seattle pediatrician and advisor to Senator Warren Magnuson (D.-Wash.). Physician, citizen-advocate, and politician himself, Bergman has stated that where health and social problems merge, "politicians can save more lives than doctors" (p. 28). He was thrown in with the author, a young inexperienced Senate aide; and together the two amateurs, uncertain and sometimes fumbling, frequently discouraged but always persistent, managed to bring forth the Emergency Health Personnel Act of 1970.[1]

Eric Redman's exciting first person narrative describes his experience as legislative assistant to Senator Magnuson and his responsibility for a large part of the doctor corps program. From the beginning in early March 1970 through anxious days in late December (when the question had become whether President Nixon would veto the bill), Redman's account vividly sketches the processes and personalities of Congress in a way few political science texts have ever matched.

The legislation was addressed to an important national issue. But the book is not about the substance of the issue; as Redman notes at the outset, "the National Health Service Corps is the vehicle, not the object" (p. 20). The pursuit of that vehicle introduces Redman to most of the significant aspects of the congressional process: jurisdiction, sponsorship, timing, staff

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1 Pub. L. No. 91-623, 84 Stat. 1868 (1970) (codified at 42 U.S.C. §§ 233, 254b (1970)).

relations, prerogatives, rules, publicity, and strategy. It also exposes him to many of the important personalities in the politics of health. For there definitely is a "Sub-Government of Health," as Douglass Cater has described it;[2] and Redman encounters many of its chief actors — some who hold office by election, some by appointment, some by employment, and some (like Abe Bergman) by avocation.

The National Health Service Corps (S. 4106) owes its legislative success to many factors including chance and just plain good luck. It should not disturb those unfamiliar with the legislative process that it often proceeds in such an apparently unplanned fashion. Small measures with limited objectives, such as this bill, can be significantly influenced by individual effort and by chance. But global legislation, such as medicare or national health insurance, generally evolves over numerous sessions of Congress, in which the issues are fully debated and the proposals are scrutinized. Even in the consideration of such large measures, however, there are numerous opportunities for a few individuals to produce effective change for the good as they see it. In the case of the National Health Service Corps the legislative process did not work major changes in the proposal; it remained basically unaltered as it evolved from idea to law.

This discussion will give an overview of the context in which S. 4106 was enacted by focusing on the general issue of the medical manpower problem and on the niche occupied by the National Health Service Corps in solving this problem. It will then comment on some aspects of Redman's attempts to deal with the legislative process.

I. Medical Manpower and the National Health Service Corps

S. 4106 was intended to set up a program to ameliorate the geographic maldistribution of primary care physicians. The doctor corps idea was basically this: the Public Health Service of the Department of Health, Education, and Welfare would assign and

2 D. Cater & P. Lee, The Politics of Health (1972).

pay physicians to practice in shortage areas for 25 months. The incentive for young doctors to join the corps would be that such service would satisfy their military obligation (p. 31). It should be emphasized that the program offers only an interim solution. For reasons discussed below, it is not likely that once a physician has completed his 25-month assignment, he will set up his practice in the area to which the corps sent him, as proponents of the measure had originally hoped (p. 31). Thus a long-term solution must still be sought.

There are two aspects of physician maldistribution which concern health policymakers today: geographic location, and distribution according to specialty and type of practice.

The causative factors of geographic maldistribution are different with respect to urban and rural areas. Migration to the cities is a major cause of the rural doctor shortage. Rural areas are short of many things, not just physicians; dealing with their doctor shortage in the long run will require a broad strategy for rural America. It is questionable whether even substantial economic incentives will encourage physicians to practice far from the city lights where their income can be spent so pleasurably (p. 32).[3] One major foundation, hoping to arrive at a long-term solution, has been aiding medical schools in efforts to attract more students who come from rural shortage areas.[4] It is too early to know whether these students will return to practice medicine in small farming communities or whether they will gravitate to the cities as so many other small-town youth have done.

While poor patients in the Watts district of Los Angeles may be nearly as isolated as those who live in small farm communities, the relevant distance in most urban ghettos is not measured in miles, but in terms of culture, race, and money. Geographic mal-

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3 Both State and Federal governments have offered forgiveness of student loans for practice in shortage areas, but few physicians have been attracted by these offers, and few of those who were attracted stayed on to practice permanently. CONSAD Research Corp., An Evaluation of the Effectiveness of Loan Forgiveness as an Incentive for Health Practitioners to Locate in Medically Underserved Areas, 1973, at 79-83 (USDHEW #05-73-68); *Hearings on Emergency Health Personnel Act Amendments of 1972 Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. 59-60 (1972).

4 ROBERT WOOD JOHNSON FOUNDATION, 1972 ANNUAL REPORT 28.

distribution in urban areas is caused by cultural, racial, linguistic, and lifestyle differences which inhibit physicians from locating their practices in the ghetto. These inhibitions are not total barriers, since physicians can still live comfortably in adjacent suburbs. The greatest single impediment may be the lack of a simple and adequate system to pay the doctor who cares for an almost totally indigent population. While the 1965 enactment of medicaid[5] seemed to promise such a system, the realization of its potential cost and a limited amount of abuse have brought the system to the point where the physician accepting medicaid patients is quickly burdened with enormous paperwork requirements.[6] Paralleling the efforts of some medical schools to attract rural-oriented students, other medical schools have begun active recruitment programs to enroll larger numbers of blacks, chicanos, and other minorities.[7] Once again it is too early to say whether these new physicians will practice in the inner city or not.

Maldistribution according to specialty and type of practice is an issue much argued among health experts. The question is: what constitutes an optimum mix of surgeons, subspecialists, psychiatrists, pediatricians, internists, and family practitioners among the total supply of practicing physicians? Modern medicine is becoming increasingly technologically and institutionally oriented. Dramatic advances in medicine frequently necessitate teams of subspecialists in medical centers utilizing highly sophisticated, costly equipment. Not only are more physicians thus drawn into narrower forms of medical practice, but they also tend to locate around the country's major medical centers.

The two problems of geographic and specialty distribution are thus intertwined. The result is that there are fewer physicians available to serve as entry points into the medical care system — to deliver primary care.[8] Economic and cultural influences make

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5 Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 290 (1965) (codified at 42 U.S.C. §§ 426, 1395 (1970)).

6 STAFF OF SENATE COMM. ON FINANCE, 91ST CONG., 1ST SESS., MEDICARE AND MEDICAID: PROBLEMS, ISSUES AND ALTERNATIVES 125-26, 219-24 (Comm. Print 1970).

7 *Hearings on Health Manpower Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 509 (1971).

8 According to the staff of the Committee on Ways and Means:

> [T]he total output of M.D.'s has more than kept pace with population growth.

this shortage of primary care physicians much more severe in rural areas and urban ghettos. It is against this background that S. 4106 must be viewed.

II. The Congressional Process

Eric Redman did not need to understand the whole substance of the issue. Indeed, from his statement that "I knew America needed more doctors" (p. 32), one suspects that, at least initially, he did not.[9] Redman needed to know only enough to manage the congressional process. Like most congressional assistants, Redman had too many assignments, ranging from the banality of following routine home state inquiries in need of reply (p. 54) to the heady matter of the "World Environmental Institute Resolution" (pp. 29-30). Redman was already overextended when, as low man on the list, he was made protector of the doctor corps idea (p. 30).

To Redman the doctor corps was above all to be a Magnuson

> . . . [The number] of M.D.'s actually treating patients in office-based practice . . . has been decreasing in recent years, from 103 per 100,000 population in 1950 to 90 in 1969. . . . Thus the number—and proportion—of physicians in private practice providing patient care has declined—even though physician-population ratios have increased in the aggregate, particularly in the last 10 years. As a result, medical care has become less accessible, particularly in rural and inner city areas.

Staff of House Comm. on Ways and Means, 92d Cong., 1st Sess., Basic Facts on the Health Industry 74 (Comm. Print 1971).

9 Many health policy observers and policymakers would argue that there is or shortly may be an absolute surplus of physicians. Dr. Charles Edwards, HEW Assistant Secretary for Health and Scientific Affairs, is reported to have told a group of health writers recently that "we may be facing a doctor surplus within the foreseeable future." Health Manpower Report, July 10, 1973 (Capitol Publications, Washington, D.C.).

No iron laws of supply and demand seem to offer hope for shortage areas. Even with a surplus of physicians, the numbers being diverted into poverty areas will probably be small. It is one of the anomalies of medical care economics that demand can be generated by the suppliers (physicians) who largely control what the patient consumes and the number of units (visits, services, or days of care) which are bought. Large-scale, fairly comprehensive insuring schemes make it even less likely that direct dollar economics will affect the patterns of demand. Finally, the surplus question depends heavily on how medical care is organized; a large, multi-specialty group practice may be substantially more efficient in this sense than individual practice. Physicians' assistants now authorized to practice in a few states could also contribute to a more efficient use of physician manpower and significantly improve the capability to provide primary care. *Hearings on S. 3586, S. 2753, and S. 3718 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 72-75, 85-113 (1970).

program. Credit-taking is the lifeblood of politics, particularly in Congress. Virtually no quality is as well regarded in a staff member as loyalty, and Redman's loyal desire to preserve as much of the credit as possible for "Maggie" influenced the strategy from the beginning (pp. 75-76).

A. *The Use of Legislative Power*

Two distinct processes are usually required to bring a program into being. First there must be authorizing legislation; some law must provide the authority to have a program. Second, funds must be voted by the appropriations committee in each House. Sometimes, however, powerful senior members of the appropriations committees have been able to circumvent this two-stage process.

The initial strategy was to keep things close, using Magnuson's chairmanship of the HEW Appropriations Subcommittee to earmark funds for the doctor corps, which HEW would create by administrative action, either voluntarily or under threat of sanction in the appropriations process. Appropriations is an insider's game. It is a use of legislative power, rather than the legislative process, in the strict sense.[10] In the case of the doctor corps there seemed to be a number of reasons for pursuing this strategy. The program would be entirely Magnuson's. It could be worked out quietly and quickly between the chairman and his client agency, HEW, without unduly stirring up opposition from the Defense Department, the Office of Management and Budget, or such interest groups as the American Medical Association (p. 40).

The appropriations earmarking strategy is an excellent one when there are cooperative partners; it can contribute substantially to the ultimate workability of a program since the bureaucrats who will administer the program are joined in a benevolent conspiracy with the legislators from the outset. There is likely to be a meeting of the minds not only on what is going to be done but also, and very importantly, on who will administer the program. When Lyndon Johnson had a clear majority in Congress in 1965 and 1966, when both Congress and the Executive wanted to expand social programs and it seemed there was money enough

10 For a description of how this power has been used, see S. STRICKLAND, POLITICS, SCIENCE AND DREAD DISEASE (1972).

to do so, the earmarking strategy worked well. In 1970, with Congress and the Administration sharply divided and with a scarcity of money for social programs, the failure of the earmarking strategy might have been predicted.

It was not HEW's hostility, however, but a procedural obstacle which caused the initial strategy to founder. There simply was no legal authority for PHS doctors to practice medicine in the shortage areas (pp. 50-51). To have carried the appropriations bill to the floor with that defect could have exposed the new program to the risk of almost certain death at the hand of a single Senator objecting on a point of order that the appropriations bill made substantive changes in existing law. Strangely enough, while congressional staffs always argue for the aggressive assertion of Congress' initiative in the legislative process, they frequently rely too heavily on the executive branch to provide the substance of bills. This was Redman's mistake, and he spent several weeks waiting for HEW to furnish information which was not forthcoming (p. 50). As a result, the legal barrier to using the appropriations process was never conclusively explained to Redman until he consulted the Senate's lawyer in the Office of the Legislative Counsel.

For some reason, Redman had to be bitten twice before he understood the nature of the beast. Instead of proceeding on his own in the Senate, Redman turned a second time to HEW for assistance in drafting a bill. This time the better part of four months was lost relying on an uncooperative HEW (p. 72). Redman was new; he did not know HEW, its personnel, or its politics. A more experienced hand would probably have concluded at an earlier date that the Administration would not cooperate. The health policymaking apparatus of HEW remained in disarray after a bruising fight over the appointment of the Assistant Secretary for Health and Scientific Affairs.[11] The Administration as a whole was firmly committed to revenue sharing and opposed to new categorical efforts (although Congress has always favored the categorical approach, which provides a highly visible demonstration

11 This was the celebrated "Knowles Affair," in which the American Medical Association's all-out lobbying effort finally forced the withdrawal of John Knowles, M.D., then Director of Massachusetts General Hospital, who was regarded as dangerously liberal.

that *something is being done*).[12] The sweetheart relationship of the midsixties between Congress and the Executive had been broken off even before the Republican administration took office. Also, successive Nixon vetoes of HEW appropriations bills showed the Administration's hostility to congressional initiatives in the social welfare area.[13]

Other aspects of Redman's newness made it seem sensible to try to keep the project close to Magnuson's office. Redman did not have established personal relationships with the staffs either in senatorial or committee offices, and this would make it more difficult for him to manage the bill through regular committee processes. He was, nonetheless, rather too timid in turning to drafting his own bill. Thus, months after the beginning of the first effort with HEW, Redman had to face up not only to the substantive problems of drafting a bill, but also to two vital aspects of the legislative process: jurisdiction and sponsorship.

B. *Jurisdiction and Sponsorship*

Abandoning the earmarking strategy involved substantially wider exposure of the bill and the issues it raised. It meant taking in new legislative partners, potentially diluting the credit available to Magnuson, to some extent losing control over the substance of the bill, and eventually losing some influence over the administration of the program. Whether the doctor corps was to be moved through the Senate as an amendment in committee, a floor amendment, or an entirely separate bill, the sum of the matter was that there would have to be an amendment to the Public Health Service Act,[14] which was within the jurisdiction of the Committee on Labor and Public Welfare — a committee on which Magnuson had no seat.

While it was not something over which Redman exercised any choice, having the bill considered by Labor and Public

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12 *See* Iglehart, Lilly & Clark, *New Federalism Report: H.E.W. Department Advances Sweeping Proposal to Overhaul Its Programs*, 5 NAT'L J. 1 (1973); Iglehart, *Health Report: Executive-Legislative Conflict Looms over Continuation of Health Care Subsidies*, 5 NAT'L J. 645 (1973).

13 6 WEEKLY COMP. PRES. DOC. 76 (1970) (vetoing H.R. 13111, 91st Cong., 2d Sess. (1970)); 8 *id.* at 1240 (1972) (vetoing H.R. 15417, 92d Cong., 2d Sess. (1972)); *id.* at 1578 (vetoing H.R. 16654, 92d Cong., 2d Sess. (1972)).

14 42 U.S.C. §§ 201-300a (1970).

Welfare in the Senate, and by Interstate and Foreign Commerce in the House, was a clear advantage. These committees, both members and staffs, have had long experience with both the politics and the substance of health issues. Aside from the technical aspect of jurisdiction, only those two committees could have moved the doctor corps bill as fast as was required. Also, on the substance of the issue, Redman's weak point, the committee staffs were strong.

One aspect of jurisdiction which Redman did not discuss, but which is crucial, is the committee's continuing role in the administration of the program. After enactment, a program can be shaped in a major way by the concern and influence of congressional committee members and staffs who have continuing relationships with the bureaucrats in their client agencies. Every time an agency head comes to the Hill to testify before a committee or to lobby a member in his office, he faces the prospect of having to answer for the progress of a member's pet program. A prudent administrator will consult the committee chairman with respect to appointments for advisory councils or committees for a new program. Strong chairmen have also been known to dictate or veto the appointment of a particular person to administer a new program, even where there is no requirement of Senate confirmation.

The substantive soundness and the continuing value of the National Health Service Corps program were guaranteed by the jurisdiction of the traditional health committees in Congress. If the National Health Service Corps requires modification, the health committees are best equipped to modify it and also to blend it together with other health manpower programs. In the long run, this is an advantage in using a substantive committee rather than the appropriations process, which does not have the same unifying and rationalizing capability.

The fact that the health committees had jurisdiction over the doctor corps proposal dictated that Redman obtain the sponsorship of certain key members. Without the sponsorship of former Senator Ralph Yarborough, the Chairman of the Committee of Labor and Public Welfare, the National Health Service Corps Bill would have been just one more bill introduced in the 91st

Congress. As it turned out, both Yarborough and Representative Paul Rogers, the key member of the health subcommittee in the House, became ardent advocates of the cause. Securing the sponsorship of these two men was a far more intricate task than Redman had anticipated. Particularly with the almost impossible timing of the bill so close to adjournment, and precisely because Magnuson was not a member of Labor and Public Welfare, Yarborough's sponsorship was the *sine qua non* for moving S. 4106 through the Senate (pp. 122-23), as was Rogers' backing in the House. Redman's efforts to secure important sponsors were complicated by his lack of any established relationship with the professional staffs of the committees. The account of the difficulties encountered and of how the job got done makes a very good story (pp. 77-113). While Yarborough is no longer in the Senate, Paul Rogers has become Chairman of the health subcommittee in the House; and it will not be lost on HEW that the National Health Service Corps is a Rogers program. Nor, with the legal authority for the program now clarified, will Senator Magnuson's interest as the principal author of the bill be ignored when HEW appears before him seeking the annual departmental appropriation.[15]

Sponsorship outside the usual committee-client agency lines also has an effect on a bill's chance for passage, and on the shape and direction of a new program once the bill has become law. In the case of the National Health Service Corps, for example, it made a great deal of sense to have Senator Henry Jackson allied as a sponsor. Jackson's senior position on the Armed Services Committee was thought necessary to provide some defensive cover in case the military objected to the new doctor corps as a drain on its supply of medical manpower (pp. 82-83). This could have been a continuing problem; and had Redman known more about the politics of health, he might have worried more.[16]

Bipartisan sponsorship is necessary insurance. It is hard to

15 It is probably fair to note, however, that impoundments by the executive branch appear to have changed the rules of the game somewhat. Appropriations committees may no longer be given the same deference as in the past.

16 The AMA's second ranking staff official, Dr. Richard Wilbur, who "thoroughly denounced S. 4106" (p. 153), became the AMA connection in the Administration as Assistant Secretary of Defense for Health and Environment not long after the bill was passed.

conceive of lobbying a new social program through Congress along harshly partisan lines under even the best of circumstances. Not only are there the formal obstacles — rules, quorums, and the like — but power is distributed informally across party lines and along lines that cannot be traced out in the *Congressional Directory*. The essential details of the congressional process depend far more on comity and the implicit recognition of prerogative than on the explicit exercise of power.

In one of the most delightful episodes in *The Dance of Legislation*, an unbelieving Redman watches as Democrat Magnuson's "socialized medicine" bill is shepherded through the Senate to a 66 to 0 vote by a most unlikely floor manager, conservative Republican Senator Peter Dominick (pp. 156-60). Ordinarily, committee Chairman Yarborough would have managed the bill on the floor; but he was out of town, as was Magnuson. Senator Jackson had another commitment and the remaining Democrats on the floor were, in Redman's estimation, too liberal and might jeopardize conservative votes. With the help of Jay Cutler, Minority Counsel to the Labor and Public Welfare Committee, Redman secured archconservative Dominick to manage the bill. To those who only read about Congress, this will seem an impossible result. Those who have worked with Congress will understand immediately that while the arrangement was unusual, the bill had virtually complete bipartisan support on the committee which reported it, and as a member of the committee, Dominick would at the least have supported the bill on the floor against opposition. In any event it is, in dramatic terms, the high point in Redman's story.

C. *Timing*

The timing of S. 4106 was impossibly close. On several occasions Redman worried that time was running out (pp. 164-66). As it turned out, extreme time pressure worked in favor of the National Health Service Corps; but Redman could not have known it, and in fact thought otherwise. If Yarborough and Rogers hadn't moved the bill in the last days of the 91st Congress, the program might never have become law. The American Medical Association, churning ponderously through its massive

agenda, would very likely have reached an official position against the bill by the time it could be heard in the 92d Congress.[17] Given the numerous opportunities that would be presented to oppose the doctor corps program, in the legislature and with the Administration, the AMA or the Nixon Administration itself could very well have killed the bill.

There was no substantial organized constituency which could have been mobilized to defend the bill if a real fight had developed.[18] With the possible exception of the American Public Health Association (whose staff included two excellent health lobbyists), there was no organization committed to S. 4106 that could have effectively managed a head count in the House, let alone a down-to-the-wire floor fight. The confusion, clamor, and pressure of the last days of the 91st Congress were in Redman's favor. Together with what appears to have been extraordinarily inept congressional relations on the part of HEW (pp. 118-20), the pressure of time gave life to the bill.

Tactical timing is always critical in the congressional process. Obviously there are many steps to coordinate between introduction and passage. Support must be mustered initially and then held through various stages of compromise and revision. Timing in this sense is always important to the progress of a piece of *legislation*; but only rarely does it determine the success or failure of a *program*. Historical timing, on the other hand, has much to do with the ultimate success of a program. "This isn't the time" is a phrase many a lobbyist has heard when he asked a member of Congress to support a controversial bill. When a controversial program lacks a sufficient consensus among the interested public, the effort to push it through Congress can force the legislative managers to compromise away its substance in order to pass a law.

Perhaps a significant factor in the historical timing of S. 4106 was the sadly reduced status of the Public Health Service, which the Administration was trying to abolish (p. 63). In 1970 the

17 For Redman's discussion of AMA procedure in arriving at positions on pending legislation, see pp. 152-54, 165.

18 For some indication of the groups supporting the bill and their potential as a supporting constituency, see Redman's discussion of the Senate hearings on S. 4106 (pp. 125-30).

commissioned corps of the PHS was largely an anachronism, with no apparent justification for its maintenance as a uniformed service. The Magnuson bill was viewed by supporters of the corps as a way to breathe new life into the service, giving it a modern day mission at last (pp. 128-29). It seems unlikely to this author that the National Health Service Corps can significantly retard the historical decline of the Public Health Service.

III. Conclusion

The National Health Service Corps will not resolve the country's medical manpower problems at one stroke; but it may alleviate doctor shortages in poverty areas, at least temporarily.[19] The continuing interest of Senator Magnuson and Representative Paul Rogers can be counted on to keep the doctor corps in existence. It is expecting rather too much, however, to believe that the program will flourish, administered by a hostile HEW (which testified against renewal of the program in 1972[20]). On the political front, Redman won a victory for his Senator. And on the literary front, Redman has drawn a marvelous picture of the congressional process that will be read and enjoyed both by those making their first acquaintance with Congress and by those who know it intimately.

19 Dr. Merlin K. Du Val, former Assistant Secretary of HEW for Health and Scientific Affairs, testified: "As of August 1, [1972,] the approximate number of personnel in the field providing services will total 210; of these 159 are physicians, 10 dentists, 28 RN's, and four allied health personnel." *Hearings on S. 3858 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 24 (1972).

He further testified that "[t]o date, the corps has selected 143 communities to receive corps assignees. And 407 PHS personnel have been or will be assigned to staff these 143 communities; 30 communities are located in urban and 113 in rural areas." *Id.*

20 *Id.* at 24-26.