# FOREWORD

## STRENGTHENING THE CONGRESS: AN ORGANIZATIONAL ANALYSIS

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### *Introduction*

One of the ironies of the Vietnam and Watergate tragedies is that they have transformed presidential power from an article of faith into an issue. In the twentieth century, and especially since 1933, the prevailing view of our governmental institutions has identified the President as the delineator and guardian of the public interest and the Congress as a parochial and obstructive force.[1] Belief in this highly simplistic conception of the character of our governmental institutions has now been shaken. Students and practitioners of American politics who had grown accustomed to an action-oriented Presidency that generally served their policy desires, and who had become comfortable with a continuing expansion in the power and glory of that office, have been shocked and disillusioned by applications of presidential power they did not approve and in some cases did not even imagine possible.[2] They thus have begun to perceive with renewed appreciation what the framers of the Constitution understood quite well — that the public interest is something to be discovered through the process of representative government, not something to be equated with the wishes of any single branch, and that there is great virtue and necessity in a strong legislative check on the exercise of executive power.

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1 *See* Andrews, *The Presidency, Congress, and Constitutional Theory,* in THE PRESIDENCY IN CONTEMPORARY CONTEXT 13-33 (N. Thomas ed. 1975); Arnold & Roos, *Toward a Theory of Congressional-Executive Relations,* 36 REV. POL. 410 (1974).

2 *See generally* E. HARGROVE, THE POWER OF THE MODERN PRESIDENCY 3-33 (1974); L. KOENIG, THE CHIEF EXECUTIVE 1-17 (1975); A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY vii-x, 359-63 (1973).

Nor are Vietnam and Watergate the only contemporary catalysts of reform thinking and action. They have in recent months been matched, if not exceeded, by the mushrooming effects of a long-run trend that bears directly on the internal politics of the Congress. That trend is the nationalization of American politics[3] and it is finally beginning to have an important impact in altering customary modes of operation in the Congress in general and in the House of Representatives in particular.

Given the decline of faith in the Presidency on the one hand and the growing strength of congressional party mechanisms on the other, we now confront a very significant moment in the history of Congress. Yet the great majority of those who wish to strengthen Congress have not come to terms with the concrete implications of their goals, the constraints that limit constructive change, or the interconnections between institutional and political reform. Dissatisfaction over Congress' status in late twentieth century America is in general more visceral than analytical, rooted more in sensitivity to impingements on commonly accepted conceptions of Congress' role than in critical examination of the complexities lurking within those conceptions. Some perceptive analysis has been done, but primarily with respect to discrete facets of the problem.[4] As a result, reform sentiment is typically not informed by an adequately comprehensive conception of Congress' basic needs as an institution. Nor is it enlightened by an adequately detailed recognition of the incompatibilities of simultaneously maximizing complex systemic and internal goals.

To recognize the existence of intellectual weaknesses, however, is not to imply that an improved analytical framework will serve

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3 The nationalization of politics pertains primarily to the replacement of a sectional or regional pattern of party politics by one in which both parties are competitive in all sections or regions of the country. However, the significance of this trend is not limited to the breadth of competition. It also has relevance for the substantive content of party conflict, modes of campaigning, the strength of party organization, and the character of party identification. *See* E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE 78-96 (1960); W. KEEFE, PARTIES, POLITICS, AND PUBLIC POLICY IN AMERICA 143-63 (1972).

4 *See, e.g., Panel Discussions on Committee Organization in the House Before the House Select Comm. on Committees,* 93d Cong., 1st Sess., vol. 2, pt. 3 (1973). This publication contains working papers prepared for the Committee by invitation. For a general review of the reform literature see L. RIESELBACH, CONGRESSIONAL POLITICS 359-95 (1973).

as a panacea. The basic difficulties in congressional reform are not intellectual in nature, but rather stem from the limited malleability of congressional structures and resources. Nonetheless, better understanding will greatly assist in determining available choices and in evaluating various courses of action.

The aim of this Foreword is to offer a more comprehensive and sophisticated framework for analyzing the problem of strengthening the Congress. We shall consider Congress as a particular type of organization existing within and interacting with a distinct and diversified environment of other units and entities. The first section is accordingly devoted to an analysis of Congress' role in the American political system. A discussion of Congress' goals as an organization follows. The third section analyzes the impact of constraints which are generated by Congress' role in the political system upon congressional capabilities. The fourth section examines the impact of environmental trends which strain Congress' organizational capabilities. In the final section the preceding analysis is applied to current approaches to reform.

## I. CONGRESS AND THE POLITICAL SYSTEM

Congress' role in the political system is usually approached in either highly formal terms or in broad, functional terms. Neither suffices, though each is based on valid insights. Formal analysis draws its guidelines simply from the notion that the Constitution vests legislative power in the Congress and executive power in the President. To approach Congress in highly formal terms fails because discretionary power over policy is too widely distributed to be adequately encompassed by any set of guidelines drawn so rigidly.[5] The functional approaches now in vogue range from highly concrete definitions of function to highly abstract ones: making law, checking administration, educating the public, etc., versus providing legitimacy, managing conflict,

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5 E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 2-4, 147-60 (3d rev. ed. 1948); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28-86 (1965). *See* Cooper, *Schauffler and the Veto: A Commentary*, 8 PUB. POLICY 328 (1958).

integrating the polity, etc.[6] These approaches provide only broad checklists. As such, they furnish little guidance in identifying the role of a particular legislature, such as the Congress, or in delineating its discrete needs and limits.

The problem of defining Congress' role can be better approached by recognizing that roles do not exist in isolation, but rather as components of wider relationships. The key to understanding Congress' role thus lies in placing it in the context of the needs and relationships its environment establishes. This, in turn, requires us to elaborate three critical points of reference in terms of which the dependencies and goals that orient Congress' interaction with its environment can be understood.

First, Congress exists as a component of the political system. Talcott Parsons has noted that all social units in order to survive must possess the ability to define and attain shared ends or purposes.[7] The political system can thus be seen as the complex of groups and entities that arise to confer goal attainment capability on society as a whole organized as a territorially defined community or collectivity. The political system accordingly has rights and powers that are denied to the goal attainment sectors of less comprehensive entities, *e.g.*, trustees and administrations of universities or directors and managements of corporations. Within self-imposed limits, the political system is authorized to apply the inducements and sanctions necessary to mobilize whatever societal resources its purposes require. Also the political system may regulate the objectives of non-political units and the resources and coercions they may mobilize and apply.

Second, Congress exists as a component of a democratic political system. Democratic political systems are oriented toward reaching decisions about collective goals through consent. Thus, the processes of goal determination and attainment must be subject in some fundamental sense to the preferences and judgments of individual citizens This, in turn, means that political decision-

6 M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 6-29 (2d ed. 1973); W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 12-30 (3d ed. 1973).

7 T. PARSONS, POLITICS AND SOCIAL STRUCTURE 5-57, 317-51 (1969). It should be noted, however, that the definition of the political system in the text is narrower than the Parsonian definition.

making in democratic systems must be organized to satisfy four basic needs.[8]

Provision for *articulation* poses one such need. If dissatisfactions concerning collective goals are not to remain largely unexpressed, democratic systems must foster the articulation of demands on the part of all elements of the population. The need for articulation is complemented by a need for *access and responsiveness.* If the substance of decisions is to reflect citizen preferences, democratic systems must provide citizen demands with ample and equitable access to official structures and insure a high degree of responsiveness to these demands.

Another important need concerns *accommodation and aggregation.* Since citizen demands, especially in important areas of policy, are likely to be conflicting, democratic systems must foster the accommodation and aggregation of demands without setting the requirements for agreement so high as to vitiate the capacity for action. *Accountability* exists as a final need. In no system can officials participate effectively in the processes of goal determination and attainment without some measure of discretion. Nonetheless, if democratic systems must temper responsiveness with discretion, they must also provide for accountability both on matters of policy and on matters of performance.

Third, Congress exists as a component of a system whose formal units are organized by a separation of powers principle. The principle is best understood in terms of the stages of decisionmaking in democratic systems.

Democratic systems organize decisionmaking on collective goals into three broad stages. Fundamental to all subsequent stages is the *electoral* stage at which point the process of filling elective offices leads parties to define and organize policy objectives into broad programs. The electoral stage is succeeded by the *legislative* stage at which point the organizing focus of activity shifts to more specific delineation of the particular goals to be pursued. At the legislative stage concrete and specific decisions on collective goals are formalized as law within a framework delimited by the electoral stage. An *administrative* stage follows. This stage operates

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8 Cooper, *The Importance of Congress,* 54 RICE U. STUDIES, Summer, 1968, at 53.

within a framework set both by the tenor of policy decisions during the two preceding stages and by the character of executive responsibility under the constitutional order. The organizing focus of activity in the administrative stage shifts to implementation or goal attainment; but this focus nonetheless allows considerable discretion as to ends or goals, not simply ministerial discretion as to means.

The major systemic units, *e.g.*, parties, pressure groups, legislatures, political executives, and bureaucracies, are involved in all three stages. Indeed, they provide the primary links and the primary means of feedback and response. Nonetheless, each of these units is by nature tied more closely to one stage than to another. Their potential for power and influence accordingly differs at the various stages.

Differences in the importance of major systemic units at the various stages and variations in the scope of discretionary decisionmaking assigned to particular stages accounts for the role differences among legislatures in democratic orders. For example, in Great Britain great emphasis is placed on the guiding character of decisions made at the electoral level. This necessarily enhances the role of political parties and political executives at the expense of the Parliament and the legislative stage. The policy influence of the legislature, while still significant, takes the form of pressure on governmental leaders to modify party programs and avoid administrative failures and excesses.[9] Thus Parliament's influence depends largely on its standing as an arena in which the parties constantly battle for the loyalty and approval of the electorate.

In the American political system the separation of powers principle shapes and defines the role of Congress. In an environment in which highly centralized and disciplined national parties have never existed its impact derives from the manner in which it divides labor between the legislative and administrative stages and the manner in which it institutionalizes interaction and feedback between these stages.

Broadly interpreted, the separation of powers principle equates discretionary decisionmaking on specific collective goals with

9 R. YOUNG, THE BRITISH PARLIAMENT (1962). *See also* B. CRICK, THE REFORM OF PARLIAMENT (1st ed. 1964).

legislative power and the legislative process. Such an equation, of course, is not subject to rigid application. It is inherently limited by the inability to compartmentalize discretionary power and by broad constitutional grants of discretionary power to the President in the areas of foreign and military policy. Nonetheless, the thrust of the precept is clear and its impact significant. Within the limits established by the Constitution it stipulates that the critical or determining decisions on specific collective goals should be made in the form of law, not administrative rules or orders, and that these decisions should be made on the basis of the legislature's sense of what our shared or common purposes require, not the President's or the bureaucracy's. In short, then, this precept makes it the right and duty of the Congress to predominate in determining collective goals, in determining policy.

The separation of powers principle, as applied in the United States, is, however, not simply divisive or distributive in its approach or implications. The precept also involves the concept of checks and balances and thus to varying degrees promotes and intensifies, rather than strictly represses, the tendencies toward a merging or overlapping of power and function that are implicit in the ties between the legislative and administrative processes.

We may note that in the American political system lawmaking and appropriation power are defined, both through constitutional prescription and historic precedent, so that the former includes full power over the structure and organization of the administrative process and the latter is wholly discretionary. As a consequence, the two basic formal parameters of legislative decisionmaking are constructed so as to permit and induce Congress to direct or influence executive decisionmaking in ways that extend beyond simply defining or redefining the policy objectives to be attained. In addition, Congress is provided with several other significant means of influencing or altering the course of executive decisionmaking: impeachment power; confirmation power; and investigatory power.

All this, however, is not so contradictory as it may appear. Though here again abuse is possible through rigid application or overextension, the intent of providing for checks and balances is not to vest Congress with day-to-day control of the administra-

tive process anymore than it is to vest the President with day-to-day control of the legislative process. The prime and governing aim of the concept of checks and balances is rather to preserve and protect the broad divisive or distributive objectives of the separation of powers principle.

In part, it serves or furthers this purpose by legitimizing a guardian or watchdog function and by augmenting the array of weapons for performing this function. In so doing it establishes and secures Congress' ability to guard against and correct abuses of executive power; it institutionalizes Congress' position as a prime agent for holding executive officials accountable for faithful, non-arbitrary, and effective performance of their duties under the laws and the Constitution.

Nonetheless, as important as this result is, it does not exhaust the impact of the concept of checks and balances. Since the administrative stage inevitably involves substantial amounts of policy discretion, Congress cannot ignore that fact and limit its attention solely to malfeasance or maladministration. Nor does it have to, given the manner in which the concept of checks and balances complements and reinforces the implications of granting legislative power to an independent or self-maintaining legislature. Under such conditions, a guardianship function, once legitimized and institutionalized, is very difficult to circumscribe narrowly. The notion of checks and balances accordingly operates to enhance Congress' overall right and ability to keep close tabs on the course of administrative decisionmaking with regard to both policy and performance. In so doing it enhances Congress' ability to influence administrative decisionmaking through means other than actual exercise of its lawmaking or appropriation powers as well as to apply these powers to reclaim and formally redefine elements of discretion previously delegated to the executive—that is, to return policy determination fully and explicitly to the legislative stage. The concept of checks and balances and the institutional consequences it involves thus provide a vital and powerful buttress for Congress' ability to serve as the source of critical and determining policy decisions in the political system.

Having elaborated these points of reference, the broad dimensions of Congress' role in the American political system are clear.

As a political system the American political system seeks to make and implement collective goal decisions that effectively serve its purposes as a political community. As a democratic political system the American political system seeks to base these decisions on consent. In a very general sense the role of the national legislature in all viable democratic orders is to contribute along with other major political units to providing the system with the capability for making and implementing collective goal decisions that are both acceptable and effective. However, in the American political system Congress has special and critical responsibilities in this regard.

Within the limits of the constitutional order Congress is charged with making the major and determining decisions on specific or concrete collective goals, with serving as the predominant policymaker in the system. Indeed, in the American political system due to the explicit grant of legislative power to the Congress in a written Constitution, executive action, except in a few specified areas, is entirely dependent on legislative authorization. However, to accord Congress predominance in policymaking is also to make the political system highly dependent on its vitality and effectiveness. In contrast, then, to the typical situation in parliamentary regimes, Congress' role in satisfying the American political system's need for articulation, access and responsiveness, accommodation and aggregation, and accountability is not secondary or supplementary to the role of parties or political executives, but rather primary and indispensable.

Such a role necessarily involves Congress extensively in both the legislative and administrative process of decisionmaking. Congress' main concern, of course, is and must be to guard the impact and significance of the legislative process since its role and actual power are closely tied to the stage at which its procedures and mechanisms provide the context and basis for decision making. Still, Congress cannot preserve and protect the impact of the legislative process if it does not concern itself with decisionmaking in the administrative process as well. It therefore must seek both to guard the autonomy and scope of initial policy determination in the legislative process and to oversee and instruct or influence the manner in which executive officers interpret its

policy directives. Moreover, within the limits of the Constitution, it must retain the right to exercise ultimate control over executive policy decisions by using its lawmaking and appropriation power to reclaim and redefine elements of discretion it believes executive officers have used to contravene its policy wishes or desires.

Congress' policy role is complemented by its role in establishing and securing executive accountability for faithful, nonarbitrary, and effective performance. It is true, of course, that these roles overlap and that they are both supported by the same mechanisms or powers. Nonetheless, seeking to check and control malfeasance, maladministration, or simple inefficiency on the part of executive officials can and should be distinguished from seeking to check and control the broad policy discretion these officials often possess within the bounds of the laws and the Constitution. If distinguishable, however, executive accountability for performance has always been and remains a critical facet of democratic orders. It provides an essential means of insuring that the purposes and procedures of democratic orders will not be violated due to the arrogance of mind, corruption of means, or self-satisfaction of conscience that positions of great and unchecked power tend to breed.

In satisfying the need for executive accountability the American political system once again relies more heavily on Congress than parliamentary systems typically do on parliaments. In the absence of disciplined and programmatic national parties and given the difficulty of holding a single chief executive with a myriad of policy responsibilities accountable for the acts of a veritable host of subordinates, the American political system is highly dependent on Congress to guard the integrity and effectiveness of the representative process from executive excesses and incompetence.

## II. Congressional Goals

Our desire to sketch Congress' broad or generalized role in the American political system derives from the crucial significance

its institutional role has for its organization and operation. Roles are prescriptive, not merely descriptive. They are defined or patterned by norms and serve to orient the behavior of units or actors in delimited situations. As such, roles involve not only specified or regulated forms of behavior, but ends or goals as well since norms themselves derive from and are contingent on values, on conceptions of what is desirable. Role analysis therefore provides a basis for identifying goals and this is especially true in the case of organizations or institutions since these social units arise and persist as planned or deliberately constructed vehicles for social collaboration or cooperation.[10]

As has been amply demonstrated in the literature that focuses on the study of formal organizations, organizational goals tend to be multiple, conflicting, and shifting rather than unitary, homogenious, or fixed. Drawing on the work of Charles Perrow, these goals may be divided into three basic types: output goals, unit goals, and residual or secondary goals.[11]

### A. *Output Goals*

Output goals define the desired product of an organization. In terms of the two major roles we have examined, Congress' product falls into two broad categories. One consists of decisions and actions that, in the form of legislation, define binding features of specific collective goals and, in a variety of other forms, guide the exercise of executive discretion in interpreting the content of collective goals already specified in the laws and the Constitution. The second legislative product consists of decisions and actions in a variety of forms, including legislation, that check and control the course of executive decisionmaking to insure faithful,

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10 For a brief discussion of the features that distinguish organizations as a special type of social unit see A. ETZIONI, MODERN ORGANIZATIONS 3-4 (1964). For general surveys of the organizational theory literature see K. AZUMI & J. HAGE, ORGANIZATIONAL SYSTEMS (1972); J. MARCH, HANDBOOK OF ORGANIZATIONS (1965); THE SOCIOLOGY OF ORGANIZATIONS (O. Grusky & G. Miller ed. 1970).

11 C. PERROW, ORGANIZATIONAL ANALYSIS: A SOCIOLOGICAL VIEW 133-74 (1970). The categories in the text are based on distinctions Perrow establishes, but nonetheless differ in several regards from his formulation.

non-arbitrary, and effective performance under the laws and the Constitution.

Congress' output goals contain both quantitative and qualitative dimensions. Quantitatively, Congress cannot meet its policy or performance responsibilities unless it maintains a certain level of output. Within the limits of the constitutional order it must be capable of making the basic decisions on collective goals in all major areas of policy. In addition, it must be capable of exercising review and oversight of executive policy decisions and performance in a large variety of complex substantive fields.

Qualitatively, congressional decisions must be made in a manner that satisfies the four needs of a democratic order and must effectively remedy the problem that prompted legislative action. Therefore, decisions which determine the content of specific goals must be responsive to citizen demands and acceptable to a broad spectrum of the electorate. In controversial areas these decisions must be highly accommodative in order to compromise a wide range of conflicting interests. At the same time the goals defined in legislation must be capable of perceptibly alleviating the distress that created the pressure for legislative action. Similarly, congressional actions that hold the executive accountable for policy and performance need to be both responsive and rational, responsive in that they reflect the legally defined or informally understood wishes of the House or Senate and rational in that they are appropriate means to the purposes they are designed to serve.

### B. *Unit Goals*

Unit goals, in contrast to output goals, relate to the operational needs of a unit or entity as an organization, to the factors or conditions required to endow an organization with the capability to satisfy its output goals. For Congress as for all organizations four basic unit goals exist: autonomy, division of labor, integration, and motivation.

Congress' need for autonomy extends to its relations both with the electorate and with the executive branch. Though it must be

tied to the electorate and responsive to it, the linkages that establish these ties must nonetheless allow some leeway. If the ties are too rigid, Congress' ability to accommodate interests and to pursue rational, though distasteful, courses of action will be severely impaired. Congress must also find an appropriate balance between dependence and independence in its relations with executive officials. Given the disparity in resources and expertise available to the two branches, Congress throughout our history has been dependent on executive officials for information, advice, and proposals. Moreover, throughout our history common party bonds and shared policy aspirations have led Congress to accept presidential aid and influence in the often difficult work of aggregating majorities behind controversial programs. Nonetheless, outcomes in Congress must reflect internal understandings and resolutions of conflict rather than bureaucratic pressure or presidential coercion. Otherwise, Congress will satisfy its policy and performance responsibilities only in form, and fail to make its own contributions to the democratic needs of the political system.

The remaining three unit goals stem from the need all organizations have to provide for an effective and efficient decisionmaking system if output goals are to be satisfied.

Division of labor is required both to distribute the time, attention, and energy of organization members efficiently and to provide a basis for rational consideration of proposed courses of action. In the case of Congress, it is required both to produce the sheer number of decisions and actions needed to fulfill its responsibilities and to extend the organization's capacity to develop internal sources of specialized knowledge and bring them to bear in decisionmaking.

Integration is no less essential an organizational need than division of labor. Indeed, though division of labor provides critical benefits for organizational decisionmaking, it also creates potentially ruinous fractionalization. Organizations therefore must have a capability for unifying and coordinating their various parts, if they are to have the actual capacity to produce outputs. In the case of Congress, integration is an especially prominent need since Congress itself serves primarily as a unifying entity in the political environment in which it functions.

Organizational success in satisfying output goals, however, depends on more than good technical design. Organizations must also provide for the human needs of organization members. They must motivate individuals to make the contributions to the achievement of output goals that both the distinctive and shared or common aspects of their roles as organization members prescribe or require. They must, in short, provide for morale and loyalty.

Morale and loyalty, however, are problematic, not assured, and must be induced through the provision of ideal and personal incentives.[12] It is true, of course, that the degree to which organizations must motivate performance and the blend of inducements they can rely on in doing so varies from organization to organization and even within levels of the same organization.[13] Nonetheless, in Congress, as elsewhere, differential distributions of power and uneven achievement of output goals breed frustration and conflict which vitiate morale and erode loyalty. Congress thus, like all other organizations, must continually confront and resolve difficulties in maintaining morale and loyalty that stem from the basic character of organizational life or else face organizational debility or even paralysis.

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12 Ideal incentives derive from the commitment of individuals to the output goals of an organization. They relate to the satisfactions attached to realizing impersonal or socially-oriented goals. Personal incentives derive from rewards and penalties that impact self-oriented needs or interests. They relate to the satisfactions attached to personal well-being, *e.g.*, pay, prestige, friendship, security, etc. Morale can be seen as a condition in which high satisfaction with the blend of ideal and/or personal incentives provided produces high positive orientation to the fulfillment or performance of both the distinctive and the common or shared aspects of organizational roles. Loyalty provides a far less specific or contingent form of support and is thus especially valuable in organizations where roles are demanding or onerous due to internal or external pressures. It can be seen as a condition in which high commitment to the broad role or abstract ideal goals of an organization produces high positive orientation to the organization per se and to role fulfillment within it, apart from the level of ideal or purposive satisfaction provided by actual outputs or the level of self-oriented satisfaction provided by actual personal rewards. In the case of Congress it rests on belief in the critical significance of Congress' role in the political system as policy determiner and agent of executive accountability, apart from the actual legislative outputs produced in fields such as health, defense, or taxation, or the actual material and psychological rewards distributed to individual members.

13 For an insightful discussion and more elaborate categorization of types of inducements see J. WILSON, POLITICAL ORGANIZATIONS 30-35 (1973).

### C. *Residual Goals*

Organizations generally encounter difficulties in motivating members when the distribution and manipulation of the inducements at their disposal are confined strictly or rigidly to the service of output goals. Given these difficulties, leadership echelons in organizations typically allow their structures and resources to be used to serve common or shared goals members have as individuals or groups of individuals rather than as organization members. In short, organizations typically provide for and seek to accommodate the pursuit of goals that are residual or secondary in relation to the output goals that derive from their broad roles in the environments in which they operate.

In the case of Congress, residual goals largely provide outputs that enhance the political fortunes of members, both singly and in groups. Leeway is provided so that the structures and resources of Congress can be used to serve the political careers of members. For example, committee assignments are often highly influenced by district interests; staff positions are used to hire personnel who can assist in campaigns; trips home are provided; floor time is set aside for speeches lauding ethnic minorities whose support is critical in particular constituencies. Similarly, the structures and resources of Congress are used by both majority and minority for "politicking" or gaining partisan advantage over opponents apart from the substance of issues. It is, for example, not uncommon for amendments to be introduced or speeches made where the primary intent is not to build on substantive issues, but rather to embarrass the opposition in the eyes of the electorate.

In Congress, as in all organizations, residual goals pose serious dangers. Their pursuit is, of course, not wholly dysfunctional since they contribute to morale and loyalty and in so doing provide a basis for motivating output performance. Nonetheless, residual goals inevitably threaten to divert time and resources from the attainment of output goals. In the Congress, for example, time spent on constituency service and campaigning can seriously detract from committee work; intense partisanship can reduce the chance for accommodation and aggregation. If allowed

free rein, the pursuit of residual goals can easily threaten to displace externally-oriented output goals and transform the basic character and purposes of an organization.[14] In the case of democratic legislatures generally this can result not only in the domination of career and partisan considerations over policy results, but also in widespread corruption through use of organization leverage and resources for private financial gain. If Congress, like all other organizations, must tolerate residual goals, it also must structure and limit their pursuit, so that their beneficial consequences are exploited and their detrimental effects kept in check.

## III. Inherent Constraints on Congressional Capabilities

### A. *Inherent Constraints*

Congress is not free to seek to satisfy its output and unit goals or manage its residual goals in any manner it chooses. Its broad role in the political system not only determines its output goals, but also imposes basic constraints on the manner in which it can function.

#### 1. Low Tolerance for Hierarchy

In bureaucratic organizations a number of different job levels can be established and decisionmaking authority distributed among levels in a highly graduated fashion. Congress, however, is not a bureaucratic organization. Its tolerance for hierarchy is and must be quite low.[15]

Authority is a facet of a role. Thus the nature and distribution

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14 This form of goal displacement should be distinguished from the one more commonly recognized in the organizational theory literature: goal displacement as a consequence of adaption to environmental constraints or demands. The classic study in this regard is P. Selznick, TVA and the Grass Roots (1949). *See also* C. Perrow, Complex Organizations 178-87 (1972).

15 For a general review of the literature on the concept of authority see R. Peabody, Organizational Authority 1-43 (1964). *See also* T. Parsons, *supra* note 7, at 371-73.

of authority are dependent on the character of organizational norms and the values that shape and legitimize these norms. The values in question, however, are neither wholly nor in most cases even largely organizational creations. They derive instead from more general and widely shared social values that provide a basis for an organization's broad role in and contribution to society. In Congress' case, as argued above,[16] the values that define its purposes and, along with separation of powers criteria, assign it its status relative to other political unfits are democratic in nature. Hence, both to make its designated contribution to satisfying the political system's basic democratic needs, and to legitimize its internal role structure and its output in the eyes of both its environment and its own membership, Congress must be organized and operate in a democratic manner. It must be organized and operate in ways that accord with democratic values as they apply to decisionmaking.

Within this requirement, of course, a wide range of permissible variation exists. However, a number of broad constraints also exist. Congress must in basic and ultimate ways accord its members equal formal status and influence to avoid prejudice in favor of particular demands. It must regularize opportunities for discussion and bargaining in order to tap the potential for accommodating and aggregating conflicting demands. It must place some reasonable limits on the need for agreement, *e.g.*, majority rule, so that a workable balance can be struck between the need for action based on high levels of agreement and the need to preserve a capacity for action. In short, then, Congress cannot be run like an army or even a business corporation and for good and substantial reasons. It must not only produce decisions on collective goals; it must do so collegiately. Decisions must be made through discussion and with the consent of at least a majority of its members.

The constraints imposed by democratic values, however, do not mean that no differential distributions of decisionmaking authority can be made. Still, such distributions as are made in the formal structure cannot authorize the holders of particular roles to command others. The type of authority that can be conferred

16 See text accompanying note 8 *supra.*

and distributed is primarily the authority to serve as agent or facilitator of collegial decisionmaking. As a consequence, relatively few levels of formal authority can be established and the authority distributed among positions and levels is essentially parliamentary in nature, e.g., authority of floor officers to schedule and order debate, or of committees to prepare legislation.

Nor does Congress' low tolerance for hierarchy mean that power or influence over decisions cannot be distributed in a differential or inequitable fashion. Power or influence derive not only from authority, but also from the totality of rewards and sanctions that are placed at the disposal of a role or position. Authority is normative in character. It contributes to power by permitting the holder of a role to mobilize some stipulated portion of the commitments members have to the norms and values of the organization and by establishing claims for the control of other ideal and personal reward and sanctions at the disposal of the organization. The authority of a role is thus not the same as its power either conceptually or empirically.[17]

In bureaucratic organizations gaps between authority and power, between legitimized ability to make decisions and actual ability to secure obedience, are deliberately minimized by concentrating the ideal and personal inducements at the disposal of the organization in its top positions. In Congress, however, the situation is more complex and fluid. On the one hand, the authority associated with a role inevitably leads to some degree of control over inducements other than those that derive from commitment to organizational purposes, values, and norms. Hence, even parliamentary forms of authority involve control over substantive policy and personal rewards at the disposal of the organization and result in differential distributions of power. Moreover, the constraining effect of democratic values can be checked or negated by notions of party government and party responsibility. As the period from 1890 to 1910 in the House illustrates, the values and norms involved in these allegiances provide a stimulus for establishing and a basis for legitimizing highly differential distributions of power within the Congress.[18] On the other hand, demo-

17 See note 15 *supra.*

18 See text acompanying notes 30-31 *infra.*

cratic values militate against disparities in the power of individual members. In eras when allegiance to party government is high they serve as a corrosive influence, evoking and reinforcing discontent and inspiring such epithets as "Czar rule." Similarly, in eras when party government values and norms are not strongly held they serve as a barrier to centralization of power in Congress and stimulate and reinforce discontent regarding the differential distributions of power that even a decentralized formal structure involves.[19] In summary, then, Congress' low tolerance for hierarchy makes the problems it faces in distributing authority and power quite different than in bureaucratic organizations. As discontent over committee chaimen in the modern era illustrates,[20] in Congress the problem is typically not that power is insufficient to support authority, but rather that authority cannot justify the actual level of power.

### 2. Openness to Environment

All organizations must be open to environmental influence and demands. Nonetheless, the degree of openness can vary and in Congress' case it is far higher than in most bureaucratic organizations.

Due to its broad role in the political system, Congress is linked to the electoral component of its environment through a system of elections, parties, and constituencies. As a result, Congressmen necessarily have dual concerns and allegiances. Whatever their concern and allegiance regarding Congress' role and needs as an institution, they cannot avoid another set of electorally-grounded interests and loyalties.

One important source of such concerns and allegiances derives from the status of members as partisans or party members. Party organizes and energizes the forms and arrangements of the election system. It provides the widest basis for articulation and for

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19 J. COOPER, THE ORIGINS OF THE STANDING COMMITTEES AND THE DEVELOPMENT OF THE MODERN HOUSE 115-30 (1970). *See* G. BROWN, THE LEADERSHIP OF CONGRESS (1922); D. ROTHMAN, POLITICS AND POWER (1966).

20 See text accompanying notes 71-78 *infra*.

accommodation and aggregation at the electoral stage. By so doing it serves as the single most important mechanism and vehicle for expressing the communalities of view and interest that exist in the political system, for uniting organized and unorganized groups in the various separate and distinct constituencies behind common policy orientations and programs. Members of Congress accordingly have partisan concerns and allegiances that encompass both matters of substantive policy and organizational arrangements.

Another even more important source of electorally grounded concerns and allegiances derives from the direct and personal relation of members to their constituencies. Members ultimately must please key groups and interests in their constituencies and cannot avoid the concerns and allegiances that stem from their dependence on them for election. Such concerns and allegiances, of course, do not necessarily conflict with partisan concerns and allegiances. On the contrary, since party itself rests on communalities of interest and view that unite separate and distinct constituencies, party and constituency considerations often overlap and reinforce one another. Nonetheless, party in the United States has never been disciplined or cohesive enough to dominate the linkage between members and their constituencies.[21] Members therefore must pay primary attention to constituency views and interests and they endanger their tenure if they sacrifice constituency to party on critical issues. Moreover, the degree of congruence in the interest alignments that compose party and hence the potential for party cohesion vary from era to era and from issue to issue. As a consequence, constituency invariably provides an independent and significant source of concern and allegiance, apart from party, and this is especially true in the modern era where levels of party voting in Congress are substantial, but nonetheless lower than at the turn of the century.[22]

Congress is also very open to the influence and desires of the

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21 *See, e.g.*, D. BRADY, CONGRESSIONAL VOTING IN A PARTISAN ERA 139-40 (1973). *But see* W. SHANNON, PARTY, CONSTITUENCY, AND CONGRESSIONAL VOTING 132-56, 177-79 (1968) which criticizes prior studies.

22 W. SHANNON, *supra* note 21, at 3-61; J. TURNER, PARTY AND CONSTITUENCY: PRESSURES ON CONGRESS (rev. ed. E. Schneier 1970).

second prime component of its environment—executive officials. In part, this is due simply to technical factors, to Congress' need, given its restricted size, for expert assistance in making rational means-ends decisions. However, policy and political factors play as important, if not more important, a role. The concerns and allegiances members have for substantive policy goals promote alliances with executive officials and cancel out the restrictive effects of formal institutional arrangements and prerogatives. This is particularly true of the President whose national constituency includes and overlaps all congressional constituencies with the result that the President inevitably shares substantive policy goals with large numbers of members. Moreover, since he is also united with large numbers of members through common partisan affiliation, shared concern for party success reinforce the impact of shared policy goals and increases congressional receptivity to his desires and influence.

In conclusion, then, it is true, of course, that it is not unusual for members of organizations to be crosspressured since roles in particular organizations rarely encompass all dimensions of human personality. For example, job or profession often conflicts with family. Nonetheless, Congress is quite distinctive in that the dual sets of concerns and allegiances that open it to electoral influence and reinforce technical sources of dependence on executive officials are built-in or inherent features of the very linkages that tie it to its environment and the basic character of its work.

### 3. Limited Control over Personnel Resources

Congress' ties to the electorate and its low tolerance for hierarchy combine to limit its control over personnel resources in quite significant and distinctive ways. The size of the House and Senate are fixed by the constituency system. Congress cannot easily expand or contract its membership in response to the needs of its output goals. It can, of course, add staff; but here too its restricted membership size limits the number of staff it can supervise and deploy. Nor does Congress have the power to select its members or to fire them except under highly limited circum-

stances.[23] Moreover, due to the need to preserve formal equality, salaries and benefits are uniform and other prerequisites, such as office and staff expenses, are either roughly equal or vary primarily in terms of the size of the constituency.[24]

### 4. Low State of Technology

If we approach technology broadly as the regularized techniques or methods that can be applied to transform raw materials into outputs, then the state of technology with reference to a particular type of work depends primarily on the degree of knowledge of the cause and effect relationships involved in producing the desired outputs. Substantial restrictions on such knowledge and hence on technology are involved in the work of Congress or any other democratic legislature.

Congress' products are decisions and actions that specify collective goals, guide executive discretion, and check and control executive performance. The most critical aspects of such work are interlaced with value decisions, with decisions on the nature and character of ends. As a result, the impact of cause and effect knowledge is seriously limited because knowledge of facts and empirical relationships cannot determine ends and because disputes over ends complicate agreement on common empirical frameworks and basic facts. To a significant degree, then, issues in Congress must be resolved not by technical or cause and effect knowledge, but rather by bargaining in which forms of advantage are exchanged and by rational persuasion in which links between ends immediately in dispute and more remote shared ends are established through rational argument. Cause and effect knowledge, of course, can play a role in each of these processes. However, in bargaining it becomes relevant only to a degree that exchangeable advantages

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23 For an account of a recent celebrated instance of exclusion see A. JACOBS, THE POWELL AFFAIR (1973). *See also* Powell v. McCormack, 395 U.S. 486 (1969). For historical precedents on exclusion see 23 CONG. Q. ALM. 541 (1967).

24 For information on the expense and staff allowances of members see the annual hearings conducted by the House and Senate Appropriations Subcommittees on Legislative Branch Appropriations. *See also* D. TACHERON & M. UDALL, THE JOB OF THE CONGRESSMAN 39-62 (1966).

exist, whereas in persuasion it becomes relevant only to the degree that logical connections exist between immediate and remote ends.

Our point, then, is not that cause and effect knowledge is irrelevant or insignificant in congressional decisionmaking. Indeed, in Congress as in all organizations cause and effect knowledge provides the basis for rational decisionmaking by clarifying the relation between intended results and actual consequences. It is rather that in the context of Congress' work such knowledge is not powerful or extensive enough to provide a foundation for any sophisticated technology, for any elaborate set of propositions or mechanisms in terms of which decisionmaking can be regularized or standardized.

Nor do we mean to imply that no standardized techniques can be applied. In minor areas of business, where there is often substantial agreement on ends and empirical frameworks, hundreds of bills can be handled each session in a highly routinized fashion. Similarly, certain aspects of Congress' work are highly subject to mechanization or even computerization, *e.g.*, the printing of bills or voting on the floor. Nonetheless, it remains true that because the most critical aspects of Congress' work are political in nature, its productive processes cannot be as highly routinized or mechanized as they are in an automobile or steel factory, nor as highly regulated by logical or analytical search procedures as they are in a hospital or engineering firm. Congress, in short, has been and remains a custom or unit producer of highly intangible outputs and should not be seen wholly or even largely as a lawmaking machine.[25]

### B. *Impact of Inherent Constraints on Congressional Capabilities*

#### 1. Autonomy

Congress' ability to maintain a viable balance between dependence and independence in its relations with executive officers

25 In recent years an important component of the organization theory literature has focused on the impact of technology on organization structure and behavior. For a general account see C. PERROW, *supra* note 11, at 50-91. *See also* J. MARCH

rests in large part on its ability to satisfy its needs for division of labor, integration, and morale and loyalty. Deficiencies in these regards result in increased dependence on executive assistance and direction and even increased tolerance of executive incursions on basic congressional prerogatives. The impact of the constraints we have identified on autonomy is thus largely indirect and derives from the manner in which they affect decisionmaking capability. Nonetheless, one of the four constraints previously identified, openness to environment, has a significant direct impact as well. In discussing this constraint, we noted that similarities in the electorally grounded concerns and allegiances of the President and members of Congress serve to negate formal roles and to render Congress amenable to presidential influence and direction. The converse also applies: differences in these concerns and allegiances serve as a bulwark of congressional autonomy and this is especially true in periods in which the President derives great leverage in the legislative process from the variety of political and institutional roles the political system confers on him.

Congress' ability to maintain a viable balance between dependence and independence in its relations with constituents also rests in part on the character of the decisionmaking system. In all periods the complexity of its decisionmaking structures and processes affords opportunities for evasion and at least to some degree such opportunities are quite functional in that they facilitate accommodation. Here, however, the direct impact of Congress' electoral ties is a more decisive factor. Though the danger of domination by electoral forces is remote unless party coherence and cohesion can be carried far beyond any point thus far attained in American history, the congruence of party alignments and levels of party voting can and do vary in response to increases or decreases in the diversity and geographical distribution of major groups and interests. As a consequence, member autonomy can also vary. It is negatively affected by the impact high levels of party voting can have in increasing accountability. It will also be negatively affected if changes in patterns of partisan conflict result in increased competitiveness within particular

& H. SIMON, ORGANIZATIONS (1958); J. WOODWARD, INDUSTRIAL ORGANIZATION: THEORY AND PRACTICE (1965).

constituencies.[26] Last, but not least, electoral ties or dependencies affect member autonomy through changes in the modes and costs of campaigning.

## 2. Division of Labor

Congress must satisfy its need for division of labor in a context in which it lacks control over the number and quality of its members, can not tolerate a high degree of formal hierarchy, and has low technological capacity. As a result, committees and subcommittees serve as the main instruments of organizing the time, attention and energy of members. Reliance on committee mechanisms not only concentrates effort and extends the number of internal units, but also organizes the work into stages. Similarly, Congress relies primarily on committees and subcommittees to provide it with its own sources of specialized knowledge and with the means for bringing such knowledge to bear in decisionmaking. Within this framework a number of other arrangements are used to provide efficiency and expertise. A few of the most important are committee and office staffs; special calendars and procedures to bring business to and handle it on the floor; and concentration of review and oversight functions in special committees and subcommittees.[27]

Due largely to its committee system and the staff resources it employs, Congress' capability for division of labor is substantial. Congress is probably unmatched by any other democratic legislature in the world in this regard.[28] Nonetheless, Congress' capabil-

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26 In the twentieth century the number of safe seats in the House has substantially increased. This result is attributable both to a decline in the degree of party competition and to the increased opportunities an expanding federal government has given members to build personal support, apart from party or policy considerations, on the basis of service to their districts and constituents. A more internally competitive party system, however, would increase the rate of turnover and limit the advantages of incumbency. D. BRADY, *supra* note 21, at 194; Price, *The Electoral Arena*, in THE CONGRESS AND AMERICA'S FUTURE 39 (2d. ed D. Truman 1973); Witmer, *The Aging of the House*, 79 POL. SCI. Q. 526 (1964).

27 L. FROMAN, THE CONGRESSIONAL PROCESS (1967); W. KEEFE & M. OGUL, *supra* note 6, at 153-278.

28 *See* J. BLONDEL, COMPARATIVE LEGISLATURES 66-70 (1973); Patterson, *Congressional Committee Professional Staffing: Capabilities and Constraints*, & Robinson,

ity for division of labor is highly restricted by its basic character and needs as a legislature. It necessarily lacks the flexibility that bureaucratic organizations possess as a matter of course. Not only must levels of formal authority be few; but the primary units of division of labor, committees and subcommittees, can only be specialized in broad substantive or functional terms. Moreover, it becomes exceedingly difficult to avoid serious jurisdictional overlaps in the committee system or to keep the number of committee assignments members possess within reasonable bounds. Finally, in an organization where the number is relatively small, benefits that can be secured from expanding staff under minimal supervision are limited. In short, Congress is highly vulnerable to increases in the size and complexity of its workload. This is especially true of the Senate, which is less than one quarter the size of the House.

### 3. Integration

Because of constraints on formal authority and on legislative technology, Congress has throughout its history been dependent on party for the integrative capability it requires. In bureaucratic organizations high levels of hierarchy and technical sophistication can serve as potent integrative mechanisms. In Congress, however, both differential distributions of authority and routinized decisionmaking are so constrained by the collegial character of the body and the value-laden character of the work that neither can provide an adequate basis for integration. Thus, in contrast to bureaucratic organizations, Congress' organizational arrangements encompass not one but two overlapping structures of roles — a formal structure based primarily on provisions in the rules and a party structure based on party affiliation and organization within Congress.

Party serves integration in several ways. What party contributes first and foremost is potential for cohesion. Party bonds express

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*Staffing the Legislature,* in LEGISLATURES IN DEVELOPMENTAL PERSPECTIVE 391, 366 (A. Kornberg & L. Musolf eds. 1970).

the broadest or widest alignments of groups and interests that emerge from the electoral stage and hence they provide the broadest or widest set of common or shared policy orientations. As such, party furnishes the strongest basis for uniting members on substantive issues across constituency lines and the primary ties for linking formal positions and operating formal processes based on equality in voting and majority rule. It is accordingly not accident but necessity that bestows on the majority parties in the House and Senate the right to organize them.

However, the significance of party for integration extends beyond providing the main substantive basis for agreement. Integrative capability is a function not only of the potential for agreement, but also of the power of leaders to tap or exploit this potential so as to construct majorities and produce outputs. Here too party is a critical factor since it serves as the primary determinant of the extent to which power can be centralized in the Congress.

As has been suggested earlier, Congress' low tolerance for hierarchy can be tempered or offset by concentrating rewards and penalties at the disposal of the organization in the hands of its leaders. In both House and Senate such concentration can be based on an expansion of the scope and complexity of the party structure.[29] This occurs when party caucuses and other less comprehensive party units become operative or more active and begin to function as control mechanisms, as mechanisms for directing and coordinating the behavior of party members on the basis of party discipline. In so doing such units expand the fund of rewards and penalties that exist in the party structure and concentrate rewards and penalties in both the formal and party structures in the hands of the party leadership. In the House, moreover, the formal structure can furnish as important a base for centralization as the party structure since it is far more elaborate than in the Senate and accordingly provides a far greater and more varied fund of rewards and penalties. Centralization in the House, therefore, can involve greater concentration

29 See text accompanying notes 72-84 *infra*.

of power in the formal structure as well as greater mutual support and reinforcement between sources of leverage in the formal structure and sources of leverage in the party structure.

Given such sources of centralized power, the point is that their development or exploitation rests on the ability of shared party policy goals to induce members to concentrate power in their leaders and the ability of party government values and norms to justify or rationalize it. Thus, in periods, such as the period from 1890-1910, when internal party agreement on policy goals is high and belief in the doctrine of party government is intense, centralized rule can be instituted in the Senate on the basis of the caucus and in the House on the basis of the Speakership and the caucus. In such a period leadership can assume the forceful and impersonal modes of a Joe Cannon or Nelson Aldrich and majority construction can rest on a disciplined and consistently mobilized majority party majority.[30] Conversely, in periods, such as the 1940's, 1950's, and 1960's, when the unifying force of party and party doctrine are not strong enough to induce or justify great disparities in power, congressional structures and processes become quite different in character and integrative capability declines. Due to dispersion of control over rewards and penalties in the formal structure and contraction in the units and functions of the party structure, leadership necessarily assumes the personal, permissive, and informal modes of a Sam Rayburn or Lyndon Johnson. In such periods party continues to furnish the main basis for agreement and levels of party voting remain high, even if lower than in periods of Czar or caucus rule. Nonetheless, the process of majority building becomes a highly tenuous and difficult one in which majorities of varying composition have to be constructed from issue to issue and great reliance has to be placed on the sheer skill of party leaders to assemble critical bits and pieces of support wherever they can find them.[31]

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30 D. BRADY, *supra* note 21; G. BROWN, *supra* note 19, at 1-171. See also the other references cited in note 19 *supra*.

31 R. BOLLING, HOUSE OUT OF ORDER 62-78 (1965); C. CLAPP, THE CONGRESSMAN 280-330 (1963); Huitt, *The Internal Distribution of Influence: The Senate*, in THE

In summary, then, integrative capability in Congress varies with the ability of party to provide a substantive and organizational basis for it. As a consequence, Congress' ability to satisfy its integrative needs is highly vulnerable to electoral changes that mitigate the differences between the constituency alignments that underlie the party coalitions and reduce the coherence or congruence of the interests or elements within them. Such changes impair the relevance of party as a basis of division on issues and the potential for unity or cohesion on controversial issues within the majority party coalitions in the House and Senate. In so doing they also impair the degree to which partisan identification or allegiance can promote belief in party government or permit reliance on the party majority to supply the votes needed to pass important programs. To some extent, of course, skillful leadership can compensate for reductions in the degree of agreement on partisan policy goals among majority party members and the erosion of centralized power this inevitably entails. Nonetheless, when organizational power is decentrailzed integrative problems are likely to be substantial and this is especially true of the House whose larger size and more elaborate formal structure make its integrative needs more intense or demanding.

### 4. Motivation

As might be expected, the pattern or blend of personal and ideal inducements that Congress must rely on in seeking to motivate performance that serves its output goals is quite different than in the case of most bureaucratic organizations. Due to its low tolerance for hierarchy and its limited ability to hire or fire or to manipulate salaries and benefits, Congress is highly dependent on personal rewards of a psychological or solidary character. Similarly, due to the concerns and allegiances that electoral

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CONGRESS AND AMERICA'S FUTURE, *supra* note 26, at 91; R. RIPLEY, POWER IN THE SENATE (1969).

linkages involve, Congress is highly dependent on providing substantive policy rewards for all its members.

Now it is true, of course, that Congress as a legislative organization enjoys advantages in these regards that bureaucratic organizations generally do not have. Nonetheless, Congress' dependence on nonmaterial personal rewards and substantive policy rewards has provided a tenuous basis for morale throughout its history. The prestige, intrinsic satisfactions, and feelings of comradeship that its role, size, and work entail are countered or checked by a variety of political, financial, and emotional tensions and frustrations that are also associated with congressional life.[32] Equally important, the provision of personal psychological rewards and substantive policy rewards conflict since the former type of reward is facilitated by decentralization of power and impaired by centralization whereas the opposite is true of the latter type of reward. It is not surprising, then, that conflict in Congress recurrently spills over substantive issues and extends to the very legitimacy of decisionmaking forms, to the detriment of internal harmony and output capability.

As in the case of all organizations, Congress can and does rely on feelings of institutional loyalty to compensate for deficiencies in its ability to manipulate personal and policy rewards so as to induce performance in the service of its output goals. Here too Congress enjoys advantages over most bureaucratic organizations, given the significance of its societal role and the strength of the democratic values that underlie it. Nonetheless, just as the overall level of satisfaction or morale it can generate in the service of its output goals provides only a tenuous basis for meeting its motivaitonal needs, so too does loyalty provide only a tenuous basis for inducing individuals to fulfill the shared and distinctive aspects of their roles as members. In cases of conflict abstract institutional concerns and allegiances usually pose only a weak counterweight to the concrete and pressing demands of electorally grounded concerns and allegiances. Moreover, institutional loyalty, though

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32 For material on the rewards and frustrations of congressional life see C. CLAPP, *supra* note 31, at 393-438; Mitchell, *Occupational Role Strains: The American Elective Public Official*, 3 AD. SCI. Q. 210 (1958); Shils, *The Legislator and his Environment*, 18 U. CHI. L. REV. 571 (1951).

based on commitment rather than direct and immediate rewards, is still subject to erosion if personal and policy rewards are inadequate for prolonged periods of time.

Given such limitations, Congress generally faces substantial difficulties in generating and sustaining the levels of morale and loyalty that are required to satisfy its decision making needs and output goals. Such problems are usually less severe in the Senate than the House, given its smaller size and longer terms; but they are nonetheless serious in both houses. As a consequence, Congress throughout its history has been forced to allow its members considerable freedom in pursuing residual goals as a means of supplementing overall levels of morale and loyalty and it has therefore usually encountered severe difficulties in managing or containing these goals.

Congress is accordingly quite vulnerable to the deleterious effects the pursuit of residual goals involves. Though such goals serve to reinforce motivation and also encompass policy outputs, they distort policy orientations and block institutional reforms by making individual self-interest or collective partisan advantage the focus of attention and the criterion of action. Such results, moreover, are especially pronounced in periods in which there are great incentives and opportunities to use organizational positions and resources for personal self-interest since self-directed pursuit of residual goals generally has more deleterious effects on output goals and adaptation than collective pursuit aimed at gaining partisan advantage over opponents. The problems and dangers residual goals involve are therefore likely to be greater when power is decentralized in Congress, when electoral voting patterns are volatile and turnover high, and when the scope of federal activity is expanding. It is thus no accident, for example, that in the Rayburn House, in which all these conditions prevailed except high turnover, the norm of "to get along, go along" was very strong and the emphasis in committee work was often on contracts, projects, or bases rather than the substance of policy.[33]

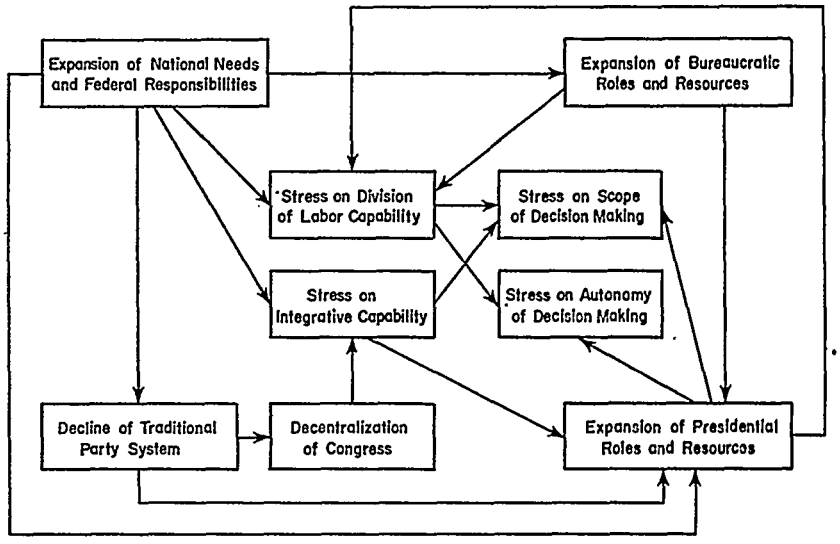
33 Dexter, *Congressmen and the Making of Military Policy*, in READINGS ON CONGRESS 371 (R. Wolfinger ed. 1971). On negotiating and bargaining norms *see* Fenno, *The Internal Distribution of Influence: The House*, in THE CONGRESS AND AMERICA'S FUTURE, *supra* note 26, at 86-89.

## IV. Current Strains on Congressional Capabilities

### A. *Environmental Factors*

In any particular period, environmental factors not only affect the levels of Congress' organizational capabilities, but also test the adequacy of those capabilities. As a consequence, any analysis of Congress' strengths and weaknesses must consider the stress which Congress' current environment imposes on its ability to maintain its role in the political system. The interaction and impact of four basic environmental trends operative in the twentieth century are modeled in Figure One below. This

Figure One




model is limited to a few highly general sources of stress on Congress' capacity to satisfy its output and unit goals. Nonetheless, it indicates the character of the challenge Congress has faced since the turn of the century in maintaining its position in the political system vis-à-vis the Presidency and the bureaucracy.

Both the expansion in national needs and federal responsibilities and the expansion in bureaucratic roles and resources are familiar phenomena. The dimensions of the expansion are re-

flected in the growth of federal expenditures from roughly $500 million in 1901 to roughly $200 billion in 1970 and in the growth of civil employees in the executive branch from about 240,000 in 1901 to nearly 3 million in 1970.[34]

The expansion in presidential roles and resources is also familiar. This trend has raised the President to a pre-eminent position of leadership in the party system, the legislative process, and the administrative process. Moreover, the expansion of staff resources has created an institutionalized Presidency. Since the institutionalization of the Presidency has both accompanied and contributed to the expansion of presidential power, the immense expansion in presidential staff resources provides a limited but instructive indicator of the general trend. Whereas President McKinley had but a few secretaries at his disposal,[35] by the end of President Nixon's first term the number of positions in the Executive Office of the President totaled 2236, including a White House Office of 540 and an Office of Management and Budget of 684.[36]

The final environmental factor is the decline of the traditional party system. In a general sense the decline of party has led to the emergence of a highly individualized or candidate-oriented politics, the growing predominance of ideal over personal incentives as a basis for participation in politics, the decline of local party organization, and the atrophy of feelings of party loyalty and identification.[37] Of greater relevance for this analysis, however, are the concomitant declines both in belief in party government and in the cohesion of the majority parties in the House and Senate.

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34 HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 710, 718 (1960); STATISTICAL ABSTRACT OF THE UNITED STATES: 1974, at 222, 235 (1974).

35 L. WHITE, THE REPUBLICAN ERA 101-02 (1958).

36 STAFF OF HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 92D CONG., 2D SESS., A REPORT ON THE GROWTH OF THE EXECUTIVE OFFICE OF THE PRESIDENT, 1955-1973, at 15 (Comm. Print No. 19 1972). For material on the historical development of the institutionalized Presidency see A. HOLTZMAN, LEGISLATIVE LIAISON 1-17, 230-83 (1970); THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE, WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937); *The Institutionalized Presidency*, 35 LAW & CONTEMP. PROB. 427 (1970).

37 W. BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970); F. SORAUF, POLITICAL PARTIES IN THE AMERICAN SYSTEM (1964); J. WILSON, THE AMATEUR DEMOCRAT (1962).

At the turn of the century the doctrine of party government, which emphasizes the representative role of party and justifies the subordination of the views of the individual to party positions, was very much in vogue. By the late 1930's, however, party discipline had become an anathema and a neo-Jeffersonian or Madisonian emphasis on the sanctity of individual choice or conscience was once again dominant. Similarly, at the turn of the century parties were based on sectional or regional divisions which produced a fairly congruent or coherent set of interest alignments within House and Senate parties as well as intense and pervasive differences between opposing party coalitions. The potential for party cohesion was accordingly high and actual levels of party unity and voting substantial and impressive. However, the overall impact of the decline of sectional or regional politics that has characterized the twentieth century has been to reduce materially both the degree to which the parties are based on different alignments of constituency interests and the degree of coherence or congruence among the interests or elements within the party coalitions. This, in turn, has led both to a decline in the degree to which party functions as a basis of division on issues and an increase in the degree to which there is internal party division on partisan issues. Thus, whereas at the turn of the century most important issues were partisan issues and the majority parties in the House and Senate were highly unified, by the early 1940's the majority parties in the House and Senate were permanently split into two large and hostile wings and the number of votes that were party votes had precipitously declined.[38]

38 D. BRADY, *supra* note 21; J. TURNER, *supra* note 22. To illustrate the decline in the role of party as a basis of division on issues it may be noted that in the 55th Congress (1897-1899) and the 56th Congress (1899-1901) 90% of one party opposed 90% of the other in the House on 50.9% and 49.3% of the votes. In these same Congresses 50% of one party opposed 50% of the other in the House on 93.9% and 92.2% of the votes. In contrast, in 1937 90% of one party opposed 90% of the other in the House on only 11.8% of the votes and in 1944 on only 10.7% of the votes. W. SHANNON, *supra* note 21, at 39, 42. In these same sessions 50% of one party opposed 50% of the other in the House on only 61.6% and 55.4% of the votes. As for the increase in internal divisiveness, the following party unity scores illustrate both the decline in the cohesion within the two parties and the even greater decline in the cohesion of the majority party. The unity score measures the percentage of the time the average party member votes with a majority of his fellow partisans on issues in which a majority of one party opposes a majority of the other. The unity score can also be read as equivalent to the

### B. *Impact of Environmental Factors*

As Figure One indicates, these environmental factors have interacted so as to impair Congress' capability for effective and efficient decisionmaking. Turning first to division of labor, the expansion of national needs and federal responsibilities has meant that the range and complexity of the legislation before Congress and the dimensions of bureaucratic activity and discretion have greatly increased. Congress' ability to deploy its limited personnel resources in response has been severely strained. In addition, the expansion in bureaucratic roles and resources has had a significant indirect impact on the benefits of division of labor. A large, growing bureaucracy has required greater coordination and control within the executive. Bureaucratic expansion played a leading role in the creation of the Bureau of the Budget in 1921[39] and the Executive Office of the President in 1930.[40] The governing motive of these actions was to endow the President with the capacity to manage the bureaucracy; but they have also increased his ability to control and restrict the flow of information and advice from departments and agencies to Congress. Control of information, combined with Congress' dependence on executive assistance has, in turn, impaired Congress' ability to use the resources it does possess to modify presidential proposals, to initiate proposals of its own, and to review bureaucratic decisionmaking and performance.

Stress on integrative capability has derived both from the expansion of national needs and federal responsibilities and the decline of the traditional party system. The former has served as a direct source of stress by expanding the range and complexity of the legislation before Congress. The latter has, of course, been

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average percentage of party members who vote together on such issues. In the 55th and 56th Congresses (1897-1901), which the Republicans controlled, the party unity scores for House Republicans were 93 and 94 and for House Democrats 89 and 90. In contrast, in the 77th and 78th Congresses (1941-1945), which the Democrats controlled, the scores for House Democrats were 81 and 80 and for House Republicans 85 and 86. (Party unity scores supplied by David W. Brady, Department of Political Science, University of Houston.)

39 *See generally* Schick, *Budget Reform Legislation: Reorganizing Congressional Centers of Fiscal Power*, 11 HARV. J. LEGIS. 303, 305 (1974).

40 See text accompanying notes 35-36 *supra*.

influenced by the former. Nonetheless, the decline in the traditional party system has itself had a critical impact on integrative ability through its role in promoting the decentralization of Congress. As has been noted above, centralization in both the House and the Senate rests on the ability of party to provide a substantive and organizational basis for it.[41] The emergence of the decentralized House and Senate of recent decades is thus closely related to the decline in the distinctive character and coherence of the electoral foundations of the congressional parties in the years from 1900 to 1940 and its consequences in reducing the significance and unifying force of party in the Congress.[42] Decentralization, in turn, has constituted a key source of stress on integrative capability. Without the forms of leverage over members and structures that centralization in the formal and/or party structure provides, congressional leaders are reduced to dependence on their political and parliamentary skills in building majorities. This, to be sure, limits the chances of rule by highly forced or artificial majorities. However, it also makes the process of majority construction inherently more difficult and enhances the ability of minorities to exploit the opportunities dispersion of power creates to frustrate valid majorities. In short, it limits the chances of passing any single piece of legislation. Personal skills are therefore no substitute for organizational power; in decentralized contexts the ability to build majorities and produce outputs necessarily declines.[43]

The overall result of the impact these factors or trends have had on Congress' capacity for division of labor and integration has been to threaten Congress' ability to protect and maintain its

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41 See text accompanying notes 29-30 *supra*.

42 On the emergence of the decentralized House in the period from 1910 to 1940 see J. COOPER, *supra* note 19, at 119-20, 164-65 n.367. In the Senate the transition from centralized rule to decentralization was more swift, but secondary material on the Senate between 1910 and 1940 is exceedingly sparse. *But see* G. BROWN, *supra* note 19, at 252-82; R. RIPLEY, *supra* note 31, at 3-52. For analysis of differences in the character and coherence of the electoral foundations of House parties in recent decades as contrasted with the turn of the century see D. BRADY, *supra* note 21, at 181-98; Brady, *Congressional Leadership and Party Voting in the McKinley Era: A Comparison to the Modern House*, 16 MIDWEST J. POL. SCI. 439 (1972). For data on party votes and party unity see note 38 *supra* and note 86 *infra*.

43 See text accompanying note 31 *supra*.

broad or generalized role in the American political system. This result derives both from the stress imposed on Congress' ability to maintain the scope or dimensions of its policy and performance responsibilities and from the stress imposed on its ability to make independent or autonomous decisions.

Problems in maintaining the scope of Congress' output derive from several sources. Stress on Congress' capability for division of labor limits the efficiency and rationality of its decisionmaking and restricts its oversight. That stress plus deficiencies in integrative capability also induce broad delegations of authority. When the desire to attain substantive policy goals is strong, members may accept vague statutory language not only because a piece of legislation involves highly technical issues, but also because vagueness minimizes the difficulties in assembling majority support. Moreover, residual goals may also encourage the delegation of questions that are thought to be highly dangerous politically.[44]

In addition, the expansion in presidential roles and resources constitute an important source of stress. The institutionalized Presidency can centralize bureaucratic decisionmaking in the White House. The inevitable result is to severely restrict Congress' ability to control either the substance of public policy or the character of executive performance.[45] Indeed, as the dimensions of presidential leadership have grown so too have his responsibilities and his personal sense of guardianship. Thus, to a far greater degree than in the nineteenth century, he has been encouraged to impose on traditional congressional prerogatives in the pursuit of policy goals he considers critical to the nation. The organizational disarray and parochial individualism of Congress lead a President to believe that he cannot attain his goals by working with Congress and that he need not fear any effective resistance from it. President Nixon's actions with respect to the

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44 An illustration of how all these factors combine to induce virtually unlimited delegation is the Economic Stabilization Act of 1970, Pub. L. No. 91-379, §§ 201-06, 84 Stat. 799 (1970), which authorized the President to impose wage and price controls. *See* Lenhart, *Seek Limit on Nixon Powers,* 3 NAT'L J. REP. 2018 (1971).

45 On the centralization of power in the White House see HAS THE PRESIDENT TOO MUCH POWER? (Proceedings of a Conference for Journalists sponsored by the Washington Journalism Center, C. Roberts ed. 1974); PANEL OF THE NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, WATERGATE: IMPLICATIONS FOR RESPONSIBLE GOVERNMENT (1974).

Vietnam war and impoundment provide extreme but nonetheless relevant illustrations.[46]

Problems in maintaining the autonomy of congressional decisionmaking derive from the same sources as problems in maintaining the scope of its role. Stress on Congress' capability for division of labor impedes its ability to formulate policy independent of executive information, advice, and proposals. However, stress on integrative capability, mediated through its effect in expanding congressional reliance on the Presidency, is the more significant source of difficulty.

In the decades following the turn of the century Congress' capacity for integration declined at the same time that presidential power and prestige increased. Congress accordingly came to rely on the President both to define a legislative program for its consideration and to supplement the political rewards and penalties at the disposal of its leaders. By the early 1940's presidential leadership of the legislative process had both expanded and been regularized. Such a result, however, has involved substantial costs. In important areas of policy the deliberative process commences with the President's proposal and focuses at least initially on it. Moreover, reliance on the President's leadership serves, along with his inherently enhanced position in the party system and the current weakness of congressional party structure, to endow the President with the ability to make his proposals his party's proposals. This ability, combined with reliance on presidential influence to provide the added support needed to assemble majorities, transforms congressional leaders of his party into his agents and makes presidential will and muscle a key factor in the final character of outcomes. Congress therefore has paid a price for the presidential resources it has borrowed. It has had to accept presidential leadership and all its attendant effects in weakening its ability to make its own decisions.

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46 A. SCHLESINGER, JR., *supra* note 2, at 177-207, 235-40, 397-400 (1973); Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973). *See also* PERSPECTIVES ON THE PRESIDENCY 179-90, 320-48 (S. Bach & G. Sulzner eds. 1974); Havemann, *White House Report/OMB's Legislative Role is Growing More Powerful and More Political*, 5 NAT'L J. REP. 1589 (1973).

## V. Strengthening the Congress

### A. *Perspective on Reform*

#### 1. Scope of Decisionmaking

Congress enjoys considerable freedom in deciding where to employ its attention and resources. Whereas Congress' share of discretionary decisionmaking power relative to the executive branch has decreased since 1900, the absolute dimensions of its discretion have increased as a result of increases in the scope of federal activity. Success in maintaining scope should not be measured exclusively in terms of the comprehensiveness and detail with which Congress legislates and oversees. Congress' problem is not to define and control everything; it is rather to make the kind of choices and develop the kind of organizational capability that will preserve its ability to determine the decisive features of national policy and to insure responsible and efficient executive performance.

#### 2. Autonomy of Decisionmaking

To preserve its broad role in the political system Congress must guard the autonomy of its decisionmaking as well as its scope. The problem here is far more subtle than simply avoiding servility. Despite reliance on presidential leadership, Congress retains the ability to originate and promote policy innovations, to compel some presidential intiatives, to modify or obstruct others, and even at times to formulate and pass major legislation on its own.[47] Nonetheless, Congress during most of this century has found it difficult to act constructively on important matters of

47 On the character of congressional response to presidential proposals in recent decades see W. Keefe & M. Ogul, *supra* note 6, at 399-403; Wildavsky, *The Two Presidencies*, in Perspectives on the Presidency, *supra* note 45, at 383-97; 29 Cong. Q. Alm. 962-65 (1973). On Congress' role in initiating legislative policy see J. Johannes, Policy Innovation in Congress, 1972 (pamphlet published by General Learning Press); N. Polsby, Congress and the Presidency 67-70 (2d ed. 1971) (the Senate).

national policy except at the direction and with the help of the President.

In Congresses in which the same party has controlled both branches, the President has had the whip hand over party policy. Party loyalty has become adherence to his wishes. Congress' capacity for independent action in controversial areas of policy thus has tended to hinge on the strength of the minority party and the degree of dissidence in the majority party. Though the President has often trimmed his proposals to attract support, in such a context legislative outcomes nonetheless have tended to be reduced into either triumphs of presidential will or mere obstruction.[48] Moreover, obstruction has led to severe counteractions in which popular Presidents have exploited large party majorities to ramrod their programs through Congress. Conversely, in Congresses in which different parties have controlled the two branches, the force of party has, of course, buttressed Congress' institutional role and needs. Nonetheless, without presidential direction and pressure Congress has found it very difficult to act on important questions of national policy except in a limited and haphazard fashion. And even this fragile capability for independent action has often been checked by presidential success in applying the veto power.

The overall consequences for autonomy have been substantial. The fact that Congress' integrative deficiencies have greatly impaired its ability to act autonomously except in restrictive or obstructive ways has meant both that the political system's need for action or results has redounded to the advantage of the Presidency. Moreover, as a direct consequence, not only has the President usually gotten the credit for legislative achievements; in addition, Congress has been placed in a position in which its public prestige or esteem varies with the degree of success the President has in passing his programs.[49] Finally, given the tie between action and presidential leadership, reform efforts to facilitate the ability of majorities to work their will have also

48 *See, e.g.*, Fox & Clapp, *The House Rules Committee and the Programs of the Kennedy and Johnson Administration*, 14 MIDWEST J. POL. SCI. 667 (1970).

49 *See* L. RIESELBACH, *supra* note 4, at 221-24.

implicitly served as mechanisms for enhancing the ability of the President to pass his proposals.

Such a condition of affairs has seriously undermined Congress' ability to retain control over national policy and to resist presidential incursions on its prerogatives. One of Congress' prime needs is therefore to increase its ability to direct itself and to act constructively and effectively on its own. Stabilizing Congress' role and power in the political system, in other words, hinges to a significant degree on augmenting its ability to function as an equal partner in the legislative process and to regain some meaningful degree of independent standing with the public. This objective is as crucial as maintaining the scope of Congress' policy and performance responsibilities and requires not only additions to specialized capacity, but more importantly a rebuilding of integrative capability. Indeed, over time success in maintaining scope will be undermined and negated if Congress cannot concurrently alter or ameliorate the highly corrosive effects on its role and power that the familiar twentieth century combination of presidential activism and congressional disarray involve.

### 3. Motivation and Politics

Motivational and political factors also bear on the quest to improve Congress' position vis-à-vis the Presidency and the bureaucracy. Congressional reformers often treat the task of strengthening the Congress as a matter of will. In truth, it is a matter of will. However, in contrast to the conclusions reformers usually draw, this fact restricts rather than broadens the number of reform options.

Of necessity, the problem of incentives limits the potential for change. Existing workload and structure involve distinct patterns of policy and personal rewards that serve to induce performance on behalf of output goals as well as distinct opportunities to pursue residual goals. Proposals for change that seriously alter these patterns and opportunities can usually not be attained simply on the basis of appeals to institutional loyalty; rather their

success is contingent on the net balance of compensations and penalties they involve.[50]

Will or motivation is therefore not something that should be treated as an exogenous or constant factor in designing and choosing among reform proposals. On the contrary, it should be regarded as an integral and critical variable. This fact constitutes one of the key dilemmas reformers must confront and endure. Major improvements in the division of labor or integrative capability may well be dependent on events that are beyond the control of individuals — on institutional crises that activate members' sense of their collective needs and interests;[51] on increases in party unity which provide the broad policy incentives necessary to overcome parochial concerns and personal self-interest; on increases in turnover which undermine toleration for traditional modes of distributing personal rewards. In short, then, all options are not open. Rather, limited areas of freedom exist and the task of reformers is to identify and exploit those areas in which institutional loyalty and/or attractive policy and personal rewards offer a promising fund of inducements with which to effect change.

The need to consider motivational factors in seeking to strengthen the Congress is matched by the need to consider the interconnections between political and institutional reform and the contingencies these interconnections involve. This is particularly true with regard to integrative capability. Despite the critical role of integrative capability in satisfying Congress' output and unit goals, serious potential conflicts or disharmonies also exist.

In part, this is true because increases in integrative capability do not contribute to autonomy under any and all circumstances. In periods in which the President's positions in the party and administrative systems give him substantial leverage in the legislative process such increases can redound to his advantage in all Congresses in which the same party controls both branches. Thus,

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50 *See, e.g.*, Schick, *supra* note 39, at 315-16.

51 *See, e.g.*, Morrison, *Energy Tax Legislation: The Failure of the 93d Congress*, 12 HARV. J. LEGIS. 369 (1975), which describes the sensitivity to organizational needs following the inaction of the House Ways and Means Committee on energy legislation.

the piecemeal reforms aimed at limiting the obstructive power of the Rules Committee that were adopted in the 1940's and 1960's did more to enhance the President's ability to pass his programs than to strengthen the Congress as an institution.[52] Indeed, even substantial increases in levels of party cohesion, which are highly functional for integration, do not necessarily serve Congress' autonomy needs. In eras of strong presidential power such increases can serve to deliver the Congress into the hands of the President unless accompanied by centralization of power within the Congress, by the creation of a strong and independent leadership echelon within Congress. Otherwise, the danger exists that the caucus will be transformed into just another instrument of presidential power.

Of equal, if not greater importance, is the fact that even those forms of enhancing integrative capability that accord with autonomy may involve more costs than benefits. The root of the difficulty here derives from the need of democratic orders and of the primary institutions within them to provide both for consent and action. Such duality creates room for discord in the relationship between integrative capability and Congress' qualitative need to produce acceptable or representative decisions.

Earlier we noted that Congress must not only make basic or determining decisions on collective goals, but make them in a democratic manner. It thus decides issues collegially on the basis of discussion and voting and relies on the principle of majority rule to limit the amount of agreement required as a precondition of action. Integrative capability is accordingly tied to the success with which majority coalitions can be built and produce decisions. Nonetheless, integrative capability and majority rule are not necessarily congruent.

The reasons for this relate both to the basic consequences of organization and the status of party in the legislative process. Organizational contexts are not neutral but rather involve differential distributions of power or leverage. At the same time the foundations for building majorities are not equal; rather, partisan ties provide the strongest and stablest basis for unifying members

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52 *See* W. KEEFE & M. OGUL, *supra* note 6, at 244-47.

across a variety of policy dimensions. Hence, the question inevitably arises as to the degree to which organizational power should be centralized in order to strengthen the role of the party majority in congressional decisionmaking.

To the extent that power is centralized in the formal and/or party structures the ability of members to obstruct action is depressed and integrative capability enhanced. Yet, centralization of power also enhances the ability of party leaders to act arbitrarily on behalf of only a majority of the majority party and depresses the ability of shifting or fleeting majorities to form and attain their ends. In contrast, decentralization of power forces the process of majority construction to be more flexible and more attentive to divisions of opinion on particular issues, but at the cost of augmenting the ability of strategically placed minorities to obstruct all types of majorities, whatever the degree of partisanship or bipartisanship, and of impairing integrative capability.

The question of providing for majority rule is therefore not a simple but a complex one in which alternative courses of action involve costs as well as benefits. Equally important, depending on the strength and viability of the party majority, Congress' consensual needs impose limits on the degree to which strengthening integrative capability through the centralization of organizational power contributes rather than detracts from the overall attainment of Congress' output goals. The case for centralization, in short, varies with the degree to which policy agreements within the majority party are deep and extensive enough to provide a valid basis for party rule.

As a consequence, balances typically have to be struck between integrative capability and majority rule. The striking of such balances is, of course, not a matter of a single, enduring act, but rather a matter of periodic adjustment in relation to fluctuations in the coherence of the party majority. This, indeed, is why the panaceas and hallowed goals of one era become the anathemas and objects of reform of another. Nonetheless, the need to strike such balances can pose an even crueler dilemma for those who wish to strengthen Congress than the narrow concerns and self-interest of members. In periods in which the possibilities for

harmonizing Congress' integrative and consensual needs are limited, the very desirability of enhancing organizational capability becomes questionable and reformers face only Hobson's choices as far as enhancing integration is concerned. The emphasis we have placed throughout this Foreword on party coherence as a determinant of integration thus has even broader significance than we have heretofore acknowledged. High levels of policy agreement within the majority party provide not only the incentives needed for stable or consistent party voting and centralized power, but the conditions necessary to justify them in terms of the representative needs of democratic orders.

### B. *Current Approaches to Reform*

#### 1. Reclaiming Congressional Domain

Until the late 1960's, efforts at congressional reform presumed that the way to strengthen the Congress was through changes in internal structure or workload that increased its effectiveness rather than through direct attacks on presidential discretion.[53] Events in the Johnson and Nixon Administrations, however, have shattered belief in this longstanding guideline. The result has been a movement to restrict presidential power and to reclaim ground lost to the President in recent decades. Prime illustrations are the War Powers Resolution of 1973,[54] which limits the President's ability to commit American troops abroad without congressional approval, and the Congressional Budget and Impoundment Control Act of 1974,[55] which subjects presidential impoundments of appropriated funds to congressional approval or veto. In addition the 93d Congress passed an act requiring Senate confirmation of all future Directors of the Office of Management and

53 *See, e.g., Can Congress Be Reformed?*, 208 ECONOMIST 508 (1963); Parkins, *Let's Disassemble the House*, 59 So. ATL. Q. 226 (1960).

54 Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-48 (Supp. III, 1973)). *See* Comment, *The War Powers Resolution: Statutory Limitation on the Commander-In-Chief*, 11 HARV. J. LEGIS. 181 (1974).

55 Pub. L. No. 93-344, §§ 1001-02, 1011-17, 88 Stat. 333 (codified at 31 U.S.C.A. §§ 665, 1401-07 (Supp. 1975)).

Budget.[56] The same Congress also seriously considered bills to strip the President of many of the emergency powers previously granted him,[57] to limit the exercise of executive privilege and subject disputes in this area to adjudication by the courts,[58] and to terminate the practice of open-ended authorization of top White House positions.[59]

Despite their appearance of toughness and their ability to tap feelings of institutional loyalty, attacks on presidential discretion have quite limited potential as a means of redressing the balance between the branches. In fact, they do not reach or attack the basic factors that have made for presidential strength and congressional weakness. Such restrictions may enhance Congress' ability to obstruct presidential desires; but their impact is nonetheless likely to be undermined by the pressure of events. For example, given its high degree of dependence on presidential leadership in fighting inflation and protecting national security, Congress will not find it easy over time either to reject presidential impoundments or to refuse to sustain commitments of troops. As long as Congress cannot provide an alternative source of national leadership and lacks independent standing with the public, the gains from impeding the President's freedom of action are likely to be only incremental. Moreover, if restrictions on presidential discretion raise new barriers to presidential will, they usually also concede and institutionalize forms of presidential discretion that have previously been objects of controversy and compromise.[60] In short, costs as well as benefits are generally involved in such changes.

Limitations on presidential staff resources are of even more limited utility as a means of strengthening the Congress. Given the President's responsibilities and the dimensions of federal activity, his staff resources cannot be subjected to substantial ex-

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56 Act of March 2, 1974, Pub. L. No. 93-250, § 1, 88 Stat. 11, *amending* 31 U.S.C. § 16 (1970) (codified at 31 U.S.C.A. § 16 (Supp. 1975)).

57 S. 3957, 93d Cong., 2d Sess. (1974).

58 S. 2432, 93d Cong., 1st Sess. (1973); H.R. 12,462, 93d Cong., 2d Sess. (1974).

59 H.R. 14,715, 93d Cong., 2d Sess. (1974). For a general review of actions and proposals see Cohen, *Presidential Report/Watergate May Alter Style but Not Substance of Power*, 6 NAT'L J. REP. 1340 (1974).

60 *See, e.g.*, Comment, *supra* note 54, at 187-88 which discusses this problem with respect to the War Powers Resolution.

ternal limitation without doing serious damage to the ability of both Congress and the political system to function. Similarly, efforts to extend the power of confirmation can provide only limited benefits and cannot be carried very far without endangering the President's ability to provide the forms of leadership the political system depends on him to provide.

All this is not to say that Congress erred in passing new limitations on the President's war and impoundment powers or in asserting its constitutional prerogatives regarding confirmation. Nor is it to say that Congress should refuse to adopt the other proposals that attracted substantial support in the 93d Congress.[61] It is nonetheless true that action which limits the Presidency, even when warranted by the benefits and costs involved, is no substitute for action that augments Congress' inherent organizational capabilities.

### 2. Improving the Division of Labor

Proposals to strengthen Congress' capacity for efficient and expert decisionmaking typically address the following topics: restructuring the committee system; adding staff resources; developing more specialized capability for oversight; and increasing the application of new information technology. In the House the Bolling Committee in early 1974 proposed a comprehensive set of reforms that affected all these areas.[62] The House in October rejected most of what the committee proposed with regard to restructuring the committee system and limiting the committee assignments of members. However, the House did adopt the committee's proposals to increase the size of the permanent committee staffs substantially, to earmark certain staff positions for the minority, to require the standing committees to include oversight information in their reports on legislative proposals, to assign the Government Operations Committee a coordinating role in oversight, and to establish a study commission on House informa-

61 However, the current legislative proposals regarding executive privilege may well merit opposition. *See* 32 CONG. Q. WEEKLY REP. 998 (1974).

62 H.R. REP. No. 916, 93d Cong., 2d Sess. pt. II (1974).

tion needs.[63] In mid-1974 Congress also provided for the creation of a Congressional Budget Office and budget committees with their own staffs in the landmark act that redefined the legislative budget process.[64]

The failure of the Bolling Committee to achieve most of its objectives and the failure of the Senate even to form a parallel committee[65] are lamentable. Due to the rise of new and complex areas of business and an immense proliferation of subcommittees, the problems created by overlapping jurisdictions and multiple memberships are now at least as serious as they were in 1946 when the committee systems in the House and Senate were last subject to extensive reorganization.[66] Similarly, there is little doubt that Congress has lagged behind in exploiting the benefits that new information technology can confer. Despite the value-laden character of Congress' work, information is critical to congressional decisionmaking both in identifying problems and in clarifying alternative solutions. Congress' failure to capitalize on computer technology beyond rudimentary forms of recordkeeping has limited its ability to bring knowledge to bear in decisionmaking and increased its comparative disadvantage vis-à-vis executive departments and agencies.[67] In contrast, the additions to committee and auxiliary staff resources, the increased emphasis on oversight, and the earmarking of staff for the minority represent beneficial ex-

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63 For general review of events and results see Cottin, *Congress Report/House Gets Proposals for Procedural, Committee Reform*, 6 NAT'L J. REP. 419 (1974); Malbin, *Congress Report/House Committee Reforms Will Change 94th Congress*, 6 NAT'L J. REP. 1614 (1974); 32 CONG. Q. WEEKLY REP. 1026, 1146, 1256, 2655, 2896 (1974). *See also* H.R. Res. 1248, 93d Cong., 2d Sess. (1974) for the Hansen substitute which served as the basis for the actions that were finally taken.

64 Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 101-02, 201-03, 88 Stat. 297. *See* Schick, *supra* note 39.

65 In early 1973 Senators Brock and Mathias introduced a resolution, S. Res. 89, 93d Cong., 1st Sess. (1973), to establish a Senate counterpart to the Bolling Committee. *See* Brock, *Committees in the Senate*, 411 ANNALS 15, 26 (1974).

66 *See* W. KEEFE & M. OGUL, *supra* note 6, at 171-75. *See also* H.R. REP. No. 916, *supra* note 62, at 9-21, 215-66; R. RIPLEY, *supra* note 31, at 139-42.

67 H.R. REP. No. 916, *supra* note 62, at 81-84; *Panel Discussions, supra* note 4, vol. 2, pt. 2, at 273-322 (1973); *id.*, pt. 3, at 724-50 (1973). *See also* STAFF OF JOINT COMM. ON CONGRESSIONAL OPERATIONS, 93D CONG., 2D SESS., CONGRESSIONAL RESEARCH SUPPORT AND INFORMATION SERVICES: A COMPENDIUM OF MATERIALS (Comm. Print 1974). The House, however, under the leadership of Dr. Frank Ryan, Director of House Information Systems, has begun to confront the problem of analytic applications intelligently and imaginatively. *Id.* at 459-74.

tensions of the division of labor in Congress, though all are essentially continuations of trends that have been operative for at least a decade.[68]

Given the critical role division of labor plays in maintaining congressional autonomy and scope in the political system, improving Congress' capacity for efficient and expert decisionmaking remains an important target or objective for reformers. Nonetheless, substantial barriers and limitations exist and must be recognized. Due to Congress' character as a legislative organization and to the current dimensions of national needs and federal responsibilities, the potential benefits of committee reorganization, staff additions, or new technology are quite finite. Overlapping jurisdictions and heavy committee loads on members can be reduced, but will remain chronic features of the modern Congress. As the size of committee staffs and the variety and size of auxiliary staffs increase from the substantial proportions they have now attained, the benefits in terms of usable additions to expertise will decline and the costs in terms of uncontrolled and independent staff operations will increase.[69] Expanded application of information technology will augment Congress' ability to evaluate factual claims and legislative proposals, but it will neither free Congress from a high degree of continuing dependence on executive sources of information and advice nor allow Congress to transcend politics in resolving questions where policy values or ends are at issue.

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68 For developments with regard to committee staffing and oversight in recent decades see W. KEEFE & M. OGUL, *supra* note 6, at 195-201, 405-35. *See also* H.R. REP. No. 916, *supra* note 62, at 355-58; *Panel Discussions, supra* note 4, vol. 2, pt. 1, at 185-271; *id.*, pt. 3, at 659-724. The increase in minority staffing, adopted last fall as a result of the Bolling Committee's efforts, was however tempered at the start of the present Congress. *See* H.R. Res. 5 § (21), 94th Cong., 1st Sess., 121 CONG. REC. H6 (daily ed. Jan. 14, 1975). In addition, it should be noted that the Legislative Reorganization Act of 1970, Pub. L. No. 91-510, §§ 201-07, 231-36, 321, 84 Stat. 1167, *amending* 2 U.S.C. § 166, 31 U.S.C. §§ 1151-57, 1171-76 (1964) (codified at 2 U.S.C. § 166, 31 U.S.C. §§ 1151-57, 1171-76 (1970)), expanded the duties of the Congressional Research Service and the General Accounting Office. Also Congress in 1972 created a new major auxiliary staff agency, The Office of Technology Assessment. Technology Assessment Act of 1972, Pub. L. No. 92-484, §§ 1-12, 86 Stat. 797, *amending* 42 U.S.C. § 1862(b) (1970) (codified at 2 U.S.C. §§ 471-81, 42 U.S.C. § 1862(b) (Supp. III, 1973)). *See* STAFF OF JOINT COMM. ON CONGRESSIONAL OPERATIONS, *supra* note 67 at 361-457.

69 See text at pp. 331-32 *supra*.

Thus, there are no quantum jumps in congressional power to be made through improving the effectiveness of the division of labor. Rather, the potential gains are relative in character and ameliorative in effect. Moreover, for these gains to be maximized adjustments in the character of the workload as well as in committee structure, staff, or technology are required. In other words, as suggested above, the more parochial aspects of committee work must be limited or else the degree to which organizational reforms can extend Congress' ability to make the critical policy decisions in the political system or to devote a larger portion of its time and attention to oversight will be substantially restricted.[70]

### 3. Increasing Integrative Capability

Of recent developments bearing on Congress ability to coordinate and unify its decisionmaking processes, the most important has been the effort to revitalize the House majority caucus as a means of reducing the independence of the standing committees. In 1969 regular monthly sessions of the Democratic Caucus were instituted. In the early 1970's caucus rules were changed to require a vote on all party nominees for committee chairmanships and a party steering and policy committee, chaired by the

70 These limitations on division of labor and use of technology apply with even greater restrictive force to the Senate than the House. Indeed, due to its size and the pressure of its business, the Senate may have little option but to increase its reliance on the House for comprehensive review of legislative proposals. The Senate may be forced to limit its own role to a "court of appeals" for those dissatisfied with House decisions. For the tendency of Senate committees to confine themselves to appellate functions in certain areas of policy see R. FENNO, CONGRESSMEN IN COMMITTEES 139-92 (1973); M. JEWELL & S. PATTERSON, *supra* note 6, at 385-97. In 1973 the average number of committee positions per member in the Senate was 15.9 in contrast to 5.6 in the House. Jones, *Between Party Battalions and Committee Suzerainty*, 411 ANNALS 158, 162 (1974). Similarly, the average number of office and committee staff employees per member is several times higher in the Senate than in the House. M. JEWELL & S. PATTERSON, *supra* note 6, at 252-54, 257-58. Both these facts suggest the greater difficulty of further enhancing the division of labor in the Senate as opposed to the House. However, the wide dispersion in committee positions and the greater staff resources per member have promoted and can continue to sustain a quite distinctive feature of the modern Senate—its role as an incubator of major policy innovations. N. POLSBY, *supra* note 47.

Speaker, was established.[71] In addition, though the osentisible purpose of holding regular sessions was to provide a forum for discussion, liberal Democrats have occasionally used these sessions to take votes on issues and to instruct the committees on legislation. Bolstered by the results of the 1974 election and in preparation for the new Congress, the caucus last December increased the size of the Ways and Means Committee, made subcommittee chairmen on Appropriations subject to caucus election, and stripped the Democratic members of the Ways and Means Committee of their longstanding function of making party nominations for committee positions.[72] It gave the Speaker responsibility for making nominations to the Rules Committee and the Steering and Policy Committee responsibility for making nominations to all other committees. In mid-January of this year the latter used its new power to recommend the removal of two senior chairmen. The caucus for the first time deposed three senior chairmen, including one of those marked for dismissal by the Steering Committee.[73]

Three other developments that bear on integrative capability are worthy of note. First, a new set of budgetary procedures and new House and Senate Budget Committees have been established to improve Congress' capacity for coordinated decisionmaking on fiscal and expenditure issues.[74] Second, efforts to limit the power of chairmen within their committees and to enhance the role of members of only moderate seniority have been made. In 1971 the Democratic Caucus prohibited committee chairmen from holding more than one subcommittee chairmanship. In 1973 it enacted a "Subcommittee Bill of Rights."[75] Last December these provi-

71 For a comprehensive review of the activities of the House Democratic Caucus from 1969 to 1974 see A. Stevens, The Democratic Study Group and the House Democratic Party: Sixteen Years of Change, Sept. 1974 (paper presented at a meeting of the American Political Science Association).

72 *See* Morrison, *supra* note 51, at 413.

73 Malbin, *Congress Report/New Democratic Procedures Affect Distribution of Power*, 6 NAT'L J. REP. 1881 (1974); Malbin, *Congress Report/House Democrats Oust Senior Members from Power*, 7 NAT'L J. REP. 129-33 (1975).

74 Havemann, *Congress Report/Conferees Approve Changes in Budgeting Procedures*, 6 NAT'L J. REP. 894; Havemann, *Congress Report/New Budget Committees Already Have Ambitious Plans*, 6 NAT'L J. REP. 1445 (1974).

75 Foremost among these changes were provisions that instructed Democratic

sions were strengthened, and in the 94th Congress subcommittee chairmen have been deposed and the scope of the bidding procedure over subcommittee positions extended.[76] Third, power and politics in the Senate have undergone significant transformations. Traditional norms in the Senate have weakened considerably. Participation is broader and power more widely shared than in the days when the Senate was dominated by an inner club. The recent reform of the cloture rule has reduced the strength of the filibuster as a barrier to action.[77] Finally, liberal Democrats have substantially increased their influence on the Democratic Steering Committee, and secured the adoption of a caucus rule providing for the election of nominees for committee chairmanships by secret ballot when requested by one-fifth of the members of the caucus.[78]

The forces responsible for these developments vary. In the case of the new Budget Act, Congress' deficiencies in budgeting were sharply demonstrated to many members during struggles with

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members on the standing committees to establish the following: subcommittees with fixed jurisdictions and their own staffs, if such entities did not already exist; procedures for electing subcommittee chairmen when vacancies occurred; and a bidding procedure for filling subcommittee vacancies in order to open up choice positions for junior members. *See* Ornstein, *Causes and Consequences of Congressional Change: Subcommittee Reforms in the House of Representatives, 1970-73*, in CONGRESS IN CHANGE 88-115 (N. Ornstein ed. 1975); Rohde, *Committee Reform in the House of Representatives and the Subcommittee Bill of Rights*, 411 ANNALS 39 (1974).

76 Malbin, *Congress Report/New Democratic Procedures Affect Distribution of Power*, 6 NAT'L J. REP. 1881 (1974); Malbin, *Congress Report/Committee Assignments Reflect House, Senate Turnover*, 7 NAT'L J. REP. 166; Malbin & Welch, *Congressional Actions*, 7 NAT'L J. REP. 186 (1975).

77 The long continuing effort to adopt a three-fifths cloture rule in the Senate has resulted in a new rule which permits cloture when supported by an absolute three-fifths or sixty members of the Senate. S. Res. 4, 94th Cong., 1st Sess., 121 CONG. REC. S3340 (daily ed. Mar. 7, 1975).

78 On the character of the modern Senate see Polsby, *Goodbye to the Inner Club*, 1 WASH. MO., Aug. 1969, at 30; D. Rohde, N. Ornstein, & R. Peabody, Political Change and Legislative Norms in the United States Senate, Sept. 1974 (paper presented at a meeting of the American Political Science Association). On change in the use of the filibuster and the application of cloture see G. ORFIELD, CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE 38-44 (J. Barber general ed. 1975); Malbin, *Congress Report/Senate, House to Vote on Legislative Procedure Changes*, 7 NAT'L J. REP. 62-63 (1975). On increased liberal influence on the Democratic steering committee and the new procedures for caucus votes on chairmen see *id.* at 63-64; Malbin, *Congress Report/Committee Assignments Reflect House, Senate Turnover*, 7 NAT'L J. REP. 166, 167 (1975); 33 CONG. Q. WEEKLY REP. 213 (1975).

President Nixon over broad economic policy and control of federal spending.[79] This reform thus provides an instance in which institutional loyalty played a critical role. It should also be noted, however, that great care was taken to construct the new budgetary procedures and committees so as to minimize reductions in the power of the regular appropriation and revenue committees.[80]

The forces at work in the revival of the House Democratic Caucus are more political. In recent decades factors that previously operated to reduce the coherence of the majority party in the House have begun to have an opposite effect. In general, the nationalization of politics has increased the absolute number and proportion of Northern as opposed to Southern members of the House Democratic Party. In the period between the end of the First and Second World Wars, however, increases in Northern Democratic strength served simply to allow Northern Democrats to replace Southern Democrats as the more numerous and loyal element in the party and ultimately resulted in dividing the party into two very sizeable and hostile wings. In contrast, the continuing decline of sectional or regional politics in recent decades has increased the ranks of Southern Republican and Northern Democrats and transformed the Northern wing into the overwhelmingly dominant component of the party.[81] As their size has increased, so too has their dissatisfaction with the power of conservative Southern Democrats and Republicans to frustrate liberal programs and with a party leadership wedded to a highly personal and permissive style of operation designed

79 *See* Schick, *supra* note 39, at 309-10.

80 *Id.* at 315-16.

81 In the 79th Congress (1945-1947) of a total of 243 Democrats, 126 were Northerners and 117 were Southerners. *See generally* 1 CONG. Q. 8-9 (1945). In contrast, in the 93d Congress (1973-1975) of a total 240 Democrats, 157 were Northerners and 83 Southerners. *See generally* 29 CONG. Q. ALM. 944-45 (1973). In the present Congress of a total of 291 Democrats, 199 are Northerners and 92 Southerners. *See generally* 33 CONG. Q. WEEKLY REP. 162-63 (1975). Similarly, the number of Southern Republicans increased from 5 in 1945, *see generally* 1 CONG. Q. 8-9 (1945), to a high of 37 in 1973. *See generally* 29 CONG. Q. ALM. 938-39 (1973). Here, as elsewhere, Southern members are defined in terms of the *Congressional Quarterly's* definition: members from the eleven states of the Confederacy plus Oklahoma and Kentucky. For additional data and discussion see Cooper & Bombardier, *Presidential Leadership and Party Success*, 30 J. POL. 1012, 1020-27 (1968). For data and analysis concerning the growth of Northern Democratic strength and loyalty and the decline of Southern pre-eminence in the years between 1921 and 1944 see J. TURNER, *supra* note 22, at 172-75.

to accommodate all elements of the party. The formation of the Democratic Study Group in the late 1950's and its subsequent operations in the 1960's represented a critical first phase of the movement to limit the obstructive power of the conservative coalition. The revitalization of the caucus in the 1970's under Study Group leadership represents a second phase in which Northern liberal Democrats have sought to use the caucus as a source of leverage against conservative chairmen and the regular party leadership. In this effort Northern liberals have been aided by a more recent effect nationalization of politics has had in bringing into the House moderate or liberal Southern Democrats, who are quite at home in the Study Group.[82]

The changes that have occurred in the politics of the Senate and in the internal organization of House committees derive in large part from similar roots. As in the case of the House, the new Senate is to a significant degree the product of the declining role and influence of Southern Democrats within the Democratic Party and the Senate as a whole.[83] Similarly, the same basic dissatisfactions that have led to a revitalization of the caucus in the House have played an important role in liberal Democratic efforts to democratize the House committees. Through the second session of the 93d Congress, the scope of caucus activity in substantive areas has been limited and the directive effect of its votes and instructions unclear and untested. Also, in the past several Congresses caucus election of chairmen did not result in any departures from seniority. Liberal Democrats in recent years have accordingly sought to reduce the power of conservative chairmen through new caucus rules on subcommittee chairmanships, powers, and assignments. However, concern for liberal programs

82 On the history of the Democratic Study Group and the increase in liberal Southern Democrats see Stevens, *supra* note 71. On the current organization and impact of the Study Group see Stevens, Miller, & Mann, *Mobilization of Liberal Strength in the House, 1955-1970: The Democratic Study Group*, 68 AM. POL. SCI. REV. 667 (1974). *See* J. COOPER, *supra* note 19, at 120, 129, 164-65 n.367 for discussion of the Rayburn leadership style and liberal dissatisfaction with it.

83 In the 79th Congress (1945-1947) of a total of 56 Democrats, Southerners numbered 25. *See generally* 1 CONG. Q. 10 (1945). In contrast, in the 93d Congress (1973-1975) of a total of 57 Democrats, Southerners numbered 16. *See generally* 29 CONG. Q. ALM. 944 (1973). *See also* Ornstein & Rohde, *Seniority and Future Power in Congress*, in CONGRESS IN CHANGE, *supra* note 75, at 72-88; D. Rohde, N. Ornstein, & R. Peabody, *supra* note 78.

has not been the only motivating factor. The desire of members with only moderate seniority to bolster their own positions and power within the House has had a powerful reinforcing effect.[84]

The revitalization of the majority party caucus in the House has contributed to the integrative capability Congress so sorely needs. Nonetheless, further extension of caucus power would not necessarily be an unmixed blessing. It is critical that increases in the role of the caucus be accompanied by increases in the power of the party leadership. Otherwise, gains in caucus power can deliver the Congress into the hands of the President whenever the two branches are again controlled by the same party. The recent actions the caucus took in giving the Speaker control over party nominations to the Rules Committee and the steering committee control over party nominations to all other committees were thus appropriate, if not essential, changes, despite the current ambiguous relationship of the party leadership to the caucus.[85] If the House is to guard its autonomy as well as increase its capacity to act, it must not lose sight of its need for strong and independent leadership.

Another source of difficulty relates to the relationship between integrative capacity and majority rule. Earlier we argued that

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84 On the limits of caucus power and activity from 1969 to 1974 and the factors that motivated committee decentralization see Stevens, *supra* note 71; Ornstein, *supra* note 75; Rohde, *supra* note 75. *See also* Balz, *Tax Report/Ways and Means Seeks to Maintain Power and Prestige*, 6 NAT'L J. REP. 913 (1974); Malbin, *Congress Report/New Democratic Procedures Affect Distribution of Power*, 6 NAT'L J. REP. 1881, 1889-90 (1974).

85 In addition, the package of committee reforms adopted in October, 1974, substantially increased the Speaker's flexibility in assigning bills to committees. H.R. Res. 988 § 101, *amending* § 5 of House Rule X (printed as enacted in H.R. REP. No. 916, *supra* note 62); 32 CONG. Q. WEEKLY REP. 2896, 2897 (1974). However, despite the additions to the power of the Speaker, what we have argued earlier in the text should be kept in mind. It is the Democratic Study Group and its leaders, not the party leadership, who have been primarily responsible for the revitalization of the caucus. The caucus is thus an arena the leadership did not create and one in which it must compete for power with Study Group leaders whose influence over their fellow Democrats rivals their own. It remains to be seen whether the next Speaker will emerge from the caucus or simply continue the line of succession that has prevailed since the days of Rayburn. What is at issue here is whether the Speakership will continue to be controlled by the alliance of big city Northerners and rural Southerners of many decades' standing or will pass to the control of Northern elements whose base of power is in the Study Group. The leading contenders are Rep. O'Neill (D.-Mass.), the majority leader, and Rep. Burton (D.-Cal.), the chairman of the caucus. *See* note 73 *supra*.

the decline of sectional or regional politics since the turn of the century has materially reduced the role of party as a determinant of voting. This remains true despite the increase in the number and proportion of Northern Democrats in recent decades. Such gains have not been matched by increases in the degree to which party serves as a basis of division on issues. On the contrary, the percentage of party votes has continued to decline. Nor has the downward trend in the degree to which members of the majority party vote together on issues that divide the parties been reversed.[86] Thus, if the nationalization of politics has contributed to the coherence of the majority party since the 1940's by reducing the dimensions and significance of the North-South split, this result has not been strong enough to counter its overall impact on party voting and party unity since the turn of the century. Indeed, even its ability to promote greater overall levels of party unity or cohesion in recent decades has been checked thus far by falling levels of Southern support and new bases of division within Northern elements.[87]

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86 The decline in party votes can be seen both in terms of the 90% versus 90% standard and the 50% versus 50% standard. Published figures on votes in which 90% of one party opposed 90% of the other are scattered. However, during the Kennedy and Johnson Administrations the percentage of such votes per session did not exceed 8% and fell as low as 2%. J. TURNER, *supra* note 22, at 17. *See also* W. SHANNON, *supra* note 21, at 68-69. Published figures on votes in which 50% of one party opposed 50% of the other are more complete since the *Congressional Quarterly* has tallied such votes regularly for several decades. In this regard we may note that in the sessions from 1955 through 1959 party votes of this type occurred 41%, 44%, 59%, 40% and 55% of the time. 14 CONG. Q. ALM. 123 (1958); 15 CONG. Q. ALM. 127 (1959). In contrast, in the five most recent sessions of the House (1970-1974) such votes occurred only 27%, 38%, 27%, 42% and 29% of the time. 29 CONG. Q. ALM. 958 (1973); 33 CONG. Q. WEEKLY REP. 199-200 (1975). The *Congressional Quarterly* can also be relied upon for trends in party cohesion, since it has compiled party unity scores in a consistent manner since 1955. In this regard it may be noted that in the sessions from 1955 through 1959 Democratic scores were 72, 70, 70, 66, and 79. 11 CONG. Q. ALM. 74 (1955); 12 CONG. Q. ALM. 121 (1956); 13 CONG. Q. ALM. 123 (1957); 14 CONG. Q. ALM. 123 (1958); 15 CONG. Q. ALM. 127 (1959). In contrast, in the five most recent sessions of the House (1970-1974) Democratic scores were 58, 61, 58, 68, and 62. 33 CONG. Q. WEEKLY REP. 200 (1975). For comparison with data from earlier periods see note 38 *supra*. The *Quarterly's* figures on party votes and unity scores are, however, not fully or precisely comparable to the earlier data due to differences in treating unanimous votes and absences. Hence, for purposes of comparison about ten points should be added to the unity scores cited from the *Quarterly* to eliminate the effects of differences in treating absences. Similarly, it should be noted that, if the earlier data on majority versus majority party votes had included unanimous votes, the percentages reported would have been somewhat lower.

87 J. TURNER, *supra* note 22, at 211-48; Cooper & Bombardier, *supra* note 81, at

The significance of the growth in the strength of Northern elements of the House Democratic Party should therefore be kept in proper perspective. Northern predominance has provided the foundations for the revitalization of the caucus and for clearer and more frequent internal definitions of party policy. Nonetheless, at present the strength or force of party cannot justify and could not long sustain any attempt to return to strict caucus rule over committees and individuals on the basis of party discipline. Given this fact, serious disharmonies continue to exist between integrative capability and majority rule and reformers should not be misled by present gains and their desire to pass liberal programs into thinking otherwise.

To argue this, however, is not to imply that events in the past six years have had a detrimental effect on majority rule. Results thus far have served essentially majority rule. Results thus far have served essentially to limit the independence of committees and chairmen, not to reestablish centralized power. This is both understandable and appropriate, given the fact that gains in caucus power have hinged on the sheer size of Northern elements rather than on any qualitative change in the role of party as a determinant of voting. Our point, then, is simply that any further substantial increase in caucus power would be detrimental to majority rule, unless accompanied by and based on a further and substantial increase in the strength and significance of party in the decisionmaking process. The Albert House, in short, remains a far different entity than the Reed or Cannon Houses, even though no longer comparable to the Rayburn House.

Our preceding analysis also allows us to draw some conclusions regarding changes in the legislative budgetary process, House committee decentralization, and the politics of the Senate. Due to its smaller size, broader constituencies, and looser formal structure, decentralization in the Senate poses less of an impediment

1023; L. Ritt, Partisan Realignment: The View from Congress, Sept. 1974 (paper presented at a meeting of the American Political Science Association). The increase in liberal Democratic Southerners in recent years appears to have reversed the downward trend in Southern party support. Nonetheless, Southern Democratic party unity scores have declined appreciably as Northern elements have gained predominance, the former dropping from scores in the mid-sixties during the late 1950's (*see generally* CONG. Q. ALM. for those years) to scores of 43, 40, 34, 50, and 44 in the five most recent House sessions (1970-1974). 26 CONG. Q. ALM. 1140 (1970); 27 CONG. Q. ALM. 98 (1971); 28 CONG. Q. ALM. 61 (1972); 33 CONG. Q. WEEKLY REP. 200 (1975).

to action and at the same time is less easy to alter or mitigate institutionally. The Senate, in other words, has less potential for centralized rule than the House, but nonetheless also tends to have greater output capability in periods in which party cannot support centralized rule.[88] It is not surprising, then, that structural reform in the Senate has lagged behind developments in the House, though both bodies have been subject to similar types of broad electoral forces. Ironically enough, however, in the context of the contemporary Presidency any reemergence of caucus rule in the Senate might well threaten its autonomy far more than a similar developmen in the House, given the greater difficulty of concentrating organizational power in Senate leaders.

The actions taken in recent years to democratize the committees will probably involve more costs than benefits. Committee decentralization has not only strengthened the barriers to restructuring the committee system, but also has deleteriously affected integrative capability. In terms of immediate results, increased autonomy of subcommittees and broader distribution of subcommittee positions have limited the integrative effects of caucus election of committee chairmen and have impaired as well as contributed to the ability of majorities to attain their desires. More important, over time the disintegrative consequences of a wider dispersion of power within committees are likely to increase if no substantial gains occur in the strength of party allegiance. In addition, committee decentralization will heighten resistance to further growth in the power of party leaders and mechanisms even if levels of party voting and unity do increase.

As for the potential benefits of budgetary reform, the fact that increased integrative capability is to be derived from new mechanisms provides grounds for skepticism. Even in a restricted area of reform, it is difficult to base integration on procedural engineering. Lower benefits than reformers have promised and serious operational difficulties are likely.

### 4. Expanding Electoral Information and Control

The final category into which reform actions and proposals can be grouped concerns Congress' relationship to the electorate. Here

88 *See* L. FROMAN, CONGRESSMEN AND THEIR CONSTITUENCIES 69-84 (1963).

too the pace of change has been rapid. Over the past decade both the House and Senate have passed new rules requiring members to make confidential financial reports, which are subject to examination by the ethics committees in each house, and to report certain limited forms of financial information publicly.[89] The Legislative Reorganization Act of 1970[90] provided for more open committee meetings in the House and Senate, changed historic practice in the House by instituting roll call votes on amendments in Committee of the Whole, and required new forms of disclosure for roll call votes taken in House and Senate committees. In addition, in 1973 requirements for open committee hearings and business sessions were further strengthened.[91] In 1966 Congress passed a Freedom of Information Act designed to enhance the ability of citizens to secure documents and records from executive departments and in the past year enacted an amended and strengthened version over President Ford's veto.[92] Nor do these actions exhaust the record. Perhaps the most important changes of all affect election campaigns. Both in 1972[93] and 1974[94] Congress passed major campaign reform bills. The 1974 Act sets ceilings on contributions to presidential and congressional candidates, establishes spending limits in presidential and congressional primary and general elections, and provides for public financing of presidential primary and general elections.

These events have not ended the pressure for change. Many reformers desire to go further: to institute comprehensive public disclosure of the personal finances of members; to increase the stringency of the requirements for open committee meetings and apply them to conference committees; to introduce a system of

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89 24 CONG. Q. ALM. 197, 814 (1968); 26 CONG. Q. ALM. 66, 1018 (1970).

90 Pub. L. No. 91-510, §§ 101-32, 84 Stat. 1140, *amending* 2 U.S.C. §§ 190a-190f (1964) (codified at 2 U.S.C. §§ 190a-190f (1970)).

91 S. Res. 69, 93d Cong., 1st Sess., 119 CONG. REC. S4030 (daily ed. Mar. 6, 1973); 29 CONG. Q. ALM. 716, 1074 (1973). *See* Eckhardt, *The Presumption of Committee Openness Under House Rules,* 11 HARV. J. LEGIS. 279 (1974).

92 5 U.S.C.A. § 552 (Supp. Feb. 1975). *See* 32 CONG. Q. WEEKLY REP. 2882 (1974).

93 Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §§ 101-06, 201-07, 301-11, 401-06, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C. (Supp. III, 1973)).

94 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 101-04, 201-10, 301-02, 401-10, 88 Stat. 1263. *See* 32 CONG. Q. WEEKLY REP. 2865 (1974).

public financing for congressional races.[95] Such changes, to be sure, involve benefits either in expanding the accountability of members or in lessening the invidious dependencies that high campaign costs combined with limited sources of funds produce. Nonetheless, the issues here are not as black and white as the reformers usually believe. On the one hand, the benefits of change tend to be exaggerated by simplistic, conspiracy-oriented views of congressional behavior. For example, public committee mark-up sessions on legislation do not work simply to force members to vote for the "public interest" instead of nefarious special interests. Rather, they increase the pressure on committee members from all segments of the electorate that are attentive to their work, from consumer or self-designated public interest lobbies to political interest groups with broad programs, such as the AFL-CIO, to more narrowly defined groups or interests.[96] On the other hand, as the current furor over the impact of the 1974 Campaign Reform Act illustrates, the costs of change are too often overlooked. Especially in the House, public financing of congressional campaigns would stimulate and promote electoral opposition. The pursuit of residual goals would accordingly be heightened as members devoted more time and attention to protecting their political careers. Comprehensive public disclosure of finances would increase the personal costs of congressional life. Expanding open committee mark-up sessions and instituting open conferences would lessen the potential for accommodation by increasing

95 See, for example, the results of a survey of House members conducted by Common Cause prior to the organizational caucus for the 94th Congress held early last December. 120 CONG. REC. H10,994-98 (daily ed. Nov. 21, 1974). *See also* M. GREEN, J. FALLOWS, & D. ZWICK, WHO RUNS CONGRESS? 283-85 (1972). The House at the beginning of the present Congress amended its rules to strengthen the requirements for open committee hearings and business sessions and to provide for open conferences. H.R. Res. 5 §§ (10), (14), (17), (26), 94th Cong., 1st Sess., 121 CONG. REC. H6-H7 (daily ed. Jan. 14, 1975). Similarly, both party caucuses in the Senate passed resolutions to strengthen the Senate's open committee rule, S. Res. 9, 94th Cong., 1st Sess. (1975), and to provide for open conferences, S. Res. 12, 94th Cong., 1st Sess. (1975). *See* Malbin, *Congress Report/Senate, House to Vote on Legislative Procedure Changes*, 7 NAT'L J. REP. 62, 64 (1975); Malbin, *Congress Report/House Democrats Oust Senior Members from Power*, 7 NAT'L J. REP. 129, 134 (1975).

96 For example, last year 150 amendments were proposed during House Commerce Committee consideration of the energy conservation bill, a result which Chairman Staggers (D.-W. Va.) attributed to the presence of lobbyists at the open mark-up sessions. Crewdson, *Hill Cuts Secret Meetings*, Washington Post, Feb. 14, 1974, § C, at 19, cols. 5-8.

the political costs of compromising positions dear to groups or interests in a member's constituency. What is needed in this broad area of reform is thus not self-righteous pressure for change, but rather informed and judicious evaluation of the merits of change.

### *Conclusion*

Neither the pall that Watergate has cast on the Presidency nor the recent congressional resurgence should be interpreted to mean that the difficulties Congress has faced throughout this century in maintaining the scope and autonomy of its decisionmaking have come to an end. The same forces that have created the modern Presidency will continue to sustain it and may again provide momentum for further expansion of its power. Congress continues to be threatened with being cast ever more firmly in the role of a restrictive and obstructive force and with being constrained to function increasingly as a limited and passive participant in decisions on critical national problems. Nor are these two threats unrelated; rather, the latter emerges as a consequence of the former. Congress' prospects for avoiding or tempering such a fate rest primarily on its ability to rebuild its integrative capability, on its ability to enhance its capacity to act independently.

This is not to imply that the clock can or should be turned back to the nineteenth century. Broad reliance on the President to initiate, formulate, and press major policy proposals will and should continue. Nonetheless, congressional weakness in responding to those proposals and acting constructively on its own undermine its autonomy as the pressure for action becomes intense. Similarly, the scope of its decisionmaking is subject to erosion when such pressure is continuing. What the modern Congress accordingly requires to protect its scope and autonomy is more capability to define and assert its own policy programs as platforms for bargaining with the President and as sources of departure from presidential proposals. Congress must regain its own voice as a spokesman for the public interest.

To conclude that the key to strengthening the Congress lies in enhancing its integrative capability is, however, not to suggest

that the remedy can be quickly, easily, or fully applied. Quite the opposite is the case for a variety of reasons, but at heart Congress' problems as an instrument for action stem from its virtues as a representative body. Ironically enough, under modern conditions to preserve its role and power as a representative body Congress must improve its capacity to act. Yet the compatibility of these goals varies in relation to the scope and strength of party allegiance. In this fact resides both the primary opportunities for and constraints on stabilizing Congress' role in the political system. In closing, then, in the next several decades as in the preceding decades of this century what will be tested and stands at issue is the character or shape of the balance between consent and action in American democracy, a balance the framers of the Constitution not only intended but sought through a separation of powers framework to institutionalize at a high and demanding level. Now as in the past congressional power is tied to the ability of the American political system to maintain the viability of the existing balance in the face of pressing national needs. What remains conjectural is our ability to do so.

# ENERGY TAX LEGISLATION: THE FAILURE OF THE 93d CONGRESS

EDWARD F. MORRISON*

## *Introduction*

The 93d Congress saw the virtual disintegration of the tax legislative process in the House of Representatives. After more than a year of deliberation, the members of the Committee on Ways and Means found themselves unable to respond to a mandate from their colleagues in the House to do something about rapidly rising profits in the oil industry. This article explores some of the factors underlying the failure of the committee to react either expeditiously or coherently to this mandate.

While the question of why the Congress adjourned on December 20, 1974, without having even considered tax reform legislation is complex, two factors were central. First, the Ways and Means Committee was itself disintegrating under pressures both internal and external. As a result, its effectiveness as a policy-making organization rapidly deteriorated in the 93d Congress. Second, weaknesses in House procedures allowed the Democratic leadership to insulate its decision to avoid entirely the issue of new taxes for the oil industry from the pressures of the House membership.

The first section of this article briefly examines the Ways and Means Committee under the chairmanship of Wilbur Mills (D.-Ark.). It investigates the nature of the committee's power under Chairman Mills and identifies some of the sources of tension which led to the downfall of Mr. Mills' chairmanship and the dilution of the committee's power in the House. Part II traces the emergence of the issue of oil industry profits and the growing pressure on the Ways and Means Committee to increase the tax burden of the oil industry. Part III examines the effectiveness of

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the public hearing process in assisting the committee in formulating a coherent policy response on the oil tax issue. Part IV of the article looks at the decisionmaking process within the committee during the drafting of H.R. 14462, the Oil and Gas Energy Tax Act of 1974. Part V reviews the procedural difficulties that were encountered in attempting to bring the committee's legislation before the House for consideration. Finally, the article concludes with a few observations on the future of the Ways and Means Committee in the 94th Congress.

## I. Wilbur Mills and the House Committee on Ways and Means

Since its establishment as a standing committee in 1802, the Ways and Means Committee has been at the center of power in the House. Article I, section 7 of the Constitution gives the House of Representatives the authority to originate "All bills for raising Revenue." Under its rules the House has delegated the responsibility of performing this obligation to the Committee on Ways and Means.[1] From the beginning the committee's legislative jurisdiction has been exceedingly broad. Originally it considered both revenue and appropriations bills. It was not until 1865 that the committee, then overburdened with war legislation, was relieved of a major portion of its jurisdiction, and a new Committee on Appropriations was created.[2] Despite this loss, the committee continues to have the largest jurisdiction of any standing committee in the House. In the 92d Congress, 3,156 public bills were referred to Ways and Means, more than any other committee.[3] This legislation touched all areas of the committee's jurisdiction over federal taxation, health insurance, social security, welfare, and trade.

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1 L. Deschler, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 384, 92d Cong., 2d Sess. 368 (1973) [hereinafter cited as Jefferson's Manual].

2 G. Galloway, History of the United States House of Representatives, H.R. Doc. No. 246, 87th Cong., 1st Sess. 60-61 (1961) [hereinafter cited as History].

3 House Select Comm. on Committees, Committee Reform Amendments of 1974, H.R. Rep. No. 916, pt. II, 93d Cong., 2d Sess. 303-25 (1974).

Historically, the pre-eminent legislative jurisdiction of the committee has been buttressed by the involvement of its chairmen in the party leadership of the House. Until the House revolt against the rule of Speaker Cannon brought reforms of party procedures in 1910, it was customary for the Speaker to select either the chairman of the Ways and Means Committee or the chairman of the Appropriations Committee as majority floor leader.[4] These reforms significantly diluted the power of the Speaker, and the political vacuum was filled by the Chairman of the Ways and Means Committee, Representative Oscar Underwood of Alabama. In his dual role as committee chairman and majority floor leader appointed by the caucus, Underwood became the real leader of the House.[5] It was not until the 72d Congress in 1933-34 that the Democrats closed off this power from Ways and Means by precluding the floor leader from retaining a committee assignment.[6] Even so, the 1910 reforms ensured that the Democratic members of Ways and Means would play an important role in party organization. The caucus designated the Democratic members as the party's Committee on Committees with the authority to make committee assignments for their fellow Democrats.[7]

### A. *The Chairmanship of Wilbur Mills*

The modern history of the Ways and Means Committee begins in 1958 when Representative Wilbur Mills became its chairman. Until Mills assumed leadership of the committee, Ways and Means had been primarily an instrument of power for the majority party.[8] Partisanship within the committee at times became so intense that it was not uncommon for Democrats in the late

4 The 1910 reforms gave the power to appoint the majority leader to the Democratic caucus. HISTORY, *supra* note 2, at 97.

5 *Id.* at 98.

6 *Id.* at 97.

7 The authority to make committee assignments was taken away from the Democratic members of Ways and Means by the Democratic caucus and given to the Democratic Steering and Policy Committee, an arm of the party leadership. These reforms were adopted by the Democratic caucus on December 2, 1974. Washington Post, Dec. 3, 1974, at A1, col. 1.

8 The Democrats have controlled the House for all but four years since 1933, the 80th Congress in 1947-48 and the 83d Congress in 1953-54. J. MANLEY, THE POLITICS OF FINANCE 156 (1970) [hereinafter cited as POLITICS].

1930's to write committee bills in the party caucus.[9] As a result of this divisiveness, the committee often risked defeat of its legislation in the House when strict party discipline broke down.[10]

### 1. The Search for Consensus

Chairman Mills brought an entirely new *modus operandi* to the committee and in the process extended its already formidable influence over the affairs of the House. Rather than using his committee as a focal point of party power, Representative Mills worked to minimize party considerations in the operation of his committee. Instead, he focused the committee's attention and its power upon the chairmanship. To accomplish this objective, Mills elevated the strategy of bi-partisanship, normally a simple political expedient for most chairmen, to the essential operating principle of his committee. Under Mills, the achievement of a broad consensus in support of committee legislation overrode substantive policy questions in conduct of the committee's affairs.[11]

The entire success of Mr. Mills' strategy was predicated upon a strong interdependence between the members of the committee and the chairman. Early in this tenure Chairman Mills took steps to limit the membership's autonomy by abolishing subcommittees and tightly controlling committee staff.[12] The absence of subcommittees and inadequate staff capabilities insured that the members could not effectively challenge the chairman.

Yet, through his considerable political acumen and his impressive intellectual capabilities, Chairman Mills was able to convert his subjugation of the committee members into a feeling of strong

9 *Id.* at 166.

10 *Id.* at 155-211.

11 Mr. Mills, proud of his long relationship with Speaker Sam Rayburn, traced the beginnings of his legislative philosophy for an interviewer in 1968:

> I was always taught by Mr. Rayburn that our whole system was to settle disputes within the committees. It's a waste of time to bring out a bill if you can't pass it. I just don't like to have a record vote for the sake of having a vote.

N.Y. Times Magazine, Feb. 25, 1968, at 76.

12 Until the 86th Congress in 1959-60 the Ways and Means Committee did have subcommittees on which it relied for the purposes of study and oversight. *See* COMMITTEE REFORM AMENDMENTS OF 1974, *supra* note 3, at 242. For recent changes see note 159 *infra*.

loyalty of the members to the chairman. Mills did not exercise power autocratically. Instead, he tried to influence the membership into accepting broad-based compromises on the legislation before them.[13] For the committee members, Republican and Democrat, Mr. Mills' procedure was for the most part entirely satisfying. They could feel content that the chairman gave them ample opportunity to contribute their ideas to the committee's decisions. At the same time, they were assured that Chairman Mills, with his almost legendary command of the complex areas of the law under the committee's jurisdiction, was making sure that the committee's decisions were thorough and responsible. By the end of his tenure as chairman of the committee,[14] most members viewed Mr. Mills with deep respect, if not reverence. As one Ways and Means Committee member commented in early 1973:

> Our chairman has been chairman of that committee so long that there is no one who serves on that committee on either the Democratic or Republican side who was even on the committee when he became chairman. He has a very retentive mind and a very skillful use of power. He is not oppressive as far as committee members are concerned, but he is able to overwhelm by his own personal intellect and his experience.[15]

### 2. The Committee Membership

Mr. Mills' political strategy of focusing the committee's activity and, hence, its power on the chairman was to a large extent made possible by the party leadership of both the Republican and the Democratic parties. Acutely aware of the political sensitivity of many of the issues considered by the committee, the leadership of both parties have taken a deep interest in the recruitment of

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13 As John Manley, a close student of the committee, has noted: "[The committee members] see him as a shaper of decisions, not a dictator. *To them he is an extremely skillful leader who responds to them in such a way that his conclusions, drawn from their discussion, become their conclusions.*" Manley, *Wilbur D. Mills: A Study in Congressional Influence*, 63 AM. POL. SCI. REV. 442, 447 (1969) (emphasis in original).

14 Speaker of the House Carl Albert (D.-Okla.) announced on December 4, 1974 that Rep. Mills would relinquish his chairmanship in the wake of a scandal over his involvement with an exotic dancer. Washington Post, Dec. 5, 1974, at A1, col. 6.

15 *Hearings on Committee Organization in the House Before the House Select Comm. on Committees*, 93d Cong., 1st Sess., vol. 1, pt. 2, at 351 (1973) (testimony of Rep. Sam Gibbons).

members to Ways and Means. Policy orthodoxy has become an important test of membership.[16] As a consequence, Chairman Mills had the pleasure of working mostly with loyal party men on his committee who were not inclined to take radical or unsettling positions on major issues.

Beyond this fact, it appears that the members themselves have not been attracted to the committee principally for interests of policymaking. Most have sought membership simply for reasons of the committee's powerful influence in the House.[17] With policy objectives playing a secondary role in their involvement on Ways and Means, the members were receptive to Mr. Mills' style of leadership.[18]

The two factors of committee recruitment and the nature of committee decisionmaking are more helpful explanations of the committee's reputation for conservatism under Chairman Mills than the particular ideological characteristics of the membership. The Chairman's technique of consensus-building largely precluded the rapid adoption of far-reaching reform legislation. As long as the membership was willing to accept and, indeed, reinforce that mode of committee operation, it is difficult to see how the committee under Mr. Mills could have performed more aggressively on major controversial issues.[19]

Nevertheless, ideological differences were present among the Ways and Means membership in the 93d Congress and were important in determining the course of the committee's action. Of the twenty-five members, ten Republicans and fifteen Democrats, the most strategic group were the Southern Democrats: Representatives Phil Landrum (Ga.), Omar Burleson (Tex.), and Joe Waggonner (La.). Together with the committee's Republicans, they could form an effective conservative coalition to block more liberal legislative initiatives. Of growing importance to the com-

16 R. FENNO, CONGRESSMEN IN COMMITTEES 25 (1973).

17 *Id.* at 4.

18 *See* POLITICS, *supra* note 8, at 126.

19 On some of the most significant issues before his committee Mills earned the reputation of not proceeding unless he was sure there were enough votes both in the committee and in the House to pass his legislation. For example, government supported health care for the elderly was an idea of considerable political appeal as early as the 1950's. It was not until 1965, however, that Mr. Mills moved the legislation establishing Medicare. *Id.* at 214-17.

mittee, however, was an increasingly assertive liberal bloc, including Representatives Charles Vanik (Ohio), James Corman (Cal.), William Green (Pa.), and Sam Gibbons (Fla.). It was this group of liberal Democrats which was to play an important role in the committee's deliberations over oil industry taxes.[20]

### 3. Committee Strategy in the House: The Closed Rule

Chairman Mills' objective of building a strong bipartisan consensus in support of committee legislation would have meant little if he were unable to translate that consensus directly into additional political power for his committee in the House. The parliamentary procedure of the closed rule allowed the chairman to make that translation. Legislation brought to the floor of the House under a closed rule is not open to amendment. Only one motion to recommit the legislation to committee may be entertained before a vote on final passage.[21] Under Chairman Mills a tight orthodoxy developed under which the Rules Committee granted a closed rule to virtually all major Ways and Means legislation.[22]

To justify this unusual parliamentary procedure, Mr. Mills developed a convincing mystique for the legislation of his committee. Due to the legislation's complexity and importance, it would be irresponsible, the Chairman argued, to allow the House to consider a spate of ill-conceived amendments on the floor. The strategy was reinforcing. By retaining effective policy control for his committee, Mr. Mills was able to convince the House membership that matters within the committee's jurisdiction were too complex for the average congressman to understand.[23] Under

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20 Other members of the committee included Reps. Al Ullman (D.-Ore.), James Burke, (D.-Mass.), Martha Griffiths (D.-Mich.), Dan Rostenkowski (D.-Ill.), Richard Fulton (D.-Tenn.), Hugh Carey (D.-N.Y.), Joseph Karth (D.-Minn.), Herman Schneebeli (R.-Penn.), Harold Collier (R.-Ill.), Joel Broyhill (R.-Va.), Barber Conable (R.-N.Y.), Charles Chamberlain (R.-Mich.), Jerry Pettis (R.-Cal.), John Duncan (R.-Tenn.), Donald Brotzman (R.-Colo.), Donald Clancy (R.-Ohio), and Bill Archer (R.-Tex.).

21 JEFFERSON'S MANUAL, *supra* note 1, at 432-33.

22 Occasionally the Rules Committee will report a modified closed rule on Ways and Means Committee legislation. Such a rule allows a specific amendment to be considered on the floor. *E.g.*, H. Res. 657 for consideration of the Trade Reform Act of 1973, H.R. 10710, 93d Cong., 1st Sess. (1973).

23 One former member of the committee seriously disputes the argument that

Mills the Ways and Means Committee established a subtle tyranny of expertise over their colleagues in the House.[24]

Chairman Mills was acutely aware, however, that, like his relationship to his committee, Ways and Means must be willing to accommodate itself to the needs of the House. Only with this flexibility could the committee hope to retain and build upon its influence. Chairman Mills has briefly described the process by which committee legislation evolves as a response to the House membership:

> As I see it, our job is to work over a bill until our technical staff tells us that it is ready and until I have reason to believe that it is going to get enough support to pass. Many of our bills must be brought out under a closed rule, and to get and keep a closed rule, you must have a widely acceptable bill. It's as simple as that.[25]

Under Chairman Mills the power and influence of the Ways and Means Committee in the House was largely predicated on maintaining effective control over policy within the committee while at the same time being attuned and responsive to the political sympathies of the House membership. The ultimate expression of committee influence became the vote on passage of its legislation. The reputation of the Chairman and the committee was reinforced with each House vote to pass committee legislation. Similarly, a defeat on the floor was an indication that the Chairman and the committee had less than complete control over their jurisdiction. Not surprisingly, the Ways and Means Committee established a remarkable record of legislative success under Mr. Mills. On only a handful of the hundreds of major bills handled by the committee during his chairmanship has the House rejected the committee's recommendations.[26]

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tax matters are too complex for the average member to understand. *See Hearings on Committee Organization, supra* note 15, vol. 3, pt. 1, at 155 (testimony of Thomas B. Curtis).

24 *See* R. FENNO, *supra* note 16, at 55.

25 N.Y. Times Magazine, March 18, 1962, at 146.

26 From 1961 to 1968 the committee only lost two roll call votes on the floor of the House. POLITICS, *supra* note 8, at 206-11.

### B. *Signs of Committee Weakness*

One of the first indications that Chairman Mills' legislative strategy was beginning to fail came as early as 1969. In that year, the Ways and Means Committee considered legislation to extend the 10 percent income tax surcharge, enacted in 1968, for an additional year.[27] Committee liberals criticized the extension and pressed Chairman Mills to consider comprehensive tax reform instead of the surcharge as a means to raise revenue. In an unusual display of committee disunity, six Ways and Means Committee Members appeared before the Rules Committee to testify on the terms of House consideration of the bill to extend the surcharge.[28] Ultimately, the legislation passed the House by a surprisingly narrow margin of 210-205, with eight members of the committee voting against passage.[29]

A clearer signal that Chairman Mills' legislative control was failing occurred in June, 1973. Chairman Mills, having gone to conference with the Senate over legislation to extend temporarily the public debt ceiling,[30] decided to accept a Senate-passed amendment providing an increase in Social Security benefits. When he brought the conference report to the House for consideration, the membership refused to go along with his action. By a vote of 185 to 190, with eleven Ways and Means members (ten Republicans and one Democrat) voting against their Chairman, the House asked Mr. Mills to go back to the conference committee and work out a more acceptable compromise.[31] Although the Chairman came back to the House the next day with a conference report the membership could accept,[32] his reputation for legislative invincibility had suffered a severe blow. Eight days later the Chairman announced he would enter the hospital for back surgery and raised the possibility that his illness might force him to re-

27 H.R. 12290, 91st Cong., 1st Sess. (1969).

28 *Hearings on H.R. 12290 Before the House Comm. on Rules*, 91st Cong., 1st Sess. (1969) (hearings before the House Committee on Rules are on file and open for public inspection at the offices of the Committee).

29 Interestingly, Chairman Mills, although present on the floor, was too ill to manage the legislation. 115 CONG. REC. 17776-874 (1969).

30 H.R. 8410, 93d Cong., 1st Sess. (1973).

31 119 CONG. REC. H5705-28 (daily ed. June 29, 1973).

32 119 CONG. REC. H5763-76 (daily ed. June 30, 1973).

tire.[33] For the next eight months, until March 1974, Mr. Mills was absent from the committee. The ranking majority member, Representative Al Ullman (D.-Ore.), became acting chairman.

The Mills defeat on the public debt bill was not an isolated incident of political miscalculation. The defeat manifested the growing ineffectiveness of Chairman Mills' leadership of his committee and his weakening capability to assess accurately the sentiments of his colleagues in the House. In short, Mr. Mills' formula for legislative success was beginning to fall apart. The factors underlying this growing failure are difficult to analyze, but they can be categorized in terms of four different variables: the decline of Representative Mills' political career, the changing character of the Ways and Means Committee, the growing strength of the Democratic caucus, and the effort in the 93d Congress to reorganize the committee system in the House.

### 1. The Decline of Wilbur Mills

The public reaction to the widely publicized scandal involving Representative Mills' relationship to an exotic dancer undoubtedly acted as the catalyst for Mr. Mills' resignation of the chairmanship of the Ways and Means Committee.[34] Beyond that, the scandal itself was little more than the tragic end piece to a political career which had already begun a serious decline. It was Chairman Mills' unsuccessful bid to run for President in 1972 and his prolonged illnesses during 1973 and 1974 that severely jolted his political credibility in the House and undercut his position as Chairman in the 93d Congress.

For many of his colleagues in the House, the announcement by Congressman Mills that he would seek the Presidency came as a surprise. One associate reportedly asked Mills, "Wilbur, why do you want to run for President and give up your grip on the country?"[35] Indeed, his short-lived, narrowly popular campaign demonstrated that Representative Mills had seriously miscalculated his ability to translate his enormous influence in Congress into votes for national office. For a man whose career was founded

33 Washington Post, July 8, 1973, at A1, col. 4.
34 *See* note 14 *supra*.
35 Washington Post, Oct. 13, 1974, at A6, col. 1.

on astute political judgment, the mistaken assessment was more than an embarrassment. Far more damaging, however, was the revelation that a portion of his political campaign was financed illegally.[36] His subsequent refusal to testify before the Senate Select Committee on Presidential Campaign Activities[37] raised further doubts concerning the chairman's personal and political integrity.

Compounding these difficulties were the Chairman's recurrent health problems during the 93d Congress. His prolonged absence from the committee appeared to dull his sensitivity to the political climate. During the 93d Congress he inaccurately assessed the mood of the House on a number of major issues.[38]

### 2. The Changing Character of the Committee

The 93d Congress also brought a significant change in committee membership with the departure of ranking minority member John Byrnes (R.-Wis.). Representative Byrnes and Chairman Mills had strongly shared the goal of building bi-partisan, consensus positions on committee legislation. With a gifted intellect and skill as a politician, Mr. Byrnes provided an excellent complement to the Chairman's formidable talents as compromiser.[39] The strong allegiance of the minority members to Representative Byrnes was not a relationship enjoyed by Representative Herman Schneebeli, his replacement. The weakened leadership on the minority side undoubtedly made the chairman's task of consensus-building more difficult.

However, it was Chairman Mills' prolonged absence from the committee chairmanship which perhaps was most significant in weakening the committee members' ability to agree among themselves. Acting Chairman Ullman guided the committee through complex deliberations on trade reform legislation[40] with a new,

36 SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT, S. REP. NO. 981, 93d Cong., 2d Sess. 903-30 (1974).

37 *Id.* at 903-4.

38 Mr. Mills had, for example, misread his colleagues' reaction to the President's taxes and overestimated their support for legislation giving President Nixon amnesty in return for his resignation. Washington Post, *supra* note 35.

39 *See* POLITICS, *supra* note 8, at 88-90.

40 H.R. 10710, 93d Cong., 1st Sess., passed the House on December 11, 1973. 119 CONG. REC. H11071-72 (daily ed. Dec. 11, 1973).

more democratic spirit to their deliberations. As one member commented about Ullman's leadership, "[t]he [committee members] rather liked operating as a committee. They liked being consulted about things rather than being the tail on Wilbur Mills' comet."[41]

The new atmosphere of independence under Mr. Ullman gave additional courage to liberal members of the committee to be more aggressive in their legislative demands. The coalescence of liberal sentiment on the committee has been promoted as well by the increasingly effective lobbying by liberal pressure groups such as the AFL-CIO and Ralph Nader's Tax Reform Research Group. In all, Chairman Mills came back to a distinctly more volatile committee in March, 1974, than the one he left eight months earlier.

### 3. The Democratic Caucus

In addition to changes within the committee, its position in the hierarchy of the House was undergoing a significant transformation. The 93d Congress produced the first successful attempt by the Democratic Caucus to restrict the power of Wilbur Mills' Ways and Means Committee. In February, 1973, the caucus met to discuss a number of reforms designed to improve the effectiveness of the party leadership and enhance its responsiveness to the caucus.[42]

One such reform was directed toward the closed rule procedure for Ways and Means Committee legislation. Specifically, the caucus agreed to amend its rules to enable at least fifty of its members to challenge the right of any committee chairman to receive a closed rule:

> If . . . 50 or more Democratic Members give written notice to the chairman of the committee seeking [a closed] rule and to the chairman of the Rules Committee that they wish to offer a particular germane amendment, the chairman or designee shall not seek and the Democratic Members of the Rules Committee shall not support, any rule or order relating to the bill or resolution involved until the Democratic Caucus has

41 6 NAT'L J. REP. 915 (1974).
42 Washington Post, Feb. 22, 1973, at A1, col. 6.

> met and decided whether the proposed amendment should be allowed to be considered in the House.[43]

The new rule represented a revolutionary change for the Mills' chairmanship. For the first time since Mr. Mills had assumed power in 1958, the party had established a direct, although tenuous, line of accountability between the caucus and the chairman. Oddly enough, the reform placed committee liberals in the most difficult position. Many were reticent to exploit their new power of appealing to the decidedly liberal caucus for fear of jeopardizing their relationship with Mr. Mills and the position of the committee in the House. Mr. Mills, for his part, was not present at the caucus and made no apparent effort to defeat the rule change.[44]

### 4. The House Select Committee on Committees

Potentially the most damaging threat to the power and prestige of the Ways and Means Committee and the challenge that most preoccupied the membership throughout the 93d Congress was the establishment of a House Select Committee on Committees.[45] The Select Committee under the chairmanship of Representative Richard Bolling (D.-Mo.) was chartered to examine the operation of the committee system in the House and make recommendations for its improvement. The long-standing animosity between Mr. Bolling and Chairman Mills led many close observers to predict privately that the principal target for reform by the Select Committee would be Ways and Means. Indeed, when the committee's preliminary recommendations on House reorganization were released in December, 1973, major reductions in the legislative jurisdiction of Ways and Means were proposed.[46]

The Select Committee recommendations profoundly affected the membership of Ways and Means. The committee leadership sent a letter to the Select Committee vigorously rejecting the pro-

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43 PREAMBLE AND RULES ADOPTED BY THE DEMOCRATIC CAUCUS M IX(b) (1974).

44 29 CONG. Q. ALMANAC 31 (1973).

45 H. Res. 176, 93d Cong., 1st Sess., 119 CONG. REC. H591-99 (daily ed. Jan. 31, 1973).

46 Washington Post, Dec. 10, 1973, at A4, col. 3. *See* 31 CONG. Q. WEEKLY REP. 3358-66 (1973).

posals.[47] To prove the point that the committee's jurisdiction was not excessively broad, Chairman Mills launched the committee into a heavy work schedule in the summer months of 1974. At one point the committee went so far as to consider tax reform legislation the first four days of the week and national health insurance on Fridays. Unfortunately, the committee was not accustomed to or, perhaps, capable of accelerating its consideration of committee legislation. The result was to create more chaos and confusion than substantive legislative activity.

In sum, the 93d Congress stood as a watershed for the Ways and Means Committee and its relationship to the House. Chairman Mills' old formula for committee success simply was no longer appropriate to a changing political climate.[48]

## II. The Emergence of the Oil Profit Issue

If the Ways and Means Committee was not entirely prepared for the dawning of the energy crisis, it was not alone. Mismanagement and indecision over energy policy had plagued the Nixon Administration from its earliest days in office.[49] In Congress, matters were no better. Jurisdiction over energy legislation in the House was split between 14 committees.[50] Among the membership, unfamiliarity with energy issues ran high. With a fragmented and incomplete understanding of the nation's energy problems, most members found themselves in a vulnerable political position

47 House Select Comm. on Committees, 93d Cong., 2d Sess., Letters and Statements From Members, Groups and Individuals Regarding the Work of the Select Comm. on Committees 40-42 (Comm. Print 1974).

48 Representative Ullman recognized this fact when he commented to an interviewer in July, 1973, "Even if Wilbur decides to stay in Congress, he is going to have to revise his operating scheme because times have changed and the needs of the House have changed." 31 Cong. Q. Weekly Rep. 1892 (1973).

49 *See generally* Permanent Select Subcomm. on Investigations of the Senate Comm. on Govt. Operations, 93d Cong., 1st Sess., Staff Study of the Oversight and Efficiency of Executive Agencies with Respect to the Petroleum Industry, Especially as it Relates to Recent Fuel Shortages (Comm. Print 1973).

50 Committee Reform Amendments of 1974, *supra* note 3, at 35-36. The Senate enjoys a more centralized organization in considering energy problems. The Senate Committee on Interior and Insular Affairs, under authority of S. Res. 45, 92d Cong., 1st Sess., 117 Cong. Rec. 13228 (1971), has initiated an extensive review of national energy policy and has assumed primary legislative jurisdiction over energy policy.

when the Arab oil embargo in October, 1973, forced the Congress to focus on the nation's deteriorating energy situation. A deluge of constituent mail generated severe pressure for prompt congressional action. In this charged atmosphere an understanding of the subtle complexities of energy policy was not as important to the members as creating an impression of movement and action.

The issue of oil profits, which emerged coincident with the oil embargo, filled a vacuum. To most congressmen rapidly increasing profitability was ample evidence of complicity in the oil industry, a convenient (albeit incomplete) explanation of the energy shortage. By attacking oil profits, the average member could create at least the appearance of doing something for his constituents.[51] Unfortunately, the purely political character of the early debate over excess profits served to obscure many legitimate and substantive questions concerning the federal government's tax policy toward the oil industry.

### A. *Emergency Energy Legislation*

On November 8, 1973, President Nixon addressed a message to Congress outlining the dimensions of the impending winter shortage of energy.[52] The outlook was grim: because of the embargo the nation could expect energy shortages of between 10 and 17 percent of anticipated demand. To prepare for this emergency, the President requested extraordinary authority to reduce the nation's energy demand with mandatory conservation programs and to expand energy supply through the easing of existing environmental regulations. The President urged Congress to act expeditiously on his request. "It is my earnest hope," Mr. Nixon stated, "that by pushing forward together we can have new emergency legislation on the books before the Congress recesses in December."[53]

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51 The statement of Representative John Dingell (D.-Mich.) typified the reaction of many members:

> As I say, what is at issue is a very simple thing: Profits for the oil companies, windfall profits if you please . . . . [I]n the case of oil companies we find that while everybody else is asked to tighten their belts, to conserve, give up driving, and other luxuries and necessities the oil companies are making a killing.

119 CONG. REC. H12024-25 (daily ed. Dec. 22, 1973).

52 119 CONG. REC. S20121-23 (daily ed. Nov. 9, 1973).

53 *Id.* at S20122.

The Senate did act quickly on the President's proposals. On November 13 the Interior Committee reported the National Energy Emergency Act.[54] On November 19, after four days of consideration, the bill was passed by a 78-6 vote.[55] It was in the House, however, that the legislation bogged down over the issue of oil industry profits.

Instead of going to work with the Senate-passed version, the House Interstate and Foreign Commerce Committee under the chairmanship of Representative Harley Staggers (D.-W. Va.) set out to write its own energy legislation. The committee felt that the Senate bill provided the President with authority that was too broad and ill-defined. Specifically, the Commerce Committee, in providing the Executive with new authority, attempted to draw more distinct lines of accountability between the President and the Congress.[56] However, the legislation reported by the committee had another major difference from the Senate-passed bill. Section 117 of H.R. 11450 amended the Emergency Petroleum Allocation Act[57] to provide for restrictions on the "windfall profits" of the sellers of crude oil, petroleum products, and coal.[58]

Under the provisions of this section, buyers of these energy products would be able to petition the Renegotiation Board[59] for relief from excessive product charges which would result in windfall profits for the producer. If the Board, after reviewing the evidence and receiving public testimony, found that windfall profits had been obtained, the Board could either establish a new, lower sales price or order an appropriate refund. For the purposes of the section, "windfall profits" was defined in terms of the excess of "the average profits obtained by all sellers of a particular product during the calendar years 1967 through 1971."[60] At the

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

55 119 CONG. REC. S20766 (daily ed. Nov. 19, 1973).

56 *See* H. REP. No. 710, 93d Cong., 1st Sess. (1973).

57 15 U.S.C. § 751 *et seq.* (Supp. III, 1973).

58 The application of the windfall profits section to the sellers of coal was deleted during consideration of H.R. 11450, 119 CONG. REC. H11277-86 (daily ed. Dec. 13, 1973). In addition, the House exempted so-called "stripper" wells or wells that produce less than ten barrels of oil a day from the application of the section. 119 CONG. REC. H11410 (daily ed. Dec. 14, 1973).

59 The Renegotiation Board was established under § 107 of the Renegotiation Act of 1951, 50 U.S.C. APP. § 1217 (1970).

60 H.R. 11450, 93d Cong., 1st Sess. § 117(a) (1973).

same time, however, the Board was given authority to use its judgment to establish what is a "reasonable" profit for a particular product in consideration of five broadly drawn criteria.[61]

The committee's proposal to establish controls over profit levels in the oil industry was prompted by the revelation that several large oil companies had sustained impressive profit gains in the first three quarters of 1973. For the 31 largest companies profits in the first nine months of 1973 were 47 percent higher than the same period a year earlier. The profits of Exxon, Mobil, and Standard Oil of California were over 50 percent higher in the third quarter of 1973 than the year before.[62] Beyond these simple statistics, however, it appears that the Commerce Committee cared little about understanding the source of these profits and what realistically could be done about them. Its report on H.R. 11450 contains no clear explanation of the intent of the committee. In fact, it is not entirely understandable why the committee did not recommend improvements in the existing pattern of price controls as a way of limiting oil industry profits.[63] From the standpoint of the committee's jurisdiction, this action would have been a simpler, more direct response to the problem.

Nevertheless, the Commerce Committee proposal crystallized anti-oil sentiment in the House. On December 14, the House

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61 The criteria included 1) the reasonableness of the costs and profits with particular regard to the volume of production, 2) the net worth of the producer, 3) the extent of risk assumed by the producer, 4) the producer's efficiency and productivity, and 5) any other factors which the Board deems in the public interest to consider. *Id.*

62 BUS. WEEK, Nov. 10, 1973, at 127.

63 In August, 1973, the Cost of Living Council established a two-tiered price control system for domestic crude oil. 6 C.F.R. § 150.354 (1974). For each producing property there was created a base period which corresponded to the monthly production from the property in 1972. Production up to this base period level was defined as "old" oil and subject to a price ceiling of $4.25 per barrel. Production above 1972 levels was defined as "new" oil and free from controls. In addition, CLC established an incentive plan whereby a producer could "release" a barrel of old oil from price controls for every barrel of new oil produced. Further, Congress in § 4(e)(2)(A) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 753(e)(2) (Supp. III, 1973), exempted from controls "stripper" oil from wells producing less than ten barrels of oil a day. Because of the various exemptions, about 25% of domestic production was free from controls and selling at an inflated world price of $9-10 per barrel. In addition, the two-tiered pricing system created some significant distortions in the marketplace. *See generally* UNITED STATES GENERAL ACCOUNTING OFFICE, DOMESTIC CRUDE OIL PRICING POLICY AND RELATED PRODUCTION (1974).

passed its emergency energy legislation with the windfall profits section.[64] In conference, the section was retained with only slight modifications, but when the conference report reached the Senate, oil state senators immediately began a filibuster. In an effort to save the legislation before the Christmas recess the Senate leadership attached the emergency energy legislation without the windfall profits section to a minor bill already passed by the House. The House overwhelmingly rejected the scheme by a vote of 22 to 240, and the Congress adjourned without an energy bill.[65]

### B. *The Administration's Windfall Profits Tax*

The Nixon Administration strongly opposed the Commerce Committee's solution to the windfall profits problem, and on December 19, in an apparent attempt to break the legislative log-jam, the Treasury Department proposed its own windfall profits tax on the oil industry.[66] Although the Administration took great pains to label its proposal a tax on windfall profits, it is more accurately described as a graduated excise tax on a barrel of crude oil.

Under the Treasury's proposal each producer of crude oil would pay a tax on an amount, "the windfall," equal to the difference between a base price and the actual sales price for each barrel of crude oil sold. The tax schedule would be graduated so that as the selling price rose above the base price, a larger portion of the windfall would be remitted to the Treasury as tax.[67] At the highest rate proposed, 85 percent of any windfall

64 119 CONG. REC. H11451-52 (daily ed. Dec. 14, 1973).

65 H. Res. 760, 93d Cong., 1st Sess. (1973). *See* 119 CONG. REC. H12026-27 (daily ed. Dec. 22, 1973). The House also rejected a number of other attempts to get the legislation passed. *See* 29 CONG. Q. ALMANAC 682-97 (1973).

66 *Hearings on "Windfall" or Excess Profits Tax Before the House Comm. on Ways and Means,* 93d Cong., 2d Sess. 3-8 (1974) [hereinafter cited as *Windfall Profits Tax Hearings*].

67 The tax schedule proposed by the Treasury Department is as follows:

| If the windfall profit from the unit of crude oil is | The tax is |
|---|---|
| Not over $0.50 | $0. |
| Over $0.50 but not over $0.75 | 10 percent of the excess over $0.50. |
| Over $0.75 but not over $1.10 | 2.5 cents plus 20 percent of the excess over $0.75. |
| Over $1.10 but not over $1.70 | 9.5 cents plus 30 percent of the excess over $1.10. |
| Over $1.70 but not over $2.50 | 27.5 cents plus 50 percent of the excess over $1.70. |
| Over $2.50 | 67.5 cents plus 85 percent of the excess over $2.50. |

*Id.* at 9.

over $2.50 would be absorbed by the government. The original base price proposed by the Treasury Department was $4.25 per barrel, the Cost-of-Living Council's ceiling price for crude oil under price controls as of December 1, 1973.[68]

In presenting its tax proposal, the Administration assumed that the price of crude oil would eventually rise to an equilibrium price where supply and demand would balance. The Treasury Department projected that this equilibrium price would be in the neighborhood of $7.00 per barrel.[69] In order for the tax not to obstruct the gradual orientation of the market to this new equilibrium point, it was proposed that the base price for the calculation of the tax be adjusted upward in monthly steps from $4.25 to $7.00 over a 36 month period. Finally, the Treasury Department recommended that the windfall profits tax be allowed to expire in five years.

The Administration's tax proposal succeeded in solving one of the major weaknesses of the House Commerce Committee proposal: a windfall profits tax would at least be easy to administer. Revenues from the tax would simply be collected from the roughly 200 domestic refiners. Beyond this advantage, however, the Administration's tax did raise some serious questions. Because the tax was to be calculated as a fraction of a producer's gross revenue rather than his net income, it was not clear that the proposed tax dealt directly with profits at all. For example, a high cost barrel of crude oil would be taxed at the same rate as a lower cost barrel of oil selling for the same price, despite the fact that the producer's profit could be significantly different on the two sales. It appeared that the Administration's plan, by discouraging increases in the price of crude oil, was more a subtle form of price control than a direct tax on excess profits.

### C. *Oil Profits in Perspective*

Neither the Commerce Committee proposal nor the Administration's windfall profits tax provided a convincing explanation of why it was necessary to impose special profit controls at all. The oil industry was already heavily subsidized by the government with an extraordinary amount of tax free income. Special pro-

68 *Id.* at 10.
69 *Id.* at 135.

visions in the Internal Revenue Code, most notably the pe centage depletion allowance for oil and gas production,[70] and th option to expense "intangible" drilling expenses[71] provided th industry with a subsidy of approximately $3.3 billion in 1974.[7] It would have been more logical and prudent policy to evaluat the necessity of continuing these subsidies before proposing com plex and likely inefficient profit constraints on the oil industry Yet this realization had escaped both Congress and the Admini tration.

In recent years a growing body of economic research has bee pushing policymakers toward a much needed examination of th present tax treatment of income from petroleum production.[7] It appears that Congress never has made a firm determination o policy in this area; there is little evidence to suggest that ther was even a conscious decision to subsidize oil production.[74] Ove the years, however, several inappropriate, yet obviously convinc ing arguments have arisen in defense of these subsidies.[75]

70 INT. REV. CODE OF 1954, § 613. A taxpayer receiving income from petroleu production is allowed to deduct 22% of his gross income from the producin property for the purpose of computing his taxable income. Although the allowanc may not exceed 50% of the taxpayer's net income from the property in any on year, the allowance continues as long as there is income without regard to th taxpayer's original investment in the property. *See* SENATE COMM. ON INTERIOR AN INSULAR AFFAIRS, 93D CONG., 2D SESS., AN ANALYSIS OF THE FEDERAL TAX TREATMEN OF OIL AND GAS AND SOME POLICY ALTERNATIVES (Comm. Print 93-29 1974).

71 INT. REV. CODE OF 1954, § 263(c). Intangible drilling and development cos incurred while drilling a well may be expensed by the taxpayer and deducted i the taxable year they are incurred rather than being capitalized and recovere over the life of the well. Such costs include expenditures for fuel, labor, rental preparation of the well site, and the like. Generally intangible costs represent 75% of the expense of drilling a well. *General Tax Reform: Panel Discussions Befo the House Comm. on Ways and Means*, 93d Cong., 1st Sess., pt. 9, at 1370-72 (197 (testimony of J. Reid Hambrick) [hereinafter cited as *Panel Discussions*].

72 G. BRANNON, ENERGY TAXES AND SUBSIDIES 31-34 (1974).

73 *See generally* HOUSE COMM. ON WAYS AND MEANS AND SENATE COMM. O FINANCE, 91ST CONG., 1ST SESS., TAX REFORM STUDIES AND PROPOSALS: U.S. TREASUR DEPARTMENT, pt. 4 (Comm. Print 1969); G. BRANNON, *supra* note 72; *Panel Discu sions, supra* note 71, at 1309-28 (testimony of Robert M. Spann), 1392-1412 (test mony of Arthur W. Wright).

74 Freeman, *Percentage Depletion for Oil—A Policy Issue*, 30 IND. L.J. 399, 40 (1955). *See generally* JOINT COMM. ON INTERNAL REVENUE TAXATION, STAFF DAT LEGISLATIVE HISTORY OF DEPLETION ALLOWANCES (1950).

75 As Stanley Surrey has noted in a perceptive essay on the tax legislativ process:

> In the process of time . . . rationalizations as to the "intent of Congress" gradually transform [unintended tax benefits] into a major tax policy which the special-interest group benefited will defend with a loftiness of

Empirical studies of the effectiveness of tax subsidies in stimulating oil exploration have called into question the efficiency of this strategy in achieving the objectives of our national energy policy.[76] As important as their conclusions, however, these studies have defined a necessary analytic framework for policymakers to evaluate current tax policies. Essentially, the research has focused attention to questions of: what is being sought by these incentives; what results are being obtained; whether these incentives are efficient in terms of the benefit received for each dollar spent; and whether our policy objectives can be achieved in a more direct, less costly way.[77] In short, the research charted a rational approach for making decisions in this unusually emotional area of tax policy.

As the first session of the 93d Congress drew a close, the legislative challenge confronting the Ways and Means Committee was becoming more clearly defined. Its task would be to respond to the strong sentiment within the House to curb oil industry profits with comprehensive tax reform legislation based on a critical reexamination of existing policy.

## III. Public Hearings on Excess Profits in the Oil Industry

With the 93d Congress reconvening in January 1974, there was little reason to expect that the misconception and confusion surrounding the issue of oil industry profits would be easily swept away. As the fumbling over the emergency energy legislation demonstrated, Congress is simply not a very sophisticated problem-solving organization. Its difficulty in adequately responding to complex public policy questions is attributable in large part to its institutional inability to gather and analyze coherently in-

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argument far removed from the origins of the benefit. There is much of the Daughters of the American Revolution in tax privileges.

Surrey, *The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted*, 70 Harv. L. Rev. 1145, 1162 (1957).

76 As early as 1969, the CONSAD Research Corporation in a study completed for the U.S. Treasury Department concluded, "percentage depletion is a relatively inefficient method of encouraging exploration and the resultant discovery of new domestic reserves of liquid petroleum." Tax Reform Studies and Proposals, *supra* note 73, at 2.2.

77 *See* G. Brannon, *supra* note 72, at 35.

formation relevant to a particular problem.[78] Without adequate information Congress is largely incapable either of developing appropriate policy alternatives or understanding the implications of those choices. This criticism applies to the Ways and Means Committee's deliberations on excess profits tax legislation for the oil industry.

The four days[79] of public hearings held by the committee on this issue provide a good case history of the inadequacy of the hearing process. A review of the hearing record reveals no focus of debate, ineffective attempts at defining problems, and inconsequential, often irrelevant, discussions between committee members and witnesses. In short, the public hearings failed to provide any usable framework for exploring the details of oil industry profits.

### A. *Treasury Department Testimony*

Customarily, the Administration initiates proposals for tax revisions which the Ways and Means Committee, in turn, reviews.[80] The procedure serves to orient the activities of the committee to the achievement of specific policy objectives. Unfortunately, the Administration's position on taxation of the oil industry suffered itself from a lack of focus and from striking internal inconsistencies. As a result, the Treasury Department's testimony generated more confusion than direction for the hearings.

Although the committee announced the public sessions largely to review the Administration's windfall profits tax, no one except the Treasury Department seemed much interested in discussing the proposal. The industry and its supporters argued strenuously against any new taxes as an impediment to the industry's search for new capital investment. Critics of the industry focused much of their attention on existing tax preferences. No witness directly endorsed the Treasury Department's position.

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78 As Professor Moynihan has observed: ". . . Congress' capacities for information gathering and processing are extremely limited, depending almost wholly on the erratic process of public hearings and the random inquiries of small and fragmented staffs . . . ." D. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME 349 (1973).

79 Hearings were held on February 4-7, 1974.

80 *See generally* DEPARTMENT OF THE TREASURY, PROPOSALS FOR TAX CHANGE (1973).

This lack of support was mirrored on the committee where members were openly skeptical of the intent of the legislation. Expectedly, oil state representatives attacked the proposal as counter-productive to increasing domestic energy supplies. Several other members, however, were not sure that tax would actually be paid by the oil producer. They feared the burden of the tax would simply be shifted to the consumer.

In meeting these challenges to its proposal, the Treasury Department was not convincing. When Representative Bill Archer (R.-Tex.) protested that the windfall profits tax would actually depress production from certain high cost wells by making production from those wells uneconomic, Treasury Secretary George Schultz came up with a confusing rebuttal:

> *Mr. Archer:* Will you exempt small stripper [*i.e.*, economically marginal] wells from the provisions of this windfall profits tax?
>
> *Secretary Schultz:* No. This tax goes onto crude however it is produced. It depends upon the difference between the base price that is established by the regulations and whatever the price turns out to be that is being charged in the marketplace.
>
> *Mr. Archer:* In other words, you are then assuming for all practical purposes that all production costs are the same?
>
> *Secretary Schultz:* No.[81]

Secretary Schultz was leaving a mistaken impression. Because the tax was simply computed as a percentage of the sales price, it ignored the costs of production. It was possible, therefore, that on a limited amount of high cost oil, the windfall profits tax would have discouraged production when the level of the tax exceeded the margin of profit.[82]

The Treasury Department was no more successful in assuaging the concerns of other members of the committee worried over who was going to pay the tax. Secretary Schultz in his opening statement assured the committee that the tax would not be passed

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81 *Windfall Profits Tax Hearings, supra* note 66, at 183.

82 Under the administration's proposed tax, oil selling for $6.00 per barrel and costing $5.75 to produce, would still have to pay a tax of approximately 42.5¢ or about twice the profit margin on that oil. The oil would obviously not be produced if the tax were in effect.

on to consumers. In support of his assertion, he submitted a lengthy and somewhat obtuse economic argument to explain why the producer would absorb the tax.[83] This testimony did little to dispel the confusion of most members, as the following colloquy between Representative Fulton (D.-Tenn.) and Deputy Secretary of the Treasury William Simon demonstrates:

> *Mr. Fulton:* Ultimately, who is it that pays the windfall profits tax under your proposal?
>
> *Mr. Simon:* Basically, the producer pays it. In the final analysis the consumer is going to pay the price created by this windfall.
>
> *Mr. Fulton:* The consumer pays it.
>
> *Mr. Simon:* Ultimately he is always going to pay it. What are we doing is removing these moneys to insure the moneys are spent to the ultimate benefit of the consumer and not just to give this man, the producer, a windfall.
>
> *Mr. Fulton:* I certainly hope you have more success in explaining that than I have had in explaining it to my constituents back home.[84]

The confusion of the Treasury Department's presentation of the windfall profits tax was amplified by inconsistencies in its other policy recommendations to the committee. In addition to a windfall profits tax the Treasury Department urged a new investment credit for exploratory drilling. Further, the Treasury proposed new restrictions on the tax benefits an individual can receive from petroleum investments. These restrictions would be accomplished through a tightening of present law relating to minimum taxable income and new limitations on artificial accounting losses.[85] Taken together, it was not clear that the Treasury was recommending anything beyond layering the tax code with additional incentives while at the same time proposing new restrictions on those incentives.[86]

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83 *Windfall Profits Tax Hearings, supra* note 66, at 142-43.

84 *Id.* at 209.

85 *Id.* at 143-44. The proposals were originally submitted to the committee by the Treasury Department in April, 1973. PROPOSALS FOR TAX CHANGE, *supra* note 80, at 13-18, 83-104.

86 *See Windfall Profits Tax Hearings, supra* note 66, at 636 (testimony of Gerard Brannon).

Much of the aimlessness of the Treasury Department's recommendations to the committee can be attributed to the Administration's apparent unwillingness to define a clear position on retaining the depletion allowance.[87] In April, 1973, Deputy Treasury Secretary Simon submitted testimony to the Senate Interior and Insular Affairs Committee which contended that removal of the depletion allowance would have negligible short-term effects on petroleum exploration and production and virtually no long-term effects.[88] Yet, ten months later, Mr. Simon was staunchly defending the depletion allowance in testimony before the Ways and Means Committee. In response to an inquiry by Representative Waggonner, Mr. Simon stated that if the depletion allowance were removed, "there would be an immediate disincentive" to new exploration.[89]

### B. *The Testimony of the Oil Industry*

The uncertain reception given to the Administration by the committee appeared to provide the representatives of the oil industry with a good opportunity for effective public lobbying. In the past, the industry had skillfully used its virtual monopoly of information on petroleum markets not only to neutralize criticism over their tax subsidies but also to control in a large way the character of the committee's deliberations over these policies. It has been industry spokesmen, for example, who have chiefly sustained the argument that tax subsidies for petroleum production are essential to the national security.[90]

The debate over excess oil profits had, however, caught the industry in an unusual state of disorganization. In recent years, several controversial energy issues, such as eliminating the oil import quota and opening the highway trust fund, had created significant divisions within the industry.[91] The issue of windfall

87 This confusion over the depletion allowance has carried over to the Ford Administration. *See* TAX NOTES, Nov. 11, 1974, at 15.

88 *Hearing on the Financial Requirements of the Nation's Energy Industry Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 241-42 (1973).

89 *Windfall Profits Tax Hearings, supra* note 66, at 225.

90 *See, e.g., Panel Discussions, supra* note 71, at 1349 (testimony of Richard J. Gonzales).

91 32 CONG. Q. WEEKLY REP. 362-63 (1974).

profits threatened to create even deeper and more serious disunity. The catalyst was provided by the announcement by the Atlantic Richfield Company (ARCO) that it would support efforts to eliminate the depletion allowance.[92] This position both embarrassed other major producers, who favored the allowance,[93] and touched off fears among small, independent producers.[94] The independent producer, who tends to rely more heavily on the depletion allowance to finance his business, saw elimination of the allowance as a means by which the major companies could squeeze him out of business.[95]

At other points in the hearing, controversy arose over whether the major oil companies should be obliged to pay additional U.S. tax on their foreign operations.[96] An independent oil producer, representing the Independent Petroleum Association of America, argued that a good way to stimulate additional production in domestic markets would be to make foreign investment less attractive. He urged the committee to consider new taxes on income from those investments.[97] Later, a representative of Exxon Corporation devoted his entire testimony to a defense of the present tax treatment of his industry's foreign source income by attempting to deflate this argument.[98]

For the committee members, the oil industry representatives provided the single most important source of information about the problem of excess profits. However, aside from a few attempts by some members to have special written inquiries of the indus-

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92 Washington Post, Dec. 25, 1973, at A44, col. 1.

93 *Windfall Profits Tax Hearings, supra* note 66, at 517 (testimony of an executive of Standard Oil of Indiana).

94 The structure of the petroleum industry is discussed in HOUSE PERMANENT SELECT COMM. ON SMALL BUSINESS, 93D CONG., 1ST SESS., ENERGY CRISIS AND SMALL BUSINESS (Comm. Print 1973).

95 Oil Daily, Nov. 13, 1974, at 1, col. 3.

96 *Windfall Profits Tax Hearings, supra* note 66, at 277-78.

97 *Id.* at 283.

98 Discouraging foreign petroleum activities is not a promising way to attract resources to domestic energy activities. Moreover, substantially increased energy self-sufficiency for America will take a number of years to achieve. Thus, we should not discourage American companies from participating in the discovery and development of additional foreign oil resources.

*Id.* at 584.

try,[99] the questioning by the committee was largely inept. For example, nearly six pages of testimony were spent trying to establish the amount of federal income tax paid by one major oil company in 1972.[100] Often the interrogation bogged down in discussions over irrelevant matters such as oil company storage capacity, gasoline dealership closings and the quality of service at service stations.[101]

In all, it was a poor showing for the traditionally monolithic oil industry. Amidst its internal dissention, the industry could not provide the committee with a clear set of policy recommendations. As a consequence, the testimony amounted to little more than a simple pleading for no new taxes.

### C. *Other Public Witnesses*

More importantly, the heavy schedule of witnesses before the committee largely precluded the members from being exposed to substantive critiques of the present tax policy toward the oil industry. Only five of the fourteen public witnesses to appear before the committee represented individuals or groups not affiliated with the oil industry. Only three of these witnesses opposed the continuation of tax subsidies for oil production. Finally, the committee heard from only one witness, Professor Gerard Brannon of Georgetown University, who had done extensive research in this area of tax law.[102] Unfortunately, only three members of the committee were present for his testimony. It was largely through the testimony of Andrew Beimiller, legislative director of the AFL-CIO, who appeared as the first witness on the fourth and final day of hearings, that the majority of the committee were exposed to policy recommendations independent of the Administration and the oil industry.[103] On the whole, however, the public hearings did

99 Reps. Griffiths, Karth and Vanik submitted written questions to oil industry representatives on a wide range of topics. *Id.* at 499-500, 527-28, 548-50.

100 See the colloquy between Reps. Vanik and Gibbons and the representative of the Gulf Oil Corporation, *id.* at 511-12, 551-52, 574-75.

101 *Id.* at 504, 514, 573.

102 *Id.* at 634-45.

103 The AFL-CIO proposed a five year phase-out of the depletion allowance as well as enactment of an excess profits tax similar to the tax in effect during the Korean stabilization period. In addition, the union made several far-reaching recommendations for taxing the industry's foreign operations. *Id.* at 647-81.

not provide the committee members with a very comprehensive or balanced examination of tax policy toward the petroleum industry.

## IV. The Drafting of the Oil and Gas Energy Tax Act

In the intense committee negotiations conducted over the Oil and Gas Energy Tax Act the simple objective of the committee leadership was to reach consensus on legislation aggressive enough to pass the House. Revenue estimates became the sole barometer to judge the "viability" of the committee's proposals. Other goals of tax reform, most notably tax simplification, were either ignored or simply flouted. The complexity of the Act in part reflected the committee's desire to accommodate everyone and offend no one. As a result, the Act was littered with special exemptions and rules designed to serve narrow interests as opposed to broad economic or fiscal objectives.[104]

The committee's decisionmaking process was hindered by several factors. The Ways and Means Committee adjourned its public hearings with the majority of the members appearing to have no certain grasp of their objectives in considering oil industry tax policy. At one point, the drafting sessions on H.R. 11462 were even interrupted to hold two days of public hearings on tax incentives for the recycling industry. For a brief moment the committee considered that extending the depletion allowance to secondary materials might solve some of the nation's energy problems by encouraging recycling.[105]

Much of the aimlessness of the committee's drafting process sprang from a stalemate that developed between the liberal and

104 The Oil and Gas Energy Tax Act, as reported from the committee, included a gradual three year elimination of the percentage depletion allowance for oil and gas. The committee did, however, provide three exceptions to this general rule. These exemptions are for oil produced from stripper wells, the first 3,000 barrels produced per day by each producer, and oil produced north of the Arctic Circle. H.R. 14462, 93d Cong., 1st Sess. § 102 (1973). The first two exemptions were justified by the committee as vital to protecting the independent producer. The third exemption is largely the product of lobbying by the Standard Oil Company of Ohio, who convinced the committee that it would be unfair to eliminate depletion on oil that would not begin production until 1977. H.R. Rep. No. 1028, 93d Cong., 1st Sess. 7 (1973). *See* text accompanying note 121 *infra.*

105 *Hearings on the Tax Treatment of Recycling of Solid Waste Before the House Comm. on Ways and Means,* 93d Cong., 2d Sess. (1974).

conservative blocs of the committee. On a number of occasions, Representative Archer, leader of the five or six staunch supporters of the oil industry,[106] threatened to bring the initial drafting process to a halt by persistently pushing the committee to accept weakening amendments to its bill. On the other side stood a loosely knit coalition of six or seven liberals who pressed for an expeditious if not immediate elimination of the depletion allowance.[107] The liberals, unlike the conservative bloc, were largely uncoordinated and vague in their specific policy objectives. Their strength arose from their position as representatives of their colleagues in the House; it was through the liberals that the committee was continually reminded of the hostile, anti-oil climate that awaited their bill on the floor.

Most other members of the committee found themselves drifting somewhere between these two poles. On the one hand, tax equity demanded that the oil companies pay a fair share of their impressive new profits in income taxes. On the other hand the nation's security demanded dependable energy reserves. Additional taxes could possibly discourage investment in domestic energy production and perpetuate our dependence on insecure foreign sources.

Virtually the only attempt to focus on the substance of tax policy was made by the staff of the Joint Committee on Internal Revenue Taxation, which serves the Ways and Means Committee.[108] Late in the public sessions, the staff prepared for the committee a series of study papers which outlined various policy options in taxing the oil industry.[109] However, in the heat of committee politicking, these were quickly forgotten.

106 This group included Reps. Landrum, Burleson, Waggonner, Broyhill, and Chamberlain. While Rep. Archer was singularly the most effective advocate of the industry position, Rep. Waggonner exercised power as leader of the Southern Democrats in the House.

107 The liberals generally included Reps. Burke, Griffiths, Vanik, Corman, Green, Gibbons, and Karth.

108 The staff of the Joint Committee on Internal Revenue Taxation has a well deserved reputation for excellence. Unfortunately, the members of the Ways and Means Committee are not very adept at exploiting this staff capability. *See* Manley, *Congressional Staff and Public Policymaking: The Joint Committee on Internal Revenue Taxation*, in CONGRESSIONAL BEHAVIOR 42-58 (N. Polsby ed. 1971).

109 The policy papers have been reprinted in HOUSE COMM. ON WAYS AND MEANS, 94TH CONG., 1ST SESS., BACKGROUND READINGS ON ENERGY POLICY 288-352 (Comm. Print 1975) [hereinafter cited as BACKGROUND READINGS].

### A. *Windfall Profits Tax and the Depletion Allowance*

The committee members spent nearly six weeks from February 20 to April 8 making and remaking their decisions on H.R. 14462. The initial proposal considered by the committee was put forth by Dr. Lawrence Woodworth, Chief of Staff of the Joint Committee. Under Dr. Woodworth's plan, the Administration's windfall profits tax, slightly modified, would be enacted for three years. In addition, the benefits of the percentage depletion allowance would be tied to the price of crude oil. As the price of oil rose above a $4.00 per barrel base, the producer would be eligible for less than his full allowance. At a price of $8.00 per barrel or more, there would be no depletion.[110]

The staff's proposal received enthusiastic support by Chairman Ullman but was pre-empted almost immediately by another proposal to eliminate the depletion allowance gradually over a period of seven years, regardless of price. The substitute had important bi-partisan support, with Representatives Schneebeli and Gibbons the principal sponsors. Seeing the political advantages to be gained, Mr. Ullman quietly shifted his support to the straight phase-out proposal.

The conservatives now began their counterattack. In a move designed largely to minimize the impact of the depletion elimination, Mr. Archer offered a motion to exempt from the phase-out all oil under price controls. That represented about 75 percent of domestic production.[111] On March 12, Mr. Archer's motion was tentatively agreed upon by the committee. In the 14-11 vote for passage, all ten Republicans joined with the three Southern Democrats and, interestingly, Mr. Gibbons to support the motion.[112] Mr. Ullman, however, saw the amendment as little more than "a pretty good gut job" of the depletion elimination proposal.[113]

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110 *House Comm. on Ways and Means, Executive Session, Windfall Profits in the Energy Industry* [hereinafter cited as *Executive Session*]. Under Committee rules the written minutes of closed executive sessions are not available to the public. The author has carefully checked all references to such sessions. *See generally* 6 NAT'L J. REP. 544-53 (1974).

111 BACKGROUND READINGS, *supra* note 109, at 289.

112 *Executive Session, supra* note 110, March 12, 1974.

113 6 NAT'L J. REP. 547 (1974).

On March 19 in an effort to develop a more substantial proposal, Mr. Ullman suggested to the committee a third alternative for eliminating the depletion allowance. This recommendation represented the most complex proposal the committee considered and suggested the extent to which Mr. Ullman was willing to go to attract support from conservative Democrats. Briefly, the new plan revived the principle underlying his first proposal to the committee of tying the depletion allowance to the price of oil. Rather than starting at a $4.00 price level, however, the phase-out under the new schedule would start at $5.25 and end at $8.25.

In order to lessen the impact of the proposal, Representative Ullman suggested that the schedule become effective gradually. Only 20% of the depletion cut back for each price level would become effective in each of the first five years of the tax. In other words Mr. Ullman was proposing a phase-in of the phase-out. The proposal also included a provision under which any producer after five years would be ineligible to receive depletion on any production if he were ineligible to receive depletion on over 75% of his production in the previous year. On a final concession to industry supporters, Mr. Ullman recommended that the 50% net income limitation for the computation of the percentage depletion allowance be lifted to 100%.[114]

The Ullman proposal, despite its complexities, satisfied the needs of most committee members just to have a bill that raised some revenue. The proposal passed 19-6, with the oil industry supporters voting against Chairman Ullman. The compromise was quickly undercut, however, as Mr. Archer turned his attention to the windfall profits tax proposal. In a series of close votes, the committee agreed that oil producers should be allowed credit against their windfall profits tax liability if they reinvested their profits in energy-related investments.[115]

The idea of a "plowback" provision to a windfall profits tax had been cautiously circulated earlier by the Treasury Department.[116] Nonetheless both the representatives of the Treasury Department and the staff of the joint tax committee opposed

114 *Executive Session, supra* note 110, March 19, 1974.
115 *Id.*
116 *Windfall Profits Tax Hearings, supra* note 66, at 7-8.

adoption of the Archer motion. They felt that high profit rates would be a sufficient inducement to additional investment.[117] A plowback provision would simply reduce revenues from the tax, nothing more. Despite these recommendations, the committee accepted the Archer proposal. The committee's action revived Mr. Ullman's fears that the bill's chances on the floor were not good.[118] He went so far as to threaten to go to the Rules Committee to request a modified closed rule permitting a separate vote on the plowback provision.[119]

Representative Ullman was obviously exasperated by his inability to get oil industry supporters to compromise. Amidst the chaos, Chairman Mills, who had returned to the committee on March 13, reasserted his leadership and pulled the committee together in support of a new proposal. On April 1 Chairman Mills recommended an immediate two year phase-out of the depletion allowance. The allowance would drop to 15% on January 1, 1975 and to 0% on January 1, 1976. The committee was stunned. Liberals were amazed that their Chairman, with a strong reputation for being an oil industry ally, had gone on record with a position stronger than even they had proposed. Mr. Schneebeli recommended an additional year be allowed for the elimination, and Mr. Mills quickly agreed. Suddenly a new consensus emerged. The Mills' proposal passed the committee 18-7.[120]

Mr. Archer and his conservative allies did not give up. In subsequent days the committee agreed to provide temporary exemp-

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117 *Executive Session, supra* note 110, March 19, 1974.

118 *See* 6 NAT'L J. REP. 548 (1974).

119 *Executive Session, supra* note 110, March 19, 1974.

120 *Id.*, April 1, 1974.

The day's session revealed the legislative mastery of Chairman Mills. In a vote immediately prior to the Chairman's announcement, Rep. Ullman had attempted to salvage his proposal with a motion to limit the allowable plowback credit to 50% of the windfall profits tax. The attempt failed by a narrow margin of 11-12. On that vote Chairman Mills supported Mr. Ullman, but did not vote the proxies he controlled for Rep. Rosentowski and Rep. Carey. When the Ullman motion failed, the Chairman moved his proposal for a three year phase-out and cast the proxies for the motion. One oil industry lobbyist spoke ruefully of the maneuver:

> If Mills had voted those two proxies for plowback, he would have lost on depletion because the committee would have thought that the bill was tough enough at that point. He woudn't have offered such a vigorous departure from the bill without counting his votes ahead of time. It was a beautiful thing to watch even though we don't like what he did.

6 NAT'L J. REP. 548 (1974).

tions from the depletion allowance elimination for different types of oil: "stripper" well production, a producer's first 3,000 barrels per day of production, or oil produced from Alaska's North Slope. For each of these classes of production the percentage depletion allowance would drop to 15% on January 1, 1975, and would end altogether on January 1, 1979.[121] In a final move to toughen the bill, the committee decided to tighten somewhat the plowback provisions of the windfall profits tax.[122]

### B. *Foreign Source Income*

The committee did not allow itself the opportunity to repeat this confusion in considering reform of the tax treatment of the oil industry's foreign operations. Despite considerable controversy outside the committee over whether the major oil companies had been induced into making investments into foreign markets by liberal United States tax laws,[123] the members demonstrated very little interest in reviewing this area of the law. The fact that the committee considered reform proposals in this area at all was largely due to the massive accumulation of excess, unused (and to some extent unusable) foreign tax credits by the oil companies in 1973.

The foreign tax credit operates on the principle that a dollar of profit should not be taxed twice: once when it is earned in a foreign country and once when it's brought back to the United States as profit. Therefore, our tax laws recognize that foreign income taxes should be creditable against U.S. income taxes on repatriated foreign earnings. Excise taxes, royalties and similar production payments are not creditable because they are not assumed to be taxes on income.

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121 H.R. 14462, 93d Cong., 2d Sess. § 102 (a)(1) (1974).

122 *Executive Session, supra* note 110, April 8, 1974.

123 For a brief review of the problems in this area, *see* BACKGROUND READINGS, *supra* note 109, at 329-40. Professor Glenn Jenkins, an economist at Harvard University, has estimated that in every year since at least 1962, the oil industry has paid no appreciable U.S. tax on its foreign source income. *Hearings on Multinational Corporations and United States Foreign Policy Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess., pt. 4, at 32 (1974). Additionally, evidence has mounted to suggest that this tax policy was not consciously chosen by Congress but rather arose as a series of largely administrative actions. *See id.* at 83-102 (testimony of George C. McGhee).

Problems with the oil companies arise in defining what is an income tax and what is not. Under the terms of their concessionary agreements with the oil producing states, an income tax is imposed on the oil companies which is computed as a fraction of an artificial posted price, net of royalties and production costs.[124] Most economists argue that this arrangement is not truly an income tax, and, consequently, not all these payments should be creditable against U.S. tax liabilities. The agreement breaks down, however, when these economists try to decide at what point a legitimate income tax ends and a *de facto* royalty payment begins. The committee avoided these thorny issues and concerned itself instead with a different problem: what should be done with the massive unused tax credits the oil companies received as the result of the rapid escalations in the posted price by the producer cartel?[125] Assistant Secretary Hickman estimated that in 1974 the multinational oil companies would generate approximately $16 billion in excess tax credits in that year alone.[126]

To remedy this problem, the Treasury Department had recommended to the committee that that an arbitrary ceiling be put on the foreign tax credits the oil companies could claim. Secretary Schultz had suggested that the ceiling be set at 48 percent of net income from foreign operations. Since this level was equivalent to the statutory U.C. corporate tax rate, it would be still possible for oil companies to avoid paying any U.S. tax on their foreign source income. However, the ceiling would largely eliminate the excess credit problem. In addition, the Treasury recommended that the percentage depletion allowance on foreign oil and gas production be repealed.[127] The committee accepted with minor

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124 *See Windfall Profits Tax Hearings, supra* note 66, at 168-69.

125 There were other areas that the committee did briefly consider. In order to deal with the problem of oil companies deducting losses sustained on their foreign operations from their U.S. income, the committee created a two step procedure whereby the so-called "per-country" method of computing the foreign tax credit was disallowed in the computation of foreign tax credits on foreign oil and gas related income. Secondly, a loss recapture provision was included to insure that losses claimed against U.S. income were recaptured in subsequent profitable years. In addition, the committee voted to deny the availability of Domestic International Sales Corporations (DISC's) in the case of energy related natural resources. H.R. 14462, 93d Cong., 2d Sess. §§ 202, 203 (1974).

126 *Windfall Profits Tax Hearings, supra* note 66, at 169.

127 *Id.* at 144-53. The committee had itself recommended the elimination of

modifications the Treasury Department's proposals. Instead of 48 percent limit, however, the committee decided to raise the ceiling by 10 percent to 52.8 percent of net income.[128]

By April 1 it appeared that Chairman Mills had succeeded in constructing a delicate coalition in support of a committee bill. The moderates on the committee were satisfied, and the liberals by and large were hesitant but quiet. Only the oil industry supporters appeared genuinely disenchanted with the committee's work. Nevertheless, the consensus was thin. Representative Green on April 7 offered in committee a substitute for the entire committee bill. The Green substitute would have scrapped the Administration's windfall profits tax, eliminated percentage depletion on petroleum retroactively to January 1, 1974, and modified the tax treatment of foreign source income. The substitute motion failed 19-6,[129] but the vote indicated a residual liberal unhappiness.

## V. The Procedural Morass

### A. *The Consensus Breaks Down*

Although his consensus was a weak one, Chairman Mills expected his committee to support him in bringing the Oil and Gas Energy Tax Act to the floor. In order to strengthen his hand, Mr. Mills hinted that he might even be willing to support a request for a modified closed rule.[130] Such a rule would enable committee liberals to offer some strengthening amendments to H.R. 14462. In sum, it appeared that the tensions within the committee could be controlled and the legislation brought before the House under terms acceptable to Chairman Mills as long as the liberals were willing to accommodate themselves to the chairman. Some accepted the constraint, but Mr. Green and, somewhat later, Mr. Vanik did not.

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depletion on foreign oil and gas wells in 1969. H.R. 13270, 91st Cong., 1st Sess. § 501(a) (1969).

128 Only one member, Representaive Vanik, was deeply dissatisfied by the committee's action. He wanted to see all foreign taxes paid on foreign oil and gas production declared ineligible to qualify as foreign tax credits. The position had no constituency in the committee, however, and his motion to make that reform was defeated by a 5-19 record vote. *Executive Session, supra* note 110, April 2, 1974.

129 *Id.*, April 8, 1974.

130 Wall Street Journal, May 3, 1974, at 2, col. 3.

### 1. The April 30 Committee Meeting

On April 30 the committee met to report the Oil and Gas Energy Tax Act to the full House and to discuss the nature of the rule Chairman Mills would request from the Rules Committee. The motion to report the legislation passed handily, with only four votes being cast against the bill.[131] During the discussion of the rule which followed, Chairman Mills asked both Mr. Vanik and Mr. Gibbons if they were contemplating any amendments to the committee bill. Mr. Vanik indicated that he would like to ask the Rules Committee for a rule which would make in order an amendment to the foreign tax credit provisions of the legislation. Specifically, Mr. Vanik wanted to disallow any foreign tax credits on United States tax liabilities on income from foreign oil and gas production. Mr. Gibbons indicated that although both Mr. Green and he were contemplating amendments to the bill, no final decisions had been made.

Chairman Mills, despite the reservations of Mr. Ullman, made assurances to both Mr. Vanik and Mr. Gibbons that even though he, as Chairman, would officially request a closed rule, he would support efforts to persuade the Rules Committee to make additional amendments in order. Significantly, the meeting adjourned with no record votes being taken; only an informal understanding had been struck. On May 1, in accordance with caucus rules,[132] Chairman Mills announced in the *Congressional Record* that he had been "authorized and directed by the committee to request a closed rule from the Rules Committee" for the consideration of H.R. 14462, the Oil and Gas Energy Tax Act.[133]

### 2. The Green and Vanik Resolutions

The committee's agreement on the Oil and Gas Energy Tax Act was shattered suddenly on May 1 when Mr. Green sent a letter to all House Democrats requesting that a caucus be called to

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131 The final vote to report the bill was 20 aye, 4 no, & 1 present. Although there were absences during the vote, members were given leave to record their vote at a later date. *Executive Session, supra* note 110, April 30, 1974.

132 PREAMBLE AND RULES ADOPTED BY THE DEMOCRATIC CAUCUS M IX(a) (1974).

133 120 CONG. REC. H3463 (daily ed. May 1, 1974).

review Chairman Mills' request for a closed rule on H.R. 14462. Specifically, Mr. Green wanted the caucus to consider a resolution to instruct the Democratic members of the Rules Committee to report a rule which would make in order an amendment to repeal the depletion allowance on oil and gas retroactively to January 1, 1974.

The impact of Mr. Green's move was simply to ignore the understanding worked out between Mr. Mills, Mr. Vanik, and Mr. Gibbons. Immediately, the Green letter polarized the atmosphere surrounding H.R. 14462. For Chairman Mills the change represented a particularly difficult situation to accept.[134] Indeed, the Green resolution represented a failure of the consensus strategy and symbolized the chairman's loss of control over his own committee. What is more, Mr. Green in his resolution made specific reference to having the caucus "instruct" Chairman Mills to request a modified closed rule, an indiscretion which undoubtedly served to heighten Mr. Mills' reaction to the Green initiative.

In less than two days Mr. Green was able to collect over 100 signatures on his petition, more than twice the required number to call a caucus and nearly half of his 247 Democratic colleagues. Anti-oil sentiment was still strong in the House.[135] On May 6, Mr. Vanik circulated a letter joining Mr. Green in calling for a caucus on H.R. 14462. Expectedly, Mr. Vanik readily collected enough signatures to place his amendment concerning oil company foreign tax credits on the caucus agenda.[136]

### B. *The Democratic Caucus*

On May 15 the Democratic caucus met to consider the Green and Vanik resolutions on the rule for H.R. 14462. By an overwhelming voice vote, the caucus membership endorsed both proposals to allow a floor vote on the two amendments. Reaction to the caucus decision was instantaneous. The *Wall Street Journal*

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134 *See* 6 NAT'L J. REP. 920 (1974).

135 As one legislator sympathetic to the oil industry commented, "It scares me to death to take any oil measures to the floor in this atmosphere." Wall Street Journal, May 3, 1974, at 2, col. 1.

136 For the text of the Vanik amendment *see* 120 CONG. REC. H3671-72 (daily ed. May 7, 1974).

labeled the action "a stinging rebuke" to Chairman Mills.[137] Frank Ikard of the American Petroleum Institute castigated the Democrats for their "lynch mob attitude" toward his industry.[138] Most significantly, however, Speaker of the House Carl Albert (D.-Okla.), a strong ally of the industry in the past, stated that he felt "bound" by the caucus to allow a floor vote on the two amendments.[139]

Attention immediately shifted to the three Democratic members of the Rules Committee who represented districts in large oil producing states: Representatives John Young (Tex.), Gillis Long (La.), and Clem McSpadden (Okla.). If these three Democrats chose to ignore the caucus directive, they could form a thin eight-vote majority by allying themselves with the committee's five Republicans and block a floor vote on the Green and Vanik amendments. The speculation touched off a controversy over the true nature of the caucus action. Were the caucus resolutions binding on all Democratic members of the Rules Committee despite the fact that some members, in following these instructions, might be voting against the interests of their constituents?

As rumors began to circulate that one or all of the oil state representatives would ignore the caucus, the Democratic Study Group, an organization of approximately 170 progressive Democrats, published a report intended to reinforce the caucus action.[140] The report concluded that since members owe both their committee assignments and their seniority to the caucus, they are agents of the caucus on the committees on which they sit. Accordingly, the caucus has the right to instruct the members on how to vote on matters before their committee in order to promote party policy. Despite this effort to enforce party discipline on Representatives Young, Long, and McSpadden, the dilemma for the three members remained essentially unresolved.

Although the Ways and Means Committee filed its report on H.R. 14462 on May 4,[141] Rules Committee consideration of the measure was postponed repeatedly as Chairman Mills procrasti-

137 Wall Street Journal, May 16, 1974, at 2, col. 2.
138 N.Y. Times, May 16, 1974, at 1, col. 3.
139 Wall Street Journal, *supra* note 137.
140 DEMOCRATIC STUDY GROUP, SPECIAL REP. 93-12 (1974).
141 H.R. REP. No. 1028, 93d Cong., 2d Sess. (1974).

nated in appearing before the committee. The delay provided time for members of the Ways and Means and Rules Committees to find a compromise solution which would save face for both Chairman Mills and Mr. Green. Resentment began to build privately among members of the Rules Committee at being caught in the middle of what they viewed as an internal Ways and Means fight.

On June 6, Mr. Mills finally appeared before the Rules Committee.[142] In a surprise announcement the Chairman stated that he would exercise his prerogative under the House Rules and bring H.R. 14462 to the floor as privileged legislation without a rule.[143] Under this procedure, by-passing the Rules Committee, any and all germane amendments to the legislation would be in order. With Mr. Mills expressing his optimism that the bill would pass intact, the Rules Committee adjourned without further action.

Nevertheless, Mr. Mills' assessment of the prospects for passage of H.R. 14462 was not realistic. Without a rule it was likely that the bill would simply be debated to death under a spate of amendments. An additional problem for the Chairman was the lack of support within his committee for such a manuever. Bringing the bill to the floor without a rule would have punctured once and for all the myth that a closed rule was essential for responsible tax legislation. Most committee members were unwilling to sacrifice this power simply for the sake of resolving a feud between Mr. Mills and Mr. Green. In the end, it appears that the Chairman's ploy to by-pass the Rules Committee was little more than a desperate attempt to rebuke Mr. Green and the caucus for challenging his authority. The maneuver did, however, buy the Chairman important time.

On June 10 Chairman Mills met with his committee to discuss the parliamentary situation of H.R. 14462. Even before the meeting, it was clear that few members were prepared to support the

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142 *Hearings on H.R. 14462, The Oil and Gas Tax Act, Before the House Comm. on Rules*, 93d Cong., 2d Sess. (1974).

143 JEFFERSON'S MANUAL, *supra* note 1, at 368-69. Rule XI, cl. 22 gives seven different committees leave to report to the House at any time on selected matters pending before them. Originating in 1812, this rule is intended to expedite the most important matters of business of the House.

Chairman's announced intention of bringing the oil tax bill to the floor without a rule. After a closed session in which no votes were taken, Mr. Mills emerged to announce that the members "had a feeling they would like to consider the possibility again of getting a closed rule." Further, he admitted that he had reservations about considering the bill without a rule because he did did not want to "set a precedent" of tax legislation "being fought out on the floor."[144] He announced once again that he would go to the Rules Committee and this time request a closed rule. Representative Gibbons tried to explain the Chairman's position: "He's got a real dilemma. He feels bound by the committee and he feels bound by the caucus." But Mr. Green did not accept that explanation: "I don't think that's the real problem. I think the real problem is his own anger that somebody told him to do something . . . . He just doesn't want to obey the caucus."[145] Indeed, the June 10 meeting solved nothing. The confrontation had gone beyond the point of a purely committee matter. There was no way for the Chairman to bring his legislation to the floor without confronting the caucus.

The Chairman's dilemma did not last for long. On June 11, Speaker Albert, forsaking his earlier pledge, announced that the Democratic leadership had decided to postpone House action on energy tax legislation until July.[146] Although the official explanation for the postponement was a heavy schedule of legislation in the last weeks of June, it was immediately clear that the principal intention of the announcement was to shift the controversy of oil to the Senate.[147] The House leadership was hoping that adequate reform legislation could be adopted in the Senate and accepted by the House in conference committee. This backdoor legislating would avoid the thorny issue of the caucus. The strategy collapsed, however, when tax reform efforts of the Senate

144 Washington Post, June 11, 1974, at A3, col. 1.

145 *Id.*

146 Wall Street Journal, June 12, 1974, at 16, col. 2.

147 Since early May a group of liberal senators had been developing a group of tax reform measures which they planned to amend to the relatively "veto-proof" legislation to extend the public debt. H.R. 14832, 93d Cong., 2d Sess. (1974). Although a set package of reforms was never firmly established, repealing the percentage depletion allowance for oil and gas as well as a restructuring of the foreign tax credit on foreign oil production income were frequently mentioned.

liberals were squashed by a filibuster led by Senator James Allen (D.-Ala.).[148]

### C. *Submerging the Issue*

The issue of oil industry taxes continued to smoulder during the congressional summer recess in July. The Oil and Gas Energy Tax Act was caught in a parliamentary limbo, and only Chairman Mills could move it. For the liberals on the committee the uncertainty was especially frustrating. As the committee worked through its tentative decisions on tax reform the liberals evidenced a growing cynicism over the willingness of the chairman to accommodate himself any further to their position. Added to this, the deepening crisis surrounding the Nixon Presidency clouded Congress' legislative schedule and made the passage of any type of reform bill problematic.

#### 1. Merging Oil Taxes with General Tax Reform

Chairman Mills still faced a knotty political problem. Pressure from the Select Committee on Committees was building for Ways and Means to produce some legislation before the November elections. The last significant bill reported from the committee was the Trade Reform Act which passed the House in December, 1973. At the same time, the Chairman could not bring a tax bill before the House without the threat of another caucus action on oil taxes.

On August 2, Mr. Mills devised a partial solution to his dilemma. He proposed to the committee that H.R. 14462 be included as one title of the general tax reform bill. To mollify his liberal critics, Mr. Mills proposed that the elimination of the depletion allowance, originally scheduled to begin in 1975, be advanced one year. From a fiscal viewpoint, the merger was an important step for the tax reform bill. Instead of losing almost $2 billion in revenue for 1975, the inclusion of the oil tax provisions placed the tax bill in a slightly surplus revenue position.[149]

148 Washington Post, June 25, 1974, at A2, col. 1.

149 According to estimates developed by the staff of the Joint Committee on Internal Revenue Taxation, taxation of the oil industry along the lines suggested by Rep. Mills could raise $2,413 million in 1975. However, the entire tax bill

The merger further jeopardized, however, the dwindling chances that tax reform could be brought to the oil industry in 1974. Any effort to increase oil industry taxes faced a hostile audience in the Senate where Senator Russell Long (D.-La.), Chairman of the Senate Finance Committee, was known to oppose significant new taxes on the oil industry. Submerging the oil tax issue into general tax reform would merely diffuse any urgency Senator Long might feel to act on H.R. 14462.

For Chairman Mills the merger presented a convenient if not altogether satisfactory solution to avoid another confrontation with the caucus. By engaging in his own brand of political jawboning, Mr. Mills attempted to shift the blame for obstructing a vote on oil taxes to his liberal critics on the committee. Including the oil tax bill in general tax reform was the only way, the Chairman asserted, that the House would vote on oil industry taxes in the 93d Congress.

Representatives Green and Vanik were not persuaded. They charged Mr. Mills with attempting to bury legislation already reported from the committee. In the end the vote to include H.R. 14462 as part of the tax reform bill passed the committee with only Mr. Green and Mr. Vanik joining the oil industry supporters in opposing the move.[150]

### 2. The Fate of the Tax Reform Bill

If holding together a coalition on H.R. 14462 was difficult for Chairman Mills, getting the committee to support his expanded tax reform bill promised to be a virtually impossible task. Added to the solid opposition of the oil industry supporters, the liberals found themselves increasingly disenchanted with a bill which they saw largely as a special interest gift package.

In early September at the urging of lobbyists from the AFL-CIO and the Tax Reform Research Group, Representative Grif-

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with these provisions included would result in a net revenue gain of only $393 million in 1975. (A copy of these estimates is on file with *Harvard Journal on Legislation*).

150 *House Comm. on Ways and Means, Executive Session, Tax Reform Legislation*, August 1, 1974.

fiths called a meeting of committee liberals to discuss legislative strategy.[151] The lobby groups wanted the members to join in pushing a simplified, substitute tax bill. The substitute would have combined additional taxes for the oil industry with tax relief for low income individuals and families. Also discussed was the possibility of undoing the committee's earlier decision by simply selecting the original text of H.R. 14462 and pushing that bill. Nevertheless, most of the members were pessimistic that anything could be done to challenge the Chairman. The meeting adjourned inconclusively with the general feeling that a tax bill would not be possible in the 93d Congress. Chairman Mills' announcement that he would postpone further consideration of tax legislation until after the November election[152] dimmed hopes even further.

As Mr. Mills returned to the post-election session, few congressional observers honestly expected a tax bill to pass the Congress before adjournment. Nevertheless, the Chairman pushed ahead with a plan to report a simplified tax reform bill to the House before adjournment. The new bill would include the original text of H.R. 14462, as modified on August 2d, as well as provisions for individual and corporate tax relief. On November 21, the committee agreed to report H.R. 17488, the Energy Tax and Individual Relief Act of 1974.[153]

Liberal Democrats, flush with their strong election gains of November and sensing Chairman Mills' own political vulnerability,[154] were openly hostile to the new strategy. Many felt that enacting a weak tax reform bill late in the 93d Congress would deflate efforts for more extensive reform in the upcoming Congress.

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151 Attending the meeting in addition to Rep. Griffiths were Reps. Burke, Vanik, Corman, Green, & Karth. Mr. Gibbons, although unable to attend, supported the initiative.

152 Wall Street Journal, Oct. 2, 1974, at 2, col. 2.

153 H.R. REP. No. 1502, 93d Cong., 2d Sess. (1974).

154 On October 8, Mr. Mills' car was stopped early in the morning under suspicious circumstances near Washington's Tidal Basin. Washington Post, Oct. 9, 1974, at A1, col. 2. The ensuing revelation of the chairman's involvement with an exotic dancer touched off immediate speculation over his future as committee chairman. Mr. Mills, however, was able to weather the storm of criticism and win a 19th term in Congress by a comfortable, if not overwhelming, vote. Washington Post, Nov. 6, 1974, at A7, col. 5.

This position received important support from Representative Bolling, an influential member of the Rules Committee.[155]

The fate of the tax bill took another turn when Chairman Mills revived the controversy over his personal conduct by appearing on a Boston stage with the same dancer with whom he had had an earlier involvement. His subsequent admission to the hospital left the task of pushing tax reform legislation to Mr. Ullman. By this time, however, tax reform had become little more than an empty exercise. There was virtually no hope that any type of significant legislation could clear the Senate before the December recess. Even in its simplified form, the tax bill was a remarkably complex piece of legislation. It seemed that Mr. Ullman's attempts to get the measure before the House had become primarily an effort to salvage some bit of pride for the Ways and Means Committee.

On December 12, Representative Ullman appeared before a hostile Rules Committee to request a rule on H.R. 17488. Chairman Ray Madden (D.-Ind.), obviously still angered by Chairman Mills' earlier maneuvering, decried the Ways and Means Committee's fumbling on tax reform. He indicated that he saw no reason to move the present bill to the floor when there was virtually no chance of Senate passage. Mr. Madden's resentment struck a responsive cord among other Rules Committee members, and by a vote of 9-4, the Rules Committee decided to defer action on Mr. Ullman's request.[156] Chairman Madden for all his oratory voted with the minority in order to avoid the impression that he supported killing the measure. With that vote tax reform of the oil industry was effectively dead for the 93d Congress.

### *Conclusion*

The 94th Congress is going to see a radically changed Ways and Means Committee. Its unproductive meandering on tax reform in the last Congress touched off efforts in the House and within the Democratic majority to reform the committee and

155 Wall Street Journal, Nov. 27, 1974, at 6, col. 1.

156 *Hearings on H.R. 17488, the Energy Tax and Individual Relief Act of 1974 Before the House Comm. on Rules*, 93d Cong., 2d Sess. (1974).

democratize its operation. In October the House, as an outgrowth of the work of the Select Committee on Committes, adopted a mild set of reforms to its committee structure.[157] Of principal importance to Ways and Means will be the mandatory establishment of at least four subcommittees on all standing committees of at least fifteen members with the exception of the Committee on the Budget.[158] The reform was intended to expedite the work of the Ways and Means Committee by dispersing legislative responsibility among its members.[159]

Additionally, the House Democratic Caucus, meeting in early December, voted first to strip the committee of its unique position in the party's organization[160] and then to expand the committee by twelve members.[161] The new party ratio will be 25 Democrats and 12 Republicans.[162] To liberal reformers the expansion was heralded as an end to the conservative tradition of the committee.[163]

How realistic is it to expect that the committee will respond expeditiously to the new initiatives of the Democratic leadership? The relationship between the Democratic Caucus and Democratic members in matters of committee procedure and policy remains unresolved. As the committee moves toward more open and democratic procedures, it risks intensifying the confusion that dominated the last months of the Mills' chairmanship. The new subcommittee structure will place enormous power in the hands of senior Democrats largely unaccustomed and inexperienced to the responsibility. The expansion of the committee to 37 members virtually guarantees the end of the consensus-style

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157 SELECT COMM. ON COMMITTEES, COMMITTEE REFORM AMENDMENTS OF 1974: STAFF REPORT, 93d Cong., 2d Sess. (1974).

158 *Id.* at 88.

159 The committee has created six subcommittees: social security, trade, health care, welfare, unemployment compensation, and oversight. Wall Street Journal, Dec. 20, 1974, at 7, col. 1.

160 *See* note 7 *supra.*

161 Washington Post, Dec. 4, 1974, at A1, col. 4.

162 Reps. Griffiths, Carey, Collier, Broyhill, Chamberlain, & Brotzman either retired from the committee or were defeated in the November, 1974 elections. Rep. Pettis died after the start of the 94th Congress. As a result, there will actually be 19 new members of Ways and Means in the 94th Congress.

163 *See* Washington Post, Dec. 4, 1974, at A12, col. 2.

of decisionmaking that has dominated the committee for the past twenty years. In consequence Ways and Means could very well become trapped in the same partisan squabbling that has paralyzed other, lesser committees of the Congress.

# STATUTORY COMMENTS

## JUDICIAL REVIEW OF CLASSIFIED DOCUMENTS: AMENDMENTS TO THE FREEDOM OF INFORMATION ACT

### *Introduction*

From the earliest days of our republic, the President, in carrying out his constitutional duties as Commander-in-Chief,[1] has limited the dissemination of information affecting our defense and foreign policy interests.[2] However, it has long been recognized that there must be a balance between national security interests and the free flow of information vital to a democracy.[3] Congress responded to this need in 1966 with the Freedom of Information Act (FOIA).[4] A basic goal of the FOIA is to insure the full disclosure of all information collected by the federal government, subject to legitimate claims for non-disclosure.[5]

To accomplish this goal the FOIA requires disclosure of government records to any person[6] except as specifically stated[7] in the nine exemptions of § (b).[8] The need for secrecy in the interest of national security was acknowledged by Congress in § (b)(1)

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1 *See* U.S. CONST. art. II, § 2.

2 The first instance of the use of presidential authority to effect secrecy was in 1790 when President Washington presented to the Senate for its approval a secret article to be inserted into a treaty with the Creek Indians. *See* 1 ANNALS OF CONG. 1064 (1790).

3 *See, e.g.*, Letter from James Madison to W.T. Barry, Aug. 4, 1822, in S. PADOVER, THE COMPLETE MADISON 337 (1953):

> A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own Governors, must arm themselves with the power, which knowledge gives.

4 5 U.S.C. § 552 (1970).

5 *See* 2 WEEKLY COMP. PRES. DOC. 895 (1966) (remarks of President Johnson).

6 5 U.S.C. § 552(a)(3) (1970).

7 *Id.* § 552(c) (1970).

8 *Id.* § 552(b) (1970). The nine exemptions apply to (1) national security secrets, (2) internal agency rules, (3) information exempted by statute, (4) trade secrets, (5) inter- and intra-agency memoranda, (6) personnel and medical files, (7) investigatory files, (8) reports concerning financial institutions, and (9) certain geological information. See note 39 *infra* for the text of § (b).

which exempts from disclosure information classified as secret pursuant to executive order.[9]

It was inevitable that the forces and motivations behind the classification system and the FOIA frequently would work at cross-purposes. Government officials have a proclivity to make use of their authority to classify information — whether it be from an over-zealous and often misguided regard for national security or simply from a desire to cover up mistakes. With 55,000 government employees authorized to classify documents, the classification system has been subjected to widespread abuse.[10] The sheer volume of classified material has increased beyond calculation.[11] Congress heard testimony of numerous examples of ludicrous misclassification,[12] including the testimony of one classification expert that less than ½ of one percent of all material classified merited even the lowest defense classification.[13] President Nixon declared that "[t]he many abuses of the security system can no longer be tolerated" and issued a new executive order in 1972 aimed at reforming the classification system.[14]

While reformation of the classification system may correct many of the abuses, its purpose is not to provide freer access to information, but to provide a better method for keeping information secret. On the other hand, a basic purpose of suits brought under the FOIA is to make previously unavailable information public. This is true whether the suits are brought by the victims of an alleged classification mistake, or by newsmen or academicians seeking to correct government errors by airing them publicly. In each

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9 *See* 5 U.S.C. § 552(b)(1) (1970).

10 *See Hearings on 5 U.S.C. § 552(b)(1) Before the Subcomm. on Foreign Operations and Gov't Information of the House Comm. on Gov't Operations*, 92d Cong., 2d Sess., pt. 7, at 2929-37 (1972).

11 *See* H.R. REP. No. 221, 93d Cong., 1st Sess. 34-38 (1973). Government estimates ranged as high as one billion pages.

12 *See, e.g., id.* at 46-48.

13 *Id.* at 34 (remarks of Mr. William G. Florence, retired Air Force security classification expert with 43 years of federal service).

14 *See* 8 WEEKLY COMP. PRES. DOC. 543 (1972). The old classification system contained in Executive Order No. 10501, 3 C.F.R. 979 (1949-53 Comp.), 50 U.S.C. § 401 (1970), was superceded by Executive Order No. 11652, 3A C.F.R. 154 (1972 Comp.), 50 U.S.C. § 401 (Supp. III, 1973).

case the individual pursuit to uncover government mistakes results in greater public access to information.

The problem of the underlying cross-purposes of the FOIA and the classification system, each having been promulgated by a different branch of government, is compounded by the fact that a third branch of government, the Judiciary, has been delegated the responsibility to decide conflicts between the two. Recent events have dramatically illustrated the tension that results from this conflict of governmental powers and purposes. In *Environmental Protection Agency v. Mink*,[15] the Supreme Court interpreted the FOIA as giving final authority on what should be classified to the criteria contained in the executive order. Congress responded by amending the FOIA[16] in order to overrule the *Mink* decision. President Ford vetoed the amendments as unconstitutional,[17] but Congress overrode his veto.[18] The law became effective February 19, 1975.[19]

This Comment examines the relationship between the FOIA and the classification system, and the problems that have arisen in defining that relationship. The new amendments to the FOIA are evaluated in light of these problems and the likelihood that ambiguities under the old law will be clarified.

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15 410 U.S. 73 (1973).

16 Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified at 5 U.S.C.A. § 552 (Supp. Feb. 1975)). The Conference Report, S. REP. No. 1200, 93d Cong., 2d Sess. (1974); H.R. REP. No. 1380, 93d Cong., 2d Sess. (1974) [hereinafter cited as CONFERENCE REP.], was approved by voice vote in the Senate on October 1, 1974, 120 CONG. REC. S17971 (daily ed. Oct. 1, 1974), and by the House 349-2 on October 7, 1974. 120 CONG. REC. H10008 (daily ed. Oct. 7, 1974).

17 Ford gave three reasons for his veto. *See* 10 WEEKLY COMP. PRES. DOC. 1318 (1974). Two of his objections concerned administrative difficulties he believed would result from the changes. He considered the time limits "unrealistic." Under 5 U.S.C.A. §§ 552(a)(6)(A-B) (Supp. Feb. 1975) the agencies have ten days to determine whether to furnish a requested document and twenty days for determination on appeal unless "unusual circumstances" required more time. In addition he reasoned that the confidentiality of law enforcement files could not be maintained because the FBI and other agencies were not equipped to make "line-by-line examination of information requests that sometimes involve hundreds of thousands of documents." 10 WEEKLY COMP. PRES. DOC. 1318 (1974). Ford's primary objection, however, was to the provisions dealing with judicial review of classified information under the § (b)(1) exemption. *See* note 79 *infra*.

18 The House of Representatives voted 371-31 to override on November 20, 120 CONG. REC. H10875 (daily ed. Nov. 20, 1974), and the Senate followed suit 65-27 the following day. 120 CONG. REC. S19823 (daily ed. Nov. 21, 1974).

19 *See* Pub. L. No. 93-502, § 4 (Nov. 21, 1974) (amendments to become effective ninety days after date of enactment).

## I. The Statutory and Administrative Background

### A. *The Classification System: Executive Order No. 11652*

President Nixon issued Executive Order No. 11652[20] with the purpose of "lift[ing] the veil of secrecy which now enshrouds altogether too many papers written by employees of the Federal establishment."[21] Section 1 of the Order provides for three levels of classification: Top Secret, Secret, and Confidential. Top Secret is defined as "that national security information or material which requires the highest degree of protection. The test for assigning 'Top Secret' classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security."[22] Examples given in the Order of such damage include armed hostilities against the United States or its allies, the revelation of sensitive intelligence operations, and others.[23] Secret is defined as referring to national security information or material requiring "a substantial degree of protection," and the test for assigning the classification is "whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security."[24] Examples of such damage include disruption of foreign relations "significantly affecting the national security," revelation of "significant military plans or intelligence operations," and others.[25] Confidential information is that information which if released "could reasonably be expected to cause damage to the national security."[26] No examples of such damage are given in the Order.

The definitions are sufficiently vague to allow for a good deal of discretion to be exercised by the agency applying them.[27] Fur-

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20 3A C.F.R. 154 (1972 Comp.), 50 U.S.C. § 401 (Supp. III, 1973).

21 8 Weekly Comp. Pres. Doc. 542 (1972).

22 Exec. Order No. 11652, § 1(A), 3A C.F.R. 154 (1972 Comp.), 50 U.S.C. § 401 (Supp. III, 1973).

23 *Id.*

24 *Id.* § 1(B).

25 *Id.*

26 *Id.* § 1(C).

27 For instance, the term "national security" is left undefined. The importance of this omission is reflected in a comment by Representative John Moss: "In 16 years of chairing the [Foreign Operations and Government Information Subcom-

thermore, implicit in the definitions is a reasonableness test which requires a natural and realistic link between the information and the dangers of disclosure. It is the use of the term "reasonable" that distinguishes the present definitions from those of previous executive orders which contained no such reasonableness standard.[28]

Executive Order No. 11652 enacted significant procedural changes in addition to the substantive changes discussed above. Section 4(a) requires that classified documents "to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use."[29]

Section 5 establishes an automatic schedule for downgrading and declassifying information. Top Secret information is to be downgraded to Secret automatically at the end of two years, and is to be downgraded to Confidential after another two years. Ten years after its original Top Secret classification, the information is to be declassified.[30] Secret information is downgraded to Confidential after two years and is declassified six years after that.[31] Confidential information is declassified after six years.[32]

However, an official authorized to classify information Top Secret is authorized under § 5(B) to exempt files from the automatic declassification schedule, provided the information satisfies certain requirements.[33] When material is exempted under § 5(B), the Order also sets out a mandatory review procedure for dealing with requests to declassify material so exempted. The first level of review can occur only after the document is ten years old, and only if it has a § 5(B) exemption.[34] If the department refuses to

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mittee] . . . I could never find anyone who could give me a definition [of national security]." *Hearings on 5 U.S.C. § 552(b)(1), supra* note 10, at 2470.

28 For a fuller comparison of Exec. Order No. 11652 with its predecessors *see generally* 59 IOWA L. REV. 110 (1973).

29 Exec. Order No. 11652, § 4(A), 3A C.F.R. 154 (1972 Comp.), 50 U.S.C. § 401 (Supp. III, 1973).

30 *Id.* § 5(A)(1).

31 *Id.* § 5(A)(2).

32 *Id.* § 5(A)(3).

33 *Id.* § 5(B). Section 5(B) sets up four categories of exemptions covering (1) information received from foreign governments, (2) statutory exemptions and intelligence sources, (3) specific information "essential to the national security," and (4) information which if disclosed would place a person in immediate jeopardy.

34 *Id.* § 5(C).

declassify the document, the person requesting declassification may appeal to the Department Review Committee and if that appeal is denied, a further appeal may be made to the Interagency Classification Review Committee.[35]

The Executive Order has three somewhat overlapping weaknesses. First, although § 4(A) requires segregating classified from non-classified information within each file, no administrative oversight is provided to insure accurate and responsible segregation. Second, the Order contains no review procedures for documents improperly classified at the outset, so any mistakes are locked into the system. Third, the mandatory review provisions apply only to exempted documents which are at least ten years old. There is no regular procedure for review within the first ten years.

The preamble of Executive Order No. 11652 makes explicit the relationship between the Order and the FOIA:

> The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in [the] Freedom of Information Act . . . .
>
> . . . .
>
> [The] official information or material, referred to as classified information or material in this order, is expressly exempted from public disclosure by section 552(b)(1) of Title 5, United States Code.[36]

### B. *The 1966 Freedom of Information Act*

The FOIA was designed to facilitate access by the public to as much government information as possible within the bounds of the public interest. Accordingly, government agencies are required to make all their opinions, reports, records, etc., available to the public on request.[37] They are required to publish instructions in

35 *Id.* § 7.

36 Exec. Order No. 11652, 3A C.F.R. 154 (1972 Comp.), 50 U.S.C. § 401 (Supp. III, 1973).

37 Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

the *Federal Register* explaining how the public can obtain such information.[38] An agency cannot withhold information unless it can show that the information is protected from disclosure under one of the nine exemptions in § (b).[39] There are no other grounds for withholding information.[40] An agency's exemption claim can

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

5 U.S.C. § 552(a)(2) (1970).

38 *See id.* § 552(a)(1) (1970).

39 This section does 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).

40 This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this

be contested in federal district court. The federal courts are empowered to punish agency employees with contempt for failure to obey a court order. The burden is on the agency to sustain its exemption claim.[41]

The section of the FOIA relating to the Executive Order[42] is the (b)(1) exemption: "This section does not apply to matters that are — (1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."

### C. *The 1974 Amendments*

Congress amended the FOIA in several ways not directly related to the issue of security classifications. For example, the time limit for an agency to respond to requests for information was reduced.[43] Changes to § (b) included narrowing the exemption for investigatory files,[44] and specifically calling for the excerpt-

section. This section is not authority to withhold information from Congress.

5 U.S.C. § 552(c) (1970).

41 Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

5 U.S.C. § 552(a)(3) (1970).

42 From 1966 to 1972 the section referred to Executive Order No. 10501. Since 1972 it has referred to Executive Order No. 11652. See note 14 *supra*.

43 5 U.S.C.A. § 552(a)(6) (Supp. Feb. 1975).

44 The amended section now reads:

investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of per-

ing of non-exempt portions of documents withheld under any exemptions.[45]

There are two provisions of the amendments to the FOIA which relate to the exemption for national security secrets. Section (a)(3) was changed in order to provide specifically for in camera review (the added language is in italics):

> In [a contested] case the court shall determine the matter de novo, *and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section,* and the burden is on the agency to sustain its action.[46]

Section (b)(1) was changed so as to relate specifically to Executive Order No. 11652 (the added language is in italics):

> This section [requiring disclosure of information] does not apply to matters that are—(1)(A) specifically *authorized under criteria established by an* Executive order to be kept secret in the interest of national defense or foreign policy *and (B) are in fact properly classified pursuant to such Executive order.*[47]

The language of these two provisions is a compromise between slightly differing versions adopted by the House of Representatives and the Senate.[48] Each house adopted its bill by large margins.[49]

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sonal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C.A. § 552(b)(7) (Supp. Feb. 1975). For the original version see note 39 *supra.*

45 An analysis of each of these changes is beyond the scope of this Comment. *See generally* Clark, *Holding Government Accountable: The Amended Freedom of Information Act,* 84 YALE L.J. 741, 751-68 (1975).

46 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975). For the full original text of § (a)(3) see note 41 *supra.*

47 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975). For the full text of the original § b see note 39 *supra.*

48 *Compare* S. 2543, 93d Cong., 1st Sess. (1973) (introduced by Senator Kennedy) *with* H.R. 12471, 93d Cong., 2d Sess. (1974) (introduced by Representative Moorhead).

49 H.R. 12471 was passed on March 14, 1974, by a vote of 383-8. 120 CONG. REC. H1803 (daily ed. Mar. 14, 1974). S. 2543 was passed by a vote of 64-17 on May 30, 1974. 120 CONG. REC. S9343 (daily ed. May 20, 1974).

The conferees adopted the Senate version with only minor changes.[50]

## II. Reconciling the Freedom of Information Act and the Classification System

In the eight years since its enactment, the FOIA has spawned more than 200 federal court cases.[51] Surprisingly, the § (b)(1) exemption has received extensive consideration in very few cases. But whenever there has been a controversy, the underlying issue has been how to reconcile the provisions of the FOIA, which mandates disclosure, and the provisions of the secrecy classification system, which mandates non-disclosure. Resolution of that issue depends on three basic concerns: (1) Does the Judiciary have constitutional authority to review executive decisions classifying information as secret; (2) What is the scope of that review under the FOIA; and (3) In what manner does the FOIA direct that review to be carried out?

The original FOIA was sufficiently vague about these concerns to provoke controversy. For example, many congressmen believed that the intent of the FOIA was to allow in camera inspection of any disputed file,[52] notwithstanding a contrary interpretation by the Supreme Court.[53] And since one of the concurring opinions[54] in that case was taken to be an invitation for Congress to clarify its intent in this regard,[55] Congress responded by enacting the 1974 amendments. The success of those amendments will depend on how well they clarify and respond to the problems that have arisen under the original FOIA.

### A. *The Constitutional Basis for Judicial Review*

The constitutional authority of the Judiciary to review executive decisions classifying information as secret can be conveniently

50 See note 16 *supra*.

51 S. Rep. No. 854, 93d Cong., 2d Sess. 7 (1974).

52 *See, e.g.*, 120 Cong. Rec. S9315 (daily ed. May 30, 1974) (remarks of Senator Kennedy).

53 *See* EPA v. Mink, 410 U.S. 73 (1973).

54 *See id.* at 94 (Stewart, J., concurring).

55 *See* 120 Cong. Rec. S9327 (daily ed. May 30, 1974) (remarks of Senator Muskie). *See also* H.R. Rep. No. 876, 93d Cong., 2d Sess. 7 (1974).

analyzed in terms of the framework provided by the political question doctrine.[56] While the political question doctrine has been deemphasized in recent years by the Supreme Court,[57] it cannot be dismissed out of hand. It is a recognition by the Court that certain classes of controversies do not lend themselves to judicial standards and judicial remedies,[58] and that in such situations judicial review is not appropriate. In *Baxter v. Carr*[59] the Supreme Court undertook to articulate the criteria for determining non-justiciability on political question grounds. Of the six criteria listed by the Court,[60] only two are potentially troublesome in the present context: whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department"[61] and whether there is "a lack of judicially discoverable and manageable standards for resolving" the dispute.[62]

### 1. The Textual Commitment Test

There does not appear to be a textual commitment of the power to classify information to any one branch of government. There is no express constitutional provision giving the President such authority.[63] Executive Order No. 10501 contained only a

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56 *See generally* Scharpf, *Judicial 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).

57 *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969); Baker v. Carr, 369 U.S. 186 (1962).

58 Baker v. Carr, 369 U.S. 186, 277-78 (1962) (Frankfurter & Harlan, JJ., dissenting).

59 369 U.S. 186 (1962).

60 In addition to the requirements that there be a textual commitment of the issue to a coordinate branch of government and that there be a lack of judicially manageable standards, the Court listed:

> the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217.

61 *Id.*

62 *Id.*

63 The only constitutional provision for secrecy is art. I, § 5 which requires Congress to publish its proceedings "excepting such Parts as may in their Judgment require Secrecy . . . ."

general statement of its legal authority under "the Constitution and statutes."[64] Presumably that was a reference to the implied constitutional powers of the Executive and to various congressional enactments recognizing executive authority to classify information.[65]

In closely analogous contexts, for example, the areas of military and foreign affairs, the executive and legislative branches share power. The Constitution authorizes the President with the advice and consent of the Senate to make treaties and to appoint ambassadors, and to be the Commander-in-Chief of the army and navy and the state militia should they be nationalized.[66] Congress, in addition to the Senate's role in approving treaties and ambassadors, is empowered to regulate commerce with foreign nations, to declare war, to establish an army and navy and make rules therefor, and to make all laws "necessary and proper" for the execution of these powers.[67]

Since the Constitution does not delegate authority to classify information to either the Congress or the Executive, it remains to determine how such authority should be shared between the two branches of government. In his well-known concurring opinion in the *Steel Seizure Case*, Justice Jackson provided an outline for determining the extent of presidential power.[68] An application of his outline strongly indicates that Congress has the constitutional power to authorize judicial review of security classifications.

Justice Jackson emphasized that presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.[69] Jackson classified the degrees of

64 Exec. Order No. 10501, 3 C.F.R. 979 (1949-53 Comp.), 50 U.S.C. § 401 (1970).

65 President Eisenhower's legal authority to issue Executive Order No. 10501 is discussed in H.R. REP. No. 221, 93d Cong., 1st Sess. 11-12 (1973). Among the statutes mentioned in support of his authority are the Espionage, Internal Security, and National Security Acts. However, in Justice Douglas' view there is "no express statutory authority for the classification procedure used currently by the bureaucracies, although it has been claimed that Congress has recognized it in such measures as the exemption from the disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552(b) and the espionage laws, 18 U.S.C. §§ 792-799." Gravel v. United States, 408 U.S. 606, 637-38 n.3 (1972) (dissent). *See also* New York Times Co. v. United States, 403 U.S. 713, 741 (1971) (Marshall, J., concurring).

66 U.S. CONST. art. II, § 2.

67 U.S. CONST. art. I, § 8.

68 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952).

69 *Id.* at 635.

presidential power into three categories. When the President acts pursuant to a congressional authorization his power is at its greatest, for in such cases his power is enhanced by that of Congress. When the President acts without denial or grant of congressional authority, he must rely on his own independent powers.[70] And Finally

> When . . . the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for he can only rely upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[71]

In amending the FOIA, Congress has acted affirmatively to restrict executive action. By so acting, any presidential claim to classify information without regard to judicial review falls into Jackson's third category. Such a claim, therefore, can only be justified by a showing that the President has "exclusive control" over security classification. As has been indicated above, however, that is not the case.[72]

### 2. The Judicial Standards Test

A more serious hurdle posed by the political question doctrine is whether there is a lack of judicially manageable standards for resolving a dispute over classification. Judicial doctrine in this area falls under a number of rubrics. For example, courts have traditionally refused to review the *methods* used to implement a foreign policy objective for lack of manageable judicial stan-

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70 *Id.* at 637.

71 *Id.* at 637-38.

72 *See* text accompanying notes 63-67 *supra*. *See also* Nixon v. Sirica, 487 F.2d 700, 715 (D.C. Cir. 1973) ("[i]f the claim of absolute privilege was recognized, . . . [t]he Freedom of Information Act could become nothing more than a legislative statement of unenforceable rights").

dards.[73] And even where judicial review is more commonplace, *e.g.*, in administrative actions, courts may refuse review if the scope of review is so broad as to replace administrative action by judicial action.[74] In such a situation review is refused because the court is being asked to perform a nonjudicial function.[75] But to state the problem is easy; the difficult issue is determining when manageable standards are lacking or when nonjudicial functions are implicated.[76]

No court in construing the original FOIA had reason to reach this issue with respect to classification decisions, since the Supreme Court had narrowly interpreted the scope of judicial review under the Act.[77] But, since the 1974 amendments presumably broaden the scope of judicial review,[78] the issue is now squarely presented: whether in expanding the scope of review under the FOIA, Congress has required the courts to perform the executive function of classifying information.[79]

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73 *See, e.g.*, Orlando v. Laird, 443 F.2d 1039, 1043-44 (2d Cir. 1971); Massachusetts v. Laird, 451 F.2d 26, 30-31 (1st Cir. 1971); Da Costa v. Laird, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967).

74 *See, e.g.*, Federal Radio Comm'n v. General Electric Co., 281 U.S. 464 (1930); FPC v. Idaho Power Co., 344 U.S. 17 (1952); Keller v. Potomac Electric Power Co., 261 U.S. 428 (1923).

75 *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.10, at 182, 184 (1958).

76 *Compare* United States v. First City Nat'l Bank, 386 U.S. 361 (1967) *and* United Steelworkers Union v. United States, 361 U.S. 39 (1959) *with* cases cited at notes 73-74 *supra*.

77 *See* EPA v. Mink, 410 U.S. 73 (1973); text accompanying notes 93-107 *infra*.

78 *See* text accompanying notes 108-09 & 134-36 *infra*.

79 President Ford's primary objection to the amendments was the fear that judicial review was now so broad as to transgress constitutional principles.

> [T]he courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise. As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable. Such a provision would violate constitutional principles . . . .

10 WEEKLY COMP. PRES. DOC. 1318 (1974).

In a speech to the Society of Professional Journalists, Sigma Delta Chi, Ford reiterated his position on the unconstitutionality of the bill: "[T]he transfer of this judgment from the executive to the judicial branch of Government may be unconstitutional." *Id.* at 1445.

To cure this "defect" Ford proposed that courts be required to uphold the original classification "if there is a reasonable basis to support it." In considering the reasonableness of the classification, the courts would consider all relevant evidence before resorting to an in camera examination of the document. *Id.* at 1318.

Functionally, the operation of the § (b)(1) exemption is much like a claim of privilege. Under the FOIA all information is to be disclosed unless it is specifically exempted.[80] Thus, when the government asserts that a document is exempt under § (b)(1) it is asserting a statutory "privilege" not to divulge. The court's obligation to review such a claim of privilege should be no different under the FOIA than its obligation with respect to any other asserted privilege. The fact that the underlying basis of the privilege is the validity of the executive action of classifying the information as secret pursuant to an executive order does not alter this obligation of review. Review in such a case does not somehow change the court into the person making the original classification, nor does it leave the court without recognizable standards when it undertakes such review.

The most clearly analogous situation is the review of a claim of privilege based on military secrets. In *United States v. Reynolds*[81] an Air Force B-29 crashed in Georgia while testing secret electronic equipment. Three civilians aboard the aircraft were killed. Their widows brought a suit for damages and sought discovery of the government accident report. The government refused a district court order to release the report on the grounds that the report contained privileged military secrets. In sustaining the government's position, the Supreme Court outlined procedures for examining government claims of privilege:

> The privilege belongs to the Government and must be asserted by it . . . . It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual consideration by that officer. *The court itself must determine whether the circumstances are appropriate for the claim of privilege,* and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[82]

Admittedly, there is language in some Supreme Court decisions that casts doubt on the applicability of the *Reynolds* case to review under the amended FOIA. For example, in *Chicago & Southern*

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80 See text accompanying notes 39-40 *supra.*
81 345 U.S. 1 (1953).
82 *Id.* at 7-8 (emphasis added).

*Air Lines, Inc. v. Waterman Steamship Corp.*[83] the Supreme Court refused to review a presidential order approving an order of the Civil Aeronautics Board which denied an overseas route to the petitioner. The Court reasoned:

> It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative . . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[84]

Taken at face value the decision in *Waterman* might support the position that the judicial review provisions of the amended FOIA involve the courts in nonjudicial functions. But the language of the *Waterman* case is overly broad,[85] and although it has "not been overruled by the Supreme Court, its apparently sweeping contours have been eroded by recent Circuit Court opinions."[86] Nor is the case directly applicable to the present situation since, as Justice Jackson later explained, *Waterman* was merely an example of "presidential powers under statutory authorization."[87]

Furthermore, the functions required to review an executive decision classifying information are very different than those involved in *Waterman*. In that case there were no standards the Court could use to review the executive decision. The Court was being asked to review the evidence in camera and make an independent assessment as to its probative value. That is not what is required under the 1974 amendments to the FOIA. There the court is being asked to review the evidence in camera and make an independent assessment of its classification status in terms of

83 333 U.S. 103 (1948).
84 *Id.* at 111.
85 *See* Miller, *The Waterman Doctrine Revisited*, 54 GEO. L.J. 5 (1965).
86 Pan American World Airways v. CAB, 392 F.2d 483, 492 (D.C. Cir. 1968).
87 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 n.2 (1952).

the criteria laid out in Executive Order No. 11652. That is what courts do daily when they review an administrative decision to determine if the agency applied the proper legal standard to the facts. And that is the type of review the Supreme Court approved in *Reynolds*.

### B. *The Scope of Judicial Review Under the FOIA*

Section (a)(3) of the FOIA provides that when an agency's refusal to disclose information is challenged, "the court shall determine the matter de novo."[88] Since the enactment of the FOIA the courts have given the de novo clause a relatively narrow construction, particularly with respect to the § (b)(1) exemption.[89] The 1974 amendments to the FOIA are not designed to change that interpretation.

#### 1. Substantive Review of Classifications

In *Epstein v. Resor*[90] an historian at Stanford University sought to enjoin the Secretary of the Army from withholding a Top Secret file described as "Forcible Repatriation of Displaced Soviet Citizens — Operation Keelhaul." In refusing to enjoin the Secretary, the court held that its de novo review jurisdiction did not extend to determining if an agency was properly using the exemptions under § (b) unless such use was clearly arbitrary and unsupportable.[91] Since the plaintiff had admitted that the information sought was classified the district court held it need look no further. On appeal the Ninth Circuit disagreed with that interpretation of the proper scope of review, but affirmed the district court since it found that the information contained in the record clearly showed that the security classification was proper.[92] However, while

88 For the full text of 5 U.S.C. § 552(a)(3) (1970) see note 41 *supra*.

89 *See, e.g.*, Epstein v. Resor, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

90 296 F. Supp. 214 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

91 *See* 296 F. Supp. at 217.

92 *See* 421 F.2d at 933.

the court of appeals recognized that the district court had an obligation to determine the validity of the classification in terms of the criteria established by the Executive Order, the court expressed no opinion on whether a court could look beyond the Executive Order to determine the validity of the classification.

That issue was settled by the Supreme Court in *Environmental Protection Agency v. Mink*.[93] The case grew out of the controversy surrounding an underground nuclear test that was to be conducted on Amchitka Island, Alaska.[94] A newspaper article appearing in late July 1971, indicated that the President had received a report containing conflicting opinions on the advisability of conducting the test. Congresswoman Patsy Mink (D.-Hawaii) requested that the President release the report. When the request was denied, Mink and 32 of her colleagues in the House of Representatives brought an action against the Environmental Protection Agency to force disclosure of the report under the FOIA. The district court granted summary judgment for the defendants on the ground that the report fell within the § (b)(1) and § (b)(5) exemptions of the FOIA.[95]

The court of appeals reversed the lower court's decision and remanded for further consideration of which, if any, portions of the report might be disclosed pursuant to the FOIA.[96] In its consideration of the relationship between the FOIA and Executive Order No. 10501 the court noted that "[t]he legislative history of the Act does not define clearly the relationship between this Executive order and the [§ (b)(1)] exemption."[97] The court ruled that the FOIA required that non-secret segments of classified government files be segregated and disclosed despite the contrary requirements of the Executive Order.[98] To determine which seg-

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93 410 U.S. 73 (1973).

94 A separate effort to enjoin the test itself was rebuffed by the Supreme Court on November 6, 1971. *See* Committee for Nuclear Responsibility v. Schlesinger, 404 U.S. 917 (1971). The test was conducted that same day.

95 Unreported case. *See* Mink v. EPA, 464 F.2d 742, 744 (D.C. Cir. 1972).

96 Mink v. EPA, 464 F.2d 742 (D.C. Cir. 1972).

97 *Id.* at 744.

98 Exec. Order No. 10501, §§ 3b & 3c, 3 C.F.R. 979 (1949-53 Comp.), 50 U.S.C. § 401 (1970), required that each document in a file receive a classification "at least as high as the most highly classified document therein."

ments to disclose, the district court was ordered to review the report in camera.[99]

The Supreme Court reversed the judgment of the court of appeals.[100] Unlike the court below, the Supreme Court discerned from the legislative history of the Act a clear congressional intent to defer to Executive Order No. 10501.[101] In camera inspection to sift out "so-called 'non-secret components' " was not permissible. Once it was determined that a document was classified pursuant to an executive order, the court was not to look behind the secrecy stamp. According to the Court, such a restrictive test was required by Congress. "Obviously this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored."[102]

Since it was not disputed that six of the nine documents sought were classified, the six documents were held to be protected under the § (b)(1) exemption. The case was remanded for a determination of whether the remaining three documents were covered by the § (b)(5) exemption for internal memoranda.[103]

In a vehement dissent Justice Douglas stated that as a result of the Court's decision "the much-advertised Freedom of Information Act is on its way to becoming a shambles."[104] In a separate dissent joined by Justice Marshall, Justice Brennan stated that he considered the Court's interpretation of the § (b)(1)

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99 In Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), the court had held that the FOIA exemptions were to be construed narrowly. In *Mink* the Supreme Court modified the *Soucie* decision by requiring that the standard be relaxed when documents relating to national defense or foreign affairs were involved. *See* 464 F.2d at 746-47.

100 EPA v. Mink, 410 U.S. 73 (1973).

101 The Court was able to find only three scattered legislative references to the Executive Order, *see* 410 U.S. at 82-83, none of which was dispositive. *See* 410 U.S. at 101-02 (Brennan, J., dissenting).

102 410 U.S. at 81.

103 Wolfe v. Froehlke, 358 F. Supp. 1318 (D.D.C. 1973), *aff'd*, 510 F.2d 654 (D.C. Cir. 1974), is one of the few cases since *Mink* focusing on the § (b)(1) exemption. In following the Supreme Court the district court somewhat restated the holding in *Mink*: "*absent allegations of fraud or subterfuge* the Court is not to look beyond the fact of procedurally proper classification of documents pursuant to Executive Order." 358 F. Supp. at 1320 (emphasis added).

104 410 U.S. at 109.

exemption overly restrictive.[105] Justice Stewart, although frustrated with the limited discretion left to the courts by the *Mink* decision, concurred with the majority because he believed the result was mandated by Congress "[Congress] has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document 'secret', however cynical, myopic, or even corrupt that decision might have been."[106] Congress, not the Court, decreed "blind acceptance of Executive fiat."[107]

Though the decision in *Mink* does not make it very clear, the case revolved around two issues that are at least theoretically separate: (1) what is the proper scope of judicial review, and (2) how is that review to be exercised? When the Court says that the documents are not to be reviewed in camera it is making a conclusion as to the second issue, *i.e.*, the method of review. However, as a practical matter, if a court cannot review documents in camera, the Court is also placing a limit on the scope of review. For, unless a court can look at the documents itself, there must be "blind acceptance of Executive fiat" whenever the Executive alleges that the requested documents are properly classified. In practice then, the import of *Mink* is to limit severely de novo review in the district court without directly saying so.

The approach of Congress in the 1974 amendments to the FOIA was not to broaden de novo review but to make it more effective by permitting in camera inspection of documents. The amended section specifically requires the courts to apply the criteria set forth in the Executive Order.[108] Courts may not review the classification criteria per se. They are expected to accord substantial weight to an agency's representations in these matters.[109]

It is important to note that the original Senate bill (S. 2543) did include a section prescribing specific standards for judicial review under § (b)(1).[110] Section 4(B)(ii) of that bill provided

105 *Id.* at 95.
106 *Id.*
107 *Id.*
108 *See* 5 U.S.C.A. § 552(b)(1) (Supp. Feb. 1975).
109 *See, e.g.*, 120 CONG. REC. H10007 (daily ed. Oct. 7, 1974) (remarks of Representative Moorhead); 120 CONG. REC. H1794 (daily ed. March 14, 1974) (remarks of Representatives Moorhead & Erlenborn); CONFERENCE REP., *supra* note 46, at 11-12.
110 S. REP. No. 854, 93d Cong., 2d Sess. 37 (1974).

that once an agency head filed an affidavit alleging that he personally had reviewed the documents and believed that they should be withheld under the criteria of § (b)(1), then "the court shall sustain such withholding unless, following its in camera examination, it finds the withholding *is without a reasonable basis* under such criteria."[111] In its explanation of this language, the committee explained that "[t]his standard of review does not allow the court to substitute its judgment for that of the agency — as under a *de novo* review — but neither does it require the court to defer to the discretion of the agency, even if it finds the determination not arbitrary or capricious."[112]

This entire section was deleted through Senate adoption of an amendment submitted by Senator Muskie just prior to the Senate's approval of S. 2543.[113] The conference committee did not substitute any other standards in its place. Consequently, the final bill as passed was silent on this issue.

Senator Muskie explained his reasons for wanting to delete § 4(B)(ii):

> What I move today to strike [is the language] which would force judges to conduct the proceedings of [review] in their chambers in such a way that the presumption of validity for a classification marking would be overwhelming . . . . If this provision is allowed to stand, it will make the independent judicial evaluation meaningless. This provision would, in fact, shift the burden of proof away from the government.[114]

Senator Muskie objected to restricting the scope of the courts' review function. The purpose of his amendment was to allow judges to make "unfettered judgments in matters allegedly connected to the conduct of defense or foreign policy."[115] Thus, in adopting the amendment Congress chose to leave the courts free to decide the appropriate scope of review under § (b)(1).[116]

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111 *Id.* (emphasis added).
112 *Id.* at 16.
113 *See* 120 CONG. REC. S9328 (daily ed. May 30, 1974).
114 *Id.* at S9319.
115 *Id.* at S9320.
116 *See* 120 CONG. REC. H10864-75 (daily ed. Nov. 20, 1974); 120 CONG. REC. S19806-23 (daily ed. Nov. 21, 1974).

### 2. Procedural Review of Classifications

The FOIA was amended to insure proper classification procedurally as well as substantively.[117] In general, courts have a freer hand in determining whether an agency has complied with administrative procedures, even when it is cautious in reviewing the substantive matters involved.[118] Accordingly, the courts can and should take a more active role in insuring compliance with the procedural safeguards specified in the Executive Order.

Whenever one makes a distinction between procedural and substantive review, the problem of how to distinguish between procedural and substantive issues usually arises. In the typical administrative action, where there is a contested hearing, the procedural and substantive issues bifurcate rather nicely. That is not the case when the challenged action is not adversary in nature but rather the result of off-the-record executive discretion, as in an executive decision to classify information. On the other hand, the present Executive Order authorizing the classification system does contain procedural requirements.[119] Courts must insure that they are met, even at the risk of reviewing substantive issues more broadly than they might otherwise prefer.

For example, when the government invokes the § (b)(1) exemption, it should be required to demonstrate that the excerpting requirement of § 4(A) of the Executive Order has been met.[120] Arguably, such an inquiry is little different than a substantive review of the classification itself. But even under the original FOIA the courts recognized a basic distinction between reclassifi-

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117 *See* CONFERENCE REP., *supra* note 16, at 12.

118 *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 566 (1965).

119 See text accompanying notes 29-35 *supra*.

120 *Documents in General.* Each classified document shall show on its face its classification and whether it is subject to or exempt from the General Declassification Schedule. It shall also show the office of origin, the date of preparation and classification and, to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use. Material containing references to classified materials, which references do not reveal classified information, shall not be classified.

Exec. Order No. 11652, § 4(A), 3A C.F.R. 154 (1972 Comp.), 50 U.S.C. § 401 (Supp. III, 1973). *See also id.* § 7; National Security Council Directive, 3A C.F.R. 227 (1972 Comp.), 37 Fed. Reg. 10053 (1972). The Executive Order and the Directive must be read together for a full understanding of the regulatory scheme.

cation and segregating classified from non-classified information. In his dissenting opinion in *Mink*, Justice Brennan interpreted § (b)(1) as meaning that

> [t]he District Court is not authorized to declassify or to release information that the Executive, in its sound discretion, determines must be classified to "be kept secret in the interest of the national defense or foreign policy." The District Court's authority stops with the inquiry whether there are components of the documents that would not have been independently classified as secret.[121]

Justice Douglas agreed in his dissenting opinion that "[t]he Court of Appeals never dreamed that the trial judge would reclassify documents. His . . . task would be to determine whether non-secret material was a mere appendage to a 'Secret' or 'Top Secret' file."[122]

Whatever discretion judges exercised under the original FOIA not to engage in such procedural review, was eliminated by the 1974 amendments. Section (a)(3) was amended to require the court to determine whether any "records or any part thereof" are properly withheld pursuant to a § (b) exemption. And in addition to the segregating requirement of the Executive Order, § (b)(1) was amended so as to require the reviewing court to determine that information is "in fact properly classified pursuant to . . . Executive order." There can be little doubt that Congress expects this type of review from the courts.

### C. *The Manner of Judicial Review Under the FOIA*

So far the issues discussed in this Comment have dealt with legal constraints on the Judiciary's power to review executive decisions classifying information as secret. However, in determining the manner such review should take, the overriding concern is not a legal constraint but a jurisprudential guide: that courts should show "utmost deference" to the President's determination of what constitutes military or diplomatic secrets.[123] As a result

121 410 U.S. at 99-100.

122 *Id.* at 109.

123 *See* United States v. Nixon, 418 U.S. 683, 710-11 (1974). *See also* New York Times Co. v. United States, 403 U.S. 713, 758 (1971).

courts have traditionally been reluctant to interfere with the exercise of executive discretion in such matters. Any legislative attempt to prod judicial activity in this area must be measured against this judicial reluctance.

### 1. Substantive In Camera Review

The original language of § (a)(3) of the FOIA was not clear on the extent to which courts could inspect withheld documents in camera. The courts have generally been hesitant to review contested files in camera and have done so only when there have been no effective alternatives.[124] The Supreme Court focused on this reluctance in *Mink*. After proscribing in camera inspection of classified documents, it set forth several alternatives for courts to pursue before conducting in camera review of non-secret documents.[125]

The Court rejected any notion that a member of the public invoking the FOIA might require as a matter of right that otherwise confidential documents be inspected in camera by a federal court. The Court believed that such an intepretation would defeat the purposes of the § (b) exemptions. Prior to an in camera inspection, an agency should be given the opportunity, "by means of affidavits or oral testimony," to establish to the satisfaction of the district court that the documents sought fall clearly within the exemptions claimed. The agency may also demonstrate this by "surrounding circumstances" or by disclosing for in camera inspection a representative document of those sought. The burden is on the agency resisting disclosure; only if the agency is unable to meet this burden is the court to order the documents submitted for in camera review. "In short, *in camera* inspection of all documents is not a necessary or inevitable tool in every case."[126]

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124 *See, e.g.*, EPA v. Mink, 410 U.S. 73 (1973); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). *See generally* Comment, *In Camera Inspection Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557 (1974).

125 The Court did not preclude in camera review of material allegedly immune from disclosure under exemptions other than § (b)(1). *See* Stern v. Richardson, 367 F. Supp. 1316, 1318 n.3 (D.D.C. 1973).

126 410 U.S. at 92-93; *see* 5 U.S.C. § 552(a)(3) (1970).

The reasons behind the courts' reluctance to review documents in camera are manifold. Primarily, they involve considerations of policy and practicality. These considerations were implicit in the *Mink* decision, and they were fully discussed a few months later in *Vaughn v. Rosen.*[127]

In *Vaughn* a law professor doing research on the Civil Service Commission sought to compel disclosure of certain reports of the Bureau of Personnel Management. The district court, on the basis of a general and conclusory affidavit submitted by the Commission, entered summary judgment for the Commission. On the professor's appeal, Judge Wilkey of the District of Columbia Court of Appeals held that the record before him was insufficient to permit a determination of whether the documents were subject to disclosure under the FOIA and remanded the case for a further examination of the merits of the Commission's claims.[128]

Judge Wilkey noted that the Supreme Court in *Mink* had generally described how trial courts were to approach the job of making the necessary factual determinations when the nature of the information sought is in dispute. He intended the *Vaughn* decision to be an elaboration of the Supreme Court's instructions in *Mink.*

Judge Wilkey noted four drawbacks to the in camera proceding. First, the review is necessarily conducted without benefit of criticism and illumination by the party with an actual interest in forcing disclosure.[129] Second, an in camera review may be overly burdensome, especially where the documents in issue constitute many hundreds of pages. This burden is compounded when the court is asked to separate exempt from non-exempt portions of documents. "Such an investment of judicial energy might be justified to determine some issues. In this area of the law, however, we do not believe it is justified or even permissible."[130] A third problem occurs on appeal since the trial court record will

127 484 F.2d 820 (D.C. Cir. 1973).

128 On remand the district court found that the requested documents were too numerous to review in camera. Instead the court reviewed only nine of the 2,448 reports requested. The parties stipulated that the nine reports were representative of all the documents requested, and that the court's decision as to the nine would apply to all the documents. Vaughn v. Rosen, 35 AD. L.2D 873 (D.D.C. 1974).

129 484 F.2d at 825.

130 *Id.*

seldom be sufficient for adequate appellate review, thus requiring the appellate court to conduct its own in camera review.[131] Fourth, when in camera review is likely, an agency is encouraged to use obfuscatory tactics. Since there are few inherent incentives that affirmatively spur government agencies to disclose classified information, an agency is prone to claim the broadest possible grounds for exemption covering the greatest amount of information. "Thus, as a tactical matter, it is conceivable that an agency could gain an advantage by claiming overbroad exemptions."[132]

Recognizing that in camera review might still be the only effective alternative available to the district court, Judge Wilkey outlined three provisions designed to mitigate the weaknesses of the procedure. Courts should accept only detailed affidavits or testimony from agencies seeking to justify withholding of information. The agency should be required to specify in detail which portions of the files are exempt and to justify the claim of exemption. Finally, if the information is still too massive, the court may appoint a special master.[133]

In view of the courts' demonstrated reluctance to review documents in camera, especially documents involving national security secrets, it is unlikely that courts will be predisposed to increase their utilization of the in camera procedure without a clear direction from Congress to do so.

Such a direction cannot be found in the amended FOIA.

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131 *Id.* Indeed, this problem is compounded by the first two problems.

132 *Id.* at 826. Nor are agencies necessarily averse to using such tactics. *Cf.* Nader, *Freedom of Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970).

Less than a month after the *Vaughn* decision, Judge Wilkey was confronted with the same problems of in camera review, only this time it was in regard to the White House tapes. In his dissent he noted two additional procedural drawbacks unique to in camera review of national security secrets. First, in order to adequately review the documents, restricted access becomes difficult. The prospect of maintaining security becomes even more remote with one or more appeals. "As the circle of 'secrecy' widens, it will dissolve and vanish." Second, the judge may not be equipped with the type of information necessary to make intelligent decisions on confidentiality. By the nature of the problem, the places a judge can turn for assistance are limited. *See* Nixon v. Sirica, 487 F.2d 700, 795-96 (D.C. Cir. 1973).

133 484 F.2d at 826-28. The only case prior to *Vaughn* to make use of a master was Frankel v. SEC, 336 F. Supp. 675 (S.D.N.Y. 1971). The documents involved consisted of 7000 pages. *But see* FED. R. CIV. P. 53(b); LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) (use of masters is discouraged except under "exceptional grounds").

Although the intent of Congress was to overrule the *Mink* proscription against in camera review of classified documents,[134] Congress went no further than that. The amended language of § (a)(3) is permissive.[135] The intent of that section is that each court should be free to employ whatever means it finds necessary to discharge its responsibilities.[136]

Congress chose to use permissive language in § (a)(3) only after careful consideration. Responding to the *Mink* decision, Senator Muskie had originally proposed that federal judges be *required* to review in camera the contents of records the government wished to withhold under the § (b)(1) exemption.[137] But, as the issue received more consideration, Congress retreated from the mandatory language, and even Senator Muskie admitted that such a requirement would have been "excessive."[138]

In agreeing on the language of § (a)(3) the conferees followed the guidelines the Supreme Court established in *Mink*. The provision is explained in the Conference Report:

> H.R. 12471 amends the present law to permit such *in camera* examination at the discretion of the court. While *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.[139]

Thus, when the agency claims that certain documents are exempt under § (b)(1) (or under any other exemption) they must meet at least a burden of production. While purely conclusory affidavits will not be sufficient, any demonstration of a relation-

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134 *See* CONFERENCE REP., *supra* note 16, at 12.

135 "In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera . . . ." 5 U.S.C.A. § 552(a)(3) (Supp. Feb. 1975).

136 *See* H.R. REP. No. 876, 93d Cong., 2d Sess. 8 (1974).

137 *See* S. 1142, 93d Cong., 1st Sess. § 1 (1973); *Hearings on S. 1142 Before the Subcomm's on Administrative Practice and Procedure and Separation of Powers of the Senate Comm. on the Judiciary and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 93d Cong., 1st Sess., vol. 2 (1973).

138 *See* 120 CONG. REC. S9319 (daily ed. May 30, 1974).

139 CONFERENCE REP., *supra* note 16, at 9.

ship between the information and the alleged danger of disclosure is likely to satisfy the requirement for a § (b)(1) exemption.[140] Once the government produces, by affidavit or testimony, a justification for the exemption, the plaintiff must cast sufficient doubt on the agency testimony to resist a motion for summary judgment. Plaintiff is thus forced into a game of blind man's bluff (before even succeeding in getting the court to look at the documents) since secret information is, by definition, unknown to the party seeking disclosure. The best the plaintiff can do is argue that the exemption is very narrow and plead that the general nature of the documents sought makes it unlikely that they contain such sensitive information.[141]

Because of the weak position of the plaintiff and the courts' customary averseness to allowing in camera review, plaintiff's success in getting the court even to look at the documents is primarily dependent on how much weight the court gives to the agency's affidavits. As noted above, a federal judge is more likely to defer to executive claims of national security under § (b)(1)

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140 Other factors contributing to this result are the traditional judicial deference to foreign policy matters, *see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); judicial deference to agency determinations, and the weight accorded government affidavits, *see* text accompanying note 143 *infra*; and the frequent inability of the plaintiff to effectively counter agency claims, *see* text accompanying note 141 *infra*.

In addition the government need satisfy only the requirements for a "confidential" classification (information which if disclosed "could reasonably be expected to cause damage to the national security") to fall within the § (b)(1) exemption. It is unlikely the court will take upon itself the added burden of downgrading classifications. *See* text accompanying note 122 *supra*.

141 *Cf.* Schaffer v. Kissinger, 505 F.2d 389 (D.C. Cir. 1974). Appellant brought an action under the FOIA seeking access to reports prepared by the Red Cross on prisoner-of-war camps in South Vietnam. Appellee, after claiming the § (b)(1) exemption, was granted summary judgment by the district court. On appeal it was contended that the reports either had not been classified at all or had not been classified in accordance with the Executive Order. Appellant argued that he could not present verified facts to support this position unless he was allowed discovery. Although mindful of *Mink*, the court of appeals recognized appellant's predicament and reversed the summary judgment. "Facts respecting the classification of the reports in question are solely in the control of the State Department. Appellant should be allowed to undertake discovery for the purpose of uncovering facts which might prove his right of access to the documents which he seeks. Rule 56(f), Fed. R. Civ. P." 505 F.2d at 391. It should be noted, however, that at least one commentator views the *Schaffer* decision as merely a narrowing of the harsh rule in *Mink* when procedural irregularity is alleged, and not the beginning of more thorough substantive review. *See* Clark, *supra* note 45, at 753 n.57.

than to other government exemption claims.[142] Congress has greatly lessened the government's burden of persuasion by encouraging continued judicial deference to agency security classifications. Again, the direction comes from the Conference Report:

> [T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552 (b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.[143]

It is clear that a plaintiff will have to overcome a substantial set of threshold burdens before he can succeed in having the court go behind the security stamp on a file.[144] Only if the government cannot convince the court by affidavit or testimony that it has properly classified the documents pursuant to executive order will the court conduct an in camera review.

### 2. Procedural Review

While courts may be reluctant to utilize in camera inspection of documents to carry out substantive review of an executive decision classifying material as secret, there should be no such reluctance when a court reviews the decision for procedural regularity.[145] At a minimum the agency should be required to

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142 *See* text accompanying notes 123-24 *supra*.

143 CONFERENCE REP., *supra* note 16, at 12.

144 Thus, although allowing plaintiffs the use of discovery is a constructive approach to easing their threshold burden, *see* Schaffer v. Kissinger, 505 F.2d 389 (D.C. Cir. 1974); note 141 *supra*, they must still overcome judicial deference to the government's opposing representations. *Cf.* Wolfe v. Froehlke, 510 F.2d 654, 655 (D.C. Cir. 1974) (court refused to defer consideration of the case pending passage of the amendments to the FOIA, stating flatly that in camera review "could add nothing relevant to the determination of this case."). See note 103 *supra*.

145 Even without the 1974 amendments the courts have shown a willingness to engage in procedural review. In Weisberg v. United States General Service Admin., Civil No. 2052-73 (D.D.C. 1973), the court held that the government had the burden of proving procedural regularity and that this burden was not met by the government Archivist stating under oath that the information was classified Top

prove that the contested documents are indeed classified, that the classification was done by a person authorized to make the classification, and that the automatic downgrading has occurred, or if not, that the information was properly exempted from such a requirement and all internal review of that decision has taken place.

The court is faced with a more difficult problem when the procedural review sought is that non-classified information has been segregated from classified information. If the court feels that an in camera review of the documents is necessary to determine that the non-classified portions have been segregated and disclosed, the amended FOIA grants it the necessary power to undertake such a review. And even if a court feels uneasy in undertaking such review, any substantive classification problems it might face should not deter the court from at least making the in camera inspection. Any doubts as to the merits of the classification can always be resolved in favor of the government. For example, courts have made a distinction similar to the classified/non-classified line in separating "fact" from "opinion" when the government claims the § (b)(5) exemption for internal memoranda.[146] In those cases where the court has found that opinion is "inextricably intertwined" with fact, it has simply refused to order the information disclosed.[147] The difficulty of the task should not cause the court to shirk its responsibilities. Similarly, the fact that the court may not always be able to distinguish classified from non-classified should not cause the court to refuse in camera review.

In any event, as a practical matter, procedural review will serve as a useful prophylactic function. Earlier in this Comment it was observed that the Executive Order has three somewhat overlapping weaknesses.[148] The first is the lack of sufficient administrative oversight to insure accurate and responsible segregation of classified from non-classified material under § 4(A). The courts can mitigate this weakness by requiring the agency to comply with

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Secret. It was necessary to show that the classification was ordered by a person authorized to do so. *Compare* text accompanying notes 142-43 *supra.*

146 *See, e.g.*, EPA v. Mink, 410 U.S. 73, 86-89 (1973).

147 *Cf.* Soucie v. David, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971); EPA v. Mink, 410 U.S. 73, 91-92 (1973).

148 See text following note 35 *supra.*

§ 4(A) or by its own inspection of material and possible segregation in the course of an in camera review.

However, the other two weaknesses of the Order — the absence of a means to review improperly classified documents and the limited mandatory review section[149] — both involve the courts in the inherently difficult problems of declassifying documents. The very fact that the courts are reviewing the classifications procedurally (and to a more limited extent, substantively) should in itself deter an official from misusing the secrecy stamp.[150] And a more active judicial role in reviewing security classifications is likely to encourage early administrative review of document classifications even though such review is not mandatory.[151] In this limited but important role the federal courts could do much to prevent the abuse of goverment over-classification without sacrificing national security and foreign policy interests.

### *Conclusion*

In attempting to reconcile the often conflicting purposes of the FOIA and the Executive Order this Comment has analyzed the constitutional basis for allowing judicial review of security classifications and the scope and appropriate manner of such review under the FOIA. The conclusion of this Comment is that the thrust of the amendments is procedural. Section (a)(3) now specifically allows for in camera review of secret files; section (b)(1) now emphasizes the duty of the courts to determine whether documents were properly classified. Accordingly, the amendments to the FOIA will have their greatest impact by insuring that the procedures specified in the executive order are followed. Specifically, judicial review will provide the administrative oversight

149 See *id.*

150 *See Hearings on S. 1142, supra* note 137, at 147 (although "the courts are generally not equipped to deal with policy questions involving national defense and foreign policy, [the] judicial review of security classifications to determine whether they are consistent with applicable criteria can provide a salutary check on executive action") (remarks of John Miller, Chairman of the Administrative Law Section of the American Bar Association).

151 As a matter of policy the Department of Defense reviews the classification of any document requested under the FOIA before deciding whether to comply with the request. *See Hearings on 5 U.S.C. § 552(b)(1), supra* note 10, at 2520.

which Executive Order No. 11652 presently lacks. By meshing the procedural requirements of that Executive Order and the review mechanisms of the amended FOIA the courts can resolve the conflicts between the two pursuant to the objectives of both.

In the final analysis the effectiveness of the amended FOIA is largely dependent on variables beyond the immediate control of Congress. Had the FOIA not been amended, the *Mink* decision might have had the effect of preventing any meaningful review by the courts whenever the Executive claimed the § (b)(1) exemption. In such an environment the likelihood of governmental abuse of the classification system would be greatly magnified. The amendments have succeeded in diminishing that risk.[152] Moreover, a preliminary analysis of the impact of the amendments indicates that agencies are making good faith efforts to comply with the new requirements, and that as a result information formerly withheld is now being disclosed.[153] However, if abuse of the classification power continues under the Executive Order, Congress may next have to consider replacing the Order with its own classification statute.[154] For the present, the decision of whether to comply fully with the spirit of the FOIA (and Executive Order No. 11652) or to hinder its operation is still left primarily with the agencies in the executive branch. If entrusting them with this responsibility proves to be unwise, then further legislation will be required "to fulfill our constitutional obligation to keep it possible for the people to govern themselves."[155]

*Jeffrey L. Levine**

152 The amendmets do contain a loophole, however. If the government fails to satisfy any exemption but is nonetheless intent on keeping information secret, a possible interpretation of the statute would leave the insistent agency one ultimate option—a special executive order declaring that the particular file is to be kept secret in the interest of national defense or foreign policy. Senator Kennedy alluded to such a possibility: "The President writes the classification rules in his Executive order. If those rules are inadequate to protect important information vital to our national defense, then let the President change the rules." 120 CONG. REC. S19807 (daily ed. Nov. 21, 1974).

153 *See* TIME, Apr. 14, 1975, at 28-29.

154 Several measures have been proposed. *See, e.g.*, H.R. 12004, 93d Cong., 1st Sess. (1973); S. 3399, 93d Cong., 2d Sess. (1974). The question of whether Congress should supersede Executive Order No. 11652 with its own statute is presented in H.R. REP. No. 221, 93d Cong., 1st Sess. (1973). The report "strongly recommends" such legislation at 104.

155 Warren, *Governmental Secrecy: Corruption's Ally*, 60 A.B.A.J. 550, 552 (1974).

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# THE ELEMENTARY AND SECONDARY EDUCATION AMENDMENTS OF 1974: THE EFFECT OF THE CONSOLIDATION AND REVIEW PROVISIONS UPON THE DISTRIBUTION OF DECISIONMAKING AUTHORITY

## *Introduction*

Public education has traditionally been considered a responsibility of state and local governments. In the second half of the 19th century, when the idea of free public education became widespread, virtually every state added a provision to its constitution requiring the state to maintain a system of free public schools. Rather than operate the schools themselves, states delegated the task to local school districts. Today approximately 17,000 local education agencies (LEA's) provide roughly half of all government revenues used to support the public schools.[1]

The federal government did not become significantly involved in the financing of the public schools until the passage of the Elementary and Secondary Education Act of 1965 (ESEA).[2] This Act provided financial assistance to states and local school districts for compensatory education, libraries, supplemental educational centers and services, and the strengthening of state departments of education (or state educational agencies, SEA's).[3] With the

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1 1975 NATIONAL EDUCATION ASSOCIATION, ESTIMATES OF SCHOOL STATISTICS 5.

2 Act of April 11, 1965, Pub. L. No. 89-10, 79 Stat. 27.

3 The result of the states' decision to delegate substantial powers to local school districts, and of the federal government's decision in 1965 to provide substantial financial assistance to public schools, is to create a three-tiered system of educational decisionmaking: federal, state, and local. Within these levels, one may identify the following major actors (not including state or federal courts):

- Federal:
  - Legislative:
    - House of Representatives:
      - Committee on Education and Labor
      - Committee on Apropriations
    - Senate:
      - Committee on Labor and Public Welfare
      - Committee on Appropriations
  - Executive:
    - The President
    - Department of Health, Education and Welfare
    - Secretary of Health, Education and Welfare

introduction of ESEA, federal appropriations for elementary and secondary education tripled between fiscal years 1965 and 1966, reaching nearly $2 billion in the latter year.[4] Since 1966, the federal government has supplied between seven and eight percent of the public revenues for elementary and secondary education in the United States,[5] all in the form of categorical grants aimed at specifically defined types of educational activities.[6]

Federal education programs take two forms. Formula grant programs involve the distribution of funds to states on the basis of legislatively prescribed formulae; in some cases, the distribution within states to LEA's is also legislatively prescribed. The Commissioner of Education[7] exercises control over formula grant programs by means of his power to write regulations and guidelines for the programs and through his authority to review and disapprove applications and plans required of the states under the authorizing legislation. However, the Commissioner does not con-

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Education Division:
Assistant Secretary for Education
Office of Education
Commissioner of Education
National Institute of Education
National Center for Educational Statistics
State:
Legislature
Executive:
Governor
State Board of Education
State Commissioner of Education.
State Department of Education
Local:
School Board (Local Educational Agency)
Superintendent of Schools

*See, e.g.*, R. CAMPBELL, L. CUNNINGHAM, & R. MCPHEE, THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS (1965).

4 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE GAP BETWEEN FEDERAL AID AUTHORIZATIONS AND APPROPRIATIONS 15-25 (1970). Total appropriations for ESEA, Impact Aid, and Vocational Education in fiscal year 1966 amounted to $1,961,430,000.

5 NATIONAL EDUCATION ASSOCIATION, *supra* note 1, at 16.

6 For a discussion of the effect of ESEA on the structure of the Office of Education and of federal education aid, *see* S. BAILEY & E. MOSHER, ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW (1968).

7 The Commissioner of Education is the administrative head of the United States Office of Education within the Education Division of the Department of Health, Education and Welfare (HEW). He reports through the Assistant Secretary for Education to the Secretary of Health, Education and Welfare.

trol the basic distribution of funds, nor does he exercise direct supervision over the operation of programs by grant recipients. Project grant programs are operated by the Commissioner on a discretionary basis. Appropriated funds are available to the Commissioner for grants to individual applicants on the basis of competitive applications submitted directly to him. Although states may become involved in some instances, as when LEA's are required to clear applications with their SEA's prior to submission, LEA's and other potential recipients normally deal directly with the Commissioner, who thereby has greater direct impact on both the selection and the operation of assisted educational programs.[8]

In recent years there has been increasing controversy over the proper roles of the three partners in the public school system: the federal government, the states, and the LEA's.[9] States have gradually asserted more control over the operation of local schools, a trend accentuated by the decision of the Supreme Court of Cali-

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8 ESEA title I, the compensatory education program, is the major formula grant in the elementary and secondary education area. The major project grants are Bilingual Education and Emergency School Assistance, a program of aid to school districts in the process of desegregating their educational facilities.

9 The federal government has funded two major studies concerning the financing of the public schools. The first was conducted by the National Educational Finance Project (Gainesville, Florida). The NEFP produced a summary report, a five volume report, and numerous supporting reports. *See*, in particular, NEFP, PLANNING SCHOOL FINANCE PROGRAMS (1972); 4 NEFP, STATUS AND IMPACT OF EDUCATIONAL FINANCE PROGRAMS (1971); 5 NEFP, ALTERNATIVE PROGRAMS FOR FINANCING EDUCATION (1971). The second was conducted by the President's Commission on School Finance appointed by President Nixon. The Commission produced a summary report and numerous supporting reports. *See*, in particular, PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE, AND MONEY: THE NEED FOR EDUCATIONAL REFORM (1972), and the bibliography of supporting studies at 114.

For congressional hearings investigating the issues of responsibility for public education, *see Hearings on S. 1539 and Related Bills Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973) (7 vols.); *Hearings on H.R. 69 and Related Bills Before the General Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. (1973) (3 vols.); *Hearings on H.R. 44 and Related Bills Before the General Subcomm. on Education of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. (1972); *Hearings Before the Senate Select Comm. on Equal Educational Opportunity*, 92d Cong., 1st Sess., pt. 16, Inequality in School Finance (1971). *See also Revenue Sharing: Boom or Bust for Education*, COMPACT, Feb./March, 1973; *Education's Financial Dilemma*, COMPACT, April 1972; NATIONAL CONFERENCE ON SCHOOL FINANCE, SCHOOL FINANCE IN TRANSITION (1973).

For bibliographic references, *see* H. COOK, THE QUESTION OF SCHOOL FINANCE, SELECTED REFERENCES (Library of Congress Congressional Research Service Docs. 72-13 ED (1972), 73-102 ED (1973), 73-197 ED (1973)); D. TOMPKINS, LOCAL PUBLIC SCHOOLS: HOW TO PAY FOR THEM? (1972).

fornia in *Serrano v. Priest*.[10] In that case, the California system of financing elementary and secondary education was challenged on the ground that it made the quality of education a function of the wealth of local school districts, which varied substantially in California (as in all states except Hawaii). The court held that the system would violate the equal protection clause of the California Constitution if the facts alleged were proven at trial. In contrast, the United States Supreme Court, in *Rodriguez v. San Antonio Independent School District*,[11] upheld the Texas school financing system, which closely resembled that of California, against challenge under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Nevertheless, *Serrano* is having an effect both in state courts, where several other state school finance systems[12] have been overturned, and in state legislatures, where numerous proposals for school finance reform have been considered or enacted.[13]

With respect to federal education programs, the nature of state and local educational decisionmaking remains the subject of controversy.[14] In general, federal categorical assistance has been

10 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

11 411 U.S. 1 (1973).

12 *See* Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (1972), *supplemental opinion*, 119 N.J. Super. 40, 289 A.2d 569 (1972), *modified on other grounds*, 62 N.J. 473, 303 A.2d 273 (1973). *See also* Sweetwater County Planning Comm'n v. Hinkle, 491 P.2d 1234 (Wyo. 1971). *Cf.* Northshore School District No. 419 v. Kinnear, 530 P.2d 178 (Wash. 1974); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated*, 390 Mich. 389, 212 N.W.2d 711 (1973). *But see* Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Spano v. Board of Education, 68 Misc. 2d 804, 328 N.Y.S.2d 229 (1972). A lower Connecticut court held the Connecticut school finance system unconstitutional in Horton v. Meskill (Dec. 26, 1974), in N.Y. Times, Dec. 28, 1974, at 1, col. 6. *See generally* Browning, *School Finance Litigation in a Post-Rodriguez Era*, 5 PLANNING AND CHANGING 67 (1974).

13 *See* EDUCATION COMMISSION OF THE STATES, MAJOR CHANGES IN SCHOOL FINANCE: STATEHOUSE SCOREBOARD (May 1974); HOUSE COMMITTEE ON EDUCATION AND LABOR, 93D CONG., 2D SESS., PUBLIC LAW 874 AND STATE EQUALIZATION PLANS: THE PROBLEMS OF THE LEGISLATIVE PROHIBITION OF SECTION 5(d)(2), at 14 (Comm. Print 1974); A. MORLEY, A LEGISLATOR'S GUIDE TO SCHOOL FINANCE (1972); REPORT OF THE NEW YORK STATE COMMISSION ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION (1972) (3 vols.).

14 *See* note 9 *supra*. *See also* Jennings, *Federal General Aid—Likely or Illusory*, 2 J. LAW & ED. 89 (1973); R. REISCHAUER & R. HARTMAN, REFORMING SCHOOL FINANCE 147 (1973); M. KIRST, THE POLITICS OF EDUCATION AT THE LOCAL, STATE AND FEDERAL LEVELS 399, 403 (1970); S. SMILEY, FINANCING PUBLIC ELEMENTARY AND SECONDARY SCHOOLS 132 (Library of Congress Congressional Research Service Doc. 72-79 ED (1972)).

The issue of the proper role of the federal government in the public education

justified by the failure of states and local school districts adequately to meet national educational goals; federal aid has been intended to cause a change in state and local educational priorities and spending patterns.[15] Nevertheless, the Congress has repeatedly expressed its desire that state and local officials retain basic decisionmaking authority;[16] in the words of the United States Supreme Court, there has been "a pronounced aversion in Congress to 'federalization' of local educational decisions . . . ."[17] There exists therefore, a tension between federal priority-setting and state and local educational decisionmaking.

Advocates of a restructuring of the federal commitment to elementary and secondary education have adopted two lines of argument. One group, while desiring to retain existing categorical programs so long as there remains a need to assure that states and LEA's meet pressing national educational goals, would supplement existing categorical grants with general, unrestricted aid to public education. Responding to inadequate state and local revenue bases and the increasing financial strain on state and local

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system recurs frequently in the annual federal budget process. *See, e.g.*, THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1976, at 120; THE BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1975, at 108; SPECIAL ANALYSES OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1973, at 117; C. SCHULTZE, E. FRIED, A. RIVLIN, & N. TEETERS, SETTING NATIONAL PRIORITIES—THE 1973 BUDGET 318 (1972); NATIONAL URBAN COALITION, COUNTERBUDGET 86 (R. Benson & H. Wolman, eds., 1971).

15 *See, e.g.*, Kirst, *Revisions in Federal Compensatory Education: A Strategic View*, in *Hearings on H.R. 69 and Related Bills Before the General Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 1st Sess., vol. 1, at 466 (1973); T. SANFORD, IS EDUCATION THE BUSINESS OF THE FEDERAL GOVERNMENT? 85 (1964).

16 *See* GEPA § 422, 20 U.S.C. § 1232a (1970):

> No provision of the Act of September 30, 1950, Public Law 874, Eighty-first Congress; the National Defense Education Act of 1958; the Act of September 23, 1950, Public Law 815, Eighty-first Congress; the Higher Education Facilities Act of 1963; the Elementary and Secondary Education Act of 1965; the Higher Education Act of 1965; the International Education Act of 1966; or the Vocational Education Act of 1963 shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of insruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

17 Wheeler v. Barrera, 417 U.S. 402, 416 (1974).

taxpayers (especially local property taxpayers), this group would have the federal government pay some share of the total cost of public elementary and secondary education. Since the purpose of this aid would be fiscal assistance rather than the meeting of national educational priorities, the federal government would supply these general aid funds with few or no restrictions as to their use. Numerous bills providing such general federal aid have been introduced in recent Congresses.[18] During the 92d Congress, the General Education Subcommittee of the House Committee on Education and Labor conducted extensive hearings on this subject.[19]

The second group desires to restructure the categorical grant system itself. This group cites the extensive red tape and bureaucratic overhead which have developed under the existing categorical system, as well as the evolution of federal priority-setting into federal decisionmaking, to the detriment of state and local authorities.[20] The approach advocated in response to these concerns is a state block grant mechanism.[21] While the block grants would go to states for federally-defined purposes, and would not therefore constitute true general aid, the purposes would be defined less narrowly than under existing law, thus leaving the recipient state agencies more discretion to set priorities within the general outlines fixed by federal law. The emphasis on increased state discretion would in turn lessen the links between the federal govern-

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18 For a description of general aid bills introduced in the 92d Congress, *see* SMILEY, REVIEW OF SELECTED BILLS RELATING TO PUBLIC SCHOOL FINANCE PENDING BEFORE THE 92D CONGRESS (Library of Congress Congressional Research Service Doc 72-157 ED (1972)).

19 *Hearings on H.R. 981 and Related Bills Before the Gen. Subcomm. on Education of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. (1972).

20 *See, e.g.*, 120 CONG. REC. S8313 (daily ed. May 16, 1974) (statements of Senator Buckley, McClure, & Curtis); *Hearings on S. 1539 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 15 (statement of Hon. Casper Weinberger, Apr. 16, 1973); *Hearings on H.R. 69 Before the General Subcomm. on Education of the House Comm. on Education and Labor* 93d Cong., 1st Sess. 2957 (letter from Hon. John Ottina, June 26, 1973).

21 As early as 1967, Congressman Quie of Minnesota proposed the consolidation of ESEA titles I (compensatory education), II (school libraries), III (supplementary centers and services), V (strengthening state departments of education), and VI (education of the handicapped) into a single block grant to be made available to the states on a formula basis. Funds would have been allotted to states according to a single formula which took into account school-age population and state average income per school-age child. *See* H.R. 8983, 90th Cong., 1st Sess. (1967).

ment and the local agencies which actually administer most educational services. President Nixon proposed such a block grant approach in his Education Revenue Sharing Act.[22]

The impact of *Serrano* on state educational finance systems has added a new element to proposals for federal education aid reform: it is now suggested that the federal government should adopt equalization of the financial resources of school districts (within and perhaps also among states) as a national educational priority.[23] This priority would be served by making a substantial portion of federal aid contingent upon the adoption by states of satisfactory school finance systems, or by providing special incentives to states to induce school finance reform. General school aid bills, with their significant increase of federal school aid, have been particularly attractive vehicles for federal incentives to promote state school finance reform.[24] An attempt by the federal government to induce such reform, and in particular to specify what would constitute "acceptable" state finance programs, would represent a major incursion into an area long considered the exclusive domain of state governments.

The Elementary and Secondary Education Act, along with most other federal elementary and secondary education legislation, expired on June 30, 1973,[25] subject to an automatic one-year extension provided by the General Education Provisions Act (GEPA).[26] During the consideration of bills to extend the programs, Congress was presented with numerous proposals for a restructuring of the categorical grant system.[27] In particular, President Nixon

22 WEEKLY COMP. PRES. DOC. 598 (Apr. 10, 1971). The President's proposals were introduced in the Congress as H.R. 7796 (92d Cong., 1st Sess. 1971)) and S. 1669 (92d Cong., 1st Sess. (1971)). Hearings were held before the Senate Education Subcommittee for three days in October and November, 1971, and before the House Education and Labor Committee for a single day, December 9, 1971. No further action was taken by the 92d Congress.

23 *See, e.g.*, Jennings, *Federal General Aid—Likely or Illusory?*, 2 J. LAW & ED. 104 (1973); 5 NATIONAL EDUCATIONAL FINANCE PROJECT, ALTERNATIVE PROGRAMS FOR FINANCING EDUCATION 211 (1971); S. 2414, 93d Cong., 1st Sess. (the Elementary and Secondary Education Assistance Act of 1972).

24 *See, e.g.*, S. 1539, 93d Cong., 1st Sess. (1973), S. 3779, 92d Cong., 2d Sess. (1972), H.R. 15736, 92d Cong., 2d Sess. (1972).

25 The ESEA Amendments of 1970, Pub. L. No. 230, 91st Cong., 2d Sess., 84 Stat. 121, signed into law on April 13, 1970, revised and extended most elementary and secondary education programs through June 30, 1973.

26 GEPA § 404(c), 20 U.S.C. § 1224(c) (1970).

27 *See, e.g.*, H.R. 16 (Mr. Perkins), H.R. 69 (Mr. Perkins), H.R. 522 (Mr. Wm.

renewed his education revenue sharing proposals in the Better Schools Act.[28] However, Congress eventually chose not to make any major changes in its categorical grant approach. Public Law 93-380,[29] signed into law by President Ford on August 21, 1974, extended most of the individual categorical programs through June 30, 1978. Although amendments were made to the authorizing legislation, each of the major education programs survived, including the compensatory education program of ESEA title I,[30] the Impact Aid program,[31] Bilingual Education,[32] and Emergency School Assistance.[33]

The refusal of the Congress to enact major reform of the categorical grant system does not mean that Congress ignored entirely the question of the proper distribution of decisionmaking authority among federal, state, and local authorities. Although the steps taken were small, the provisions of Public Law 93-380, title IV,[34] regarding the consolidation of certain programs into two state grants, and of title V, concerning administrative and judicial review of actions taken pursuant to federal education programs,[35] reveal a sensitivity to issues of control and a willingness to re-evaluate the proper role of the federal government in educational decisionmaking. This Comment will explore the provisions of titles IV and V of Public Law 93-380 which bear upon the allocation of decisionmaking authority among the three levels of government. Its purpose is to analyze what Congress has done and, in doing so, to shed light on what directions Congress may take in the future. Its major conclusion is that, to the extent the Congress is willing to release control over federal education monies, it prefers to transfer that control not to the states, as suggested by President Nixon's proposals, but to the LEA's, which have the actual responsibility of operating educational programs.

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Ford), H.R. 3085 (Mr. Dellums), H.R. 5160 (Mr. Obey), H.R. 5163 (Mr. Quie), H.R. 5823 (Mr. Bell, by request), S. 1539 (Mr. Pell), S. 1900 (Mr. Javits), and S. 2414 (Mr. Mondale), 93d Cong., 1st Sess. (1973). *See also* EDUCATION COMMISSION OF THE STATES, FEDERAL OPTIONS IN EDUCATION FINANCE REFORM (Report No. 54, June 1974).

28 H.R. 5823, 93d Cong., 1st Sess. (1973), & S. 1319, 93d Cong., 1st Sess. (1973).

29 88 Stat. 484 (1974).

30 20 U.S.C. §§ 241a-m (1970).

31 *Id.* §§ 236-41, 631-47 (1970).

32 *Id.* § 880b (1970).

33 *Id.* §§ 1601-19 (1970).

34 88 Stat. 535 (1974).

35 88 Stat. 556, 566, 569-71 (1974).

## I. Legislative Background of Consolidation

Faced with the impending expiration of virtually all elementary and secondary legislation, the 93d Congress quickly began consideration of proposals to renew the authorizations. The initial proposals revealed substantial differences in approach between the President and the Congress. President Nixon renewed his revenue sharing approach in the Better Schools Act.[36] A bill (H.R. 69) extending most elementary and secondary education programs through June 30, 1978, and containing no provisions for consolidating education grants, was introduced on the opening day of the 93d Congress by Mr. Perkins, the Chairman of the House Education and Labor Committee.[37] During the 34 days of hearings on H.R. 69 and related bills, conducted between January 31 and June 26, 1973,[38] virtually no mention of consolidation was made until April 16, when Administration witnesses appeared to testify on the Better Schools Act.[39] Negotiations during the summer of 1973 led to some accommodation between Mr. Perkins and those members of the committee favoring some grant consolidation.[40] H.R. 69, as reported by the General Education Subcommittee, contained a limited consolidation involving seven categorical programs.[41] The full Education and Labor Committee amended these consolidation provisions before reporting the bill to the House on February 21, 1974.[42]

Mr. Pell, the Chairman of the Senate Education Subcommittee, introduced his own bill (S. 1539) to amend and extend elementary and secondary education programs.[43] As introduced, S. 1539 contained no consolidation of state grant programs.[44] However, it did

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36 H.R. 5823, 93d Cong., 1st Sess. (1973), & S. 1319, 93d Cong., 1st Sess. (1973).

37 H.R. 69, 93d Cong., 1st Sess. (1973).

38 *Hearings on H.R. 69 and Related Bills Before the General Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. (1973) (3 vols.).

39 *Id.* vol. 2, at 2725.

40 Education Daily, July 20, 1973, at 3; *id.* Aug. 3, 1973, at 1; *id.* Aug. 6, 1973, at 1; *id.* Sept. 20, 1973, at 1; *id.* Oct. 5, 1973, at 4.

41 House Committee on Education and Labor, 93d Cong., 1st Sess., Short Summary of H.R. 69 as Reported by the General Subcommittee on Education (Comm. Print 1973).

42 H.R. Rep. No. 805, 93d Cong., 2d Sess. 25, 139 (1974).

43 S. 1539, 93d Cong., 1st Sess. (1973).

44 In his remarks on the Senate floor upon introducing S. 1539, Senator Pell ex-

contain a new Special Projects Act, into which it folded certain of the Commissioner's discretionary project grant programs.[45] Hearings were held before the subcommittee between April 16 and October 31, 1973.[46] The Senate Labor and Public Welfare Committee reported S. 1539, with amendments, on March 29, 1974.[47] The reported bill contained two consolidations.[48] The first involved the consolidation of certain state formula grants into a single block grant;[49] although the specific categorical grants involved differed from the House consolidation, the scope of the consolidation was similar. The second involved the grouping of certain of the Commissioner's discretionary grant programs into the Special Projects Act.[50]

The House passed H.R. 69 on March 27, 1974, without modification of the Education and Labor Committee's consolidation proposals.[51] The Senate passed H.R. 69, amended by the substitution of the text of S. 1539, on May 20, 1974.[52] During the debate on S. 1539, the Senate rejected an amendment by Mr. Buckley

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pressed discontent with both the Administration's handling of its proposals and with the substance of state formula grant consolidation:

> As chairman of the Subcommittee on Education, it has been my custom to delay proceedings with the legislative program until the President's proposals have been laid before the Congress. . . .
>
> When I first decided to defer to the President on this initiative, I had no idea the President would delay until the middle of March in order to submit a rehash of a proposal not adopted during the 92d Congress; nor did I realize that there would be little, if any, consultation with the Congress on this matter. . . .
>
> I will say that there will have to be some very convincing evidence placed before the subcommittee before I will give up the theory that categorical aid is a necessary component of the Federal education programs.

119 CONG. REC. S7071, S7073 (daily ed. Apr. 11, 1973).

45 S. 1539, 93d Cong., 1st Sess. § 701(c)(1)(A), at 88 (1973).

46 *Hearings on S. 1539 and Related Bills Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973) (7 vols.).

47 S. REP. No. 763, 93d Cong., 2d Sess. (1974).

48 The Senate bill also contained provisions simplifying the procedures by which states apply for federal education grants. These administrative provisions are referred to by the Senate Committee Report as a third "consolidation." For a discussion of this administrative "consolidation," see text at note 168 *infra*.

49 ESEA tit. VI, as added by tit. IV, § 402, S. 1539, as reported by the Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess. (1974). *See* S. REP. No. 763, 93d Cong., 2d Sess. 64, 354 (1974).

50 Special Projects Act, as proposed by tit. IV, § 403, S. 1539, as reported by the Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess. (1974). *See* S. REP. No. 763, 93d Cong., 2d Sess. 68, 525 (1974).

51 120 CONG. REC. H2270 (daily ed. Mar. 27, 1974).

52 120 CONG. REC. S8611 (daily ed. May 20, 1974).

which would have substituted provisions similar to the Better Schools Act for the committee's state grant consolidation provisions.[53]

The Conference Committee combined the approaches of the House and Senate, accepting the House consolidation of state formula grant programs and the Senate consolidation of Commissioner's discretionary programs into the Special Projects Act.[54] In that form the bill was enacted into law.

## II. The Selection of Programs for Consolidation

### A. *The Better Schools Act*

The Better Schools Act[55] proposed to consolidate 29 separate elementary and secondary education programs, comprising 42 separate authorizations, into a single program of grants to states for elementary and secondary education. Section 20 of the bill proposed the repeal of virtually every existing authorization involving the distribution of elementary and secondary education funds to states according to a statutory formula. The breadth of the consolidation can be seen by a listing of the Acts involved: 1) the Elementary and Secondary Education Act, titles I, II, III, and V;[56] 2) Public Laws 81-815 and 81-874, the Impact Aid laws;[57] 3) the National Defense Education Act, title III;[58] 4) the Vocational Education Act[59] and the Smith-Hughes Act;[60] 5) the Education Professions Development Act, Part B-2[61] (the state grant program for attracting and qualifying teachers to meet critical teacher shortages); 6) the Education of the Handicapped Act, Part B[62] (the

53 120 Cong. Rec. S7027 (daily ed. May 14, 1974), 120 Cong. Rec. S8304 (daily ed. May 16, 1974).
54 S. Rep. No. 1026, 93d Cong., 2d Sess. 57 (1974).
55 H.R. 5823, 93d Cong., 1st Sess. (1973) & S. 1319, 93d Cong., 1st Sess. (1973).
56 20 U.S.C. §§ 241a-m, 821-47a, 861-69a (1970).
57 *Id.* §§ 631-47 & 236-41 (1970).
58 *Id.* §§ 441-44, 451-55 (1970).
59 *Id.* §§ 1241-48, 1261-64, 1281-84, 1301-05, 1321-23, 1341, 1351-55, 1371-74, 1391 (1970).
60 *Id.* §§ 11-15, 16, 18-28 (1970).
61 *Id.* §§ 1108-10 (1970).
62 *Id.* §§ 1411-13 (1970).

state grant program); 7) the Adult Education Act, § 304[63] (the state grant program); and 8) three of the four state grant programs authorized by the Child Nutrition Act[64] and the National School Lunch Act.[65]

In place of the repealed authorities, the Better Schools Act authorized a single appropriation for grants to states for elementary and secondary education. Funds appropriated were to be allotted among the states in several steps: first, each state would be allotted an amount based upon its population of Impact Aid "A" children (children who live on federal property);[66] second, each state would be allotted an amount based upon its population of children from families with incomes below the poverty level (children currently eligible for compensatory education funds under ESEA title I); third, remaining funds would be apportioned among the states on the basis of their shares of the nation's children aged 5-17, inclusive. Funds received by a state as a result of the presence of Impact Aid "A" children would be passed through to LEA's for the education of such children. Funds received as a result of the presence of low-income children would be distributed to LEA's according to standards laid out in the Act, and would be used for compensatory education. Funds received by states on the basis of population aged 5-17 would be available for three types of activity: 16 percent of such funds for education of the handicapped, 43 percent for vocational education, and 41 percent for supporting educational services.

In essence, the Better Schools Act consolidated all state formula grant programs into a series of five categorical grants linked by a single formula for distribution of appropriated funds. This linkage had several important features. First, it assured that certain programs would be funded before others. The Impact Aid and compensatory education factors each determined exact dollar allocations for each state; the formula required that no funds be allocated for compensatory education until Impact Aid was fully

63 *Id.* § 1203 (1970).
64 42 U.S.C. §§ 1771-85 (1970).
65 *Id.* §§ 1751-61 (1970).
66 After allotting funds for Impact Aid, the Secretary of Health, Education and Welfare could reserve funds for the outlying territories. Here and throughout, such set-aside provisions for the outlying territories are not considered.

funded, and no funds go to the residual categories until both Impact Aid and compensatory education were fully funded.[67] Second, assuming funds remained for the residual categories, the allocation among the three was fixed, subject to a provision that any state could reallocate up to 30 percent of its handicapped, vocational education, or supporting services funds to either of the other residual categories or to compensatory education.[68]

The effect of these provisions on the control of education would have been substantial. At the state level, the state's power over the use of federal education funds was clearly enhanced by the consolidation of some 30 programs into five, and by the ability at least partially to reallocate funds after they had been allocated by a statutory formula. At the federal level, there was a corresponding decrease in the degree of control exercised collectively by the Congress and the Office of Education. There would also have been a shift of authority within the federal government. Currently, the executive and the appropriations committees of the House and the Senate have a major input, during the annual budget and appropriations process, into the selection of funding levels for each of the categorical programs. Under the Better Schools Act, the relative funding levels would already be set out in the authorizing legislation; the annual appropriations process would be limited to setting a single, overall appropriation for all elementary and secondary education grants. Except to the extent that Congress was willing to include modifications of the statutory formula in an appropriations act, attempts to change the relative priorities accorded the five component programs would have to be channelled through the authorizing committees responsible for education legislation.

Within the five categories established, the Better Schools Act effected substantial changes in the level of program detail specified at the federal level. First, it required that 75 percent of compensatory education funds be spent on basic reading and mathematics instruction, a requirement not found in title I. By contrast, in the areas of education of the handicapped, vocational education, and supporting services, it substantially freed the states

67 S. 1319, 93d Cong., 1st Sess. §§ 4(a), (c), (d) (1973).
68 *Id.* §§ 4, 7.

from the constraints imposed by the Education of the Handicapped Act, the Vocational Education Act, and the relevant titles of ESEA.[69] In place of the detailed provisions of those acts, the Better Schools Act required only that funds be used "for programs and projects at the pre-school or any other educational level designed to meet the special educational needs of handicapped children,"[70] "for vocational education activities,"[71] and for "supporting materials and services,"[72] respectively.

The Better Schools Act did require that each state develop and publish a plan for the use and distribution of federal funds supplied under the Act; however, in a major departure from current practice,[73] the Act did not require that this plan be approved by the Commissioner of Education. The elimination of the approval requirement reduced the Commissioner's control over the use of federal funds.

### B. *House Consideration*

While neither the House Education and Labor Committee nor the Senate Labor and Public Welfare Committee was willing to accept the President's proposals for the consolidation of all state formula grants, both eventually reported bills which contained limited grant consolidation. The major programs aimed directly

69 For example, funds for the education of the handicapped are currently subject to two kinds of constraints. First, the basic authorization of part B of the Education of the Handicapped Act requires states to adopt various standards relating to the size and scope of assisted programs, the evaluation of handicapped children's needs and the success of assisted programs in meeting them, the dissemination of project results, and other matters. *See* Education of the Handicapped Act, § 613, 20 U.S.C. § 1413 (1970). Second, funds for the education of the handicapped are available under authorizations other than the Education of the Handicapped; such funds must be used for the categorical purposes of the authorizing legislation. One important source of handicapped funds is title I of ESEA. *See* ESEA tit. I, § 103(a)(5), 20 U.S.C. § 241c(a)(5) (1970). Another source is the 15 percent set-aside for handicapped children under ESEA title III. *See* ESEA tit. III, § 305(b)(8), 20 U.S.C. § 844a(b)(8) (1970).

70 S. 1319, 93d Cong., 1st Sess. § 4(d)(2)(A) (1973).

71 *Id.* § 4(d)(2)(B).

72 *Id.* § 4(d)(2)(C).

73 See discussion of state plan requirements, text at notes 166-74 *infra*. For the statutory sections governing state plans, *see* ESEA § 142, 20 U.S.C. § 241f (1970); ESEA § 305, 20 U.S.C. § 844a (1970); ESEA 504, 20 U.S.C. § 864 (1970); ESEA § 533, 20 U.S.C. § 867 (1970); NDEA § 303, 20 U.S.C. § 443 (1970); Education of the Handicapped Act, § 613, 20 U.S.C. § 1413 (1970); Vocational Education Act, §123, 20 U.S.C. § 1263 (1970).

at elementary and secondary education, title I of ESEA and the Impact Aid program (which in fiscal year 1974 accounted for appropriations of $1.7 billion and $593 million)[74] were deemed too important for consolidation.[75] Similarly, the vocational education, education of the handicapped, and adult education programs were considered sufficiently distinct in purpose and in beneficiary groups to exclude consolidation with the basic elementary and secondary grants.[76] This left a number of relatively small programs aimed at elementary and secondary education which Members considered appropriate for consolidation. These included several state formula grant programs authorized by various titles of ESEA,[77] the program for strengthening instruction in critical subjects (equipment and minor remodeling) authorized by title III of NDEA, and several discretionary programs operated by the Commissioner.[78] Altogether, appropriations for these programs in fiscal year 1974 amounted to $318 million.[79]

The House Education and Labor Committee combined programs on the basis of the governmental level to be charged with the major role in their operation.[80] The committee grouped the

74 120 CONG. REC. H11270 (daily ed. Dec. 4, 1974).

75 When the Senate considered the Buckley Amendment, which when introduced closely resembled the Better Schools Act, those provisions of the Better Schools Act involving compensatory education and Impact Aid had been removed. *See* 120 CONG. REC. S8304 (daily ed. May 16, 1974).

76 Bilingual education (ESEA tit. VII, 20 U.S.C. § 880b (1970) and Emergency School Assistance (Pub. L. No. 318, 92d Cong., 2d Sess., tit. VII, 20 U.S.C. §§ 1601-19 (1970)) were apparently never considered, except that Representative William D. Ford of Michigan did propose inclusion of Emergency School Assistance during the House Committee consideration of H.R. 69. *See* Education Daily, July 20, 1973, at 3; *id.* Aug. 3, 1973, at 1.

77 Specifically, the school libraries program (title II), the program of educational innovation, supplementary centers and services, guidance, counseling and testing (title III), and the program for strengthening state departments of education (title V).

78 The discretionary programs considered included the discretionary portion of ESEA § 306, 29 U.S.C. § 844b (1970); the discretionary portion of ESEA title V (ESEA tit. V, part C, 20 U.S.C. § 867 (1970)); the discretionary portion of NDEA title III (NDEA § 305, 20 U.S.C. § 455 (1970)); the drop-out prevention program (ESEA § 807, 20 U.S.C. § 887 (1970)); the school nutrition and health program (ESEA § 808, 20 U.S.C. § 887a (1970)); the correction education program (ESEA § 809, 20 U.S.C. § 887b (1970)); the consumers' education program (ESEA § 811, 20 U.S.C. § 887d (1970)); the Environmental Education Act program (20 U.S.C. §§ 1531-36 (1970)); and the Drug Abuse Education Act program (21 U.S.C. §§ 1001-07 (1970)).

79 120 CONG. REC. H11270 (daily ed. Dec. 4, 1974).

80 H.R. REP. No. 805, 93d Cong., 2d Sess. 139 (1974).

innovation and supplementary services portions of ESEA title III, the program of aid to state and local educational agencies of ESEA title V, and the discretionary drop-out prevention and school nutrition programs of ESEA title VIII under the title of Educational Innovation and Support. Funds for Innovation and Support were allocated on a formula basis to the states, and the states were to operate the program as a state-level discretionary grant program.[81]

Under the title of Library and Learning Resources, the committee grouped the library program of ESEA title II, the guidance, counseling and testing portions of ESEA title III, and the equipment and minor remodeling program of NDEA title III. Funds for Libraries and Learning Resources were provided to the states on a formula basis; states were required to distribute at least 95 percent of the funds to their LEA's and give the LEA's complete discretion over the use of funds received.[82]

The inclusion of certain of the Commissioner's discretionary funds in the consolidated program, including the discretionary portions of ESEA titles III and V, and NDEA title III, strengthened the role of the states vis-à-vis the federal government. On the other hand, the requirement that at least 95 percent of library funds be passed on directly to LEA's represented a shift of effective power from the states to the local authorities.

### C. *Senate Consideration*

The Senate Labor and Public Welfare Committee, like the President, focused on the state formula grant programs. Subject to considerable hold harmless constraints,[83] the Senate Committee

81 ESEA tit. VIII, part C, as added by H.R. 69, as reported by the House Committee on Education and Labor, 93d Cong., 2d Sess. (1974). *See* H.R. REP. No. 805, 93d Cong., 2d Sess. 148 (1974).

82 ESEA tit. VIII, part B, as added by H.R. 69, as reported by the House Committee on Education and Labor, 93d Cong., 2d Sess. (1974). *See* H.R. REP. No. 805, 93d Cong., 2d Sess. 142, 146 (1974).

83 Hold harmless provisions suspend operation of amendments to an existing program to the extent necessary to assure that grant recipients receive the same amount of funds for the same purposes as they did in some year prior to the amendments. The Senate's hold harmless provisions in this case guaranteed each state the amount received in fiscal year 1972 for ESEA title II and NDEA title III, plus the amount received in fiscal year 1969 for ESEA title III (Innovation) and NDEA title V (Guidance, Counselling, and Testing). *See* S. REP. No. 763, 93d Cong., 2d Sess. 64, 354 (1974).

grouped into a single formula grant title II of ESEA, the formula grant portion of title III of ESEA, title III of NDEA, and the formula grant program for attracting and qualifying teachers to meet critical teacher shortages authorized by the Education Professions Development Act, part B-2.[84] Considerable restrictions were placed upon the usage of these funds, in order to assure that under the consolidated program the same amounts would be spent for the purposes of titles II and III of ESEA and title III of NDEA as were spent for those same purposes under the individual categorical programs before consolidation.[85] In addition, the consolidated program required that the states use the funds solely for grants to LEA's, although the method and distribution of those grants were not specified.[86] To supplement the program, the Senate consolidated ESEA title V and the administrative expenses set-asides provided by other titles into a single grant to states for strengthening and developing their SEA's and meeting the administrative expenses associated with federal grants.[87]

The practical effects of the Senate consolidation were unclear. In theory, the Senate proposals were a block grant; states were to have complete discretion to allocate funds among the general types of permitted activities, subject only to the requirement that the funds be distributed to LEA's for actual operation of programs. As a practical matter, however, appropriations appeared unlikely to exceed current levels for some time, and the states would consequently have been constrained by the hold harmless provisions to operate the consolidated program in a manner little different from the practice under the superseded categorical grants. For the foreseeable future, then, the effect of Senate consolidation would have been minimal.

## III. The Effect of Consolidation upon the Horizontal Distribution of Power

The distribution of decisionmaking power between the Congress and the Office of Education — the federal horizontal dis-

84 S. Rep. No. 763, 93d Cong., 2d Sess. 354 (1974).
85 *See id.* at 64, 356.
86 *Id.* at 356.
87 *Id.* at 66, 355.

tribution of power — was greatly affected by title IV of Public Law 93-380.[88] The major repercussions arise in the minimum appropriations provisions of the state grant consolidation and in the Special Projects Act.

### A. *The Appropriations Problem*

In recent years, there has been recurring conflict between the Congress and the Administration over appropriations for education. President Nixon, who opposed increased federal spending for education programs, four times vetoed bills making appropriations for the Office of Education.[89] In the last year involved, fiscal year 1973, the Departments of Labor and Health, Education and Welfare were forced to operate throughout the fiscal year on the basis of continuing resolutions.

This antagonism over educational program funding was exacerbated by the budget proposed for the Better Schools Act. According to the President's Budget for fiscal year 1974, the 1974 request for the Better Schools Act exceeded the fiscal year 1973 request for consolidated programs by $6 million.[90] However, this calculation did not take into account a number of programs terminated by the Better Schools Act, notably the library resources program of ESEA title II and the Impact Aid program for children whose parents work on federal property ("B" children). No appropriations were requested for these activities. Including these items in the comparison, the fiscal year 1974 appropriations request was

88 Other provisions of Public Law 93-380, beyond the scope of this analysis, bear significantly upon the horizontal distribution of power within the federal government. In particular, many of the amendments to the General Education Provisions Act contained in title V of Public Law 93-380 affect the relationship of the Congress, the Commissioner, and the Office of Education.

89 President Nixon vetoed H.R. 13111 (91st Cong., 1st Sess., 1969), the first Labor-HEW appropriations bill for fiscal year 1970, on January 26, 1970. The veto was sustained by the House. President Nixon subsequently vetoed H.R. 16916 (91st Cong., 2d Sess., 1970), the Office of Education appropriations bill for fiscal year 1971, on August 11, 1970. Both houses of Congress voted to override the veto. President Nixon later vetoed H.R. 15417 (92d Cong., 2d Sess., 1972), the first Labor-HEW appropriations bill for fiscal year 1973. The veto was sustained by the House on August 16, 1972. The President thereafter pocket-vetoed H.R. 16654 (92d Cong., 2d Sess., 1972), the second Labor-HEW appropriations bill for fiscal year 1973, on October 27, 1972.

90 6 U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, JUSTIFICATIONS OF APPROPRIATIONS ESTIMATES FOR COMMITTEE ON APPROPRIATIONS, FISCAL YEAR 1974, EDUCATION DIVISION 1-45.

$269 million below the fiscal year 1973 budget request and $489 million below the amount actually appropriated in fiscal year 1972.[91]

Apprehension that the Administration might again attempt to use consolidation for budgetcutting led both the House and the Senate to make their consolidations depend on adequate funding.[92] Although the Senate bill was by far the more complex in this regard, both bills essentially provided that consolidation would not take effect unless the appropriation for the consolidated program equalled the appropriations in a given base year for the programs included in the consolidation.[93] The Conference Committee, adopting the House provisions, provided that neither the Library and Learning Resources Consolidation nor the Innovation and Support Consolidation should take effect in the first year of proposed operation unless the appropriation for the consolidated program is at least equal to the appropriations for constituent programs in the preceding fiscal year or in fiscal year 1974, whichever is higher.[94] In subsequent years, the consolidation would continue only if appropriations are at least equal to those of the preceding fiscal year.

The first test of the minimum funding conditions occurred in the Senate consideration of H.R. 16900, a bill making supplemental appropriations for fiscal year 1975.[95] Ironically, it was not the Administration which sought reduced funding. In compliance with Public Law 93-380, the Administration requested

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91 *Id.*

92 *See* statement of Senator Pell, 120 CONG. REC. S7442 (daily ed. May 8, 1974): "Bitter experience has taught us that when this administration talks about consolidation, it is really talking about cutting out programs and cutting services to people." *See also* H.R. REP. No. 805, 93d Cong., 2d Sess. 26 (1974): "Consolidation of programs must not be used to retrench the Federal commitment to education. If the aggregate amount of appropriations for the consolidations is not the same, then the consolidations cannot be effected." *See also* S. REP. No. 763, 93d Cong., 2d Sess. 68 (1974): "The Committee does not intend that Title VI be utilized as a budget-cutting mechanism. For this reason, the bill provides that the title will not be effective in any fiscal year for which the aggregate appropriated for Title VI does not exceed $307,302,813."

93 The House provisions appear in ESEA § 801, as proposed by title II of H.R. 69 (as passed by the House). The Senate provisions appear in ESEA § 602, as proposed by title IV of H.R. 69 (as passed by the Senate).

94 ESEA tit. IV, § 401, as amended by Pub. L. No. 380, 93d Cong., 2d Sess. (1974), 20 U.S.C.A. § 1801 (Supp. 1975).

95 H.R. 16900, 93d Cong., 2d Sess. (1974).

$137,330,000 for Libraries and Learning Resources and $172,888,000 for Innovation and Support for obligation in 1975-76, the minimum required to effect the two consolidations.[96] The Senate Appropriations Committee recommended only $152,888,000 for Innovation and Support,[97] and recommended language overriding the minimum funding conditions of Public Law 93-380, thus still permitting consolidation. An amendment by Mr. Pell to delete the language overriding the minimum funding condition was accepted by the Senate.[98] The Conference Committee restored the $20 million deleted by the Senate, and the Conference Report,[99] accepted by the House on December 4, 1974,[100] and by the Senate on December 9, 1974,[101] contained sufficient funds to permit both consolidations to become effective in the 1975-76 school year.

The consolidations are scheduled to take effect in 1975-76. However, the minimum funding requirement raises questions about the permanency of consolidation. The constituent programs remain in the law,[102] and any reduction in funding will vitiate consolidation and restore the individual categorical grants. To the extent states fear future federal budget-cutting and wish to prevent dislocations in operating programs, they may continue to fund programs in accordance with the relative priorities of the consolidated categorical authorizations rather than exercising their own judgment.

### B. *The Special Projects Act*

Prior to the enactment of Public Law 93-380, the Cooperative Research Act[103] authorized the appropriation of funds to the Commissioner of Education to allow him to make grants and contracts in support of educational research, including the training of educational research staff and, under certain circumstances, the con-

96 *Hearings on H.R. 16900 Before Subcomm's. of the House Comm. on Appropriations,* 93d Cong., 2d Sess. 280 (1974). *See also* 120 CONG. REC. H1270 (daily ed. Dec. 4, 1974).

97 S. REP. No. 1255, 93d Cong., 2d Sess. 20 (1974).

98 120 CONG. REC. S18915 (daily ed. Oct. 10, 1974).

99 120 CONG. REC. H11156 (daily ed. Nov. 26, 1974).

100 120 CONG. REC. H11274 (daily ed. Dec. 4, 1974).

101 120 CONG. REC. S20865 (daily ed. Dec. 9, 1974).

102 S. REP. No. 1026, 93d Cong., 2d Sess. 20-22, 32, 113-14 (1974).

103 20 U.S.C. §§ 331-32b (1970).

struction of facilities needed for research and related programs. Section 402 of Public Law 93-380[104] repeals the Cooperative Research Act and replaces it with the Special Projects Act.

The Special Projects Act originated in S. 1539, introduced by Senator Pell, and was incorporated in the versions of that bill passed by the Labor and Public Welfare Committee and the full Senate. Section 403 of the Senate version of H.R. 69 repealed not only the Cooperative Research Act but also the 15 percent Commissioner's set-aside of ESEA title III,[105] the discretionary programs of ESEA title VIII (drop-out prevention,[106] school nutrition,[107] correction education,[108] and consumers' education),[109] and the discretionary programs authorized by the Education Professions Development Act.[110] Section 402 of the bill as enacted, however, repeals only two programs in addition to the Cooperative Research Act; the correction education program and the Commissioner's set-aside in ESEA title III. The drop-out prevention and school nutrition programs were instead included in the Innovation and Support consolidation, thereby shifting control over these programs from the federal level to the states. No other Commissioner's discretionary programs were affected.

The purposes for which funds appropriated under the Special Projects Act may be used are broadly defined. Section 2 of the Act[111] authorizes the Commissioner to carry out special projects 1) to experiment with new educational and administrative methods, techniques, and practices; 2) to meet special or unique educational needs or problems; and 3) to place special emphasis on national education priorities. Section 3 of the Act[112] authorizes the Commissioner to contract with public and private agencies, and with individuals in order to carry out such projects. The Senate Report explains that the new provisions intentionally broaden the Commissioner's discretion in order to reduce the incentive for the

104 88 Stat. 544 (1974).
105 ESEA §§ 305(d), 306, 307(c), 20 U.S.C. §§ 844a(d), 844b, 845(c) (1970).
106 ESEA § 807, 20 U.S.C. § 887 (1970).
107 ESEA § 808, 20 U.S.C. § 887a (1970).
108 ESEA § 809, 20 U.S.C. § 887b (1970).
109 ESEA § 811, 20 U.S.C. § 887d (Supp. III 1973).
110 EPDA parts C-F, 20 U.S.C. §§ 1111-19 (1970).
111 20 U.S.C.A. § 1851 (Supp. 1975).
112 20 U.S.C.A. § 1852 (Supp. 1975).

Commissioner to manipulate existing programs to implement his own ideas.[113] Such actions on the part of the Commisisoner, according to the report, "inevitably lead to the Executive-Legislative confrontations."[114]

The Congress' desire to allow the Commissioner of Education greater flexibility in matching his discretionary monies with his own set of program priorities by no means represents such a major reallocation of authority as the language of the Senate Report might suggest. First, the programs melded into the Special Projects Act represent only a small portion of the Commissioner's discretionary authorities. The major discretionary programs directly concerned with elementary and secondary education, bilingual education,[115] and emergency school assistance[116] are not affected. Neither are the discretionary programs authorized by the Education of the Handicapped Act,[117] the Vocational Education Act,[118] the Adult Education Act,[119] and the Education Professions Development Act.[120]

Second, Congress adopted new provisions giving the House Education and Labor Committee and the Senate Labor and Public Welfare Committee direct oversight authority over the Commissioner's exercise of his discretion under the Special Projects Act. Section 4(b) of the Act[121] requires the Commissioner to submit to each of the two committees, by February 1 of each year, a plan for the use during the succeeding fiscal year of funds provided under the Act. This plan must include a list of every contract involving more than $100,000. Within 60 days either committee may adopt a resolution of disapproval which bars the Commissioner from proceeding according to this plan and requires him to submit a new plan. The Senate Report justifies this oversight mechanism in the following words:

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113 S. REP. No. 763, 93d Cong., 2d Sess. 68-70 (1974).
114 *Id.* at 69.
115 ESEA tit. VII, 20 U.S.C. § 880b (1970).
116 20 U.S.C. §§ 1601-19 (Supp. III, 1973).
117 Education of the Handicapped Act, parts C-G, 20 U.S.C. §§ 1421-26, 1431-36, 1441-44, 1451-54, 1461 (1970).
118 Vocational Education Act, parts C & I, 20 U.S.C. §§ 1281-84, 1391 (1970).
119 Adult Education Act, § 309, 20 U.S.C. § 1208 (1970).
120 EPDA, parts B-1, C-F, 20 U.S.C. §§ 1101-07, 1111-19 (1970).
121 U.S.C.A. § 1853(b) (Supp. 1975).

> It is not anticipated that the committees will make extensive use of the disapproval authority. However, it is a useful oversight tool for the authorizing committees, enabling them to understand in advance the Commissioner's plans for expenditure of discretionary funds. Such understanding before-the-fact can prevent misunderstanding after funds are obligated by the Commissioner under his discretionary authority.[122]

The passage of the Special Projects Act thus represents a limited retreat by the Congress from the use of narrow categorical authorizations to control the discretion of the Commissioner of Education. Although the precise effect will depend upon the willingness of the two overseeing committees to use their disapproval powers, the Act broadens the scope of Congress' delegation and gives the Commissioner wider authority to focus federal education funds on areas of special concern to him.

Congress was not willing, however, entirely to forego its prerogative of setting national educational goals through categorical authorizations. Title IV of Public Law 93-380 specifies seven new categorical programs;[123] for a period of four years, 50 percent of Special Projects Act funds must be set aside for these seven programs.[124] The effect of the Special Projects Act is two-fold: Con-

122 S. REP. No. 763, 93d Cong., 2d Sess. 69 (1974).

123 Education for the use of the metric system of measurement (20 U.S.C.A. § 1862 (Supp. 1975)); Education of Gifted and Talented Children (20 U.S.C.A. § 1863 (Supp. 1975)); Community Schools (20 U.S.C.A. § 1864 (Supp. 1975)); Career Education (20 U.S.C.A. § 1865 (Supp. 1975)); Women's Educational Equity (20 U.S.C.A. § 1866 (Supp. 1975)); Arts in Education (20 U.S.C.A. § 1867 (Supp. 1975)); Consumers' Education (20 U.S.C.A. § 887d (Supp. 1975)). Consumers' Education was originally enacted by Pub. L. No. 318, 92d Cong., 2d Sess., but was never funded; it was reenacted by Pub. L. No. 93-380 and grouped with the six new categorical programs.

124 The Senate Report explains the rationale behind this mixture of categorical programs with the consolidated discretionary authority provided by the Special Projects Act:

> While Section 403 reflects the Committee's belief that it is important to consolidate certain established categorical programs in order to facilitate flexibility in program management to meet changing needs, the section also reflects the Committee's belief that it is equally important to respond to newly-perceived needs, and that this response can best be effected through a limited categorical approach. Thus, a fifty percent set-aside is provided for six new programs. . . .
>
> Consequently, these new programs would, for an incubator period of three years, remain within the shelter of the fifty percent set-aside. After this period, when the programs will have had an opportunity to become established and to prove their worth, they would be moved from the set-aside shelter to the consolidated area with other established programs

gress asserts its own power to focus attention on newly-perceived national education needs; at the same time, the Commissioner is delegated the power to assign priorities among ongoing federal educational efforts and to develop new priorities of his own without having to seek explicit congressional authorization.

## IV. The Effect of Consolidation upon the Vertical Distribution of Power

The consolidation of seven categorical grant programs into the new § 401 of ESEA, while falling far short of the sweeping consolidation envisaged by the Better Schools Act, nonetheless represents a new accommodation of the interests of the three levels of government — federal, state, and local — in the operation of federal education aid programs. The particular accommodation reached is interesting for two reasons: first, it represents a congressional refusal to move in the direction of major shifts of power to states through the mechanism of broad-based block grants; second, it reveals a congressional emphasis on the role of local agencies in the provision of federally-funded educational services, a move which may forecast future developments in other federal education programs.

Public Law 93-380, § 401,[125] amends the Elementary and Secondary Education Act by adding a new title IV, entitled "Libraries, Learning Resources, Educational Innovation, and Support."[126] This title includes two consolidations of state grant programs: first, the consolidation of ESEA titles II, III (guidance, counseling, and testing), and NDEA title III into a program of Library and Learning Resources; second, the consolidation of ESEA title III (supplementary centers and services), ESEA title V, and ESEA §§ 807 (drop-out prevention) and 808 (school nutri-

consolidated into the Special Projects Act. This would give the Congress an opportunity to establish new areas of priority from time to time and would also assure that the advantages of consolidation would not be eroded by the continuing establishment and perpetuation of new and separate categorical programs.

S. Rep. No. 763, 93d Cong., 2d Sess. 69-70 (1974).

125 88 Stat. 535 (1974).

126 20 U.S.C.A. §§ 1801-06, 1821, 1831-32 (Supp. 1975).

tion and health) into a program of Educational Innovation and Support. The Act authorizes the appropriation of $395 million and $340 million, respectively, for obligation under the two consolidations during fiscal year 1976,[127] and such sums as necessary in fiscal years 1977 and 1978.[128] Since the Act requires forward funding of the consolidations, appropriations under these authorizations must be included in appropriations acts for fiscal years 1975, 1976 and 1977.[129]

### A. *Authorized Uses of Consolidated Program Funds*

Sections 421 and 431 of the new title IV[130] set out the purposes for which funds appropriated under the Libraries and Learning Resources consolidation and the Innovation and Support consolidation, respectively, may be used. The language of § 421 repeats nearly verbatim the authorizing clauses of the consolidated categorical grants.[131] However, § 421 does not contain the language of NDEA title III-B, concerning the program of grants to LEA's.[132]

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127 Fiscal year 1975 appropriations for obligation in 1975-76 amount to $137,330,000 for Libraries and Learning Resources and $172,888,000 for Innovation and Support. *See* note 99 *supra*. In their initial year, therefore, these programs are funded at 35 percent and 51 percent, respectively, of authorizations.

128 The substitution of a single distribution formula for several formulae results in some shift in the interstate distribution. Apparently, the primary effect is to eliminate the skewing effect of minimum grants contained in ESEA titles III and IV, and NDEA title III, thereby eliminating the favored position of small states. An estimated fiscal year 1976 distribution of ESEA title IV funds was compared with the sum of the estimated fiscal year 1974 distributions under ESEA titles II, III, & V, and NDEA title III. (1970 data were used for the number of school age children; fiscal year 1975 budget justifications for the Office of Education were used for the total funding level of ESEA title IV and the estimated distributions for fiscal year 1974 of the superceded programs. *See* 5 U.S. DEPARTMENT of HEALTH, EDUCATION, AND WELFARE, JUSTIFICATIONS OF APPROPRIATIONS ESTIMATES FOR COMMITTEE ON APPROPRIATIONS, FISCAL YEAR 1975, at 55 (1975)). Sixteen states suffered losses of 15 percent or more under title IV: Alaska, Delaware, District of Columbia, Hawaii, Idaho, Maine, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Utah, Vermont, and Wyoming. The greatest losses were 53 percent and 55 percent, sustained by Wyoming and Alaska, respectively. Eight states registered gains of 5 percent or more: California, Illinois, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Texas. The largest gain was New York's increase of 9.4 percent.

129 ESEA §§ 401(a)(2)(B), 401(b)(2)(B), as added by Pub. L. No. 380, 93d Cong., 2d Sess. (1974), 20 U.S.C.A. §§ 1801(a)(2)(B), 1801(b)(2)(B) (Supp. 1975).

130 20 U.S.C.A. §§ 1821, 1831 (Supp. 1975).

131 *See* ESEA § 201, 20 U.S.C. § 821 (1970); ESEA § 301(a), 20 U.S.C. § 841(a) (1970); and NDEA § 303(a)(1), 20 U.S.C. § 443(a)(1) (1970).

132 20 U.S.C. § 451 (1970).

Further, § 421(a)(3) excludes junior colleges and technical institutes from the "programs for testing and guidance and counseling" of ESEA § 301(a) and § 303(b)(4). Finally, § 421(b) specifies that the program of loans for nonpublic schools operated by the Commissioner under NDEA § 305[133] is not carried over to the consolidated program. Since this loan program is not otherwise authorized, it is to be terminated.[134] Section 431 also follows closely the language contained in the authorizing clauses of the consolidated programs.[135]

The intent of title IV is that the types of projects and activities funded be the same as were previously funded under the categorical grants. Sections 421(b) and 431(b) state that "it is the purpose of this part to combine within a single authorization [the programs authorized by the consolidated titles], and funds appropriated to carry out this part must be used only for the same purposes and for the funding of the same types of programs authorized under those provisions." Thus, the effect of consolidation is, simply, to give states and LEA's greater flexibility in setting priorities among the congressionally-defined types of activity.

One additional constraint upon the state and local agencies is carried over from ESEA title III. Section 305(b)(8) of ESEA[136] requires each state to reserve 15 percent of its title III allocation for programs for handicapped children. This requirement is retained in § 403(a)(9) of the new title,[137] but the reservation now applies to all funds available for Innovation and Support which are not reserved for strengthening state and local educational agencies.

The requirement of 50 percent state and local matching of federal grants under NDEA title III[138] is dropped.

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133 21 U.S.C. §§ 1001-07 (1970).

134 Termination of the nonpublic school loan program appears reasonable in view of ESEA § 406, 20 U.S.C.A. § 1806 (Supp. 1975), which requires activities funded under the consolidated authorizations to include nonpublic school children on a comparable basis.

135 *See* ESEA § 301(a), 20 U.S.C. § 841(a) (1970); ESEA § 501(a), 20 U.S.C. § 861(a) (1970); ESEA § 521(a), 20 U.S.C. § 866(a) (1970); ESEA § 807(a), 20 U.S.C. § 887(a) (1970); ESEA § 808(a), 20 U.S.C. § 887a(a) (1970).

136 20 U.S.C. § 844(a)(b)(8) (1970).

137 20 U.S.C.A. § 1803(a)(8) (Supp. 1975).

138 NDEA § 304(a), 20 U.S.C. § 444(a) (1970).

### B. *Intrastate Distribution*

The patterns of intrastate distribution of funds involved in the consolidation differed among the state formula grants. The school libraries program under title II of ESEA required each state to use available funds for the acquisition of library and instructional materials, and to allocate these materials under criteria which "take into consideration the relative need . . . of the children and teachers of the state for such library resources . . . ."[139] The innovation, supplementary educational services, guidance, counseling and testing program under ESEA title III required states to use all available funds for grants to LEA's. However, states could retain funds for certain administrative and evaluation activities, and states whose SEA doubled as an LEA could retain funds for use in that capacity.[140] The state was further required to include in its plan criteria for achieving an "equitable" distribution of assistance, considering the size and population of the state, the geographic distribution and density of its population, the relative need of persons "in different geographic areas" and "in different population groups within the State," and the financial ability of LEA's.[141] The equipment and minor remodeling program under NDEA title III was operated by the state on a project grant basis, with no restrictions on the state's distribution methods except that the state plan "set forth principles for determining the priority of such projects in the State for assistance . . . ."[142] Funds available under title V of ESEA for strengthening SEA's were retained at the state level.

The House Education and Labor Committee Report expressed dissatisfaction with the manner in which some states had exercised their discretion in this area, particularly with respect to the school libraries program:

> Under present law the State agencies can retain very substantial amounts of Federal funds — at their own discretion — for programs at the State level.
>
> The Committee believes that that discretion has been

139 ESEA § 203(a)(3)(A), 20 U.S.C. § 823(a)(3)(A) (1970).
140 *See* ESEA tit. III, § 305(b), 20 U.S.C. § 844a(b) (1970).
141 ESEA § 305(b)(3), 20 U.S.C. § 844a(b)(3) (1970).
142 NDEA § 303(a)(2), 20 U.S.C. § 443(a)(2) (1970).

> abused by a number of States within the last several years. For instance, according to the General Accounting Office, one state retains approximately 60% of its funds under a Federal library program at the state level. Another state in the same program retains approximately 30% of its funds at the state level.
>
> . . . .
>
> The Committee . . . has [also] been dissatisfied with the manner in which States have interpreted the requirements to distribute ESEA Title II funds among local school districts according to "relative need." In many States, that requirement has been disregarded and rich school districts have been given larger grants or the same grants as poor school districts.[143]

Title IV provides standards for the intrastate distribution of funds which substantially reduce the ability of SEA's to retain funds at the state level. Under § 403 of the new title, at least 95 percent of the funds received under the Libraries and Learning Resourses program must be distributed among LEA's. With respect to the Innovation and Support program, a state may use no more than 15 percent of its grant to strengthen state and local educational agencies. From amounts remaining in the program, the state must distribute at least 95 percent to LEA's.

Title IV also provides criteria for the distribution of funds to LEA's under the two consolidations. In the case of funds available for Libraries and Learning Resources, § 403(a)(4)(A) requires that the state plan make assurances that funds will be distributed to LEA's

> according to the enrollments in public and nonpublic schools within the school districts of such agencies, except that substantial funds will be provided to (i) local educational agencies whose tax effort for education is substantially greater than the State average tax effort for education, but whose per pupil expenditure (excluding payments made under Title I of this Act) is no greater than the average per pupil expenditure in the State, and (ii) local educational agencies which have the greatest numbers or percentages of children whose

143 H.R. REP. No. 805, 93d Cong., 2d Sess. 27-28 (1974). *See also* J. BERKE & M. KIRST, FEDERAL AID TO EDUCATION: WHO BENEFITS? WHO GOVERNS? (1973); D. COHEN, THE EFFECTS OF REVENUE SHARING AND BLOCK GRANTS ON EDUCATION 42 (1970).

> education imposes a higher than average cost per child, such as children from low-income families, children living in sparsely populated areas, and children from families in which English is not the dominant language.[144]

In the case of funds available for Innovation and Support, § 403(a)(4)(B) requires assurances that funds will be distributed

> on an equitable basis recognizing the competitive nature of the grantmaking except that the State educational agency shall provide assistance in formulating proposals and in operating programs to local educational agencies which are less able to compete due to small size or lack of local financial resources.[145]

In both cases, the state is required to set forth in its plan the "specific criteria the State educational agency has developed and will apply to meet the requirements"[146] of § 403(a)(4).

The effectiveness of these provisions in restricting the authority of SEA's and in channeling funds to those school districts which the Congress considers to be especially needy depends on a number of factors. In the first place, the Commissioner can, if he chooses, exercise some control by means of his power under §§ 403 and 404 to prescribe the level of detail required of state plans and to disapprove those plans which do not comply with federal standards, subject to the states' rights to administrative and judicial review. Beyond this, the courts may be willing to intervene at least to the extent of enjoining substantial deviations from federal standards. It is clear, in light of § 403, that the Congress did not intend to commit the matter of intrastate allocation of funds to the discretion of SEA's in such a manner as to insulate their actions from judicial review in an appropriate case. If a state agency's actions are reviewable, the standards set out in § 403 provide sufficient guidance for a court to assess the legality of a particular state plan, especially in the case of the quasi-formula distribution required for Libraries and Learning Resources for which there is relevant legislative history. Concerning

144 20 U.S.C.A. § 1803(a)(4)(A) (Supp. 1975).
145 *Id.* § 1803(a)(4)(B).
146 *Id.*

the Libraries and Learning Resources program, the House Report states:

> The States must distribute these funds, in general, according to the respective enrollments (in both public and private schools) in local school districts, and there must be substantial funds distributed to two particular types of school districts. The first type is the school district which is exerting a greater tax effort, although it has an average or minimal tax base. The Committee is thinking particularly of suburban communities which have very little industry located within their borders. . . .
>
> The second type of school district is the school district which has substantial numbers of children whose education costs more. The Committee is thinking particularly of socially and economically disadvantaged children in need of compensatory education, handicapped children in need of extra services, and children with limited English-speaking ability who need bilingual education classes. A very good indicator of socially disadvantaged children in urban areas could be the degree to which there is student transiency within a school district.[147]

Although no reported cases deal with the programs involved in these consolidations, there has been litigation with respect to similar types of requirements contained in other federal education grant programs. In *Wheeler v. Barrera*[148] the Supreme Court affirmed the Eighth Circuit in its judgment that the defendant school district was not supplying public and nonpublic school students with "comparable" educational services within the meaning of ESEA title I.[149] In *Natonabah v. Board of Education*,[150] the United States District Court for the District of New Mexico held that the defendant school board had failed to meet the comparability requirements of title I of ESEA,[151] which state that, as a condition for receiving title I funds, a school district must provide to proposed title I schools, from state and local funds, services which are "comparable" to those provided non-title I

147 H.R. REP. No. 805, 93d Cong., 2d Sess. 27-28 (1974).
148 417 U.S. 402 (1974).
149 ESEA § 141(a)(2), 20 U.S.C. § 241e(a)(2) (1970); 45 C.F.R. § 116.19 (1973).
150 355 F. Supp. 716 (D. N. Mex. 1973).
151 ESEA § 141(a)(3)(C), 20 U.S.C. § 241e(a)(3)(C) (1970); 45 C.F.R. § 116.26 (1973).

schools. In *Nicholson v. Pittenger*,[152] the United States District Court for the Eastern District of Pennsylvania enjoined approval of title I applications from the school district of Philadelphia until adequate assurances were forthcoming that comparability violations would be remedied and that the school district would comply with title I requirements concerning the concentration of funds in a limited number of projects.[153] Several federal courts, with varying results,[154] have addressed the question of the standards which must be applied by states and local school districts in determining which schools and which individual students shall be entitled to participate in the National School Lunch Program.[155] Subsequent to the decision in *Briggs v. Kerrigan*,[156] the statute was changed to clarify the congressional policies in this area.[157]

Congress' provision of explicit and reviewable standards for the intrastate distribution of federal funds represents a firm desire to restrict further the decisionmaking authority of the states and to expand that of the LEA's. Congress has defined certain types of LEA's which it considers to be especially needy, and which should be given some priority in the distribution of funds. States, however, tend to distribute federal funds along the same patterns as they distribute state funds, patterns which tend to favor relatively wealthy suburban districts, or, at any rate, tend not to overcome existing disparities in school district resources.[158] By elaborating stricter distribution standards, Congress gave the Commissioner of Education a stronger hand in overseeing state agencies. Should the Commissioner fail to act, Congress has provided affected LEA's, and parents and children served by those LEA's, a method of compelling administrative or judicial review of illegal SEA action.[159]

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152 364 F. Supp. 669 (E.D. Pa. 1973).

153 ESEA § 141(a)(1)(B), 20 U.S.C. § 241e(a)(1)(B) (1970); 45 C.F.R. § 116.18 (1973).

154 *See* Annot., 14 A.L.R. Fed. 634 (1973).

155 42 U.S.C. §§ 1751-61 (1970).

156 431 F.2d 967 (1st Cir. 1970).

157 Act of May 8, 1968, Pub. L. No. 90-302, § 2b, 82 Stat. 117, *amending* 42 U.S.C. § 1758 (1964) (codified at 42 U.S.C. § 1758 (1970)).

158 *Cf.* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1970); note 143 *supra*.

159 Section 425 of the GEPA, as added by § 508 of Public Law 93-380, grants

### C. *LEA Discretion over Libraries and Learning Resources Funds*

In each of the programs consolidated into the new title IV, the SEA retained substantial control over the use of funds transferred to LEA's by means of its control over the distribution mechanism and, in the case of title III of ESEA and title III of NDEA, its authority to disapprove applications from LEA's.[160] The SEA retains similar powers under the Innovation and Support consolidation.[161] With respect to the Libraries and Learning Resources consolidation, however, Congress concluded that the states should no longer exercise such discretion over the use of federal funds. Section 403(a)(5) of the new title IV[162] provides that the state plan must contain the following assurance:

> . . . [E]ach local educational agency will be given complete discretion . . . in determining how the funds it receives from appropriations made under Section 401(a) [the authorization for Libraries and Learning Resources] will be divided among the various programs described in Section 421 [enumerated purposes for which Libraries and Learning Resources appropriations may be used] . . . .[163]

This section represents a congressional decision that authority over these monies be shared by local and federal agencies, with only pass-through authority vested in the states. The House Report explains this policy:

> . . . [T]he Committee amendment provides for . . . true local decisionmaking since the local school district will decide, once it receives its library and instructional resources grant, how much it will spend for library books, equipment, and guidance and counseling. . . .
>
> The Committee believes that this is "revenue sharing" in

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LEA's the right to appeal adverse SEA actions to the Commissioner of Education. For the first time, therefore, LEA's have the ability to force the Commissioner to initiate compliance proceedings to review state operation of federal education programs. This new GEPA section is discussed in the text at notes 204-11 *infra*.

160 ESEA § 304(b), 20 U.S.C. § 844(b) (1970); NDEA §§ 202(a)(2), 313(a), 20 U.S.C. §§ 443(a)(2), 453(a) (1970).

161 *See* ESEA §§ 403(a)(4)(b), 403(a)(7), 20 U.S.C.A. §§ 1803(a)(4)(b), 1803(a)(7) (Supp. 1975).

162 20 U.S.C.A. § 1803(a)(5) (Supp. 1975).

163 In the first year of consolidation, the LEA is granted discretion over only 50 percent of Libraries and Learning Resources funds.

> the truest sense: local people deciding how to spend their tax dollars with a minimum of State or Federal interference. In fact, in giving local school districts instead of States, the authority to make these decisions, the Committee bill goes much further than the Administration's own special revenue sharing proposal.[164]

### D. *LEA Application Requirements*

Section 403(a)(7) of the new title IV of ESEA provides that LEA's applying for funds under any part of the consolidated title IV program shall be required to submit only one application to the SEA in any fiscal year. Coupled with the requirement contained in paragraph (4) of the same subsection, that SEA's must provide assistance to LEA's with limited resources in the preparation of applications under the Innovation and Support consolidation, this provision represents a congressional policy of simplifying the tasks of LEA's with regard to federal education aid, and of assuring that all agencies, including the relatively poor school districts, have an equal chance to receive federal aid. This policy is underscored by the House Committee Report:

> The Committee has consolidated the program of aid to State departments of education within the innovative programs category in order to make clear its intention that the State departments of education are to provide assistance to local school districts without adequate local resources to draft and to submit applications for innovative programs. The Committee found that all too frequently so-called "light-house" school districts tend to be rich school districts which can well afford to hire personnel to write applications and to administer innovative programs. The Committee expects the State departments to compensate for the lack of this ability in poor school districts by using former Title V money to provide technical assistance to these poorer school districts.[165]

### E. *State Plan Requirements*

Section 511 of Public Law 93-380[166] adds a new § 434[167] to the GEPA. This section effects an "administrative consolidation"

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164 H.R. REP. No. 805, 93d Cong., 2d Sess. 27 (1974).
165 *Id.* at 28.
166 88 Stat. 569 (1974).
167 20 U.S.C.A. § 1232c (Supp. 1975).

under which SEA's are required to submit a single, general application covering all federal programs providing assistance to LEA's through or under the supervision of SEA's.[168] This application, which would be kept on file by the Commissioner and need not be renewed annually, must contain assurances by the state of compliance with statutory standards concerning administration of covered programs, fiscal control and accounting procedures, reporting practices, and maintenance of effort.[169]

In addition to the general application, each SEA is requred to submit an annual program plan meeting the plan requirements of each grant program.[170] Section 403(a) of the new title IV[171] requires a single plan covering both Libraries and Learning Resources and Innovation and Support.[172] This plan must set forth "a program under which funds paid to the State from its allotments . . . will be expended solely for the programs and purposes authorized by Parts B [Libraries and Learning Resources] and C [Innovation and Support]."[173] Although the language of Parts B and C is not identical to that of the consolidated programs,[174] the intent of Congress to authorize the same types of activity makes it doubtful that any differences in language will substantially affect the selection or operation of assisted programs.

The new state plan provisions do not, then, alter the distribu-

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168 Both Libraries and Learning Resources, and Innovation and Support, would clearly be covered. ESEA § 403(a)(1), 20 U.S.C.A. § 1803(a)(1) (Supp. 1975), requires each state to designate its SEA as the agency responsible for the administration of the state plan governing the consolidated title IV program.

169 Largely identical requirements are found in each of the state grant programs consolidated by title IV (except NDEA title III and ESEA title V-C) as well as title I of ESEA and other state grant programs. *See* ESEA §§ 142(a)(2), (3), 20 U.S.C. §§ 241f(a)(2), (3) (1970); ESEA §§ 203(a)(5)-(7), 20 U.S.C. §§ 823(a)(5)-(7) (1970); ESEA §§ 305(b)(9)-(11), 20 U.S.C. § 844a(b)(9)-(11) (1970); and ESEA §§ 504(b)-(d), 20 U.S.C. §§ 864(b)-(d) (1970). *But see* NDEA § 303(a), 20 U.S.C. § 443(a) (1970); ESEA § 533, 20 U.S.C. § 867(b) (1970).

170 *See* GEPA § 434(b)(1)(A)(V), 20 U.S.C.A. § 1232c(b)(1)(A)(V) (Supp. 1975).

171 20 U.S.C.A. § 1803(a) (Supp. 1975).

172 This plan supercedes plans called for by ESEA titles II, III, & V, and NDEA title III. *See* ESEA § 203, 20 U.S.C. § 823 (1970); ESEA § 305, 20 U.S.C. § 844a (1970); NDEA § 303, 20 U.S.C. § 443 (1970); ESEA § 504, 20 U.S.C. § 864 (1970); ESEA § 533, 20 U.S.C. § 867b (1970).

173 ESEA § 403(a)(2), 20 U.S.C.A. § 1803(a)(2) (Supp. 1975).

174 *Compare* ESEA §§ 421, 431, 20 U.S.C.A. §§ 1821, 1831 (Supp. 1975) *with* ESEA § 203(a)(2), 20 U.S.C. § 823(a)(2) (1970); ESEA § 305(b)(1), 20 U.S.C. § 844a (b)(1) (1970); ESEA § 504(a), 20 U.S.C. § 864(a) (1970); NDEA § 303 (a)(1), 20 U.S.C. § 443(a)(1) (1970).

tion of power; rather, they are designed merely to ease state administrative burdens.

## V. Title V — Administrative and Judicial Review

Title V of Public Law 93-380 contains provisions of an administrative nature, mostly in the form of amendments to the General Education Provisions Act.[175] Section 511,[176] as discussed above,[177] provides for a unified state plan covering all federal education programs under which funds are allotted to states (or made available to states pursuant to state or LEA entitlements). In addition, § 511 makes provisions for the withholding of funds by the Commissioner and for judicial review of the Commissioner's actions. Section 508 of Public Law 93-380[178] adds a new § 425 to the GEPA,[179] providing administrative review of the actions of SEA's in granting federal money to their LEA's.

Prior to the enactment of Public Law 93-380, administrative and judicial review provisions were contained in each of the individual categorical programs.[180] In general, the Commissioner of Education was given the authority, after providing SEA's with reasonable notice and opportunity for a hearing, to take two types of action: first, to refuse to approve state applications or plans which he found not to comply with statutory standards,[181] and second, to withhold payments from states whose administration

175 GEPA § 401(a), 20 U.S.C. § 1221(a) (1970), makes the GEPA applicable to all programs for which the Commissioner of Education has administrative responsibility. For the purposes of this analysis, only those programs involving grants to states for elementary and secondary education will be considered.

176 88 Stat. 569 (1974).

177 See text at notes 166-74 *supra*.

178 88 Stat. 565 (1974).

179 20 U.S.C.A. § 1231b-2 (Supp. 1975).

180 A terminological problem results from the fact that the individual categorical programs consolidated into the new ESEA title IV were not repealed, but rather remain in the statutes. For the purposes of this analysis, those programs replaced by title IV, but not repealed, will be referred to as "pre-existing" programs.

181 *See* ESEA §§ 141(c), 142(b), 20 U.S.C. §§ 241e(c), 241f(b) (1970); ESEA § 206(a), 20 U.S.C. § 826(a) (1970); ESEA § 305(e)(1), 20 U.S.C. § 844a(e)(1) (1970); ESEA § 551(a), 20 U.S.C. § 869(a) (1970); NDEA § 1004(b), 20 U.S.C. § 584(b) (1970); EPDA § 520B(a), 20 U.S.C. § 1110b(a) (1970); Vocational Education Act § 123(c)(1), 20 U.S.C. § 1263(c)(1) (1970); Adult Education Act § 306(b), 20 U.S.C. § 1205(b) (1970); Education of the Handicapped Act § 613(c)(1), 20 U.S.C. § 1413(c)(1) (1970).

of federal programs did not, in his judgment, comply with the provisions of their plans or the applicable statutes.[182]

With respect to the state grant programs, SEA's were generally accorded rights to administrative and judicial review. Administrative review of the Commissioner's actions with respect to approving applications and withholding funds for state noncompliance was implicit in the requirement of notice and hearing mentioned above. States dissatisfied with the Commissioner's actions were accorded the right to petition for review in the court of appeals for the circuit in which the state was located.[183] Review was on the record, with the findings of fact by the Commissioner conclusive if supported by substantial evidence.[184] The court of appeals had the authority to remand to the Commissioner for further findings, or to affirm or set aside the action of the Commissioner, in whole or in part.[185]

Certain categorical programs extended the protection of statutory administrative and judicial review to LEA's in their dealings with SEA's concerning federal education assistance grants. To the extent that funds received by a state were to be made available to LEA's pursuant to applications approved by the SEA, LEA's were generally entitled to reasonable notice and opportunity for a hearing before an application could finally be rejected.[186] In addition, ESEA § 305(f)[187] and § 123(d)(1)[188] of the Vocational

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182 *See* ESEA § 146, 20 U.S.C. § 241j (1970); ESEA § 206(b), 20 U.S.C. § 826(b) (1970); ESEA § 305(e)(2), 20 U.S.C. § 844a(e)(2) (1970); ESEA § 551(b), 20 U.S.C. § 869(b) (1970); NDEA § 1004(c), 20 U.S.C. § 584(c) (1970); EPDA § 520B(b), 20 U.S.C. § 1110b(b) (1970); Vocational Education Act § 123(c)(2), 20 U.S.C. § 1263(c)(2) (1970); Adult Education Act § 308(a), 20 U.S.C. § 1207(a) (1970); Education of the Handicapped Act § 613(c)(2), 20 U.S.C. § 1413(c)(2) (1970).

183 *See* ESEA § 147, 20 U.S.C. § 241k (1970); ESEA § 207, 20 U.S.C. § 827 (1970); ESEA § 305(e)(3), 20 U.S.C. § 844a(e)(3) (1970); ESEA § 552, 20 U.S.C. § 869a (1970); NDEA § 1005, 20 U.S.C. § 585 (1970); EDPA § 520C, 20 U.S.C. § 1110c (1970); Vocational Education Act § 123(c)(3), 20 U.S.C. § 1263(c)(3) (1970); Adult Education Act § 308(b), 20 U.S.C. § 1207(b) (1970); Education of the Handicapped Act § 613(d), 20 U.S.C. § 1413(d) (1970).

184 *See* note 183 *supra.*

185 *See* note 183 *supra.*

186 *See* ESEA § 141(b), 20 U.S.C. § 241e(b) (1970); ESEA § 305(b)(12), 20 U.S.C. § 844a(b)(12) (1970); NDEA § 313(b), 20 U.S.C. § 453(b) (1970); EPDA § 520(a)(3)(A), 20 U.S.C. § 1110(a)(3)(A) (1970); Vocational Education Act § 123(a)(13), 20 U.S.C. § 1263(a)(13) (1970).

187 20 U.S.C. § 844a(f) (1970).

188 20 U.S.C. § 1263(d)(1) (1970).

Education Act provided that any LEA dissatisfied with the final disapproval of its application could obtain review of the SEA's action on the record in the court of appeals for the circuit in which the state is located.[189]

### A. *The Commissioner's Statutory Remedies for State Noncompliance*

Section 434(c) of the GEPA,[190] as added by Public Law 93-380, directs the Commissioner to withhold funds under any program to which the GEPA applies whenever he finds, after reasonable notice and hearing, that "there has been a failure, by any recipient of funds under any applicable program, to comply substantially with the terms to which such recipient has agreed in order to receive such funds . . . ." Such funds must be withheld until the Commissioner is satisfied that the recipient is no longer in noncompliance. These provisions are substantially the same as provisions already contained in the various categorical authorizing statutes.[191]

Section 434(c) makes no allowance for the Commissioner to limit withholding to those portions of a recipient's program affected by the noncomplying acivities. When a state is the recipient of a grant, the Commissioner would therefore appear to be required to withhold that state's entire allotment under a given statute in the event any action by the state did not comply with federal statutory or regulatory requirements, including the state's action in tolerating non-complying action by a single LEA. This mandate represents an important change; all but two of the state grant programs in the elementary and secondary education area specifically authorize the Commissioner to limit the scope of his

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189 Neither the GEPA nor individual categorical authorizing statutes accord private individuals administrative or judicial review rights. The Senate version of H.R. 69 would have added a new provision to the GEPA granting administrative review procedures to individuals, but this provision was dropped in conference.

*Compare* GEPA § 434(d)(3), as added by the Senate version of H.R. 69, 93d Cong., 2d Sess. (S. REP. No. 763, 93d Cong., 2d Sess. 285), *with* GEPA § 434(d), 20 U.S.C.A. § 1232c(d) (Supp. 1975). The subject of individual remedies for violations of the statutes and regulations governing federal education programs is beyond the scope of this comment.

190 20 U.S.C.A. § 1232c(c) (Supp. 1975).

191 *See* note 182 *supra*.

withholding to noncomplying activities, or to particular LEA's which are not in compliance.[192] The new provision originated in the Senate, which apparently did not intend to remove the Commissioner's discretion to effect partial cut-offs.[193] The effect of § 434(c) may therefore be muted by courts reading the legislative history to reveal congressional intent to retain the Commissioner's discretion, or giving a restrictive definition to the word "program" in the statutory injunction that the Commissioner cease payments to noncomplying recipients "under that program" in which the non-compliance occurs. It is unlikely that a court would define "program" more narrowly than "activity carried out pursuant to a single statutory authorization"; however, it is possible that a court might hold that the activities of a state and of each individual LEA constituted separate "programs," even though carried out pursuant to a single statutory authorization.[194]

Section 434(c) makes one other change in the prevailing statutory pattern concerning the Commissioner's withholding authority. Unlike provisions in pre-existing categorical statutes, § 434(c) grants the Commissioner authority to suspend payments to recipients pending the outcome of withholding proceedings after giving such recipients reasonable notice and opportunity to show cause why such suspension should not be effected.

The Senate version of H.R. 69 contained provisions making the general state application for federal education assistance and the annual state program plans submitted pursuant to individual statutes contractual agreements specifically enforceable in the federal courts.[195] In its Report, the Committee on Labor and

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192 *See* note 182 *supra*. The two programs not providing such discretion to the Commissioner are titles II and V of ESEA, neither of which mandate grants by states to their LEA's.

193 *See* S. REP. No. 763, 93d Cong., 2d Sess. 63 (1974): "The administrative consolidation contains standard provisions for withholding of a portion or all of a State's funds under any applicable program, in cases on noncompliance . . . ."

194 In the desegregation area, it has been held that the purpose of the fund cut-off provided by title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), was remedial rather than punitive, and that the terms "program or activity" as used in § 602 of that title should be interpreted narrowly. Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

195 Section 434(b)(1)(A) of the GEPA, as amended by § 401 of the Senate version of H.R. 69, provided that each state shall make a general application which shall

Public Welfare explained its reasons for including these provisions:

> Specific performance provides an alternate remedy for the Commissioner to invoke in situations of noncompliance, one less drastic than the presently available remedy of suspension or termination of funds. It also assures that the contracted-for services or activities are provided to the intended beneficiaries, rather than denying them such services or activities because of the failure of others to live up to their agreements. It is understood by the Committee that the rules of equity shall govern the invocation of the remedy of specific performance.[196]

The Conference Committee deleted these provisions of the Senate bill. The practical effect of the deletion is unclear. In *United States v. County School Board*[197] the District Court for the Eastern District of Virginia granted the Commissioner specific enforcement of LEA assurances made in connection with Federal Impact Aid grants.[198] The Fifth Circuit, in *Bossier Parish School Board v. Lemon*,[199] granted specific performance to parents of schoolchildren as third-party beneficiaries of the assurances given the Commissioner by the defendant school board. The same circuit, however, refused to characterize Alabama's assurances concerning desegregation as contractual in nature in *Gardner v. Alabama*;[200] here, the court expressed concern that such a characterization might be taken to authorize the Commissioner to seek reimbursement of funds spent by the state without compliance with its desegregation assurances. The court indicated an unwillingness to countenance such a result in light of the primary purpose of

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be in the "form of a contractual agreement." Section 434(c)(2) provided: "The terms of any application for funds under any applicable program shall constitute a contractual agreement between the Commissioner and the applicant. Such agreement shall be specifically enforceable by the Commissioner in any court of the United States."

196 S. REP. No. 763, 93d Cong., 2d Sess. 63 (1974).

197 221 F. Supp. 93 (E.D. Va. 1963).

198 *Accord,* United States v. Sumter County Sch. Dist. No. 2, 232 F. Supp. 945 (E.D.S.C. 1964); *but see* United States v. Madison County Bd. of Ed., 326 F.2d 237 (5th Cir. 1964), *cert. denied,* 379 U.S. 929 (1964); United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970).

199 370 F.2d 847 (5th Cir. 1967), *cert. denied,* 388 U.S. 911 (1967).

200 385 F.2d 804 (5th Cir. 1967), *cert. denied,* 389 U.S. 1046 (1968).

federal grantmaking, *i.e.*, the satisfaction of vital needs of individual citizens. Thus, courts appear willing to grant specific enforcement of state or LEA assurances when the effect is to improve the position of the intended beneficiaries of the assisted programs, but hesitate to characterize such assurances as contractual when enforcement of such contracts would jeopardize the provision of program services to those beneficiaries. Congress, in deleting the Senate provisions, might simply have felt that the Senate's approach could unduly hamper courts in dealing with activities involving three groups of participants: the federal government, state and local governments, and intended program beneficiaries.

Overall, the Commissioner's remedies for state noncompliance under the new GEPA § 434(c) are not significantly different from those previously available. Although the mandatory fund termination provisions reduce the Commissioner's discretion subsequent to a finding of noncompliance, no substantial change is to be expected. More fundamentally, the termination provisions still take effect only after a finding of noncompliance, which can be made only if the Commissioner initiates compliance procedings.[201] The Commissioner has not often resorted to his formal administrative remedies,[202] and nothing in § 434 appears calculated to induce greater reliance in the future.

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201 *But see* the discussion of the new GEPA § 425, text at notes 204-11 *infra*, under which LEA's can trigger review of state actions by the Commissioner.

202 As a matter of policy, the Office of Education appears to prefer to resolve compliance (and also initial state plan) problems by means of informal negotiations rather than formal conformity hearings. *Cf.* 45 C.F.R. § 116.52(b) (1973), stating with respect to ESEA tit. I:

> Prior to initiating a hearing under this section, the Commissioner will attempt to resolve any apparent differences between him and the State educational agency regarding the interpretation or application of the provisions of Title I of the Act and the regulations in this part. . . . Nothing herein shall be deemed to prevent any State educational agency from seeking the advice of the Commissioner prior to disposing of such matters.

Furthermore, the Office has had unfortunate experiences with the use of termination proceedings against politically powerful grantees. During ESEA's first year, Commissioner Keppel initiated termination proceedings against Chicago on account of desegregation noncompliance. The proceedings were abruptly dropped, apparently as a result of pressure by Mayor Daley on President Johnson. *See* S. BAILEY & E. MOSHER, *supra* note 3, at 151-52. This experience seems to have inculcated a reluctance to attempt termination proceedings because of their political ramifications. *See also* Murphy, *Title I of ESEA: The Politics of Federal Education Reform*, 41 HARV. ED. REV. 35, 45 (1971).

B. *State Rights to Administrative and Judicial Review*

Section 434(d) of the GEPA, as added by § 511 of Public Law 93-380, grants states the right to obtain review, in the United States Courts of Appeals, of the Commissioner's actions in disapproving applications for federal education assistance or in withholding federal education funds. States already possessed this right pursuant to the individual elementary and secondary education grant authorizing statutes.[203]

C. *LEA Rights to Administrative and Judicial Review*

Section 508[204] of Public Law 93-380 adds a new § 425[205] to the GEPA, dealing with administrative review of the actions of SEA's. The new section applies to ESEA title I and to any program under which federal funds are made available to SEA's for expenditure according to state plans. Under § 425, any applicant for or recipient of state-administered federal education assistance has the right to a review on the record, by the SEA, of that agency's final action in: 1) disapproving or failing to approve an application for funds; 2) failing to provide funds in amounts specified by law or regulations; or 3) terminating assistance for an approved program. Such review may cover allegations of violations of either state or federal laws, rules, regulations, or guidelines.

Any applicant or recipient aggrieved by the failure of the state agency to rescind its original action subsequent to its review has the further right to appeal to the Commissioner of Education. Such appeal is to be determined on the record, with the findings of fact by the SEA to be final if supported by substantial evidence. In the event the Commissioner finds that the SEA has violated applicable federal law, rules, regulations, or guidelines, he is directed to issue an order to the SEA prescribing appropriate action. If the SEA fails or refuses to comply with the Commissioner's order, the Commissioner is directed to terminate all assistance to the SEA under the program involved.

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203 See note 183 *supra*.
204 88 Stat. 565 (1974).
205 20 U.S.C.A. § 1231b-2 (Supp. 1975).

The new GEPA § 425 makes no provision for judicial review of SEA actions separate from or subsequent to the administrative review by the state agency and the Commissioner.[206] The availability and form of judicial review, therefore, are unclear.[207] In light of the traditional reluctance of courts to provide non-statutory review to petitioners who have available some form of statutory review,[208] the omission of judicial review provisions from a statute making provisions for administrative review will at the least delay the availability of court review for LEA's and other recipients of state-administered federal funds.[209]

The provisions of pre-existing elementary and secondary education programs generally require SEA's to accord LEA's notice and hearing prior to the rejection of LEA applications for federal assistance funds.[210] The new § 425 significantly expands local

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206 *See* GEPA § 434(d), 20 U.S.C.A. § 1232c(d) (Supp. 1975). The Senate bill would have given LEA's the same rights to judicial review of the Commissioner's action in the administrative review of SEA actions as the SEA's enjoy with respect to the Commissioner's actions. S. REP. No. 763, 93d Cong., 2d Sess. 285 (1974).

207 The fact that § 425 neither provides judicial review, nor specifies that its remedies shall be exclusive, raises special problems with respect to the two federal elementary and secondary education programs which do afford LEA's certain judicial review rights. Under both ESEA title III § 305, 20 U.S.C. § 844a (1970) and the Vocational Education Act, § 123, 20 U.S.C. § 1263 (1970), any LEA dissatisfied with the final action of an SEA with respect to its application for federal assistance may obtain review in the appropriate court of appeals. Such right of appeal to a court of appeals does not seem consistent with a concurrent right of appeal to the Commissioner of Education; it is possible that a reviewing court might hold that the statutory administrative appeal preempted the statutory judicial appeal or, more narrowly, that the judicial review should not be available until the administrative appeal has been exhausted.

208 *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 56 (1958); K. DAVIS, ADMINISTRATIVE LAW TREATISE 642-69 (1970 Supp.).

209 The only reported cases involving challenges by LEA's to the actions of SEA's under federal elementary and secondary education programs appear to be Huntsville City Board of Education v. Brown, 379 F. Supp. 1092 (M.D. Ala. 1974); Nebraska *ex rel.* School District of Hartington v. Nebraska State Board of Education, 188 Neb. 1, 195 N.W.2d 161 (1972); and Board of Education v. Commissioner of Education, 61 Misc. 2d 741, 306 N.Y.S.2d 382 (Sup. Ct. 1969). In *Nebraska*, the Supreme Court of Nebraska ordered the State Board of Education to approve an LEA application for ESEA title I funds upon finding that the LEA's contract with a parochial school for the lease of classroom facilities did not violate the First and Fourteenth Amendments. In *Huntsville*, the United States District Court upheld the actions of the Alabama State Board of Education under ESEA title I, applying a rational basis test. In *Board of Education*, the court upheld the Commissioner of Education's actions under ESEA title I on the grounds that they were within his legitimate discretion and not illegal.

210 *See* note 186 *supra*.

rights. First, that section extends the right to applicants and recipients other than LEA's. Second, it extends the right of review to cover the operation and possible termination of federal grant assistance by the SEA, as well as the approval of initial applications. Most importantly, it provides an administrative appeal outside the SEA which has no counterpart under pre-existing elementary and secondary education programs.

The new GEPA § 425 potentially gives great power to LEA's to force SEA's to comply with federal statutory and regulatory standards. For the first time, LEA's are in a position to initiate a process leading to the Commissioner's review of SEA compliance and, if necessary, his issuance of remedial orders. The force of any remedial orders is augmented by mandatory fund cut-off provisions which deny the Commissioner discretion to limit the impact of his orders on SEA's. Although the actual effect of this section will depend upon LEA willingness to make use of the new procedures, this statutory scheme gives LEA's a double role as guardians of federal statutory standards in both their ability to force SEA's into compliance and their ability to force the Commissioner to fulfill his own review responsibilities.[211]

## VI. Conclusion

The Education Amendments of 1974 do not represent a major reworking of the basic structure of federal aid to education. The Nixon Administration sought to move from a strictly categorical approach to more broadly-defined block grants, with an accompanying shift in decisionmaking authority to lower levels of government. In the face of Administration pressures, the Congress elected to reenact most elementary and secondary education programs largely intact. The major categorical formula grants were

211 In a sense LEA's, as "beneficiaries" of federal education aid, are cast in the role of "private" enforcers of statutory standards. In light of the Office of Education's reticence to invoke administrative sanctions to obtain SEA compliance, it has long been advocated that citizen-beneficiaries be given such a role. *See, e.g.*, Murphy, *supra* note 202. The Senate bill would have accorded aggrieved persons a statutory administrative review procedure, *see* GEPA § 434(d)(3), as added by S. 1539, 93d Cong., 2d Sess. (S. Rep. No. 93-763, 93d Cong., 2d Sess. 285). The Conference Committee omitted this provision.

extended for four years; compensatory education, impact aid, vocational education, education of the handicapped and adult education all remain independent programs. Similarly, the major categorical discretionary programs were retained, particularly bilingual education and emergency school assistance. Even in the consolidation effected by title IV of Public Law 93-380, the Congress made clear its intention to continue to define national educational priorities and to channel federal funds to programs designed to meet those goals. The new title IV of ESEA combines several goals formerly embodied in separate authorizations, but it remains a categorical grant.

The consolidation and review provisions of titles IV and V of the Act, nonetheless, reveal a congressional sensitivity to the problem of distributing authority over federal education aid among the various actors in the educational hierarchy, both within the federal government and among the federal, state, and local governments. With respect to the allocation of power within the federal government, the Congress was concerned with the Administration's budgetary policies and its attempts to circumvent congressional intent by manipulating categorical discretionary authorities. It sought to exercise control over the budget by tying consolidation proposals desired by the Administration to minimum funding requirements. It sought to balance the need for executive flexibility with Congress' desire to assure executive compliance with congressional priorities in the device of the Special Projects Act. Although the Act does give the Commissioner a greater pool of unrestricted funds to focus on problems of special concern to him, this increased discretion is more than balanced by the set-aside of 50 percent of funds for seven new categorical programs and by the introduction of a new direct congressional oversight mechanism. The fact that the Commissioner must submit a plan for using Special Projects Act funds gives the Congress substantial bargaining power. If the Congress chooses to exercise its new disapproval authority, the impact on congressional-executive relations could be profound.

The effect of the consolidation and review provisions of Public Law 93-380 on federal-state relations is both modest and mixed. Each state will now receive two grants in place of four. With

respect to the Innovation and Support grant, the state will now be able to determine relative funding priorities among the types of authorized activities, although it will be required to limit the amount of funds retained for use at the state level. On the other hand, with respect to Libraries and Learning Resources funds the states are largely relegated to the status of pass-through agencies. The states must still submit annual program plans for approval by the Commissioner of Education, and these plans, coupled with the single general application filed with the Commissioner in accordance with the new GEPA § 434, will contain the same types and detail of material as under the old categorical programs. States and their SEA's are granted no significant new administrative or judicial review rights.

It is on state-local relations that the consolidation and review provisions of Public Law 93-380 have their greatest effect. The new title IV of ESEA does not direct the process by which SEA's are to make federal funds available to LEA's and other local recipients. No standards for LEA applications are set out, such as may be found in ESEA title III.[212] However, substantial limitations are placed on the states by the assurances required by § 403 and by the administrative review requirements of the new GEPA § 425. Each state must distribute at least 95 percent of Libraries and Learning Resources funds to local districts, and at least 95 percent of Innovation and Support funds not reserved for strengthening departments of education (§ 403(a)(8)). This distribution must be made according to articulated state distribution criteria meeting federal statutory standards (§ 403(a)(4)). Funds distributed for Libraries and Learning Resources must be made available to LEA's for use in their unfettered discretion, subject only to federal statutory standards regarding provision of services to nonpublic school children (§ 403(a)(5)). LEA's may not be required to submit more than one application in any fiscal year for all funds requested under title IV (§ 403(a)(7)). Local agencies must be accorded notice and an opportunity for a hearing before the final rejection of their applications for federal funds (GEPA § 425(a)).

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212 ESEA § 304, 20 U.S.C. § 844 (1970).

These restrictions on the SEA's activities vis-a-vis their LEA's create a two-part system under which SEA's make Libraries and Learning Resources funds available to LEA's according to a quasi-formula distribution mechanism while handling Innovation and Support funds according to traditional discretionary project grant procedures. The fact that the restrictions are placed indirectly rather than directly, however, raises questions as to the range of procedures available to SEA's. ESEA § 403(a)(4), specifies that funds must be "distributed" to local agencies, but does not define "distribution." In the case of Libraries and Learning Resources funds, is a specific formula required, or might the SEA distribute funds without a formula, so long as the actual distribution complied with statutory standards? Can the SEA require an application for library funds, and if so, what information and assurances can it require in that application, consistent with the requirement that it accord LEA's "complete discretion" in the use of library funds? Since the LEA submits a single application for both its Libraries and Learning Resources grant and for any projects for which it desires Innovation and Support funding, what procedures must the SEA adopt to assure partial approval of Libraries funds even if other parts of the application are not approved?

Another series of problems arises from the standards for intrastate distribution laid out in § 403(a)(4). It is apparent that Congress intended to limit the discretion of the SEA's and to provide a standard of review in an appropriate case challenging SEA action. The standard is reasonably clear. Nonetheless, the reviewing court or agency will have to provide definitions for the terms "substantial funds," "tax effort for education," and "children whose education imposes a higher than average cost per child."[213] In the case of Innovation and Support funds, the statute specifies only that the distribution of funds be "equitable recognizing the competitive nature of the grantmaking";[214] however, the SEA is placed under the additional obligation to provide "less able"[215] LEA's with assistance in preparing applications.

It is also apparent that Congress intended to increase the rights

213 ESEA tit. IV, § 403(a)(4)(A), 20 U.S.C.A. § 1803(a)(4)(A) (Supp. 1975).
214 ESEA tit. IV, § 403(a)(4)(B), 20 U.S.C.A. § 1803(a)(4)(B) (Supp. 1975).
215 *Id.*

of LEA's with respect to federal education monies: both their substantive rights, especially regarding the intrastate distribution of funds and the free use of Libraries funds, and their review rights, to assure that LEA's can force SEA's to comply with statutory standards. While the consolidation and review provisions of Public Law 93-380 transfer limited effective power from the federal to the state level, they transfer substantial power from the state to the local level.

The effect of this shift in the relative positions of state and local educational agencies is buttressed by the provisions of GEPA § 425 granting local agencies the right to appeal SEA administrative review decisions to the United States Commissioner of Education. This new mechanism gives the local agency an appeal route outside its parent SEA; it may also force the Commissioner to take actions regarding state non-compliance which he might hesitate to initiate himself. The effectiveness of this new provision will depend on the willingness of LEA's to go outside their SEA's, on which they depend not only for federal aid, but also for the more substantial amounts of state aid. It will depend on the Commissioner's willingness to respond to LEA complaints in the face of SEA opposition. And it will depend on the willingness of courts to review the Commissioner's final determinations.

The consolidation and review provisions of Public Law 93-380 reveal a congressional desire to reinforce the tri-polar basis of the educational power structure, and to increase the power of LEA's both to exercise unfettered operational control of federally funded education programs and to assure the compliance of their state and federal partners with federal statutory and regulatory standards. Such an attempt to alter the distribution of real power by means of manipulation of statutory standards will be confronted, however, by entrenched habits at all levels of government. On one hand, the Office of Education has not actively used its statutory remedies to obtain state and local compliance;[216] emphasis has been placed on service to SEA's and on auditing to assure technical and financial compliance.[217] On the other hand, states

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216 *See* note 202 *supra*.

217 *See* S. BAILEY & E. MOSHER, *supra* note 6; Murphy, *supra* note 202; B. FRIEDMAN & L. DUNBAR, GRANTS MANAGEMENT IN EDUCATION: FEDERAL IMPACT ON STATE AGENCIES (1971).

and local agencies have not actively pursued either administrative or judicial procedures to remedy perceived noncompliance by their grantors or grantees.[218] Rather, elementary and secondary education programs have been administered by an informal process of intergovernmental adjustment; disagreements have been ironed out before formal applications or state plans were filed, so that formal review procedures were not necessary. When state or local agencies have been dissatisfied and have been unable to cajole the Office of Education into concessions, they have turned to political remedies exercised though their influence on the President or on their representatives in Congress. It is possible that the new statutory scheme will effect changes in this prevailing atmosphere, especially if LEA's make active use of their new procedural powers. It is more likely, however, that prevailing processes will continue largely unchanged, and that the substantive shifts in decisionmaking authority envisaged by Public Law 93-380 will be diluted as they are filtered through such old-style, informal processes.

*Stafford Smiley**

218 The major instance of agency resort to court review is the successful challenge by states to the impoundment of education funds by the Nixon Administration. *See* Louisiana v. Weinberger, 369 F. Supp. 856 (E.D. La. 1973); People *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721 (N.D. Ill. 1973); Pennsylvania v. Weinberger, 367 F. Supp. 1378 (D.D.C. 1973); Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973).

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# COMMENT

## CONGRESSIONAL PORK AND PROJECT DISCOUNTING: A COMMENT ON FEREJOHN'S *PORK BARREL POLITICS*

JAMES T. MURPHY*

### *Introduction*

The existence of a congressional pork barrel has traditionally been taken as axiomatic by students of American politics.[1] Those who write on Congress point toward public works projects, particularly the Army Corps of Engineers projects, as more than sufficient evidence of a congressional pork barrel.[2] The Corps projects in particular, the argument goes, have precious little societal value but lots of political mileage for those congressmen in whose districts they are built; congressmen, therefore, indiscriminately authorize and appropriate funds for projects having little value save the votes they generate. Congressmen themselves confess to the political mileage in the projects and to having worked very hard to bring projects for their district to fruition.[3] At the same time, however, they insist that public works projects are legitimate government investments. Congressmen argue that the projects have tangible economic benefits for taxpayers, and

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1 *See, e.g.*, R. MCKEAN, EFFICIENCY IN GOVERNMENT THROUGH SYSTEMS ANALYSIS WITH EMPHASIS ON WATER RESOURCES DEVELOPMENT 15 (1958). McKean goes on to point out, however, that there is every reason to believe less emphasis will be placed on pork barrel aims when policy makers get more quantitative analysis of projects.

2 *See, e.g.*, S. BAILEY & H. SAMUEL, CONGRESS AT WORK 166-71 (1952).

3 J. FEREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968, at 49-50, 130 (1974); Murphy, *Political Parties and the Porkbarrel: Party Conflict and Cooperation in House Public Works Committee Decision Making*, 68 AM. POL. SCI. REV. 169, 171-72 (1974).

it is these benefits that account for the votes generated by the projects.[4] But the congressional critics, while admitting of some redeeming economic value in the projects, argue that the projects simply cannot be justified on economic grounds and dismiss the congressional point of view as merely self-serving.[5]

Moreover, it is held, if there is congressional pork — projects which are politically useful but which cannot be economically justified — there will be congressional pork barreling — the allocation of project funding on the basis of a member's influence within the House or Senate.[6] Because there is a scarcity of money for the projects, not all congressmen who are sponsoring projects will be able to get them funded. This scarcity of funds occasions a power struggle within the House and Senate for federal dollars for constituents. In that struggle the more powerful a congressman or senator is, the more likely it is that projects for his district will be funded. Powerful members of the House and Senate do, certainly, have priority in the allocation of funds for Corps projects. This is not to say, however, that pork barreling necessarily explains the distribution of funds, for many congressmen who are not at all powerful receive funding for their projects. My own research indicates that these congressmen receive funding because the appropriations subcommittee seeks a national, geographical spread and, in their search, accommodate some of the non-powerful as well as the powerful.[7] But this search for geographic balance in the funding is apparently not of central interest to the critics of pork barreling. After all, they would argue, when the powerful are pitted against the non-powerful, the former win and the latter lose and this winning and losing is the interesting fact.

The most recent contribution to this argument is John A. Ferejohn's book, *Pork Barrel Politics: Rivers and Harbors Legis-*

4 S. BAILEY & H. SAMUEL, *supra* note 2, at 166-93; Murphy, *supra* note 3, at 172.

5 S. BAILEY & H. SAMUEL, *supra* note 2, at 166-93; *see* Muckleston, *Water Projects and Recreation Benefits*, in CONGRESS AND THE ENVIRONMENT 112-29 (R. Cooley & G. Wandesforde-Smith eds. 1970).

6 J. FEREJOHN, *supra* note 3, at 235-42.

7 J. Murphy, The House Public Works Committee: Determinants and Consequences of Committee Behavior 371-84 (1969) (unpublished thesis at University of Rochester).

*lation, 1947-1968.* Ferejohn reports that it makes a difference whether congressmen and senators are on Public Works and the high-ranking Appropriations Committees. Though he reports some interesting variances across subcommittee membership, congressmen on these committees do generally fare better in getting project funding than congressmen not on these committees.[8] Ferejohn thus documents congressional pork barreling behavior, though he does not demonstrate exactly how much of the budget is accounted for by that behavior. Similarly, Ferejohn does not attempt to measure how much pork exists, asserting simply "that there most certainly is a pork barrel."[9]

A systematic analysis of pork barreling ought, however, to be based on a better understanding of how much pork is in the congressional barrel in the first place. Ferejohn bases his assertion of the existence of a pork barrel on essentially two observations: (1) the rate at which projects are discounted is too low; (2) the Corps of Engineers overestimates project benefits.[10] Of these, the discount rate is particularly significant.

For public works projects, discounting occurs in the context of calculating a benefit-cost ratio. By law, the Flood Control Act of 1936, public works projects must have a benefit-cost ratio to be considered for authorization and appropriation.[11] Customarily, it is unlikely that a project whose benefit-cost ratio is not 1:1 or greater will be either authorized or appropriated.[12] It is partially this custom that makes the discount rate so critical: for many projects the ratio will be less than 1:1 if a high discount rate is used, but 1:1 or above at a low discount rate.[13] In order to measure how much pork the Congress is handing out, therefore, a standard for determining appropriate project discount rates is needed.

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8 J. FEREJOHN, *supra* note 3, chs. 8-10.

9 *Id.* at 46.

10 *Id.* at 44. In addition to these observations, Ferejohn might have added a third: the exact items of cost and the exact items of benefit that go into the Corps' evaluation of a project.

11 Flood Control Act of 1936 §§ 1, 2, 33 U.S.C. §§ 701a, b (1970).

12 J. FEREJOHN, *supra* note 3, at 19, 21-22.

13 Fox & Herfendahl, *Attainment of Efficiency in Satisfying Demands for Water Resources,* 54 AM. ECON. REV. 202 (1964).

## I. Discounting and Opportunity Costs

Discounting is crucial to investment choice and is, perhaps, best understood in its relationships to the rate of interest.[14] Discounting is the process whereby future income is systematically assigned less value than is assigned to income in the present. It makes sense to discount because present dollars are preferred to future dollars; dollars in hand can be converted into immediate enjoyment income, can be used for consumption, whereas dollars in the future cannot be converted into enjoyment income now.[15] When future income is discounted it is said to have a present value. The present value of a dollar now is a dollar but the present value of a dollar one year from now discounted at, say, 10 percent is about $.91, and the present value of a dollar ten years from now discounted at 10 percent is about $.39.[16] Any discount rate is effectively the price exacted by those who are willing to sacrifice consumption now for consumption at a future date. It is the price that must be paid by those engaged in exactly the opposite process, namely, exchanging future income for present income. For those who are loaning there is a discount rate at which they are exchanging present for future income and for those who are borrowing, there is a rate of interest at which they are exchanging future income for present income.[17] In a competitive market system, assuming only the options of lending or borrowing, the rate at which present income is exchanged for future income is the discount rate and is equal to the rate at which future income is exchanged for present income, the rate of interest.[18] Normally, of course, there are far more options available to investors than lending. The existence of these other options presents the question of opportunity costs.

Investors are normally presented with several different options. For the sake of simplicity only two will be considered here: a

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14 For a detailed description of the relationship of discounting to interest rates, *see* I. Fisher, The Theory of Interest chs. I-IV (1930).

15 *Id.* ch. IV, §§ 1-2.

16 Figures are calculated from tables in R. Johnson, Financial Management 184-85 (2d ed. 1962).

17 *See* I. Fisher, *supra* note 14, ch. V, §§ 1-3.

18 *See id.*

loan as against a land improvement project.[19] Let us assume a certain degree of stability in the market rate of interest and that the returns are perpetual. Suppose now, in particular, that a landholder is presented with the options of converting a swamp into productive land as against loaning (investing) dollars at the market rate of interest, say 10 percent. The landholder can calculate his investment choice in either one or two ways: calculate return over cost (yield) or calculate net present value.[20] If the landholder calculates his choice in terms of the yield of the investment, the rate which equates the present value of the benefits with the present value of the costs, he invests in the improvement until the yield on the investment is equal to the yield of the loan. Suppose that the returns over cost of various increments in investment are as follows: 1) leave the swamp alone for perpetual return of $500, *i.e.,* effectively invest zero dollars for zero return; 2) invest $1000 for an additional $250 return, giving a total return of $750 or yield of 25 percent; 3) invest an additional $1000 for a yield of 15 percent or an additional $150 generating a total return of $900; 4) invest another $1000 for a yield of 10 percent or an additional $100 giving a total return of $1000; 5) invest still another $1000 for a yield of 6 percent or a return of $60, giving a total return of $1060. For a total investment of $4000 the landholder is presented with an income stream of $1060 annually in perpetuity. But the landholder will stop short of investing all $4000 in improving the swamp for the last $1000 yields only $60, which is $40 less than the amount of return yielded by investing in loans at the 10 percent market rate of interest. This $40 in perpetuity is the opportunity cost of investing in the improvement instead of the loan. By virtue of the same reasoning, the landholder will be indifferent between investing the third investment of $1000 in the swamp or in the loan market, the choice depending on such intangibles as esthetic value.

Alternatively, the landholder could calculate the net present value of each increment of $1000 in investment cost. To calculate the net present value, the landholder would discount the benefits

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19 The example is adopted from an illustration found in *id.* at 167-68.

20 For the two different methods of calculation, *see* R. JOHNSON, *supra* note 16, at 186-91.

at 10 percent, for that is the return on the alternative investment. He would then compare the present value of the benefits with the present value of the cost and invest in the improvement as long as there is a net present value. The landholder's first $1000 would generate $250 with a present value of $2500, giving a net present value of $1500; the second $1000 would generate an additional $150 with a present value of $1150, giving a net present value of $150; the third $1000 would generate an additional $100 with a present value of $1000, giving a net present value of zero. Here the landholder would stop investing for to continue would mean to entail a loss, or an opportunity cost; the net present value of the last $1000 would be —$400. The landholder would invest in loans at 10 percent, for the rate of return on the last $1000 is only 6 percent. Again, to invest in a project with a lower rate of return than an alternative is to incur an opportunity cost in that the investor would be worse off than in the next best choice.

Possible opportunity costs are an element in any set of investment choices. For two reasons, in the private sector, the market rate of interest is considered to be the appropriate rate for discounting income streams and assessing opportunity costs. First, investing in the loan market, as in the example above, is often an alternative. But the choice is not always between marginal projects and loan options. Investors can be faced with several choices, all having internal rates of return above the market rate of interest. Anytime an investor is faced with several choices, projects with the higher internal rates of return (yield) or higher net present values should be chosen in favor of those with lower internal rates of return or lower net present values if opportunity costs are to be avoided. But even when the market rate of interest is not relevant as an investment option, it is relevant as the price investors must pay for investment capital. This price that must be paid represents possible opportunity cost to those who are loaning funds to the borrowing investors. Since the interest rate is the price that must be paid for investment capital, present values of benefit streams must be discounted at that rate and internal rates of return must ultimately be measured against it. As will be seen, the market rate of return does not necessarily have this crucial role in the public sector and thus it is not obvious in

just what way opportunity costs and the price of capital ought to be assessed.

## II. Alternative Discount Rates

What is the appropriate rate of interest for the federal government to use in discounting public investments? In responding to this question students of natural resource development have generated an almost bewildering array of answers, among them (1) the rate of return on private investments; (2) the internal rate of return on the next best project; (3) the social opportunity costs of capital; (4) an unspecified social discount rate; and (5) the rate of interest on Treasury notes.[21] For the first two of these positions, return on private investment and the internal rate of return on the next best project, the argument turns explicitly on the question of investment opportunity costs to the investor. Arguments for using the social cost of capital or an unspecified social discount rate, take a position of consumer sovereignty and turn explicitly on the opportunity costs to the consumer, *i.e.*, the taxpayer. Finally, the argument that federal investments ought to be discounted at the rate of interest on Treasury notes turns on the question of the cost of capital to the federal government. These differing vantage points from which the discount rate problem has been approached, as well as the structure of the arguments themselves, must be examined in attempting to assess the validity of the differing positions.

American economists traditionally have taken the position that the rate of return on private investments ought to be used as the rate for discounting federal investments.[22] The popularity of the rate of return on private investments undoubtedly stems from its apparent virtue as a Gross National Product maximizer:

> It is argued that the capital employed in public projects could be used in fields of private investment instead, where

21 All the alternatives except the next best project are discussed in O. Eckstein, Water-Resource Development: The Economics of Project Evaluation 94-104 (1961). The next best project is discussed in R. McKean, *supra* note 1, at 82-88.

22 *See, e.g.*, Baumol, *On the Discount Rate for Public Projects*, in Public Expenditures and Policy Analysis 273-90 (R. Haveman & J. Margolis eds. 1970).

> it would earn a high rate of return, and therefore that an optimal allocation of investment in the economy would require that the rate on public investment should be as high as the rate in the private sector in order to maximize the total increase of national income that the country's investment in any period can be produce.[23]

This position holds to the obvious: investments with higher rates of return add more to GNP than investments with lower rates of return; if the federal government invests at less than the market rate, there is a national opportunity cost. But the argument supposes that if the federal government does not invest, investments will occur in the private sector or, viewed from the opposite direction, if the federal goverment invests at lower than market rates, investments at market rates will not occur in the private sector.

Because the position assumes this particular trade-off between presumably inferior public investments and superior private investments, it cannot really be sustained. In the first place, as has been noted by Eckstein, "since public investment is financed primarily out of taxation, most of which is paid by households, its expansion would at least in part be at the expense of consumption,"[24] not necessarily at the expense of private investment. Secondly, again as has been noted by Eckstein, "insofar as it is private investment that is affected, it need not be the best investments, but only marignal undertakings in enterprises whose growth is particularly constrained by federal business taxes."[25] Moreover, under conditions of less than full employment, the federal government is not employing resources otherwise in use and these unused resources are presumably not being employed by the marginal investors in the private sector.

There are other grounds for rejecting the market rate of return as the appropriate rate for discounting public works projects. Federal agencies, it has been argued, are faced with two conditions, capital rationing and the irrelevancy of resale value, not normally to be found in the private sector. Because of the combination of these conditions, the argument goes, the market rate

23 O. ECKSTEIN, *supra* note 21, at 96-97.
24 *Id.* at 97.
25 *Id.*

of return is irrelevant; instead, projects should be discounted at a rate equal to the internal rate of return or yield of the next best project.[26] First, it is said a federal agency is constrained by a politically imposed investment budget. This budget means that capital is rationed. Furthermore, this condition of capital rationing exists in combination with the second condition always present in the case of a federal agency: the agency is not going to be sold for the sake of making better investments. Because the agency does not face liquidation, it need not be concerned about the attractiveness of its assets to potential buyers on the open market. In this context of capital rationing and the irrelevancy of resale value a government agency, when faced with alternative investment choices, might think of opportunity costs in terms of the next best project, the project below the last project for which funds are available.

A federal agency, it is argued, does not have the choice of several investment opportunities for which the market rate of return would be appropriate, the agency not being authorized to invest its funds in the private sector; instead, it is argued, an agency has only choices to make among several competing projects. Hence the counsel of perfection: discount all projects at the internal rate of return of the next best project and maximize net present worth.[27] This argument assumes that a set of worthy projects exist and that the total dollar value of the set exceeds the amount of dollars fixed for investment in them by the politics of the budgetary process. Indeed, there will normally be far more projects than dollars available for funding them.[28] A set of worthy projects, one supposes, would be a set such that each has a yield, has some positive rate which equates the present value of the benefits with the present value of the costs. And the assumption of a yield is all that is supposed; all that is required is a next best project which will yield a rate of return that can be used to discount the superior projects.

There are at least two problems with using the internal rate of return of the next best project as the discount rate. Just which

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26 R. McKean, *supra* note 1, at 82.
27 *Id.* at 84-85.
28 J. Ferejohn, *supra* note 3, at 21-23.

project is the next best project is not clear. If there are, say, 20 projects but only funding for 10, how are the initial ten to be chosen? What project, in other words, is the eleventh, or next best? A way out of this dilemma is to rank all the projects according to their internal rates of return, choose the top ten and discount them at the rate of return of the eleventh. But even if the question of the next best project can be settled, there remains a more important problem: using the internal rate of return of the next best project as the discount rate ignores the cost of capital to the federal government. That is to say, discounting at the rate of return of the next best project shares with discounting at the market rate of return the problem of ignoring the dollars taxpayers actually forgo for the federal government to invest in projects.

There are at least two different ways of thinking about the rate at which taxpayers forgo dollars for the sake of federal investments, the social cost of capital and the social rate of time preference. The former takes a short-term view of federal investment and the latter takes a long-term view. The social cost of federal capital is based squarely on the time preferences of taxpayers. "A household," writes Eckstein,

> which is willing to borrow at an interest rate of 10 per cent, [for example], in order to increase its present consumption must be assumed to have that time preference; and income which is taxed away for the sake of a public project represents a social cost measured by that interest rate, for it would take a rate of at least that magnitude to have the consumer voluntarily lend his money in order to permit the public investment.[29]

In 1958 Krutilla and Eckstein reported an elaborate statistical inquiry which discovered a rate of preference among taxpayers for present over future consumption to range between 5 and 6 percent.[30] Taxpayers, that is to say, were not willing to lend money for federal investment at less than 5 or 6 percent, for that is the minimum rate they need to defray the loans for which they

29 O. ECKSTEIN, *supra* note 21, at 98.

30 J. KRUTILLA & O. ECKSTEIN, MULTIPLE PURPOSE RIVER DEVELOPMENT 98 (1958). For a summary of this analysis, *see* O. ECKSTEIN, *supra* note 21, at 99. One supposes that the rate is much higher at present.

are obligated. This social cost of federal capital as the appropriate discount rate for federal investments is appealing in that it approximates what taxpayers might actually forgo in order for the federal government to make investments, and in that most federal investments are supported by taxes. For these reasons, it is the rate favored by Ferejohn.[31] Using the social cost of capital as the discount rate has further appeal in that some federal investments are short-term, intended essentially for the present generation. For these projects, discounting at the social cost of capital seems appropriate.

However, most federal resource investments are intended, not for this generation, but for future generations. For these projects a different rate, that at which taxpayers are willing to forgo income completely for the enjoyment of income by future generations, would be more appropriate. Such a rate would be the social rate of time preference, an unspecified rate at which the society allocates benefits for future generations.[32] In contrast to the social cost of federal capital, it ignores the rate at which individuals forgo present enjoyment income for their own subsequent enjoyment income. Rather, the social rate of time preference takes political processes into account in determining the rate at which present generations wholly forgo enjoyment income in order to create enjoyment income for their children and grandchildren.[33] The chief disadvantage of the social rate of time preference is that it is empirically elusive.

There is, however, information on the rate at which taxpayers are willing to forgo income completely for future generations: the rate at which they are willing to lend money to the federal government on long-term Treasury notes. True, not every taxpayer who purchases a long-term government note intends the proceeds for future generations, but it is certainly often the case as when grandparents buy long-term notes for grandchildren, or when older citizens buy notes clearly intended for those in their family who survive them. There is thus available a rough estimate of the social rate of time preference for the purpose of dis-

31 J. FEREJOHN, *supra* note 3, at 45-46.
32 O. ECKSTEIN, *supra* note 21, at 99-100.
33 *Id.*

counting long-term federal investments and this rate has, in the past, been in the neighborhood of 3 percent.[34] Precisely because this is the rate at which taxpayers are willing to make long-term loans to the Treasury, it is the cost of capital to the federal government. This rate on long-term Treasury notes is thus suggested by two different standards, the social time preference standard and the cost of capital to the federal government standard, as the appropriate rate for discounting federal natural resource development projects.[35]

It has, nonetheless, been criticized on at least two counts. First it is said there is a great difference between the lender's risk and the borrower's risk; purchasing long-term government bonds is a very low risk investment but building great natural resource projects can have a high risk.[36] And here, it is argued, the free market analogy tends to break down. In the case of a firm's benefits, the lender shares the risk and loses out when the firm fails; in the case of the federal government, however, taxpayers absorb the losses, not the Treasury note lenders. Hence, the apparent cost of capital, so measured, does not reflect the actual cost of capital, which includes the amount taxpayers must make up. The problem with this criticism is that it assumes a significant rate of failure in federal natural resource investments. Yet an indirect measure of such a failure, the frequency of large cost overruns, will not sustain the criticism. For fiscal year 1968, for example, completion funds were requested for 51 public works projects. Cost estimates on these projects when first prepared totaled $734,637,000. Cost estimates at the time of the request for completion funds totaled $735,502,000, or a one-tenth of one percent increase over the cost estimates given at the outset.[37] The data thus indicates that the differential between lender's and borrower's risk is not really very substantial.

Using the rate at which the federal government must borrow funds for discounting projects has also been criticized because it "assumes that the money is actually raised through voluntary

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34 *Id.* at 94-95.
35 *Id.* at 94-97.
36 *Id.* at 95-96.
37 S. REP. No. 574, 90th Cong., 1st Sess. 4 (1967).

bond sale to the public,"[38] which is not, of course, the case. Most dollars for federal projects are raised through taxes. And, as noted above, taxpayers are actually forced to forgo income at a rate perhaps twice as high as the social rate of time preference. But the former is not the rate at which taxpayers are willing to forgo consumption completely for the enjoyment income of future generations. To criticize the rate on the grounds that most of the money is really raised through taxes thus misses the point, because it is long-term federal investments that are at issue.

Using the rate at which the government must borrow funds is thus defensible on the joint grounds that it is the opportunity cost to the lender and the opportunity cost to the borrower. And it is the *only* rate for discounting federal projects that simultaneously takes into account the vantage point of lender and borrower. It is, therefore, suggested here that all long-term federal projects be discounted at the rate of interest on long-term Treasury notes. In suggesting the social rate of time preference as the appropriate rate, due note must be taken of federal projects that are essentially intended for the present generation, *e.g.*, dredging harbors. For these short-term projects, it is thus further suggested, the private rate of return or the rate at which taxpayers would be willing to loan money to the federal government for them might well be considered as the appropriate rate.[39]

## III. Toward a Measurement of Congressional Pork

Deciding which public works projects are congressional pork and which are legitimate national investments turns primarily on the prior decision of an appropriate discount rate. There is

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38 O. Eckstein, *supra* note 21, at 96.

39 Eckstein, in *id.* at 101-03, has presented a somewhat more complex compromise to allow for the long-term perspective of the federal program and, at the same time, to assure that only those projects are undertaken in which capital yields as great a value as it would in alternative employments. He permits all projects with internal rates of return of 6% to have benefit-cost ratios of unity; but he requires projects with internal rates of return lower than 6% to have benefit-cost ratios higher than unity. For projects with internal rates of return lower than 6% the benefit-cost ratio must be high enough that the project effectively yields 6%.

general agreement that projects with a benefit-cost ratio below unity are unworthy but that projects with benefit-cost ratios of unity or better are worthy investments.[40] Which rate is chosen is crucial since many projects authorized by Congress are close to the margin. Higher rates of discounting would eliminate such projects because the ratio of benefits to costs is very sensitive to the discount rate; a small increase in the discount rate brings the benefit-cost ratio down rapidly and can very quickly push the ratio below unity.[41] Because Congress has authorized many so-called marginal projects, there is either a lot of pork or not very much pork depending on which discount rate one selects.

The Army Corps of Engineers has always discounted at a rate approximating the rate of interest on Treasury notes or what is here being thought of also as the social rate of time preference.[42] This discounting procedure has generated a large number of projects. While the benefit-cost ratios on these projects vary a great deal, many of the projects have low ratios. For the 80th through the 90th Congresses, 379 flood control projects and 400 rivers and harbors projects were authorized by Congress. Of the 379 flood control projects, 44 or 10.6 percent had ratios of less than 1:1 (unity), 168 or 44.3 percent had ratios between unity and 1.49, 73 or 19.3 percent had ratios betwen 1.5 and 1.9, 44 projects or 11.6 percent had ratios between 2.0 and 2.49, and the balance of the flood control projects, 50 in all, had ratios of at least 3.0, some being as high as 5.0 and beyond. Benefit-cost ratios on the rivers and harbors projects present a similar pattern: 23 projects or 5.5 percent had ratios of less than unity; 139 projects or 34.8 percent had ratios of unity to 1.49; 79 projects or 19.8 percent had ratios between 1.5 and 1.9; 44 projects or 11 percent had ratios between 2.0 and 2.49; and the balance of the projects, 116, had ratios of 2.5 or better, some as high as 5.0 and beyond.

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40 *See* note 12 *supra* and accompanying text.

41 J. FEREJOHN, *supra* note 3, at 30-31. *See also* Fox & Herfendahl, *supra* note 13.

42 O. ECKSTEIN, *supra* note 21, at 94. The interest rates on long-term Treasury notes can be found in the appropriate issues of the *Federal Reserve Bulletin.* Unfortunately discount rates for Army Corps of Engineers projects are not generally reported in the government documents. Records of the discount rates are nonetheless available; *see* Review of Federal Discount Rates Subsequent to the Flood Control Act of 1936 (memorandum on file with the Army Corps of Engineers), which lists the discount rates for the years 1936-74.

Nonetheless, if either the market rate of return or the social cost of capital are insisted upon as the appropriate discount rate, probably 59.9 percent of the flood control projects and 40.3 percent of the rivers and harbors projects would not be considered worthy of being funded.[43] About half the projects considered worthy of funding by using the Treasury note discount rate, that is to say, would be considered unworthy of funding if discounted at either the market rate of return or the social cost of capital rate.

The customary line drawn between economically worthy and unworthy projects constitutes both a convenient and an analytically sound benchmark from which to measure congressional pork. It marks the division between legitimate national investments and congressional handouts. Using the criterion of a unity or higher benefit-cost ratio as computed under the Treasury note discount rate advanced above, the data shows that 89.4 percent of the flood control projects authorized and appropriated from the 80th through 90th Congresses are legitimate national investments, and that 95 percent of the rivers and harbors projects authorized and appropriated during the same period are also legitimate.[44] Just under 11 percent of the flood control projects and exactly 5 percent of the rivers and harbors projects authorized and appropriated from the 80th through 90th Congresses, in other words, are pork. On the average, just over 8 percent of the Army Corps of Engineer projects funded by Congress are in the congressional pork barrel.

Many will consider this particular estimate of the actual amount of congressional pork in the congressional pork barrel too low. To be sure, the estimate suggested here is conservative. It does not allow for discounting short-term projects at the social cost of capital rate. It excludes all projects with net present values

43 This data has been gleaned from the 108 appropriate reports of the House and Senate Public Works and Appropriations Committees for the 80th through 90th Congresses. Citations for these reports for authorizations and appropriations can be located in the appropriate volumes of the *Congressional Quarterly Almanac*, generally under the heading of "Public Works."

44 The benefit-cost ratios for the authorized but not appropriated projects closely approximate those of the funded projects. Of course, a project authorized but not appropriated is neither a piece of pork nor a legitimate national investment, since no funds are committed to it.

of zero, *i.e.*, all projects with benefit-cost ratios of unity. Unfortunately, as of this writing, the data is not in a form that allows a precise determination of how many projects that entails. Even if these unity ratio projects are lumped in, however, the average figure would be something less than 20 percent, still a very low amount of pork.[45]

## *Conclusion*

As noted at the outset, it has traditionally been assumed that internal development projects are congressional pork. It has always been supposed that, whatever merit the improvements might have, they exist essentially because they generate votes for the senators and representatives who authorize and appropriate funds for them. Heretofore, no attempt has really been made to determine how many of these projects are worthy in terms of economic benefits. Yet because Army Corps of Engineers projects must have benefit-cost ratios, there is a way of deciding which projects are meritorious. They need not all be considered essentially similar with respect to economic benefits even though they are probably quite similar with respect to political benefits.

These political benefits are apparently much easier to assess than the economic benefits, for there appears to be tacit agreement about the former but not about the latter. Disagreement about the economic benefits stems from disagreement about how to assess them, and, in particular, how to discount them. In this Comment it has been asserted that there is not really very much pork in the congressional pork barrel. This point of view turns on the choice of a discount rate that is much lower than others have often proposed. Many, such as Ferejohn, would insist on at least the social cost of capital. Discounting at this rate would mean that somewhere in the neighborhood of half the Army Corps of Engineer projects would be considered pork. But even this estimate, one supposes, is far lower than impressionistic considerations and popular reports would suggest.

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45 *See* note 43 *supra.*