CONGRESSIONAL BUDGET REFORM: THE FIRST TWO YEARS

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Three years ago the Harvard Journal on Legislation *published an Article by Allen Schick on legislative proposals to reform the congressional budget process.*[1] *Mr. Schick found that the budget control bills then before Congress contained many ambiguities that concealed underlying disagreement and confusion about the objectives of budget reform. Mr. Schick concluded: "Much of the story of budget reform will have to be written in congressional practice rather than legislative words."*[2] *On July 12, 1974, Congress enacted the Congressional Budget and Impoundment Control Act. In the Article that follows, Mr. Fisher describes the first two years of practice under the 1974 act and suggests the directions in which Congress may be moving to regain control over the federal budget.*

Introduction

The Congressional Budget and Impoundment Control Act of 1974[3] has been in effect for two years. The Act, which was partially implemented in 1975 and went into full operation in 1976, is designed to strengthen congressional control over the size and shape of the federal budget. The key features of the new budget process are the concurrent budget resolutions that are prepared by the House and Senate budget committees and passed by Congress at least twice during each fiscal year, and the power of Congress to overturn a Presidential decision to impound appropriated funds. These two features, congressional budget reform and impoundment control, were combined in 1974 for practical and political reasons. Although they serve the same goal — to increase congressional control

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1 Schick, *Budget Reform Legislation: Reorganizing Congressional Centers of Fiscal Power*, 11 Harv. J. Legis. 303 (1974).

2 *Id.* at 350.

3 Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified in 2 U.S.C. §§ 190d, 601-603; 31 U.S.C. §§ 11-11d, 701, 1020-1020a, 1151-1154, 1301-1353, 1401-1407 (Supp. V 1975)).

over federal spending — they do so in rather different ways. The first three sections of this Article are devoted exclusively to the congressional budgetary process. The discussion of impoundment appears in Section IV.

Two years of legislative activity under the budget reform act have generated a complex record of performance. Moreover, the public record does not tell the whole story because much of the congressional action has been conducted privately in order to avoid costly and abrasive battles on the floor. The congressional budget process is a legislative puzzle that continually changes in response to new circumstances. This Article briefly describes the background and content of the new congressional budget reforms and discusses the general performance of the process in 1975 and 1976.

I. THE ENACTMENT OF BUDGET REFORM

A. *Precipitating Factors*

The congressional budget reforms were largely a response to three factors: the deterioration of the national economy, the increase in "uncontrollable" and "backdoor" spending, and President Nixon's penchant for confrontation with Congress. Inflationary pressures that began during the Johnson administration grew to alarming proportions under Richard Nixon. The annual rate of increase in the consumer price index doubled between 1966 and 1969 and continued to accelerate. In 1974 the consumer price index rose 11.0 percent, the largest annual increase since 1947.[4] The recession of 1970 also took its toll by increasing unemployment and reducing the flow of federal tax revenues needed to balance the budget. The federal funds budget deficit, $5.5 billion in fiscal year (FY) 1969, increased to $13.1 billion in FY 1970 and reached $29 billion in FY 1971 and FY 1972.[5] When budget control became a major issue in 1972, the estimated federal funds deficit for FY 1973 was $34 billion.[6]

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4 ECONOMIC REPORT OF THE PRESIDENT 47, 130 (1975).

5 H.R. REP. No. 147, 93d Cong., 1st Sess. 35 (1973). "Federal funds" do not include surpluses generated by the social insurance trust funds.

6 *Id.*

Congress faced a major obstacle in its attempts to control federal spending: the fact that an increasing percentage of the budget was "relatively uncontrollable under existing law."[7] Uncontrollable budget items include interest on the national debt and funds appropriated to fulfill prior year contracts. Almost two-thirds (66.2 percent) of the $196.6 billion budget for FY 1970 consisted of relatively uncontrollable expenses.[8] Estimates of the uncontrollable percentage of the budget continued to climb, from 72.8 percent in FY 1973 to 75.1 percent in FY 1974.[9]

"Backdoor spending" also complicated congressional budget control. Although Congress normally funds agencies through regular appropriations bills, it occasionally grants them spending authority by "backdoor devices."[10] One form of backdoor spending is "contract authority," which allows agencies to enter into contracts before they receive appropriations. Congressional funding to liquidate the contract obligations when they come due is perfunctory because the good faith and credit of the federal government is at stake. A second form of backdoor spending is "borrowing authority," which allows agencies to obligate and spend funds that they borrow directly, through authority to spend agency debt receipts, or indirectly, through authority to spend Treasury debt receipts. A third form of backdoor spending is authorized by the system of "mandatory entitlements" which requires payments to any person or government that meets standards established by law. Funding of such payments by the appropriations committees is an automatic, clerical operation.

The inability of Congress to control federal spending became a major political issue during the 1972 election campaign season, when President Nixon and Congress engaged in a bitter struggle over a spending ceiling for FY 1973. Nixon asked Congress to set a $250 billion ceiling on total outlays for FY 1973 and to give him complete discretion to decide which

7 *See* The Budget of the United States Government, Fiscal Year 1974, at 333 (1973).

8 The Budget of the United States Government, Fiscal Year 1972, at 527 (1971).

9 The Budget of the United States Government, Fiscal Year 1974, at 333 (1973).

10 *See generally* Schick, *supra* note 1, at 313.

programs to cut in order to stay under that ceiling.[11] Congress refused to delegate such broad authority.[12] But the intense controversy prompted Congress to create a Joint Study Committee on Budget Control (JSC) with instructions to recommend

> procedures which should be adopted by the Congress for the purpose of improving congressional control of budgetary outlay and receipt totals, including procedures for establishing and maintaining an overall view of each year's budgetary outlays which is fully coordinated with an overall view of the anticipated revenue for that year. . . .[13]

In 1973 the JSC recommended that budget committees be established in each House to set an overall ceiling on the budget and to allocate the budget among the various committees and subcommittees of Congress.[14] The JSC recommendations were substantially modified by the House and Senate in the course of lengthy committee and floor deliberations.[15] On July 12, 1974, the Congressional Budget and Impoundment Control Act became law.

B. *A Description of the Process*

The Act created budget committees in each house and a Congressional Budget Office (CBO).[16] The budget committees

11 Special Message to the Congress on Federal Governmental Spending, PUB. PAPERS 741, 742 (July 26, 1972).

12 *See generally* Fisher, *Congress, the Executive and the Budget*, 411 ANNALS 102 (1974).

13 Act of Oct. 27, 1972, Pub. L. No. 92-599, § 301(b)(1), 86 Stat. 1324.

14 H.R. REP. No. 147, 93d Cong., 1st Sess. 35 (1973); *see* Schick, *supra* note 1, at 316-19.

15 *See generally* Schick, *supra* note 1.

16 The House Budget Committee originally consisted of 23 members: five from the Ways and Means Committee, five from the Appropriations Committee, eleven from other standing committees, and one each appointed by the majority and minority leaders. Pub. L. No. 93-344, § 101(a), 88 Stat. 297 (1974). In 1975 the House expanded the Budget Committee to 25 members, of whom 13 are from standing committees other than Ways and Means and Appropriations. H.R. Res. 5, 94th Cong., 1st Sess., 121 CONG. REC. H5 (daily ed. Jan. 14, 1975).

The Senate Budget Committee originally consisted of 15 members selected in the same manner as for any other standing committee. Pub. L. No. 93-344, § 102(9), 88 Stat. 297 (1974). The Senate did not set quotas for members of the Appropriations and Finance Committees. In 1975 the Senate Budget Committee expanded to 16 members. S. Res. 17, 94th Cong., 1st Sess., 121 CONG. REC. S510-11 (daily ed. Jan. 17, 1975).

The Act also created the Congressional Budget Office to provide analytic assistance to the budget committees, the appropriations committees, other committees, and individual members of Congress. 2 U.S.C. §§ 601-603 (Supp. V 1975).

must prepare at least two budget resolutions each year: one in the spring to set targets and a second in the fall to establish binding totals.[17] A rigorous timetable regulates the entire budget process. The President must submit his budget on or before the 15th day after Congress meets. All committees and joint committees must transmit recommendations to the budget committees by March 15. CBO must submit a report by April 1. On the basis of the committee recommendations, the CBO report, and their own hearings, the budget committees must report the first concurrent resolution to each house by April 15.[18] This resolution is intended to guide the authorization and appropriation committees by setting appropriate levels for budget authority outlays, revenues, an overall surplus or deficit, and the public debt.[19] Outlays and budget authority are presented in terms of major functional categories in order to permit debate on budget priorities. Congress must complete action on the first resolution by May 15, the date by which all other committees must report bills and resolutions that authorize the appropriation of any *new* budget authority. Meanwhile, the appropriations committees report the regular appropriation bills to the floor for action. By the seventh day after Labor Day Congress must complete action on all appropriations bills and any other "backdoor" bills that provide spending authority.[20] The budget committees must report a second concurrent resolution that sets binding totals for budget authority, outlays, and revenues and upon which Congress must act by September 15.[21] Differences between the totals in the second concurrent resolution and any spending, revenue, or debt legislation must be resolved in a reconciliation process by September 25. Congress cannot breach the limits set by the September budget resolution unless it passes a new budget resolution. The new fiscal year begins on October 1, rather than on July 1 as in the past.[22]

17 31 U.S.C. §§ 1302, 1311 (Supp. V 1975).

18 *Id.* § 1321.

19 *Id.* § 1322(a). "Budget authority" permits agencies to enter into obligations. In previous years this concept was called "new obligational authority." Obligations generally are liquidated by outlays: the issuance of checks or disbursement of cash.

20 31 U.S.C. § 1321 (Supp. V 1975).

21 *Id.* § 1331(a), (b).

22 *Id.* §§ 1020-1020a. The Act also restricts "backdoor spending," *id.* §§ 1351-1353;

The budget committees resolved to follow this timetable for FY 1976,[23] but the two houses did not complete action on the second budget resolution until mid-December 1975[24] and the budget resolutions contained only aggregate figures. The budget resolutions did not begin to include functional category breakdowns until the budget for FY 1977, when the new budget process was fully implemented.

II. Disagreement over the Objectives of Budget Reform

The legislative history of the Congressional Budget Act of 1974 reveals sharp disagreement among members of Congress over the objectives of budget reform.[25] The principal asserted objectives were (1) to reduce spending and balance the budget, (2) to use the budget to stimulate the economy, and (3) to reinforce congressional control over federal spending priorities. The first two years of practice under the Act have not resolved the disagreement over objectives. The first two objectives are treated together in Section A since each reflects a distinctive perspective on macroeconomic policy. The third objective, control over budget priorities, is considered in Section B.

A. *The Budget as a Macroeconomic Tool*

Some members of Congress believe that the basic purpose of the Congressional Budget Act is to reduce spending. According to Senator John L. McClellan (D-Ark.), chairman of the Appropriations Committee and a vice-chairman of the JSC, "the very concept of budget control by Congress was to reduce expenditures, not to increase them."[26] Senator Carl T. Curtis (R-Neb.), another member of the JSC, has put the emphasis on

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strengthens program review and evaluation, 2 U.S.C. § 190d, 31 U.S.C. §§ 1154, 1303 (Supp. V 1975); provides for improved fiscal and budgetary information, 31 U.S.C. §§ 11, 1151-1153 (Supp. V 1975); and creates a new impoundment control procedure, *id.* §§ 1400-1407.

23 *See* H.R. Rep. No. 25, 94th Cong., 1st Sess. (1975); S. Rep. No. 27, 94th Cong., 1st Sess. (1975).

24 H. Con. Res. 466, 93d Cong., 2d Sess., 121 Cong. Rec. S21,879 (daily ed. Dec. 11, 1975); *id.* at H12,454 (daily ed. Dec. 12, 1975).

25 *See* Schick, *supra* note 1.

26 121 Cong. Rec. S7217 (daily ed. Apr. 30, 1975).

balancing the budget.[27] Other members disagree. Representative John Conyers, Jr. (D-Mich.) has argued that the purpose of budget reform is to improve the national economy. Conyers claims that concern over deficits is "nothing less than a travesty upon the budget process, for the fixation upon the deficit has obscured the simplest of truths: That the budget shapes the economy, and the economy exists to fulfill the needs of the people."[28]

1. Restraint on Spending

During the 1972 election campaign President Nixon charged that Congress acted irresponsibly on federal spending. Nixon attributed this behavior to the procedures that Congress used to consider the budget, asserting that "Congress not only does not consider the total financial picture when it votes on a particular spending bill, it does not even contain a mechanism to do so if it wished."[29] Many members of Congress agreed with the premise of Nixon's charges. In its 1973 report the JSC linked the increasing size of budget deficits to inadequacies in congressional decision-making and concluded that the "failure to arrive at congressional budget decisions on an overall basis has been a contributory factor in this picture."[30]

Budget data suggest, however, that the criticism of congressional spending behavior was unfounded, for Congress had little *net* effect on total budget authority during the Nixon years. Indeed, Congress reduced the President's appropriations requests for fiscal years 1969 through 1973 by a total of $30.9 billion. This reduction was offset by a $30.5 billion increase in spending authorized by backdoor devices and mandatory entitlements.[31] The large budget deficits during the Nixon years were caused principally by the loss of tax revenues due to the recession and not by runaway federal spending.[32] Thus, the road to a balanced budget lay not in reduced spending but in a more vigorous economy.

27 *See* 122 CONG. REC. S5332 (daily ed. Apr. 9, 1976).
28 121 CONG. REC. H3575 (daily ed. May 1, 1975).
29 PUB. PAPERS 964, 965-66 (Oct. 7, 1972) (radio address on federal spending).
30 H.R. REP. No. 147, 93d Cong., 1st Sess. 1 (1973).
31 *Id.* at 39.
32 H.R. REP. No. 90, 93d Cong., 1st Sess. 7 (1973); S. REP. No. 731, 94th Cong., 2d Sess. 3 (1976).

Some fiscal conservatives, mostly Republicans, have reacted with bitter disbelief to the size of deficits under the new budget process. For instance, Representative Robert Bauman (R-Md.) charged that House Budget Committee Chairman Brock Adams (D-Wash.) had "done an admirable job in presiding over the institutionalization of deficit spending in this Congress. A system that was to provide checks and balances on spending is glorified as a justification for deficits and debt."[33] But most observers agree that the new budget process has restrained spending;[34] critics of "excessive" spending seem to concede as much. Representative Delbert L. Latta (R-Ohio), ranking minority member on the House Budget Committee, voted against every budget resolution on grounds of "excessive" spending, but he admitted: "I realize if we did not have this budget process, no one could even guess as to the amount this Congress would be spending in fiscal year 1977."[35] Representative Herman T. Schneebeli (R-Pa.), another member of the Budget Committee who voted against every budget resolution, agreed: "Almost any final outlay figures would be much higher if we had no budget process."[36] Such statements, however, may only be political rhetoric that gives the new budget process more credit than it is due.

The first two years of experience under the Congressional Budget Act indicate that the new budget process has had an uncertain effect as a restraint on federal spending. The new process definitely has held down backdoor authorizations. Staff members of the appropriations committees claim that Title IV of the budget reform act[37] has closed more backdoors in two years than had been closed in the previous two decades.[38] However, those savings may be offset by a growing laxity in the

33 122 CONG. REC. H9607 (daily ed. Sept. 9, 1976).

34 Interviews with senior staff people of the House Budget Committee (Feb. 15, 1977) and the Office of Management and Budget (Jan. 18 and Feb. 16, 1977). However, senior staff people of the House Appropriations Committee assert that the new budget process has not acted as a restraint. Interviews (Feb. 16 and 22, 1977). The author has promised to preserve the anonymity of the persons whom he interviewed for this Article.

35 122 CONG. REC. H9517 (daily ed. Sept. 8, 1976). *See also id.* at H9518.

36 *Id.* at H4368 (daily ed. May 13, 1976).

37 31 U.S.C. §§ 1351-1353 (Supp. V 1975).

38 Interview with senior staff people of the House Appropriations Committee (Feb. 16, 1977).

regular appropriations process. The appropriations committees traditionally took pride in cutting the President's budget each year. Now it appears that for the first time in decades the net effect of appropriations committee action may be to increase the President's budget.[39]

The effect of the new budget process on congressional attitudes toward new spending programs is also ambiguous. The Act has given the budget committee chairmen the authority and the incentive to oppose spending bills which do not fit within the general contours of the budget resolutions. These limits may encourage more members to vote against costly new programs than had done so in the past. But the congressional budget also may justify votes in favor of spending increases. In past years a member could ask whether a proposed spending measure was in the President's budget. A negative reply would induce him to vote against the measure. Now he can ask whether the spending proposal is within the congressional budget. If it is, the member can rationalize a vote in favor of the program.

The budget committees can claim to have reduced federal spending by billions of dollars since the aggregate requests of the authorization and appropriation committees are far larger than the limits specified by the budget resolutions. But this comparison is a statistical exercise devoid of significance because authorization and appropriation committees may intentionally exaggerate their requests to protect themselves against cuts and to promote the appearance of budget discipline in Congress. Thus, it is unclear how much the new budget process has done to serve the objective of restraining federal spending.

2. Economic Stimulus

Many legislators believe that budget reform should increase Congress's ability to use the budget to control the national economy. The 1974 Act requires that concurrent resolutions set forth the "amount, if any, of the surplus or the deficit in the budget which is appropriate in light of economic conditions

39 *Id.*

and all other relevant factors. . . ."[40] The Joint Economic Committee must recommend to the budget committees a "fiscal policy appropriate to the goals of the Employment Act of 1946."[41] Some members of the budget committees have claimed that these fiscal policy objectives had been shortchanged. In 1975 Senators Walter F. Mondale (D-Minn.) and James Abourezk (D-S.D.), stated that the first budget resolution did not do enough to "reverse the tide of unemployment and lost production which is sweeping over this country."[42] Representatives Parren J. Mitchell (D-Md.) and Louis Stokes (D-Ohio) agreed that the budget resolution reflected "little change in our ordering of priorities, even in the face of sustained economic blight and domestic suffering."[43] Similar sentiments were voiced many times during floor debate.[44]

The proponents of a budget stimulus were opposed by the Ford Administration and by fellow congressmen who argued that increases in federal spending and a higher budget deficit would fuel inflation and would threaten the prospects for private investment in an economic recovery. Treasury Secretary William Simon was an aggressive spokesman for this position. He warned that an increase in the budget deficit proposed by the Administration would either produce "vicious competition" between the federal government and "crowd out" private borrowers from the capital market "or [cause] the Federal Reserve . . . to supply funds without regard to the inflationary consequences."[45]

Most members of the budget committees rejected Simon's arguments about inflation and the "crowding out" of private

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40 31 U.S.C. § 1322(a)(3) (Supp. V 1975).

41 *Id.* § 1322(c).

42 S. Rep. No. 77, 94th Cong., 1st Sess. 114 (1975).

43 H.R. Rep. No. 145, 94th Cong., 1st Sess. 82 (1975).

44 *See, e.g.*, 121 Cong. Rec. H3489-90 (daily ed. Apr. 30, 1975) (remarks of Rep. Stokes); *id.* at H4001 (daily ed. May 15, 1975) (remarks of Rep. Conyers). For similar comments, *see* H.R. Rep. No. 608, 94th Cong., 1st Sess. 71-72 (1975) (supplemental views of Rep. James O'Hara (D-Mich.)); *id.* at 77-78 (supplemental views of Rep. Mitchell); *id.* at 99-100 (dissenting statement of Rep. Elizabeth Holtzman (D-N.Y.)).

45 *Hearings on Fiscal Year 1976 Budget and the Economy Before the House Comm. on the Budget*, 94th Cong., 1st Sess. 130 (1975). *See also Hearings on the 1976 First Concurrent Resolution on the Budget Before the Senate Comm. on the Budget*, 94th Cong., 1st Sess. 995-1033 (1975) (remarks of Secretary Simon).

borrowers. Senate Budget Committee Chairman Edmund S. Muskie (D-Me.) cited the simultaneous decline of the unemployment rate and the consumer price index as "evidence that we can reduce unemployment further without accelerating inflation."[46] In April 1975 the House Budget Committee reported that private demand for capital had "fallen rapidly during the current recession. This decline should enable a significant portion of the deficit to be financed without displacing borrowing in the private sector. . . ."[47] The Senate Budget Committee also dismissed the threat of competition with private borrowers in the short term.[48] The budget committees' skepticism was warranted. In September 1976 House Budget Committee Chairman Brock Adams stated that recent experience proved "that the Federal Government's borrowing did not crowd out private borrowing. In fact, interest rates went down."[49]

The rejection of Simon's argument that larger deficits fuel inflation is one indication of the educational impact that the new budget process has had on the members of the budget committees in particular and on Congress in general. Until recently most legislators assumed that budget deficits cause inflation, although some economists told Congress that this correlation does not hold during a recession like the one under the Nixon and Ford administrations.[50] By 1976 certain members of the budget committees began to change their thinking on this issue because of the greater attention that they had begun to give to macroeconomic policy. For example, during House debate over the effect of a $50 billion deficit on the rate of inflation, Budget Committee Chairman Adams stated that econometric studies by his committee staff indicated that such a deficit "does not affect the rate of inflation by as much as 0.1 of 1 percent."[51] Adams argued that the traditional notion of inflation as "too many dollars chasing too few goods" did not

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46 122 CONG. REC. S5293 (daily ed. Apr. 8, 1976).
47 H.R. REP. No. 145, 94th Cong., 1st Sess. 16 (1975).
48 S. REP. No. 77, 94th Cong., 1st Sess. 30 (1975).
49 122 CONG. REC. H9603 (daily ed. Sept. 9, 1976).
50 *The 1972 Midyear Review of the Economy: Hearings Before the Joint Economic Comm.*, 92d Cong., 2d Sess. 153 (1972) (testimony of Paul A. Samuelson).
51 122 CONG. REC. H9515 (daily ed. Sept. 8, 1976).

hold because the demand for goods "is still not that strong."[52] Representative Neal Smith (D-Iowa), a member of the Budget Committee, said that he would be glad to see the end of "this old bugaboo that inflation goes up and down automatically and in concert with the deficit."[53] The change in attitude toward the deficit-inflation linkage is only one example of how the new budget process has made Members of Congress more conscious of the economic implications of budget decisions.[54]

B. *The Budget as a Means to Shape National Priorities*

The third objective of reforming the budget process was to enable Congress to reshape the President's budget proposals. Indeed, an explicit purpose of the 1974 Act is "to establish national budget priorities. . . ."[55] But thus far the process has not stimulated intensive debate on the relative allocation of funds to the various categories of federal spending.

1. The Character of Floor Debate

The level of attendance at floor debates on the budget resolutions did not evidence strong congressional interest in the budget process. Representative Samuel L. Devine (R-Ohio) called it a "real tragedy" that the debate on the first budget resolution for FY 1976 attracted less than 10 percent of the House membership to the floor and received little attention from the press.[56] Attendance at debate on subsequent budget resolutions has not been any better.[57]

The level of attendance at floor debates on the budget resolutions is not, however, the best measure of congressional interest since legislation rarely attracts many members to the floor. The important legislative activity normally occurs prior to floor action, particularly during committee hearings and

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52 *Id.*

53 *Id.* at H9515 (daily ed. Sept. 8, 1976).

54 *See, e.g., id.* at H9520 (daily ed. Sept. 8, 1976) (remarks of Rep. Charles H. Wilson (D-Cal.)).

55 31 U.S.C. § 1301(2) (Supp. V 1975).

56 121 CONG. REC. H3469 (daily ed. Apr. 30, 1975).

57 *See* 121 CONG. REC. H10,944 (daily ed. Nov. 11, 1975) (remarks of Rep. Robert Bauman (R-Md.)); 122 CONG. REC. H3442 (daily ed. Apr. 27, 1976) (remarks of Rep. Paul Findley (R-Ill.)).

mark-ups. Nevertheless, the poor attendance during floor action is a disturbing signal that the budget process has not stimulated as much attention as reformers had hoped.

2. Problems with Functional Categories

Congress has handicapped its ability to set budget priorities by adopting as a decision-making device the system of functional categories that had been used for decades by the executive branch.[58]

Functional categories lie between the extremes of budget aggregates, *i.e.*, total outlays and budget authority, and specific line items for federal programs and projects. The 1974 Act contemplates that Congress will consider the budget in terms of sixteen broad categories, such as national defense, income security, health, and agriculture.[59] The complete list of functional categories used in the first budget resolution for FY 1978 is contained in Table 1.

TABLE 1
Functional Categories[60]

Code	Function
050	National Defense
150	International Affairs
250	General Science, Space, and Technology
300	Natural Resources, Environment, and Energy
350	Agriculture
400	Commerce and Transportation
450	Community and Regional Development
500	Education, Training, Employment, and Social Services
550	Health
600	Income Security
700	Veterans Benefits and Services
750	Law Enforcement and Justice
800	General Government
850	Revenue Sharing and General Purpose Fiscal Assistance
900	Interest
	Allowances
950	Undistributed Offsetting Receipts

58 31 U.S.C. § 11a (Supp. V 1975).
59 *See id.* §§ 11a, 1322.
60 H.R. Rep. No. 189, 95th Cong., 1st Sess. iii (1977).

The choice of functional categories to structure the budget was dictated at least partially by political considerations. To have allocated the budget along the lines of committee jurisdictions would have increased the possibility of intense, perhaps fatal, intercommittee conflicts because a reduction in spending would appear to be a clear defeat for the committee that authorized that spending. Functional categories avoid the problem of committee jealousies because they are not coextensive with committee jurisdictions.

Some congressmen, however, have been dissatisfied with the functional categories. Representative James G. O'Hara (D-Mich.), a member of the Budget Committee, has complained that functional categories aggregate spending in areas which Congress traditionally has considered separate.[61] For example, the functional category for education, manpower, and social services combines three program areas which O'Hara claims deserve separate attention.[62] O'Hara has suggested that the functional categories be coextensive with the jurisdictions of the individual standing committees because the committees cannot easily understand the sixteen functional codes of the executive branch.[63]

The breadth of some functional categories makes them meaningless. For example, the functional category for "Commerce and Transportation" is so broad that a member cannot decide whether it is overfunded or underfunded. Even the subfunctions, such as water transportation, ground transportation, and air transportation are too broad to facilitate debate on spending priorities. Members of Congress and their constituents do not think in such broad terms. They are more concerned about choices between mass transportation and private automobiles, the deregulation of air fares, and other, more specific policy questions. Consequently, the present functional categories are largely ignored in the Congressional decision-making process. The budget committees concentrate attention on specific topics of current importance, such as sales of strategic materials, food stamp reform, and programs to

61 H.R. REP. No. 145, 94th Cong., 1st Sess. 103-04 (1975) (separate statement).
62 *Id.*
63 *Id.*

stimulate the economy. The functional categories are adjusted afterwards to take account of these specific policy decisions.

In response to the various criticisms of the functional categories, a task force of the House Budget Committee in 1976 recommended some changes for FY 1978. The task force concluded that the "existing functional classifications do not adequately reflect the increasing Congressional need for greater clarity in addressing the Nation's priorities and in determining the proper level of Federal spending to implement them."[64] The task force recommended the elimination of one functional category (Undistributed Offsetting Receipts) and the creation of several new ones, including one for energy.[65]

The General Accounting Office (GAO) also has recommended changes in the functional and subfunctional categories. The GAO recommendations resembled many of the proposals of the House Budget Committee task force but urged a much larger number of additional subfunctions. The GAO recommended that functional categories highlight areas of national concern such as energy, and that functional categories not contain programs that serve divergent purposes.[66] For example, GAO agreed with Representative O'Hara that the present functional category for "Education, Training, Employment and Social Services" should be divided into three separate categories: "Education"; "Employment and Employment Benefits"; and "Social Services and Public Assistance."[67]

The task force and the GAO recommendations demonstrate the growing dissatisfaction with the present functional categories. But nothing has come of their recommendations, which suggests that it is easier to identify problems with the categories than to solve them. The Office of Management and Budget opposes proposals,[68] like those of the GAO and the House task force, which would break the budget into many pieces and might make a comprehensive, organized approach to the

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64 122 CONG. REC. H930 (daily ed. Feb. 10, 1976).

65 *Id.*

66 COMPTROLLER GENERAL OF THE UNITED STATES, STANDARD BUDGET CLASSIFICATIONS — PROPOSED FUNCTIONS AND SUBFUNCTIONS 10 (1976).

67 *Id.* at 10-11.

68 Interviews with senior staff people at the Office of Management and Budget (Jan. 18, 1977).

budget more difficult. There is no agreement within the Congress over changes in the functional categories.

An increase in the number of budget categories and subcategories would be valuable if they were described in substantive terms that are meaningful to Congressmen, whose major interests are particular programs rather than general functional totals. But an increase in budget categories poses some dangers. If categories become so specific that they coincide with committee and subcommittee jurisdictions, the discussion of changes in funding for each category will be complicated by the jealousies and fears of the affected committees. Moreover, as the number of categories increases every special interest will demand that funding for its particular programs be accorded the status of a functional category or subcategory. It will be difficult to control the number of categories and subcategories once this lobbying process begins. Finally, an increase in the number of budget categories and subcategories will endanger the overall objective of budget reform — to give the entire budget some structure. These difficult political and policy problems may prevent Congress from taking any action to change the present form of functional categories, so that the executive branch would continue to choose the categories for framing the budget.

3. Reductions in Defense Spending

The debate over spending priorities was dominated by the contest between defense and domestic programs. Sizeable reductions were made in defense spending in the first year of the new budget process but not in the second. Table 2 presents its reductions in the "National Defense" category proposed by the budget committees for FY 1976 and FY 1977.

Senator Alan Cranston (D-Cal.) complained that the budget committees were much more inclined to stay within the confines of the President's defense budget for FY 1977 than they had been the previous year,[69] when, Cranston said, the Senate Budget Committee examined the principal policy

69 S. REP. No. 731, 94th Cong., 2d Sess. 120 (1976) (additional views).

TABLE 2

Proposed Reductions in "National Defense" Spending[70]

Budget Category	FY 1976 (in billions)	FY 1977 (in billions)
Budget Authority		
House Budget Committee	$7.9	$1.3
Senate Budget Committee	6.7	0.3
Outlays		
House Budget Committee	4.3	0.5
Senate Budget Committee	2.8	0.2

judgments, assumptions, and perceptions behind the defense budget, as well as the actual figures.[71]

One explanation for this difference in the treatment of the defense budget by the budget committees was an increase in political pressure by the Department of Defense (DOD), which organized an extensive lobbying campaign in 1976.[72] However, factors other than the new budget process, particularly the reduction in military requirements caused by the U.S. withdrawal from Southeast Asia, contributed to the budget reductions in 1975. The end of military involvement in South Vietnam and Cambodia produced a savings of over one billion dollars for FY 1976, in addition to another billion dollars of savings in reserve stocks; the Pentagon had overestimated the cost of inflation for 1975 and funds from prior years became available.[73] These one-shot savings could not be repeated in 1976. Changes in the international and political arenas also restrained budget cutbacks in 1976. The Russian intervention in Angola strengthened resistance to cuts in the defense budget. The resignation of Defense Secretary James Schlesinger, amidst warnings that his budget had been reduced to dangerously low levels by the Ford Administration, made Congress more reluctant to reduce the budget further. The impor-

70 H.R. Rep. No. 145, 94th Cong., 1st Sess. 20 (1975); S. Rep. No. 77, 94th Cong., 1st Sess. 44 (1975); H.R. Rep. No. 1030, 94th Cong., 2d Sess. 30 (1976); S. Rep. No. 731, 94th Cong., 2d Sess. 20 (1976).

71 *See* S. Rep. No. 77, 94th Cong., 1st Sess. 126 (1975) (additional views).

72 Interview with senior staff members of the House Budget Committee (Feb. 24, 1977).

73 H.R. Rep. No. 145, 94th Cong., 1st Sess. 20-21 (1975); S. Rep. No. 77, 94th Cong., 1st Sess. 41-44 (1975).

tance of these events increased as a result of charges by Ronald Reagan during the presidential primaries that President Ford had allowed the United States to slip into a second-rate military posture. Members of Congress who in past years regularly had advocated defense cuts decided that the political atmosphere in 1976 was not right, particularly since many thought that defense spending could produce jobs.[74]

Since the defense budget was more vulnerable to reduction in 1975 than in 1976, some savings in the earlier year might have been realized in the absence of the new budget process. But budget committee review probably produced savings which would not have been made under the old budget system. At the very least the appropriations committees gained a new ally in support of their defense budget reductions. The budget committees joined the appropriations committees in opposition to attempts by the armed services committees to authorize supplemental funds that did not fit within the targets of the first budget resolution.[75] Moreover, the additional scrutiny of the budget committees may have induced the Pentagon to tighten its own budget review process so that the defense budget would not be as susceptible to reduction in 1976 as it had been the previous year.

III. Institutional Changes Within Congress

Budget reform produced several institutional changes within Congress. The most important change was the creation of budget committees. The budget reform act gives the budget committees a mandate to make recommendations on spending priorities,[76] but the act does not determine the level of detail for budget committee analysis. Consideration of specific programs can distract the budget committees from their principal role as a forum for comprehensive review, and can bring the budget committees into conflict with the appropriations and authori-

74 Analysis now suggests that defense and nondefense expenditures, on average, have broadly similar effects on employment. *See Hearings on Military Posture and H.R. 11500 (Part 1) Before the House Comm. on Armed Services*, 94th Cong., 2d Sess. 1185-87 (1976) (testimony of Alice Rivlin, Director of the Congressional Budget Office).

75 Interview with senior staff members of the House Budget Committee (Feb. 24, 1977).

76 31 U.S.C. § 1322 (Supp. V 1975).

zation committees. The budget committees also created an opportunity for partisan battles in the House. The budget reform act also changed the congressional timetable for consideration of the budget and created the Congressional Budget Office, which has only begun to realize its potential as an analytic arm of the Congress.

A. *The Level of Detail of Budget Committee Analysis*

The legislative history of budget reform suggests that the budget committees should not pay much attention to the specifics of federal spending. For example, Representative Richard Bolling (D-Mo.), the House floor manager of the budget reform bill, stated that the budget resolution would not "get into particular programs, agencies, appropriations, or projects. To do so would destroy the utility of the congressional budget process as an instrument for making national economic policy."[77] Nevertheless, the preparation and review of budget resolutions open the door to duplication of effort and conflict among committees. The budget committees must examine some program details as part of their efforts to establish overall limits on outlays and budget authority and to choose among competing spending priorities.[78] Even Representative George H. Mahon (D-Tex.), who was concerned about attempts by the House Budget Committee to invade the jurisdiction of his Appropriations Committee, admitted that it was "certainly appropriate for the [budget] committee to have an awareness of individual spending programs in order to arrive at its recommendations . . . ."[79] The Joint Study Committee expected that the new budget committees would hold hearings on "overall budget levels *and the priority status of various programs*"[80] and that a joint staff would assist the budget committees in examining the "priorities of various programs."[81]

77 120 CONG. REC. H5181 (daily ed. June 14, 1974).

78 This was the position of the Joint Study Committee on Budget Control. H.R. REP. No. 147, 93d Cong., 1st Sess. 8 (1973).

79 121 CONG. REC. H11,018 (daily ed. Nov. 12, 1975).

80 H.R. REP. No. 147, 93d Cong., 1st Sess. 8 (1973) (emphasis added).

81 *Id.* at 28. Statements during Senate floor action on the budget reform bill which claimed that the budget committees would only set fiscal policy aggregates and would

The budget process actually presents many opportunities for the budget committees to consider program details. First, the authorization and appropriations committees supply program details in their spring reports to the budget committees.[82] Second, the testimony at budget committee hearings often includes program details, even though the legislative history of the budget reform act suggests that the budget committee hearings should concern "economic conditions and national priorities at a high level of aggregation."[83] Third, votes within the budget committees on amendments to the proposed budget resolutions affect the program interests of other committees. Finally, the budget committee reports to each House offer another opportunity to discuss program details.

The Senate Budget Committee has attempted to avoid consideration of program details. Senator Muskie has declared that the budget resolution should allocate budget authority and outlays among different functional categories without deciding how much should be spent on individual programs and activities.[84] The latter task, he said, was the responsibility of the authorization committees and the appropriations subcommittees. Senator Muskie has admitted that the Budget Committee could easily "slip into discussion of individual programs or line items in the budget" because each senator has favorite programs and areas of special expertise.[85] But Muskie claimed that the Senate Budget Committee does "not vote to include or exclude a given program or even an amount for such a program, except in rare cases where the program is of such magnitude, generally in the hundreds of millions of dollars, as to constitute in itself a significant priority."[86]

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not infringe upon the jurisdiction of any existing committee can be read as rhetorical arguments designed to reduce opposition to budget reform. *See* S. REP. No. 579, 93d Cong., 1st Sess. 29 (1973) (Government Operations Comm.).

82 31 U.S.C. § 1322 (Supp. V 1975).

83 S. REP. No. 579, 93d Cong., 1st Sess. 19 (1973) (Government Operations Comm.). The budget reform act authorizes the budget committees to take testimony from members of Congress and appropriate representatives of federal departments and agencies, the general public, and national organizations. 31 U.S.C. § 1322 (Supp. V 1975). Nothing in that section prevents witnesses from giving their views on specific programs and activities.

84 122 CONG. REC. S5309 (daily ed. Apr. 8, 1976). *See also id.* at S5339-42 (daily ed. Apr. 9, 1976); *id.* at S5479 (daily ed. Apr. 12, 1976).

85 *Id.* at S5294 (daily ed. Apr. 8, 1976).

86 *Id.*

The House Budget Committee, on the other hand, has been attacked for giving too much attention to program details.[87] This practice has brought it into frequent conflict with the other standing committees of the House Appropriations Committee Chairman George Mahon complained that the House Budget Committee had "succumbed in a few instances to the temptation to deal with subjects in its report which are not directly related to its primary objectives, and which are being dealt with by other congressional committees."[88] Mahon contended that the budget reform act "did not contemplate adding another voice pleading for special programs and projects and giving separate advice on the details of administering individual programs."[89]

Jurisdictional conflicts between the House Budget Committee and the other standing committees became less frequent in 1976. For example, Representative Thomas E. Morgan (D-Pa.) protested in 1975 that budget reductions by the House Budget Committee transgressed the jurisdictional responsibilities of his International Relations Committee,[90] but in 1976 Morgan complimented both budget committees for producing a conference report that "reflects the views and actions of the authorizing and Appropriations Committees in a fair and balanced way."[91] But some criticism from other quarters in the House continued. Charles H. Wilson (D-Cal.) complained that when the House Budget Committee "begins to take positions with respect to authorizing legislation, it really is involving itself in line item budgeting," which, he claims, was neither the intent of the budget reform act nor acceptable to the members of the authorizing committees.[92] The House Appropriations Committee also repeated its criticism of the House Budget Committee practice of including recommendations on specific line items in its reports on budget resolutions.[93]

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87 *See* H.R. REP. No. 608, 94th Cong., 1st Sess. 91 (1975) (remarks of Rep. Elford A. Cederberg (R-Mich.)).

88 121 CONG. REC. H3557 (daily ed. May 1, 1975).

89 *Id.* at H11,018 (daily ed. Nov. 12, 1975).

90 121 CONG. REC. H3583 (daily ed. May 1, 1975) (letter to Brock Adams).

91 122 CONG. REC. H10,309 (daily ed. Sept. 16, 1976).

92 *Id.* at H3432 (daily ed. Apr. 27, 1976).

93 "While these line item recommendations have no actual effect, they do tend to obscure the overall macroeconomic responsibilities of the Budget Committee and to

The jurisdictional conflicts between the House Budget Committee and the other standing committees represent a struggle for power which is constant within Congress. Occasionally this struggle is attributed to the desires of committee staff. For instance, Representative James C. Corman (D-Cal.), a ranking member of the Ways and Means Committee, protested that the budget committee staff was "trying to tell the Ways and Means Committee that it doesn't have much power any more. The whole game up here is power, and the staff of the Budget Committee would like to see the committee have a veto over all the other congressional committees."[94]

The jurisdictional complaints may demonstrate that the new budget process has imposed some discipline upon Congress. One example of the budget committees' power is the prolonged battle that ensued when the House Budget Committee supported the imposition of a ceiling on highway spending in order to protect the limits in the final budget resolution that had been adopted for FY 1977. The Budget Committee feared that an increase in highway spending would require reductions in other programs in order to maintain the binding ceiling on total outlays. But Representative James J. Howard (D-N.J.), chairman of the Subcommittee on Surface Transportation, charged that the budget committee leadership had executed a "willful, deliberate, and totally destructive manuever . . . to accomplish by subterfuge what they were unable to do in free and open debate on the floor of the House."[95] Nevertheless, the House followed the Budget Committee's recommendation.[96] This kind of conflict could not have occurred in the past when individual programs were considered without regard to an overall budget.

The Senate Budget Committee has occasionally clashed with other committees in the Senate, such as Appropriations and

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needlessly duplicate much of the hearings and deliberations that are the responsibility of the authorizing and appropriating committees." HOUSE COMM. ON APPROPRIATIONS, 94TH CONG., 2D SESS., VIEWS AND ESTIMATES ON THE BUDGET PROPOSED FOR FISCAL YEAR 1977 2 (Comm. Print 1976).

94 Havemann, *The Congressional Budget Committees — High Marks After the First Years*, NAT'L J., Sept. 25, 1976, at 1346, 1350.

95 122 CONG. REC. H7533-34 (daily ed. July 21, 1976).

96 *Id.* at H8209-17 (daily ed. Aug. 3, 1976). *See also* Havemann, *supra* note 94, at 1346-52.

Armed Services.[97] In 1976 its major collision was with the Finance Committee over tax reform. The Senate Budget Committee report proposed two billion dollars in tax relief.[98] Senator Russell B. Long (D-La.), chairman of the Finance Committee, quickly called that goal impracticable and unrealistic, and proposed an amendment to the Budget Committee report.[99] Long's amendment was opposed by Budget Committee Chairman Muskie and the Senate defeated it by a vote of 49-26.[100] The same dispute resurfaced two months later when the Senate began consideration of the tax reform bill.[101] Muskie charged that the bill did not accord with the policy of the budget resolution, but he was unable to attract enough votes in the Senate to sustain his position.[102] But the House and the conference committee satisfied Muskie by enacting $1.6 billion in tax relief, and Muskie then expressed his hope that the Budget and Finance committees would work together more closely in the future to "avoid the conflicts that developed this summer on the Senate floor."[103] But Senators Muskie and Long engaged in acrimonious debate the following year during action on the Tax Reduction Simplification Act of 1977.[104] Thus, the Senate budget process has also encountered its share of jurisdictional conflicts.

B. *Partisanship in the Budget Process*

There were moments in 1975 when it appeared that the new budget process would be destroyed by partisan conflict in the House. The House Budget Committee was split between Republican conservatives, who were infuriated by increases in spending and large deficits, and Democratic liberals who ar-

97 A dispute between the Budget and Appropriations Committees concerned jurisdiction over impoundments. Washington Star – News, Jan. 24, 1975, at A5, col. 1. The Senate Budget Committee clashed with Armed Services over the level of military authorization, causing the Senate to reject the conference report. 121 CONG. REC. S14711-50 (daily ed. Aug. 1, 1975).

98 S. REP. No. 731, 94th Cong., 2d Sess. 8 (1976).

99 122 CONG. REC. S5295 (daily ed. Apr. 8, 1976).

100 122 CONG. REC. S5322-36 (daily ed. Apr. 9, 1976).

101 H.R. 10612, 94th Cong., 2d Sess. (1976).

102 122 CONG. REC. S9712 (daily ed. June 17, 1976), S10010 (daily ed. June 21, 1976).

103 *Id.* at S16,018-19 (daily ed. Sept. 16, 1976).

104 123 CONG. REC. S6207, 6211-12 (daily ed. Apr. 21, 1977).

gued for less defense spending and a greater fiscal stimulus to the economy. House floor votes on budget resolutions were perilously close because of the opposition of most Republicans and many liberal Democrats. The first budget resolution for FY 1976 passed the House by the narrow margin of 200-196.[105] The House vote on the conference report for the second budget resolution for FY 1976 was even closer: 189-187.[106] In 1977 the House actually rejected a budget resolution, by a vote of 84-320, after an amendment which increased the level of funding for national defense stirred opposition by liberal Democrats.[107] Votes on the budget resolutions were never close in the Senate, however, because of the general spirit of cooperation established by Budget Committee Chairman Muskie and the committee's ranking minority member Henry Bellmon (R-Okla.).[108] Bellmon even joined Muskie in 1975 in criticizing the Ford Administration.[109]

The difference in partisanship between the House and the Senate cannot be explained simply in terms of personalities. For example, Representative Elford A. Cederberg (R-Mich.) generally behaves in a nonpartisan fashion as the ranking minority member of the House Appropriations Committee, but on the Budget Committee he consistently joined the other seven Republicans to oppose the Democratic majority. The divergent experiences in the House and the Senate reflect more basic differences in their structure and history.

The unusual partisanship in the House Budget Committee may reflect two important factors. First, the Budget Committee lacks the tradition of nonpartisanship which is characteristic of other House Committees, such as the Appropriation Commit-

105 121 CONG. REC. H3590-91 (daily ed. May 1, 1975).

106 *Id.* at H12,454 (daily ed. Dec. 12, 1975).

107 123 CONG. REC. H3691 (daily ed. April 21, 1977). *See* CONG. Q. WEEKLY REP., April 30, 1977, at 775.

108 *See* rollcall votes cited at note 112 *infra*. The full Senate passed the first budget resolution for FY 1977 by a vote of 62-22. 122 CONG. REC. S5526 (daily ed. April 12, 1976).

109 "I would like to say that I agree with the chairman of the committee that the $60 billion figure [for the estimated budget deficit] that was sent to this Senate yesterday and made public by the White House is phony. As a member of the President's party, I genuinely regret this lack of candor on the part of the Office of Management and Budget and the President." 121 CONG. REC. S7258 (daily ed. May 1, 1975) (remarks of Sen. Bellmon).

tee. Second, the budget resolutions are more political by nature than other forms of legislation. Furthermore, a nonpartisan tradition is unlikely to develop on the House Budget Committee because its members rotate from other committees and thus lack the incentive to cooperate and bargain that exists within other committees.

The strategies used by the majority and minority leaderships in appointing the members of the Budget Committee have intensified the partisan atmosphere. Democrats made the first appointments to the Budget Committee and their selections were, on the whole, more liberal than the general composition of the Democratic membership of the House. The Republicans reacted to what they regarded as an attempt to increase federal spending by appointing members who were more conservative than the norm within their own party. Democrats subsequently appointed members who were even more liberal in order to offset the Republican conservatives. This method of appointments polarized the Budget Committee along ideological lines. Committee Chairman Adams may have contributed to the partisanship within the House Budget Committee by setting targets ("chairman's mark") for the aggregate budget and functional category totals.[110]

The budget resolutions are regarded as political documents because they make general statements about macroeconomic policy and spending priorities that receive prominent attention in the House and in the press. For example, a conservative congressman might support an inflationary increase in defense spending on grounds of national security but would oppose a deficit in a budget resolution which has the same economic effect. The budget resolution is more explicit, more visible, and more difficult for him to defend. The political nature of budget resolutions has increased because they have become instruments of the majority leadership and of the Democratic caucus.[111]

Several factors may explain the more nonpartisan attitude within the Senate Budget Committee. First, the members of

110 Interviews with senior staff members of the House Budget Committee (Feb. 15, 1977).

111 *Id.*

that committee do not rotate in from other committees and the two parties did not appoint members in the partisan fashion used by the House. Second, the nature of the Senate as an institution discourages partisanship. The Senate has a custom of transacting routine business by unanimous consent. Its smaller membership and the longer terms of individual senators also promote a more collegial atmosphere in the Senate than in the House. Third, the six year terms in the Senate give conservative senators more opportunities to please constituents who react negatively to large budget deficits and increases in spending.

Finally, Chairman Muskie has had to develop a working relationship with the Republicans on his committee because three Democratic members — Senators Lawton Chiles (D-Fla.), Ernest F. Hollings (D-S.C.), and Sam Nunn (D-Ga.) — have conservative sympathies that would lead them to vote with the Republicans on many issues. Thus, Muskie often needed moderate Republican votes from Senators Bellmon, J. Glenn Beall, Jr. (R-Md.), Bob Dole (R-Kan.), and Pete V. Domenici (R-N.M.) in order to carry the committee.[112] Moreover, Muskie did not follow Adams' practice of setting a "chairman's mark" for the budget resolution, a practice that probably added to partisan conflict in the House Committee.[113] Also, the minority staff of the Senate Budget Committee has played a more active role than their counterparts in the House.[114]

C. *The New Budget Timetable*

The budget reform act has accelerated the authorization and appropriation cycles by requiring early submissions to the budget committees and by mandating that Congress establish binding budget totals by September 15. Prior to 1974 Congress often failed to pass appropriation bills on time because of late action by the authorization committees.[115] As a result executive

112 *See, e.g.*, the rollcall votes recorded in S. REP. No. 77, 94th Cong., 1st Sess. 103-11 (1975); S. REP. No. 453, 94th Cong., 1st Sess. 65-66 (1975); and S. REP. No. 731, 94th Cong., 2d Sess. 103-16 (1976).

113 *See* text accompanying note 110 *supra*.

114 Interview with members of the minority staff of the Senate Budget Committee (Feb. 25, 1977).

115 H.R. REP. No. 147, 93d Cong., 1st Sess. 13-14, 45 (1973).

agencies increasingly had to rely on stopgap funding through continuing resolutions for long periods of time. The agencies, as well as state and local governments, complained about the delays in full funding. The continuing resolutions produced waste, a loss of momentum for certain programs, and an inability to engage in long-range planning. The new budget reform process could have aggravated the problem of late appropriations by adding another layer of budget resolutions to the existing procedures. In order to avoid this result, Congress shifted the beginning of the fiscal year from July 1 to October 1.[116]

Congress has not eliminated continuing resolutions, but the record for FY 1977 was encouraging. All thirteen regular appropriations bills were enacted on or before October 1, 1976.[117] By contrast, only seven of the appropriations bills for FY 1975 were enacted by October 1, 1974,[118] and only three for FY 1976 were enacted by October 1, 1975.[119] Although the bulk of the appropriations were completed on time for FY 1977, Congress had to enact a continuing resolution to fund certain programs that were not authorized in time for inclusion in the regular appropriations bills.[120]

The new budget timetable has placed heavy demands on Congress and the executive branch. The Office of Management and Budget is under extreme time pressure to prepare a budget within a few months after the previous fiscal year closes. Authorization and appropriations committees operate under shorter calendars than in the past, and as a result their examination of executive budget estimates cannot be as thorough.

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116 31 U.S.C. § 1020(a)(2) (Supp. V 1975). *See* H.R. REP. No. 658, 93d Cong., 1st Sess. 31 (1973).

117 A. SCHICK, CONGRESSIONAL CONTROL OF EXPENDITURES, 95TH CONG., 1ST SESS. 38 (Comm. Print 1977).

118 Pub. L. No. 93-371, 88 Stat. 424 (Aug. 13, 1974) (Legislative Branch); Pub. L. No. 93-381, 88 Stat. 613 (Aug. 21, 1974) (Treasury); Pub. L. No. 93-393, 88 Stat. 782 (Aug. 28, 1974) (Public Works); Pub. L. No. 93-391, 88 Stat. 768 (Aug. 28, 1974) (Transportation); Pub. L. No. 93-405, 88 Stat. 822 (Aug. 31, 1974) (District of Columbia); Pub. L. No. 93-404, 88 Stat. 803 (Aug. 31, 1974) (Interior); Pub. L. No. 93-414, 88 Stat. 1095 (Sept. 6, 1974) (Housing and Urban Development).

119 Pub. L. No. 94-59, 89 Stat. 269 (July 25, 1975) (Legislative Branch); Pub. L. No. 94-91, 89 Stat. 441 (Aug. 9, 1975) (Treasury); Pub. L. No. 94-94, 89 Stat. 468 (Sept. 10, 1975) (Education).

120 122 CONG. REC. S17,310-11 (daily ed. Sept. 30, 1976); S. REP. No. 1378, 94th Cong., 2d Sess. (1976).

The time pressure on congressional committees could be relieved if they focused on large policy questions instead of on program details.[121] The General Accounting Office is considering "mission budgeting," which concentrates on the basic purposes and needs to be served by federal expenditures. Mission budgeting would eliminate the budgetary details that obscure policy decisions, but Congress is not likely to adopt such an approach because members like to concentrate on program details. That has been the custom for as long as anyone has written about the budget process.[122] Congressmen understand details and they find that details bring control. Nevertheless, the time pressures created by the new budget process may force legislators to examine the budget from a broader perspective.

D. *The Congressional Budget Office*

The budget reform act created the Congressional Budget Office (CBO), a joint staff agency of Congress whose primary responsibility is to assist the budget committees in preparing the annual budget resolutions.[123] The CBO director must submit an annual report to the budget committees on fiscal policy — revenues, budget authority, outlays, and tax expenditures — and on alternative allocations of budget authority and outlays among the major federal programs and the sixteen categories. CBO must also examine how different allocations will meet major national needs and will affect balanced growth and development.[124] Although the subject matter of CBO's responsibilities resembles the combined functions of both the Office of Management and Budget (OMB) and the Council of Economic Advisers (CEA), CBO has much less influence on budget decision-making than those agencies. The power of OMB and CEA derives from their close relationship to a single master — the President. In addition OMB monitors the flow of

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121 *See generally* Fisher, *Senate Procedures for Authorizing Military Research and Development*, in PRIORITIES AND EFFICIENCY IN FEDERAL RESEARCH AND DEVELOPMENT, A COMPENDIUM OF PAPERS SUBMITTED TO THE JOINT ECONOMIC COMMITTEE, 94th Cong., 2d Sess. 20-45 (Comm. Print 1976).

122 *See generally* A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (2d ed. 1974).

123 2 U.S.C. § 601 (Supp. V 1975).

124 *Id.* § 602.

information between the agencies and Congress. CBO has none of those political resources. It serves a Congress which is divided between House and Senate, between Democrats and Republicans, and among a myriad of authorization, appropriation, and budget committees. Moreover, CBO is not situated in the mainstream of budget activity and decision-making within Congress.

Some members of Congress have sought to limit the political power of CBO even further. Early in CBO's history Senator Strom Thurmond (R-S.C.) objected to the press attention given to CBO Director Alice Rivlin when she commented on President Ford's proposal to cut the budget for FY 1977 by $28 billion. Thurmond complained that "she publicly attacks a Republican President who wants less Federal spending. I do not recall the Director of the Library of Congress or the head of the General Accounting Office, both chiefs of analysis [sic] agencies of the Congress, making partisan speeches around town."[125] The House Appropriations Committee warned CBO that debate over public policy in the legislative branch "must be conducted by elected officials. Neither the Congressional Budget Office, nor any of its employees, should initiate, or take positions, on individual policy recommendations."[126] House Budget Committee Chairman Brock Adams agreed that CBO's function was to suggest alternatives, not to prepare policy positions, and that the CBO Director was "not in the business of making policy pronouncements."[127] CBO Director Rivlin consistently maintained that CBO was not trying to affect policy: ". . . we are not an advocacy organization. The law is very clear. . . . I do not feel it is the function of the CBO or any of its employees to take policy positions."[128]

Although CBO cannot explicitly support specific policies, it can influence the course of policy development. CBO's annual report presents a good opportunity to redirect debate on macroeconomic policy and budget priorities by framing policy

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125 121 Cong. Rec. S18,734 (daily ed. Oct. 28, 1975).

126 H.R. Rep. No. 645, 94th Cong., 1st Sess. 32 (1975).

127 121 Cong. Rec. H11,079-80 (daily ed. Nov. 13, 1975).

128 *Hearings on Congressional Budget Office Oversight (Part 1) Before the House Comm. on the Budget*, 94th Cong., 1st Sess. 11, 16 (1975) (testimony of Alice Rivlin).

choices.[129] But the first annual report did not have this effect because the budget committees generally ignored it. CBO may have overreacted to the criticism it received in its first year by posing unimaginative alternatives to the President's budget. Often CBO suggested that the budget be changed up or down by some arbitrary number or percentage. For example, when President Ford requested authority to purchase 500 ships in the FY 1977 defense budget, CBO proposed the alternatives of 600 ships (high option) and 400 ships (low option), but only gave cursory explanations of the consequences of each number in terms of military and foreign policy.[130] Similarly, CBO's two alternatives to the President's budget request for military research and development were merely 10 percent less and 10 percent more than the President's request.[131] CBO recognized the inadequacy of its first report and substantially changed the style and format of its second report.[132]

Some members of Congress have expressed alarm about the size of CBO. The budget reform act provides it with open-ended funding.[133] CBO Director Rivlin initially projected a total staff of 259 by January 1, 1976.[134] Although that number is not large by executive branch standards, many members were stunned. During floor debate on CBO's first budget request, Representative Latta warned that if this "extravagant, unregulated, and unjustified growth continues, we will soon find ourselves creating still another budget committee to ride herd on the New Budget Office."[135] Latta complained that CBO was overstaffed and duplicated work done elsewhere in the government.[136] But duplication has not been a serious

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129 *See, e.g.*, 122 CONG. REC. S3739 (daily ed. March 18, 1976) (remarks of Sen. Proxmire).

130 CONGRESSIONAL BUDGET OFFICE, BUDGET OPTIONS FOR FISCAL YEAR 1977: A REPORT TO THE SENATE AND HOUSE COMM. ON THE BUDGET 38-39, 80-85 (1976).

131 *Id.* at 38-39, 97-99.

132 CONGRESSIONAL BUDGET OFFICE, BUDGET OPTIONS FOR FISCAL YEAR 1978: A REPORT TO SENATE AND HOUSE COMM. ON THE BUDGET (1977).

133 "There are authorized to be appropriated to the Office for each fiscal year such sums as may be necessary to enable it to carry out its duties and functions." 2 U.S.C. § 601 (Supp. V 1975).

134 *Hearings on Organization and Activities of the Congressional Budget Office Before the House Comm. on the Budget*, 94th Cong., 1st Sess. 14 (1975).

135 121 CONG. REC. H9782 (daily ed. Oct. 8, 1975).

136 *Id.*

problem within CBO, which must provide many unique services, including preparation of its annual report to the budget committees, scorekeeping,[137] calculation of cost estimates on pending legislation, and formulation of five-year budget projections.[138] However, CBO did conduct some studies on subjects that had already been explored by other congressional agencies, and budget committee staff members found little utility in them.[139] In 1976 the Senate Appropriations Committee rebuked CBO for such studies: "Self-initiated CBO activities that are not directly related to CBO's primary mission should clearly be subordinated in work priority to those that are."[140]

CBO is cautiously threading its way through the Capitol Hill minefield, trying to avoid pedestrian reports on the one hand and advocacy on the other. The success of CBO lies as much in public relations and media control as in the substance of its reports. The most recent Congressional study of CBO concluded that it had established itself as a "full-fledged, competent, and respected member of the congressional support family . . . ."[141] But competence in such tasks as costing out proposed bills and scorekeeping will not elevate CBO to a position of political influence. The challenge facing CBO is to demonstrate competence, both technical and political, on questions of macroeconomic policy and budget priorities. It must learn to integrate its operations with the ongoing work of the budget committees without sacrificing professional independence and objectivity.

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137 "Scorekeeping" compares congressional action on individual authorization, appropriation, and revenue bills to the targets or ceilings in the concurrent budget resolutions. CONGRESSIONAL BUDGET OFFICE, THE CONGRESSIONAL BUDGET OFFICE: RESPONSIBILITIES AND ORGANIZATION 1 (1976).

138 2 U.S.C. § 602; 31 U.S.C. §§ 1329, 1353 (Supp. V 1975).

139 Interviews with senior staff members of the House Budget Committee (Feb. 15, 1977).

140 S. REP. No. 1201, 94th Cong., 2d Sess. 28 (1976). The Senate Appropriations Committee also identified the major CBO activities meriting high priority: scorekeeping, cost estimates on pending legislation, and providing reports and data requested by the budget, appropriations, and revenue committees to enable them to meet their obligations under the budget reform act. *Id.* at 27. The House Appropriations Committee, which cut CBO's initial budget request from 259 to 193 positions, also reminded CBO not to duplicate the functions of the Congressional Research Service, the Office of Technology Assessment, and the General Accounting Office. H.R. REP. No. 645, 94th Cong., 1st Sess. 31-32 (1975). *See* Havemann, *CBO Proceeds With Work While Taking Heat on Staff Size,* NAT'L J., Nov. 15, 1975, at 1575-77.

141 H.R. DOC. No. 20, 95th Cong., 1st Sess. 5 (1977).

IV. Impoundment Control

The Nixon administration's attempts to withhold congressionally appropriated funds sparked a series of major controversies during the 92d and 93d Congresses.[142] Administration officials argued that in the absence of effective congressional control over the budget, impoundment was an essential weapon in the fight against inflation, deficit spending, and waste.[143] Members of Congress protested that the administration was using impoundment to substitute its budget priorities for those enacted and funded by Congress.[144] Although the argument between the President and the Congress often was couched in terms of separation of powers and congressional prerogatives,[145] Nixon's use of impoundment was merely another indication of the weak control that Congress then possessed over the budget.

The Senate took the initiative in passing anti-impoundment legislation. At first the House avoided such legislation because many members feared that voters would perceive congressional action to require the release of impounded funds as prospending legislation. But the House soon realized that impoundment control was an essential element of budget reform because in its absence congressional decisions on budget priorities could be easily frustrated by the Administration. The Senate proponents of impoundment control had both political and policy reasons for combining it with budget reform. Nixon had often castigated Congress for its lack of effective budget control mechanisms; thus he would find it difficult to veto impoundment control if it was part of a budget reform package. Once both houses of Congress came to recognize the desirability of joining impoundment control with budget reform, they passed the Impoundment Control Act as Title X of the budget reform act of 1974.[146]

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142 For a description of Nixon's use of impoundment, *see* L. Fisher, Presidential Spending Power 175-201 (1975).

143 *See, e.g., Impoundment of Appropriated Funds by the President: Joint Hearings Before the Senate Comms. on Government Operations and the Judiciary*, 93d Cong., 1st Sess. 269-72 (1973) (statement of Roy L. Ash, Director-designate of the Office of Management and Budget).

144 *See, e.g., id.* at 276-77 (statement of Sen. Sam Ervin (D-N.C.)).

145 *See* L. Fisher, *supra* note 142.

146 Pub. L. No. 93-344, § 1000, 88 Stat. 332 (1974).

A. *The History of Impoundment*

The presidential use of impoundment did not begin with Richard Nixon. Presidents Truman, Eisenhower, and Kennedy impounded funds that Congress added to their defense budgets, and President Johnson impounded funds for domestic programs.[147] Nixon's impoundments, however, were much larger than those of previous Presidents, and reflected a basic assumption that the President, not the Congress, had the power to set budget priorities.[148] Thus, Nixon began to impound much of the funds that Congress added to his budget requests.[149]

Presidential impoundment power rested on a weak statutory foundation. The Budget and Accounting Act of 1921[150] established a budget-making process in which the President was to draw up a budget proposal that the Congress could review and revise. Although the Budget Act gave the initiative in framing the budget to the President, it left final authority with the Congress. Over the years Presidents looked for ways to increase their control over the final form of the budget. They seized upon some loose language in the Antideficiency Act,[151] which had been enacted in order to ensure that executive agencies would not overspend their appropriations. In order to facilitate this objective, the Antideficiency Act provided that the President could establish budgetary reserves by apportioning an appropriation "to provide for contingencies, or to effect savings whenever savings are made possible by and through changes in requirements, greater efficiency of operations, or *other developments* subsequent to the date on which such appropriation was made available."[152] The congressional objective in enacting this provision of the Antideficiency Act was to save money which could not be spent to achieve the purposes for which it had been appropriated. But President Nixon used the "other developments" language of the Act to justify refusals to spend appropriated funds on independent policy grounds, such as dis-

147 *See* L. FISHER, *supra* note 142, at 161-65.
148 *See id.* at 175-97.
149 *See* L. FISHER, *supra* note 142.
150 31 U.S.C. § 1 (Supp. V 1975).
151 *Id.* § 665.
152 *Id.* § 665(c)-1 (1970) (amended 1974) (emphasis added).

agreements with Congress over the wisdom of particular programs and a desire to reduce overall federal spending in order to fight inflation. For instance, Nixon impounded all of the public works funds that Congress added to his budget request in 1971 on grounds of fiscal responsibility rather than savings in particular programs.[153]

Nixon's expansive use of impoundment to promote his own policy objectives provoked Congress into action to regain control over budget outcomes. Congress never contested the President's authority to impound funds for the specific reasons contained in the Antideficiency Act — to provide for contingencies or to save money that would otherwise be wasted. But Congress has insisted that "the practice of reserving funds [must] not become a vehicle for furthering Administration policies and priorities at the expense of those decided by Congress."[154] By 1973 the courts began to overturn Nixon's impoundments on the ground that the President could not disregard the budget decisions made by Congress,[155] and Congress decided that a new system of impoundment controls was necessary.

B. *The Impoundment Control Process*

The Impoundment Control Act narrows the President's authority to accumulate budgetary reserves by removing "other developments" from the Antideficiency Act.[156] Thus, a President can impound funds only to provide for contingencies or to save money that would otherwise be wasted. The Act also es-

153 *See* L. FISHER, *supra* note 142, at 168-69.

154 S. REP. No. 688, 93d Cong., 2d Sess. 75 (1974).

155 In Local 2677 v. Phillips, 358 F. Supp. 60 (D.D.C. 1973), Judge Jones held that the Nixon Administration could not impound funds appropriated for the Office of Economic Opportunity because the President had not requested such funds in his budget request. The court said that the President's budget was "nothing more than a proposal to the Congress for the Congress to act upon as it may please." 358 F. Supp. at 73. In National Council v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973), Judge Gesell held that the Nixon Administration could not impound mental health funds because the President "does not have complete discretion to pick and choose between programs when some are made mandatory by conscious, deliberate congressional action." 361 F. Supp. at 902. *Accord*, Pennsylvania v. Lynn, 362 F. Supp. 1363, 1372 (D.D.C. 1973), *rev'd on other grounds*, 501 F.2d 848 (D.C. Cir. 1974). *See generally* Mitchell, *Pennsylvania v. Lynn: The Rest of the Iceberg*, 52 J. URB. L. 421 (1974).

156 Pub. L. No. 93-344, § 1000, 88 Stat. 332 (1974) (amending 32 U.S.C. § 655 (1970)).

tablishes a comprehensive scheme for congressional review of impoundment actions in order to ensure that the President does not abuse his authority.[157]

The Act recognizes two categories of impoundment, rescissions and deferrals.[158] The President may seek to rescind a budget appropriation (1) when he determines that all or part of such budget authority will not be required to carry out the full objectives of a funded program; (2) when a funded program is terminated; or (3) when he determines that all or part of budget authority provided for only one fiscal year (one-year money) should be made unavailable for obligation.[159] The President must transmit a special message to Congress requesting a rescission of budget authority. Unless both Houses approve the President's request within 45 days of continuous session, the President must make the budget authority available to the appropriate agencies for obligation.[160]

The President must also submit a special message to Congress when he proposes to defer spending of appropriated funds. Deferrals include any delay in obligating budget authority or "any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority. . . ."[161] The President must make the affected budget authority available for obligation if either House of Congress passes an "impoundment resolution" which disapproves the proposed deferral.[162]

The General Accounting Office (GAO) helps Congress implement the Impoundment Control Act in several ways. The Comptroller General must review each Presidential message which proposes a rescission or deferral and report his recommendation to Congress.[163] The Comptroller General must also report any action by the President or any other executive officer that impounds funds without notifying Congress.[164] In such a case the Comptroller General's report functions like a

157 31 U.S.C. § 1400 (Supp. V 1975).
158 *Id.* § 1401.
159 *Id.* § 1402.
160 *Id.* § 1402(b).
161 *Id.* § 1401(1)(B).
162 *Id.* § 1403(b).
163 *Id.* § 1404(b).
164 *Id.* § 1405(a).

presidential message and triggers the 45-day period for approval of a rescission or allows one House to veto a deferral. The Comptroller General must also inform Congress whenever he believes that the President has incorrectly classified a rescission or a deferral.[165] The Comptroller General's reclassification of the impoundment action is conclusive. Finally, the Comptroller General is empowered to sue in federal court to enforce the provisions of Title X.[166]

C. *Routine Impoundments and Policy Impoundments*

Impoundments generally fall into one of two categories: those that are "routine" and those that reflect "policy" decisions. Routine impoundments normally serve the specific purposes of the Antideficiency Act — to promote savings or to set aside funds for contingencies. Routine impoundments do not by themselves restrict authorized programs and activities and do not interfere with the priorities for spending which are established by Congress. Policy impoundments, however, reflect Presidential decisions to substitute administration spending priorities for those chosen by Congress and act independently of other circumstances to restrict congressionally authorized programs and activities. Thus policy impoundments pose a more serious threat to congressional budget control than do routine impoundments.

The choice of characterization of an impoundment as routine or policy is difficult but not impossible. The executive branch has made rough distinctions of this kind in the past. Prior to 1972 the Office of Management and Budget prepared impoundment reports that distinguished routine actions ("budgetary reserves") from non-routine actions ("impoundments").[167] The Federal Impoundment and Information Act of

165 *Id.* § 1405(b).

166 *Id.* § 1406.

167 OMB used the term "impoundment" to describe funds that

> could or might be used (i.e., obligated) during the apportionment time period, but which have not been apportioned because of the Executive's responsibility to (1) help keep total Government spending within a congressionally-imposed ceiling, (2) help meet a statutory limitation in the outstanding public debt, (3) develop a governmentwide financial plan for the current year that synchronizes program-by-program with the budget being recommended by the President for the following year, or (4) otherwise carry out broad economic and program policy objectives.

118 CONG. REC. 8032 (1972).

1972[168] required the President to submit impoundment reports, but it did not require that impoundments be characterized as "routine" or "policy". As a result of this omission, the reports under the 1972 law did not make such distinctions. Similarly, the 1974 Impoundment Control Act did not require the President to segregate routine and policy impoundment proposals in his special messages to Congress. But President Ford did indicate when a proposed impoundment was made pursuant to the Antideficiency Act,[169] and since most impoundments under the Antideficiency Act could be characterized as routine, Ford's indications suggest that the executive branch does have some capability to distinguish routine from nonroutine impoundments.

A completely accurate characterization of an impoundment as routine or policy would require a thorough analysis of its implications. This Article will employ several guidelines to characterize President Ford's impoundments.[170] First, an impoundment which had both routine and policy aspects is categorized as a policy action even if the President invoked the authority of the Antideficiency Act.[171] Second, an impoundment which could not be classified as routine on the basis of available descriptions is classified as a policy action. Third, the characterization of an impoundment as policy by the Comptroller General is preferred to the administration's characterization of it as routine. In many cases the author had to rely on personal experience and judgment to characterize an impoundment as routine or policy.[172]

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168 Pub. L. No. 93-599, 86 Stat. 1325 (1972) (repealed 1974).

169 *E.g.*, 40 Fed. Reg. 18,372 (1975) (D75-153), 41 Fed. Reg. 1731 (1976) (D76-89 and -90).

170 The author's methodology is explained more fully in Fisher, Impoundment Control Act of 1974 (June 30, 1976) (unpublished paper prepared at the Congressional Research Service and on file at the *Harvard Journal on Legislation*).

171 *E.g.*, 40 Fed. Reg. 18,372 (1975) (D75-153).

172 Some impoundments presented special characterization problems. For example, many programs are funded pursuant to continuing resolutions. If a continuing resolution funded a program at a level higher than the President's budget, and Ford proposed to impound all funds above the amount which he requested, the impoundment proposal was treated as a policy action because he suggested that higher priority be given to his request than to the amount established by Congress. If, however, a continuing resolution funded a program at a level lower than the President's request, the President's action to withhold funds pursuant to the congressional mandate was designated a routine action. *E.g.*, 39 Fed. Reg. 42,637-42, (1974) (D75-103 to -106); 40 Fed. Reg. 1668 (1975) (D75-132). Another unusual situation occurred in 1974 when

D. *The Ford Administration Impoundments*

In the course of his administration, President Ford proposed 480 impoundment actions, including 330 deferrals and 150 rescissions.[173] Only one-third of Ford's deferral proposals could be classified as policy, but almost 90 percent of his rescission proposals fell into that category.[174] The large number of routine deferral proposals generated a great deal of paperwork and demanded an inordinate amount of congressional time and attention that would have been better spent on analysis of Ford's policy impoundment proposals. The routine proposals were treated in the same manner as policy impoundments. Agencies supplied information to OMB, which organized it into special messages from the President to Congress and the GAO. Congress referred the President's messages to congressional committees for evaluation.[175] GAO and the committees then reported their recommendations to each House for floor action.

Congress could reduce the burdens of reviewing routine impoundments in either of two ways. First, it could eliminate altogether Presidential reports on routine impoundments by amending the 1974 Act. Congress could define as "routine" those impoundments which are authorized by the Anti-

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Congress invited the administration to submit proposals for rescissions and deferrals which would limit total new budget authority to $33.0 billion. H.R. Rep. No. 1489, 93d Cong., 2d Sess. 21 (1974). The administration's rescission proposals, 40 Fed. Reg. 5649-702 (1975) (R75-55 to -79), were classified as policy since the administration selected the programs in which reductions should be made. The Ford administration characterized some impoundments as efforts to "restrain outlays" although their specifics suggest that they were basically of a routine nature. *E.g.*, 39 Fed. Reg. 42,521 (1974).

173 In addition, President Ford submitted 146 supplementary messages to revise actions already reported. These figures do not reveal the many times in which the Ford administration used a single deferral request to cover deferrals in more than one program. For example, in 1976 Ford proposed in one action the deferral of $596 million in defense funds for ten separate appropriation accounts. 41 Fed. Reg. 1707 (1976) (D76-86). The figures also do not include actions by the Comptroller General to reclassify Presidential impoundment requests or to report impoundments which had not been submitted for congressional approval.

174 Using the guidelines specified in Section C, the author found that 209 of the 330 proposed deferrals were routine and that 17 of the proposed rescissions were routine. In addition, 99 of the 146 supplementary impoundment messages were revisions of routine actions. For prior figures, which have been updated for this Article, *see* Fisher, *supra* note 170, at 2-3.

175 Normally impoundment messages are referred to the appropriations, budget, and relevant authorization committees.

deficiency Act or by any other law except the Impoundment Control Act. Alternatively, Congress might require the President to submit abbreviated reports on routine impoundments to the Comptroller General, who would decide whether the proposed impoundments had policy aspects that required congressional action.[176] This second alternative gives the President less discretion to define impoundments as routine and thereby safeguards the impoundment control process against executive abuse or error. Such a mechanism to screen routine impoundments was proposed by the Senate Government Operations Committee in 1973 in its report on an early version of the impoundment control bill,[177] but it was not included in the 1974 Act despite the concern that a large number of routine impoundments would overload the process.[178] Preliminary GAO review would eliminate unnecessary paperwork for Congress and the executive branch and would focus congressional attention on policy impoundment proposals that have a significant effect on budget priorities.

The large number of policy rescission proposals indicates that President Ford was attempting to continue the presidential custom of reshaping the budget priorities enacted by Congress, even after enactment of the Impoundment Control Act. The number of policy impoundment proposals under Ford was greater than Congress had anticipated. During Senate action on the Impoundment Control Act, its floor manager, Senator Sam Ervin (D-N.C.), said he expected that there would be no more than "a few dozen policy impoundment actions a year."[179] But the Ford Administration, in less than three years, proposed more than 120 policy deferrals and an additional 133 policy rescissions.[180]

Congress rejected most of Ford's policy impoundment proposals,[181] but those proposals accomplished two purposes.

176 If the President thinks it is improper for him to report to an arm of Congress rather than to the Congress itself, he could transmit two separate lists of impoundments to Congress: one for routine impoundments and one for policy impoundments. Copies of the former would be referred to the Comptroller General for review.

177 S. Rep. No. 121, 93d Cong., 1st Sess. 14 (1973).

178 *See* 120 Cong. Rec. S11,238-39 (daily ed. June 21, 1974) (statements of Sen. Hubert Humphrey (D-Minn.) and Sen. Sam Ervin).

179 120 Cong. Rec. S11,238 (daily ed. June 21, 1974).

180 *See* note 174 *supra*.

181 A. Schick, The Impoundment Control Act of 1974: Legislative History and

They gave Administration supporters in Congress a second opportunity to defeat spending programs which were not included in the President's budget, and they delayed actual funding of such programs until the congressional review procedure was exhausted. Members of Congress complained that Ford was misusing the impoundment control process. House Appropriations Committee Chairman George H. Mahon declared:

> It is not appropriate, in my view, for the Executive to transmit a rescission proposal that only contains funds which have been enacted into law as a result of the initiative of the Congress. I do not subscribe to the theory that everything the Executive does is correct and right and defensible, and that everything the Congress does by way of providing additional sums or modifying sums is all wrong.[182]

Senator Ted Stevens (R-Alas.) found a parallel between the impoundments by Nixon and the rescission proposals by Ford:

> We have gone through it before. Everything that was added on by the Congress was impounded. Now almost everything that is added by the Congress is rescinded. You just have a new mechanism for delay.[183]

Ford did not simply submit a large number of policy impoundments, he also concentrated them in one area — nondefense spending. Ford proposed certain routine impoundments that affected military programs,[184] but proposed policy rescissions for FY 1975 that reduced Defense Department (DOD) outlays by only $382 million, or 0.46 percent.[185] Ford proposed no DOD policy impoundments for FY 1976, other than $700,000 in deferrals and $3.5 million in rescissions for the Corps of Engineers.[186] Ford's last impoundment message, which covered a portion of FY 1977, proposed a policy

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Implementation 8-19 (Feb. 27, 1976) (Congressional Research Service multilith 76-455).

182 121 CONG. REC. H1054 (daily ed. Feb. 25, 1975).

183 *Budget Rescissions and Deferrals: Hearings Before the Senate Comm. on Appropriations (Part 1)*, 94th Cong., 1st Sess. 283 (1975) (testimony).

184 *E.g.*, 39 Fed. Reg. 36,245 (1974) (D75-32); 40 Fed. Reg. 29,018 (1975) (D76-4).

185 39 Fed. Reg. 42,547-69 (1974) (R75-17 to -28). Ford also proposed two policy deferrals that affected $58,448,000 for the Corps of Engineers. 39 Fed. Reg. 39,232-39 (1974) (D75-81 to -82).

186 41 Fed. Reg. 4236, 4174 (1976) (R76-32).

rescission of $721 million in Navy shipbuilding funds for certain aircraft carrier programs.[187]

Domestic programs bore the brunt of Ford policy impoundments. The policy impoundment proposals for FY 1975 and FY 1976 in the Departments of Agriculture and of Health, Education, and Welfare (HEW) are presented in Tables 3 and 4, along with corresponding figures for DOD.

TABLE 3

Policy Rescissions Proposed by the Ford Administration[188]

	Absolute Totals		Percentage of Department Outlays	
Department	FY 1975	FY 1976	FY 1975	FY 1976
Agriculture	$ 822,021,000	$ 808,426,561	9.4	5.6
Health, Education and Welfare	$1,098,755,250	$1,696,391,094	1.0	1.3
Defense*	$ 382,000,000	- 0 -	0.46	0.0

* Does not include Corps of Engineers.

TABLE 4

Policy Deferrals Proposed by the Ford Administration[189]

	Absolute Totals		Percentage of Department Outlays	
Department	FY 1975	FY 1976	FY 1975	Fy 1976
Agriculture	$426,865,000	$729,650,866	4.8	5.1
Health, Education and Welfare	$338,550,000	$193,786,250	0.3	0.1
Defense*	- 0 -	- 0 -	0.0	0.0

* Does not include Corps of Engineers.

The figures in Tables 3 and 4 understate the effect of policy impoundments on HEW outlays since as much as 85 percent of the HEW budget is "relatively uncontrollable" because of man-

187 H.R. Doc. No. 48, 95th Cong., 1st Sess. 8 (1977).

188 For prior figures, which have been updated for this Article, *see* Fisher, *supra* note 170, at 8-10.

189 For prior figures, which have been updated for this Article, *see id.*

datory entitlement programs, whereas the DOD budget may be only 35 percent uncontrollable.[190] Table 5 also illustrates the small effect that policy impoundments had on the defense budget under President Ford. Military programs were immune from policy deferrals in both FY 1975 and FY 1976 and from policy rescissions in FY 1976.

TABLE 5

The Military's Share of Policy Impoundments[191]

	FY 1975	FY 1976
Policy Rescissions		
Total	$2,876,228,183	$2,993,212,755
DOD	372,100,000	3,500,000
Military Sector	372,100,000	-0-
Corps of Engineers	-0-	3,500,000
Military Portion of Total	12.9%	-0-
Policy Deferrals		
Total	$22,436,233,999	$1,041,603,568
DOD	58,000,000	700,000
Military Sector	-0-	-0-
Corps of Engineers	58,000,000	700,000
Military Portion of Total	-0-	-0-

President Ford might have hesitated to make so many policy impoundment proposals, and to concentrate them on non-defense spending, if they had been more visible. Policy impoundments would be more visible if the President reported them separately from routine impoundments and if he were required to list the amount of any congressional add-ons next to his proposed rescissions and deferrals. This would warn Congress when the President's motive for an impoundment was to substitute his own spending priorities for those enacted by Congress.

V. Conclusion

The Congressional Budget and Impoundment Control Act of 1974 has improved congressional control over the budget

190 The Budget of the United States Government, Fiscal Year 1977, at 7, 354-55 (1976) (supplemented by statistics from Part 7). The actual degree of controllability in the defense budget is disputed. Few people think it is realistic to say that the defense budget is 65 percent controllable. Nevertheless, the administration estimates suggest the greater relative effect of policy impoundments.

191 For prior figures, which have been updated for this Article, *see* Fisher, *supra* note 170, at 11.

process in several ways. First, the spring and fall concurrent budget resolutions have forced Congress to consider the budget as a unit rather than as a collection of isolated appropriations and revenue actions. Second, the simultaneous consideration of appropriations and revenues permits Congress to vote on the amount of the annual budget deficit or surplus that is most appropriate for the economy. Third, the timetable for the new budget process has accelerated the authorization and appropriation cycles, thus reducing the number of continuing resolutions.

While the budget process has improved, the changing nature of the budget itself has created new obstacles to effective congressional control. The tight budgets of recent years have intensified the competition for funds at the same time that the "uncontrollable" portion of the budget climbed to approximately three-quarters of the total. As a result the budget process has become a combination of mechanical and perfunctory tasks. Much of the judgment and discretion which are at the heart of political and policy decisions has been replaced by the clerical tasks of computing the amounts required for mandatory entitlements and for programs funded by permanent appropriations. The notion of "debating budget priorities" does not apply to short-run changes in the budget. Senator Muskie has warned that if the proportion of uncontrollable spending continues to increase, "the much-hailed new congressional budget process could, in the not-too-distant future, become little more than the simple arithmetic sum of predetermined spending levels."[192]

Congress is now considering two proposals that would open the budget to more initiative and choice.[193] One proposal is "sunset legislation," which would require that almost every federal program be renewed on a five-year cycle by Congress. The second option is zero-base budgeting, which would require annual consideration of each department's entire budget rather than just the incremental changes made from year to year. The premise of zero-base budgeting is that Con-

192 Muskie, *Effective Government: Our Next Big Challenge*, NAT'L J., April 3, 1976, at 458, *reprinted in* 122 CONG. REC. S16,095 (daily ed. Sept. 17, 1976).

193 *See generally Government Economy and Spending Reform Act of 1976: Hearings Before the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. (1976).

gress and the executive branch should periodically reexamine the fundamental assumptions behind each program.[194] Legislation to require zero-base budgeting and sunset legislation was favorably reported in the 94th Congress by the Senate Government Operations Committee[195] and, with reservations, by the Senate Rules and Administration Committee.[196] Similar legislation has been reintroduced in the 95th Congress.[197]

The new budget and impoundment processes have made some improvements in congressional control over federal spending, but Congress has yet to demonstrate that it can markedly adjust the President's budget. The President is in a strong position because he directs a relatively unified executive branch and has the responsibility for framing budget proposals. Congress is still in the position of responding to presidential initiatives. The short history of President Carter's tax rebate proposal is a good example of the relative position of the President and the Congress on control of the budget. Carter suggested a $50 rebate to stimulate the economy, but as Congress began to comply with his request Carter abandoned it.[198] Congress was left in an embarrassing position. Representative Robert L. Leggett (D-Cal.) complained:

> I do think we are hopping, skipping, and jumping to the tune of the President. . . . It makes it appear that we are no more than a rubber stamp in that we say, "Here's your economic stimulus program, Mr. President, whatever you want," and then say, "thank you, Mr. President, for taking it away."[199]

The congressional treatment of the tax rebate proposal illustrates how Congress lacks independent judgment when it evaluates presidential budgetary policy. During the Nixon and Ford administrations Congress often did not have the will or the confidence to oppose presidential policies on issues like inflation and the size of the defense budget; thus it made

194 For a recent analysis of these proposals, *see* Note, *Zero-Base Sunset Review*, 14 HARV. J. LEGIS. 505 (1977).

195 S. REP. No. 1137, 94th Cong., 2d Sess. (1976).

196 S. REP. No. 1263, 94th Cong., 2d Sess. (1976).

197 S. 2, 95th Cong., 1st Sess. (1977), 123 CONG. REC. S 144-58 (daily ed. Jan. 10, 1977).

198 *See* CONG. Q. WEEKLY REP., April 16, 1977, at 692.

199 123 CONG. REC. H3570-71 (daily ed. Apr. 26, 1977).

changes only at the margins. Now the Democratic leadership of Congress appears to have been overly deferential to the budget initiatives of the first Democratic President in eight years. But congressional embarrassment over the tax rebate may have jolted the leadership, particularly the members most involved in the budget process, to be more wary of presidential budget proposals in the future. If Congress wants to exercise its statutory and constitutional responsibilities over federal spending, it will have to be more willing to challenge the President with a budgetary strategy of its own.

DISARMING THE MILITARY SUBGOVERNMENT

GORDON M. ADAMS*

The cycle of political concern about national defense has turned once again toward growth in the military's share of the national budget. Prominent congressmen of various political persuasions have spoken in favor of more defense spending in response to a newly-perceived Soviet threat. Carefully culled intelligence data have been released by various Pentagon agencies to augment the feelings of insecurity. New strategic policies promise larger military budgets with attendant waste and cost overruns. The voices of rationality and efficiency have been muted until it once again becomes fashionable to oppose higher military spending.

In this Article, Mr. Adams argues that Congress' failure to incorporate a strong permanent element of opposition to increased military expenditures into its review process represents an abdication of its responsibility to control the military budget. Instead the Pentagon and military contractors have been permitted to pass through budget requests with only token scrutiny. These interests have formed a "military subgovernment" of enormous power with the congressional military committees by exploiting the normal process of committee specialization. Members of military committees have been influenced by careful location of military facilities and monopolization of defense information. Past attempts by Congress as a whole to improve its control over the military budget have been rebuffed by the military subgovernment.

Mr. Adams recognizes that the mutual self-interest of its members cements together the elements of the military subgovernment. He suggests that this force must be counterbalanced if Congress is to reassert successfully its authority over the size of the military budget and the allocation of national resources.

Introduction

Congressional action on the proposed military budget for fiscal year 1978 confirms a continuing pattern of deference to presidential initiative in major aspects of defense policy.[1] Many

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1 *See* 35 CONG. Q. WEEKLY REP. 665 (1977).

congressmen seem to limit their participation in review of military expenditures to zoning spending into the right districts. One House Armed Services Committee member has observed that "we mostly reflect what the military people recommend; military policy is made by the Department of Defense. Our committee is a real estate committee."[2] This cynicism about the current congressional role concurs with the view of many scholars that Congress generally has been ineffective in controlling the size and composition of the military budget and in preventing inefficient procurement of weapons.[3]

While many critics have described the process of congressional review of the military budget, few have attempted to explain why it continues to be inadequate. All of them recognize that the Pentagon and the defense industry exert tremendous influence over congressional budgetary decisions.[4] Some of them point to the Armed Services Committees and the Appropriations Committees as the subjects of Pentagon and defense industry pressure. These committees and their subcommittees appear to yield to and even to augment the budgetary demands of executive defense agencies and contractors.[5] But the persistence of this uncritical acceptance of defense spending, in light of recent congressional concern over the size of the defense budget, is a mystery. Many congressmen have stated that they are willing to cut back on defense expenditures

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2 Anonymous member of the House Armed Services Committee, *quoted in* L. Dexter, *Congressmen and the Making of Military Policy*, in READINGS ON CONGRESS 376 (R. Wolfinger ed. 1971).

3 One scholar, for example, has concluded that:

> [M]ore and more the role of the Congress has come to be that of a sometimes querulous but essentially kindly uncle who complains while furiously puffing on his pipe but who finally, as everyone expects, gives in and hands over the allowance, grants the permission, or raises his hand in blessing, and then returns to his rocking chair for another year of somnolence broken only by an occasional anxious glance down the avenue and a muttered doubt as to whether he had done the right thing.

E. KOLODZIEJ, THE UNCOMMON DEFENSE AND CONGRESS, 1945-1963, at 414 (1966).

4 One commentator expressed the consensus in these terms:

> The sad truth is that outside of legislation in military pay, construction and manpower — areas of less than primary importance — the military committees have largely become a conduit through which the armed forces are able to secure the weapons systems and funding they desire, whether needed or not.

Hersh, *The Military Committees*, WASH. MONTHLY, April, 1969, at 87.

5 *See* text accompanying notes 49-54 *infra*.

and examine Pentagon spending practices more closely if given the opportunity.[6] Yet defense budget requests pass through appropriations committee and floor consideration virtually unchanged in amount and content.

The discrepancy between congressional speech and action may be a sign that the government and the defense industry are engaged in a unique conspiracy that some writers have labelled the "military-industrial complex."[7] This article offers an alternative explanation for congressional laxity in scrutinizing the defense budget that eschews the conspiratorial view and examines the structure of budgetary review for the elements that perpetuate the hegemony of the Pentagon and the defense industry. Section I presents the case for greater congressional supervision of military expenditures and spending policy by describing the benefits of independent scrutiny and the costs of past acquiescence in budget requests and Pentagon policy. Section II introduces the idea of the "military subgovernment," a coalition of the Pentagon, the defense industry and the military committees in Congress. The natural congressional inclination to delegate authority for expenditure review to subunits created a powerful committee that came to consider the military as its client. Committee hearings provide a forum insulated from outside criticism of military assumptions about foreign policy and from competing social programs. Section III demonstrates that the military subgovernment has stifled attempts after World War II to improve review of Pentagon budget requests and spending practices. Section IV suggests ways that Congress as a body can reduce the influence of the military subgovernment. The power of military subcommittees to push through defense budgets unopposed, like that of any committee, lies in its specialization. Congress as a whole must assume greater responsibility in reviewing military spending if dissenters are to have a voice in reducing waste.

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6 Even members of congressional military committees, such as Senator Thomas McIntyre (D-N.H.), have made such comments: "Now I'm not like McGovern. I don't believe in a $30 billion cut. That's a myth. But there is fat in that bill. I know there's fat!" August 1972 Interview, *cited in* C. LISKE & B. RUNDQUIST, THE POLITICS OF WEAPONS PROCUREMENT: THE ROLE OF CONGRESS 80 (1974) [hereinafter cited as POLITICS OF WEAPONS PROCUREMENT].

7 *See generally* S. LENS, THE MILITARY-INDUSTRIAL COMPLEX 15-32 (1960).

I. The Need for Stricter Congressional Review of Military Spending Policy

The Constitution gives Congress little guidance in choosing forms of control over military spending that clearly comply with limitations on congressional power. Article I, Section 8 confers upon Congress the responsibility to "raise and support armies, . . . , to provide and maintain a navy . . . ," and "to make rules for the government and regulation of the land and naval forces."[8] These words, however, do not specify what congressional action should be. Furthermore, the text of the Constitution does not reconcile the role of Congress with the role of the President under Article II, Section 2, as "Commander in Chief of the Army and Navy." Any major expansion in review procedures may conflict with the principle of separation of powers.[9]

This textual ambiguity, however, should not gainsay the importance of the tools Congress has developed over time to supervise the national defense. One device is control of the budgetary process. Congress authorizes military programs and appropriates money for them.[10] Another device is oversight of Pentagon spending practices. Congressional committees have examined contracting procedures and conflicts-of-interest in an effort to reduce inefficiencies and corruption.[11] Congress could strengthen these tools and broaden its participation in review without a noticeable incursion on executive discretion.

The consequences of the present narrow review of defense spending requests have been serious. One problem is that the nation relies almost exclusively upon internal debate at the Pentagon for shaping military policy. Decisions made within the Pentagon determine what weapons will be built and how they will be deployed. But the agency is not a forum where

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8 U. S. Const. art. I, § 8, cl. 12.

9 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). But the scope of executive privilege under this clause continues to be a subject of considerable controversy. *See* Henkin, *A More Effective System for Foreign Relations: The Constitutional Framework,* 61 Va. L. Rev. 757-58 (1975); R. Berger, Executive Privilege: A Constitutional Myth 110-13 (1974).

10 For a general discussion of the congressional authorization and appropriations process, *see* A. Wildavsky, The Politics of the Budgetary Process (2d ed. 1974).

11 *See* notes 82-83 *infra*.

opposition to further weapons construction can be aired because its managers are committed to increased military spending. Thus, any internal disputes will be limited to conflicts among the armed services over division of the budget.[12] These squabbles over pet projects are seldom related to real differences in views on national security and always seem to raise the bill.

A second negative effect is the exemption of the Pentagon budget from the ordinary financial restraints on other government programs. Defense planners make no serious efforts to assess the impact of different levels of military spending upon foreign policy goals or defense capabilities. Each program receives the same promotion as "vital to the national security." When line-by-line examination of the defense budget occurs in congressional subcommittees, only a few members understand the relationship between particular items and national defense needs, and these individuals tend to subordinate their knowledge to constituent pressure for more defense employment.[13] Moreover, there is no independent examination of the allocation of government money between military and other competing social programs. Only the President and the Pentagon are in a position to decide what decreases in military spending can be tolerated to allow increases in domestic social spending. Their evaluation seldom leads to redistribution in favor of non-military needs. Thus, the military budget remains uncontrolled both in its relationship to national goals and to other types of government expenditure.

The final difficulty resulting from weak congressional scrutiny is that internal Pentagon policy perpetuates poor cost estimates and spending practices. Willful misstatements about the spending implications of weapons choices in the early stages of programs sustain costly projects that never should have been considered.[14] Moreover, Pentagon contracting procedures that favor the defense industry, such as cost-plus reimbursement, frequently create massive cost overruns that the Congress must

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12 *See* M. HALPERIN, BUREAUCRATIC POLITICS AND FOREIGN POLICY 40-57 (1974).

13 *See* notes 50-52 *infra* and accompanying text.

14 W. PROXMIRE, REPORT FROM THE WASTELAND: AMERICA'S MILITARY INDUSTRIAL COMPLEX 48-75 (1970).

cover by supplemental authorization.[15] Congressional investigation of these wasteful practices, although increasing, is often stymied because investigating committees cannot find a reliable and on-going source of information.[16] Uncontrolled expenditures ensure that military dollars will be devalued and the pressure for a larger share of the budget will increase.

Present ineffective congressional checks and the resulting deference to internal Pentagon decisions add up to excessive military spending in any budgetary year. The Pentagon operates beyond congressional control at great cost to the taxpayer and to the American economy as a whole by misallocating national resources. More thorough congressional review of military spending could yield substantial benefits. First, such scrutiny may make defense agencies more receptive to genuine public desires for expenditures on weapons and personnel. It could contribute to the kind of political accountability that the separation of powers principle seeks to foster. Second, such scrutiny may give critics of current practices a new opportunity to present their positions to government officials. A discussion of strategic choices and social needs less monopolized by spokesmen for the military could lead to more rational and efficient decisions on how much government money should be spent and for which projects. But in order to reap the savings in national resources that stricter review could provide, Congress must be willing to take on responsibility as a body for examining budget proposals. As the next section will demonstrate, delegation of review powers to subcommittees guarantees inadequate review. Only Congress as a whole can hope to accommodate the diversity of viewpoints necessary to balance military against other social needs in a thorough manner.

II. The Military Subgovernment and Its Roots

The ability of an agency or private interest to have most of its budgetary requests enacted into law without actual or even a substantial threat of review or challenge on the floor of Congress must be considered an implicit delegation of law-making

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15 *See* Oleszek, *Toward a Stronger Legislative Branch: Congress Proposes Committee and Oversight Reforms*, 3 The Bureaucrat 444, 456 (1975).
16 *See* note 29 *infra*.

power. Control over appropriations would match in form the power of issuing regulations that Congress has given to independent regulatory agencies.[17] Therefore the three-sided relationship between the Pentagon, the arms industry, and the military committees in Congress can be described best as a "military subgovernment"[18] because it enables military budgets to pass through the normal supervisory process with few changes. Proposals by the Pentagon or the arms industry frequently receive a very favorable, even rubber-stamp, hearing in the military committees.[19] Moreover, Congress as a whole approves the committees' recommendations without reconsidering their basic assumptions about national security and the relative value of other spending programs.[20] Thus the three-way coalition governs by formulating the national needs necessary for legislation and by designing the policy that meet these needs, i.e., higher military spending, while being accountable only to themselves and to their constituents.

Ordinarily, this kind of relationship might be considered an unavoidable consequence of constraints in congressional time and resources. Congress splits itself into committees with jurisdiction over separate issue areas because no member has the time or the ability to absorb all of the information or even attend the meetings necessary for review of all legislative proposals.[21] Furthermore, members seek assignment to those

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17 For a discussion of the permissible scope of congressional delegation to administrative agencies, *see* K. DAVIS, ADMINISTRATIVE LAW TEXT 26-52 (3d ed. 1972).

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> The ultimate centrifugal force in the congressional system, and in the entire federal government, is the three-way partnership sometimes found among congressional committees (or chairmen of subcommittees), powerful bureaus in federal departments or agencies, and well-organized outside pressure groups. This partnership, at its most efficient, creates what Douglass Cater has called "subgovernments."

S. BAILEY, CONGRESS IN THE SEVENTIES 61 (1970). *See also* D. CATER, POWER IN WASHINGTON (1964).

19 *See* Hersh, *supra* note 4, at 87.

20 *See* Kanter, *Congress and the Defense Budget, 1960-1970,* 66 AM. POL. SCI. REV. 132, 137 (1972).

21 "Congressmen farm out their serious legislative research to the Library of Congress, their serious bill-drafting to the Office of Legislative Counsel, to the executive branch, or even to private lobbyists, and their serious thinking to committee chairmen and staff." M. GREEN, J. FALLOWS & D. ZWICK, WHO RUNS CONGRESS? 208 (1972). *See* R. DAVIDSON & W. OLESZEK, CONGRESS AGAINST ITSELF 20 (1977); W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 156-57, 159 (1977).

committees which will advance the interests of their constituents or their personal legislative interests.[22] Once in positions of authority within subcommittees, these legislators will be receptive to executive agency proposals and interest group pressures if they perceive political benefits from acquiescence.[23] And Congress will give considerable weight to the judgments of the committee despite the potential for influence because it recognizes the expertise on specific matters that the committee develops over time. Thus, in the hope of producing a better outcome, Congress exchanges some degree of control over the decision-making process and the possibility of more outside influence for the ability of its members to devote considerable amounts of their own time and staff resources to particular issues.

But two special aspects of military spending make this method of review dangerous because they give the military a special budgetary power not possessed by other claimants. The first involves monopolization by the Pentagon and the arms industry of information necessary for judgments about national defense needs. The Pentagon's exclusive control of military information on the grounds of "national security" forces Congress to forfeit a large portion of the decision-making power to the executive. Thus most of the important decisions about defense are made before the proposed budget reaches Congress. The second aspect, inordinate political strength, is a corollary of the first. Congress cedes to the Pentagon the power to allocate a large percentage of the budget devoted to "defense" because it perceives that the Pentagon could best determine how to spend it on military goods. In addition, Congress seldom puts an absolute ceiling on military expenditures because it cannot define for itself the limits of national security. Thus the Pentagon can determine how much and where military dollars are spent, and uses this authority to influence the members of congressional subunits and members in general key positions to gain acceptance of increased military spending. This section will explore the impact of these two elements to

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22 *See* W. KEEFE & M. OGUL, *supra* note 21, at 181.

23 *See* M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 65-67 (1977).

demonstrate the unique governing power of the military subgovernment.

A. *Information Control*

The significance of the Pentagon's dominant position in the acquisition and interpretation of information relevant to national defense lies in the nature of national security as a political issue. Security is a very diffuse term, and the preservation of peace may depend as much on external events as on the provision of military hardware. Moreover, while military preparedness has some effects on these external events, its impact can be negative as well as positive if the complex game theory of international relations produces arms escalation or desperate action.[24] These considerations make it difficult to correlate military expenditure levels to distinct improvements in national security. Citizens can only spend money and hope.[25] At the same time, however, the indeterminate nature of the need to spend breeds an uneasiness among taxpayers that can be exploited. Proponents of new weapons systems can point to suspicious actions by adversaries and urge that the uncertainty calls for increased spending without tendering proof or fearing persuasive contradiction.[26] But the public may not feel safer as long as the uncertainty remains.

Military information renders security less uncertain by making external events more predictable. At least four types of information could be used to place a cap on the military budget. First, data on the military capabilities of other nations reveal the potential threat that must be countered. Second, accurate knowledge about the foreign policy goals and actions of our own and other governments assists in deciding what amounts of military force must be amassed and where it might be deployed.

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24 *See generally* R. FISHER, INTERNATIONAL CONFLICT FOR BEGINNERS 1-14 (1969).

25 *See* C. LINDBLOM, THE POLICY-MAKING PROCESS 14-15 (1968). Even the Secretary of Defense, who assumes the responsibility of setting performance goals for military expenditures cannot be sure which set of priorities will best promote national security. *See* N. SINGER, PUBLIC MICROECONOMICS 279 (1972).

26 One of the most recent examples of this process concerns warnings about an extensive Soviet civil defense system. These assertions have been used to support the Defense Department's new strategic policy of assured retaliation that could increase expenditures for strategic weapons. *See* Kipper, *Disarmament Through Weapons Expansion,* WASH. WATCH, June 3, 1977, at 2-3.

Third, projections about future technological capabilities indicate how strong a military force could be developed and which research projects should be begun. Fourth, information about the cost-effectiveness of weapons and personnel in budgetary dollars and military capabilities gives some idea of the effect of different expenditure levels on military strength.

These categories of information, gathered by the Pentagon and executive intelligence agencies, are withheld from Congress on the grounds of national security and executive privilege.[27] Military officials can claim that Congress as a body tends to divulge information that could harm the national defense.[28] Furthermore, they see the release of military documents to Congress as a violation of the President's power to command the deployment of the armed forces under the Commander-in-Chief doctrine.[29] Yet the members of the military subcommittees continually receive these kinds of data and testimony, carefully tailored to support the military budget requests.[30] Congress' failure to challenge the military's assertions of exclusive rights to information and to develop smaller adversary subunits that could meet the national security objection ensures a default in policy judgments to those agencies that can collect and shape information for their own purposes. The Pentagon and the President can decide what foreign policy goals will be and what proportion of the budget will be devoted to military

27 *See* R. SANDERS, THE POLITICS OF DEFENSE ANALYSIS 208-09 (1973). A 1973 survey by the Subcommittee on Separation of Powers of the Senate Judiciary Committee documented 225 instances of refusal to provide information requested by congressional committees or the General Accounting Office. One of the most extensive of these instances was the denial of information on the TFX (F-lll) fighter bomber by the Defense Department between 1962 and 1969. *See* Cohen, *Watergate May Alter Style But Not Substance of Power*, 6 NAT. J. REP. 1340, 1344-45 (Sept. 7, 1974).

28 *See* Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L. J. 477, 486 (1957). This claim is hotly contested by other writers. *See* R. BERGER, *supra* note 9, at 288-89.

29 In 1973, for example, the Secretary of the Air Force invoked executive privilege in refusing to answer questions about some airplane cost overruns before a civil service examiner. A. BRECKENRIDGE, THE EXECUTIVE PRIVILEGE 83 n. 14 (1974).

30 The Armed Services Committee receives the "posture statement" annually from the Secretary of Defense. The statement outlines much sensitive data and is heard in closed session. *See* W. PROXMIRE, *supra* note 14, at 116.

One critic has proposed that a Permanent Joint Committee on Intelligence Estimates be created to serve as "an indirect reference point against the selective and slanted intelligence often sped to the Appropriations and Armed Services Committees by means of end-runs around budget time." Hughes, *The Power to Speak and the Power to Listen*, *in* SECRECY AND FOREIGN POLICY 39 (T. Franck & E. Weisband eds. 1974).

purposes without significant challenge from legislators not inalterably committed to greater spending.

Several characteristics of present military budget review illustrate the deterimental results of congressional deference to the Pentagon's superiority in military information. One example is the proliferation of technical terminology and program review processes.

In the early 1960's the Pentagon greatly increased its capacity to overwhelm Congress with its superior technical expertise. Defense Secretary McNamara's "whiz kids" adapted methods of budget preparation and cost estimation such as "program budgeting" and "systems analysis." These new techniques increased the already large volume of general information which the Pentagon fed to Congress.[31] By flooding Congress with general information from program assessment while hiding the specific data needed to make judgments about military needs, the Pentagon could retain control over all important budgetary decisions while retaining an appearance of expertise.[32] These technical management techniques seemed to replace "political" decisions with "scientific" ones.[33] In addition, these decision-making practices centralized authority in the Secretary of Defense's office, reduced inter-service rivalry, and thus cut off the one potential source of information for congressional policy

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31 In addition to the budget, the Pentagon annually presents Congress, among other reports, the Secretary of Defense's Annual Posture Statement, the Research and Development Statement, and an evaluation of projected costs of major weapons systems.

The report accompanying the FY 1977 defense budget to the Congress from the Defense Department was 271 pages long, and the detailed budget estimates comprised 92 pages of tables and charts. U.S. DEPT. OF DEFENSE, ANNUAL DEFENSE DEPT. REPORT, FY 1977 (1976); U.S. DEPT. OF DEFENSE, THE BUDGET OF THE UNITED STATES GOVERNMENT, FY 1977, APPENDIX (1976).

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> The president prevails because secretly Congressmen think he is right. The President's budget is made in private, the Congressional budget in public. Congressmen see how their budget is made; knowing what went into it, they are, like sausage makers, leery of what will come out of it. Unaware of what has been going on in the Executive Office of the President, they respect its products more because they know the ingredients less. Thus have Congressmen come to prefer other people's errors to their own.

See A. WILDAVSKY, *supra* note 10, at 209-10.

33 Mollenhoff notes how systems analysis diminished political pressures from Congress. C. MOLLENHOFF, THE PENTAGON: POLITICS, PROFITS AND PLUNDER 23 (1967). *See generally* R. SANDERS, *supra* note 27 (a general view of systems analysis in the Defense Department).

debates.[34] Thus program budgeting and systems analysis, with their analytical structures for introducing military data known only to the Pentagon, dissuaded Congress from taking a more active role in military budget review by helping to transform weapon decisions into "unknowable issues" that must be left to experts from the Pentagon and the military committees. Now Congress as a whole could specify only the absolute amount of military spending if it approached the limits of tax revenues and borrowing ability. Budget shares and allocation among projects remain within the discretion of the military subgovernment.

Another aspect of review that reflects the Pentagon's control of information is that defense appropriations are authorized by general categories of weapons rather than by individual weapons. Congress defers to the military judgment on which individual weapons should be developed with their funds. This practice leaves the Pentagon free, as it has been since 1949, to reprogram authorized and appropriated funds from one item to another within a category.[35] Reprogramming became especially useful to the Pentagon during the Vietnam War because it enabled the agency to conduct the war effort with minimal interference from Congress.[36] The amount of money repro-

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34 Dexter, *supra* note 2, at 381-83. He says members at the time were in effect stating "[w]hat we need is more interservice squabbling. *When the military falls out, then and only then can the Congress find out.*" *Id.* at 382 (emphasis added).

35 H. Stephens, *The Role of the Legislative Committees in the Appropriations Process: A Study Focused on the Armed Services Committees,* 24 W. Pol. Q. 156 (1971). L. Fisher, *Reprogramming of Funds by the Defense Department,* 36 J. Pol. 78-79 (1974).

36 The reprogramming decisions communicated to the Armed Services and Appropriations Committees for prior approval included:

> With respect to procurement of aircraft, missiles, naval vessels, tracked combat vehicles and other weapons, prior approval is obtained from the Armed Services and Appropriations committees from both houses for these situations:
>
> 1. Items deleted by the Congress from programs as originally presented.
> 2. Programs for which specific reductions in original amounts requested have been made by the Congress.
> 3. Any aircraft, missiles, naval vessels, tracked combat vehicles and other weapons authorized by legislation reported by the Committees on Armed Services in compliance with Section 412(b) of Public Law 86-149, as amended.
> 4. Reprogramming from an earlier fiscal year program to a later fiscal year program.
>
> With respect to other items and categories of items covered under defense appropriations, prior approval is obtained from only the Appropriations committees for these situations:

grammed by the Pentagon increased by almost 80 percent between 1964 and 1967.[37] Under more generalized review encouraged by the paucity of solid facts available, Congress once again places enormous discretion in the hands of the Pentagon and the military committees.

A third characteristic of military budget review that shows the influence of the Pentagon's data monopoly is the "uncontrollability" of large segments of the military budget.[38] On the surface, Pentagon budgets appear to be controllable because they involve relatively few entitlements which must be continued from year to year.[39] But because of its monopoly over the information needed to reassess the base of military expenditures, the Pentagon can avoid annual comprehensive review and convince Congress to approve incremental increases to reflect the cost of program development, personnel, raises, and general inflation. Various items in the military budget may be deemed uncontrollable for different reasons. For example, of the $67.5 billion in military and international affairs outlays in

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1. Procurement of items deleted by the Congress from programs as originally presented.
2. Programs for which specific reductions in original amounts requested have been made by the Congress.
3. Reprogramming from an earlier fiscal year program to a later fiscal year program.

U.S. DEPT. OF DEFENSE, DIRECTIVE NO. 7250.5, REPROGRAMMING OF APPROPRIATED FUNDS (1970), as noted in L. Fisher, *supra* note 34, at 85. However, the Pentagon retained the authority to carry out a considerable number of reprogramming decisions internally, without notification, averaging $1.1 billion per year between 1964 and 1967. *See* Table I, note 37 *infra*.

37 Table I, Reprogramming Actions Compared to Internal Reprogramming (in millions of dollars).

TABLE I

Fiscal Year	Reprogramming Actions	Internal Reprogramming	Total
1964	2,008	853	2,861
1965	1,985	927	2,912
1966	2,353	1,247	3,601
1967	3,448	1,555	5,004

Department of Defense Appropriations, 1969: Hearings Before the House Comm. on Appropriations, 90th Cong., 2d Sess. 365 (1968), *reprinted in* Fisher, *supra* note 35, at 89.

38 Havemann, *Ford, Congress Seek Handle on "Uncontrollable" Spending*, 7 NAT. J. REP. 1619 (Nov. 29, 1975). *See also* A. WILDAVSKY, *supra* note 10, at 13.

39 *See* R. HAVEMAN & J. MARGOLIES, PUBLIC EXPENDITURES AND POLICY ANALYSIS 241-42 (1970).

FY 1976, $38.2 billion were earmarked for salaries and benefits.[40] Reduction of this item could lead to unemployment. Another $10 billion was earmarked for operation and maintenance expenses, which Congress authorizes and appropriates as a general category. Military advocates can argue that cuts in this area would reduce the level of American military preparedness. Most of the remainder of the defense budget covers research and development and procurement costs which could be cut. However, a large share of this represents payments on contractual commitments made in previous years which are therefore difficult to cut.[41]

Manipulation of research and development plans to build up irresistable pressure for new weapons presents a most striking example of the use of the information monopoly by the Pentagon. The logical time for Congress to review and weed out undesirable new programs would be at the initial stage of development, when a number of weapon alternatives are available for consideration. Some observers have estimated that as much as $4 to $8 billion could have been saved in FY 1976 if this procedure had been employed.[42] But Congress does not review them and funds almost all of these programs at low levels because it does not have the informaton necessary to be selective and the Pentagon will not deliver it.[43] As a result, projects at

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40 Havemann, *supra* note 38, at 1621.

41 *Id.* at 1622. For example, Congress appropriated $51 million in FY 1968 and $82 million in FY 1969 for start-up costs for the nuclear aircraft carrier, *Dwight D. Eisenhower,* due for completion in June, 1977. In FY 1970, another $382 million was appropriated to complete work on the carrier at current prices, with an agreement to meet ordinary cost increases. From that time on, outlays for the *Eisenhower* effectively left congressional control, although the Congress has had to appropriate another $218 million to meet price increases. Additional contract commitments with Tenneco's Newport News Shipbuilding and Dry Dock Co. and other contractors are likely to require another $265 million in payments. Even if the contract were cancelled, penalty payments would require substantial sums. In these circumstances Congress has few options but to appropriate the money. *Id.* at 1623.

42 *Id.* at 1622.

43 The Research and Development Subcommittees of Armed Services do not have a staff large enough to evaluate properly the large number of highly technical projects in this category. Senator Thomas McIntyre (D-N.H.), who chairs the Senate's Research and Development subcommittee, has complained that he has only one staffer and three assistants to examine the Research and Development budget. "We spend an awful lot of time, but we are lucky if we can take a look or have a briefing or hearing on, say, 15 percent of those projects." Quoted in L. Fisher, *Senate Procedures for Authorizing Military Research and Development* in SUBCOMM. ON PRIORITIES AND ECONOMY IN GOVERNMENT OF THE JOINT ECONOMIC COMM., PRIORITIES AND EFFICIENCY IN FEDERAL RESEARCH AND

an early stage of research and development are not very vulnerable to cuts.[44]

Yet if Congress is unable to exert control at this early stage of a project's life, it may never get another chance. For it is precisely at this early stage that a constituency begins to develop around a military project. Vested interests in the Pentagon and in the contracting industry are loath to abandon a project once it is already well under way.[45] By the time Congress is able to be attentive, long-range commitments have been made, contracts signed, and competitors eliminated from the race. Thus the Pentagon can assure continued growth in its budget by withholding data and projections relevant to choices between weapons until Congress no longer can curtail development without encountering stiff political opposition.

When Congress allows the Pentagon to distribute and use information on military needs and capabilities for its own purposes without forcing disclosure to subunits other than the military committees, it incurs significant penalties in the independence of its budgetary evaluations. Furthermore, even if the military committees were willing to undertake critical review of Pentagon budget requests, they could not mobilize staff and other resources sufficient to interpret the data the Pentagon provides.[46] These committees are relegated to ineffectual

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DEVELOPMENT: A COMPENDIUM OF PAPERS 94th Cong., 2d Sess. 26 (1976) [hereinafter cited as Fisher, *Senate Procedures*]. Moreover, Senator McIntyre asserted innocence about technical matters: "What the hell do I know about these items? I'm just a country lawyer." POLITICS OF WEAPONS PROCUREMENT, *supra* note 6, at 81. Fisher also notes the committee's frustration in attempting to understand the R&D budget in Fisher, *Senate Procedures, supra,* at 42. *See also* A. WILDAVSKY, *supra* note 10, at 146-47.

44 A study of the Army's Cheyenne helicopter and MBT-70 tank programs confirms the finding that, at the early stages, Congress plays a small part in budgetary decisions. POLITICS OF WEAPONS PROCUREMENT, *supra* note 6, at 12, 76-77.

45 Fisher, *Senate Procedures, supra* note 43, at 21.

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> The task confronting Congress in acting upon this budget is overwhelming. Its members have, and can have, no adequate facilities for formulating alternative programs in any systematic fashion; for this they must rely on military dissent. They must accept in the main what is submitted, grappling with thousands of items and reams of documentary exhibits. They will try to ferret out some evidence of waste and mismanagement, and usually succeed, but this bogs them down in a morass of detail and diverts their attention frequently from underlying strategic issues . . . . In short, the totals involved in the defense budget have become so great, the lump-sums and carry-overs so large, the discretion to shift funds from one category to another so extensive, that

line-by-line examinations of the budget, which too often leads to the accommodation of each committee member's favorite project.[47] No comprehensive reassessment of military spending takes place because Congress cannot appraise military policy and program judgments without running into "unknowables" and problems of national security that can be resolved only by accurate information from executive agencies. The Pentagon protects its budget base by making the implicit judgments and advocating its annual mix of new projects and expenses as essential to national security. As long as Congress fails to develop an internal capacity to counter these assertions, it must accept them with no more than token resistance.

B. *Political Strength*

The Pentagon's power of knowledge and preemption of military spending decisions up to the limits of national financial resources creates an extraordinary power to frustrate the checks on self-interest built into the congressional committee system. Normally, competition among committees with different spending interests, such as housing or medical care, and rivalry between committees in a single area will generate enough conflicting reports and challenges to keep social expenditures in line with their utility in solving social problems.[48] But executive military agencies and their contractors command sufficient resources and deal with a small enough group of congressmen to mute most dissent that could produce alternative conceptions of proper military spending.[49] An examination of each level of review reveals that money spent in the right places draws the military committees into the subgovernment

> budgetary controls have actually provided Congress with little leverage over policy.

Dawson, *Congressional Innovation and Intervention in Defense Policy: Legislative Authorization of Weapons Systems*, 56 AM. POL. SCI. REV. 44 (1962).

47 *See* POLITICS OF WEAPONS PROCUREMENT, *supra* note 6, at 81.

48 *See* A. WILDAVSKY, *supra* note 10, at 16, 153-54.

49 The domination of military interests over defense spending may well be traced to the lack of concern on the part of American industry about military expenditures. Domestic expenditure may involve substantial regulatory aspects which increase the costs and risks of doing business. Thus industry will fight to hold down or reallocate domestic expenditures while ignoring defense. *See* Lieberson, *An Empirical Study of Military-Industrial Linkages*, in TESTING THE THEORY OF THE MILITARY-INDUSTRIAL COMPLEX 46 (S. Rosen ed. 1973).

and makes enthusiastic supporters out of many congressmen who could lead floor challenges.

Appointment to military committees begins a long process of Pentagon influence by the distribution of military spending in members' districts. Legislators often are appointed to the military committees because of the existence of military bases in their districts.[50] Once on the committees, these members encourage the agency to give them what they are most interested in — increased civilian employment in existing bases. Existing data, although far from extensive, indicates that support from military committee members is promoted more by direct spending by the Pentagon on military bases in members' districts than by awarding prime defense contracts to private industries in those districts. A study based on 1968 data found a high correlation between membership on the House Armed Services Committee or the House Appropriations Subcommittee and higher than average levels of employment at military bases in the member's district. The correlation between membership on these committees and employment in private military plants did not appear to be as strong.[51] This distinction would seem to be logical. Locations of bases and levels of spending on those bases are decisions over which military committee members have had a very direct power for many years.[52] Thus, the military committees join the subgovernment in exercising uncritical review over spending proposals and in promoting certain programs to protect and enhance their employment interests.

Military agencies also use the power of directing military expenditures to play off against each other the four committees that review the military budget. Each house of Congress has an Armed Services Committee whose function is to authorize expenditures to carry out legislative purposes. In general, how-

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50 *See* B. Ray, Investigating the Myth of Congressional Influence: The Geographic Distribution of Federal Spending 15-16 (unpublished paper for the American Political Science Association, 1976).

51 Goss, *Military Committee Membership and Defense-Related Benefits in the House of Representatives*, 25 W. POL. Q. 215, 224-29 (1972). In a separate study, Rundquist examined House military committee membership and 1960 prime contract data, broken down by type of work (*e.g.*, aerospace, electronics, shipbuilding, etc.). He found little or no relationship between the two that varied from the distribution for all members of the House. *See* B. Rundquist, Testing a Military Industrial Complex Theory (unpublished study, 1972).

52 *See* note 57 *infra*.

ever, the Treasurer of the United States cannot pay out any funds unless an authorization has been legitimated by an appropriation. Thus, the Armed Services and Appropriations Committees share responsibility for shaping the military budget. While this division of responsibility theoretically might have added to congressional independence in military budget matters, such has not been the case. Committee rivalry in each house prevents Congress from reviewing the military budget in a comprehensive fashion; instead, debate focuses upon those individual items over which the committees disagree.[53] Committee chairmen will resolve their differences informally in a manner which will accommodate the spending interests involved.[54]

A final congressional check on budgetary demands that the Pentagon undermines by wide-spread and well-directed dispersal of military projects is challenges on the floor by other members of Congress. The persuasive appeals to the employment interests of congressmen in order to preclude opposition take two forms. First, key congressmen whose districts rely on military industries receive promises of fiscal reward. These legislators can steer military appropriation bills through general sessions and cut off debate when necessary to forestall adversaries.[55]

Both the Pentagon and the interested contractors lobby long and hard to convince them that particular weapons systems, base locations, and investments will be of substantial economic benefit to their districts.[56] Some members of Congress, whether

53 "Since money bills, constitutionally, must originate in the House, the House Appropriations Committee and its subcommittees become powerful jurisdictional rivals of most of the legislative committees." S. BAILEY, *supra* note 18, at 59.

54 *See* POLITICS OF WEAPONS PROCUREMENT, *supra* note 6, at 67.

55 *See* W. PROXMIRE, *supra* note 14, at 97-99.

56 D. PEARSON & J. ANDERSON, THE CASE AGAINST CONGRESS: A COMPELLING INDICTMENT OF CORRUPTION ON CAPITOL HILL 293-363 (1968). Despite the substantial literature on contractor lobbying practices focusing on both the Executive and Congress, members of Congress have been somewhat loath to publicize the approaches made to them by contractors and the services, let alone their own responses to such presentations. Rep. Les Aspin (D-Wisc.), and Rep. John Seiberling (D-Ohio) shed some light on this practice by releasing documentation presented to them by the prime contractor for the B-1 bomber, Rockwell International, emphasizing its benefits to their districts. Seiberling's district was said to derive great benefits from the program, given the location of several key subcontractors in the area, such as Goodyear Aerospace, Goodyear Tire and Rubber, and B.F. Goodrich Aerospace. *See* Aspin, *The B-1 as Flying*

or not they sit on the key committees, are easily convinced of the economic importance of military spending, coming from states or districts where the concentration of military industry is high.[57] For example, California, Ohio, Washington, New York, and Massachusetts alone accounted for over 85 percent of the dollar value of prime contracts for the B-1 bomber's research and development phase in 1975.[58] Thus, Senator Henry Jackson (D-Wash.), ex-Senator Robert Taft (R-Ohio), and even liberals such as Senator Alan Cranston (D-Cal.), are strong advocates of military spending.[59]

Second, many other legislators can be induced to accept military budgets when military lobbyists emphasize the indirect allocation of money to their districts through the subcontracting of work by primary contractors to numerous supporting businesses.[60] Despite the geographic concentration of the military industry, there were 991 major private defense plants and

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Pork Barrel, Wash. Post, December 22, 1974, at B1, col. 1. Rockwell also commissioned econometric forecasting and input-output analyses of the economic and employment impact of the B-1 program, which it distributed to some members of Congress. CHASE ECONOMETRIC ASSOCIATES, ECONOMIC IMPACT OF THE B-1 PROGRAM ON THE U.S. ECONOMY AND COMPARATIVE CASE STUDIES (1975). The data in this study do not offer great support for the B-1 as an employment program. *See also* G. ADAMS, THE B-1 BOMBER: AN ANALYSIS OF ITS STRATEGIC UTILITY, COST, CONSTITUENCY, AND ECONOMIC IMPACT 16-22 (Council on Economic Priorities, New York, N.Y. 1976).

57 One study concluded that Pentagon votes seem to be more closely correlated with the location of military bases than with the location of primary Defense Department contracts with private industry. Clotfelter, *Senate Voting and Constituency Stake in Defense Spending*, 32 J. POL. 979, 981-82 (1970). This finding makes sense in view of the more direct effect Congress has on base locations and military construction than on defense contracts. It also may suggest that the Pentagon has more influence as a lobbyist than do private contractors. *See* Goss, *supra* note 51, at 227; 27 CONG. Q. WEEKLY REP. 845, 846-47 (1969). *But cf.* note 56 *supra*.

58 G. ADAMS, *supra* note 56, at 17.

59 One need not be cynical about their views, since contracting is obviously important to the economy of their states.

> The loss of a large defense contract to Boeing may be a multi-billion-dollar nightmare. It may mean thousands of unemployed, and a general dip in the economy of the entire state of Washington to say nothing of the nationwide ripple effect upon particular subcontractors. Surely compassion and representational concern are genuine motivating forces in legislative behavior.

S. BAILEY, *supra* note 18, at 21. Occasionally, such arguments even convince other members, whose district's economies are unaffected by the contractor in question. Senator Lee Metcalf (D-Mont.), for example, was reported to be a fervent opponent of a federal loan guarantee for Lockheed Aircraft in 1971, until Senator Cranston turned his vote around with the argument of the importance of Lockheed jobs in California. M. GREEN, J. FALLOWS & D. ZWICK, *supra* note 21, at 210-11.

60 It is hardly surprising that existing research under-estimated the role of subcontracting, since this data is almost impossible to obtain. *See* Clotfelter, *supra* note 57 at 980; Rundquist, *supra* note 51, at 4.

government installations in 363 of the 435 congressional districts in 1970.[61] Much of the military work at these installations is done pursuant to subcontracts. Moreover, even though prime contractors are not required to report publicly subcontract details, they can make great use of them as lobbying tools, both in the aggregate and for specific congressional districts. Rockwell International, for example, has emphasized its relationship on the B-1 program with 5000 subcontractors, suppliers and vendors in over forty states.[62] In the congressional debate over the ABM in the late 1960's it was frequently argued that twenty-two companies in sixteen states had a financial stake in the program.[63] Through subcontracting, the Pentagon and its suppliers can influence nearly all of Congress.[64]

The flexibility to make internal decisions that change the geographical apportionment of military spending constitutes the major political resource of the military subgovernment. Contractors and the Pentagon can strengthen their relationship with military committees and smooth the path for annual appropriations. In the process, the subgovernment circumvents the normal degree of vigilance that other congressmen exercise cover the assertions of committees in other substantive areas. Moreover, as the next section will demonstrate, the subgovernment can frustrate congressional attempts to obtain information and give dissenters a voice in the review process. Deference to the information and judgments of the Pentagon in the ordinary course of overseeing military expenditures gives the subgovernment the power to link individual interests of congressmen in the location of facilities to expansion in military spending. The budget share must always be enlarged to meet new individual demands without taking away from established congressional supporters. This cycle fulfills the desires of the military subgovernment for an ever-increasing portion of

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61 W. PROXMIRE, *supra* note 14, at 110.

62 *See* G. ADAMS, *supra* note 56, at 13-15.

63 The principal contractors — Motorola, General Electric, and Lockheed — pushed the American Security Council, a conservative lobby, to state their case before Congress, rather than do it themselves. Miller, *The Making of a Majority: The Senate and the ABM*, 1 WASH. MONTHLY 60, 65 (1969).

64 Rundquist, *supra* note 51, at 14.

national resources, but other social needs must yield to pay the price.

III. The Military Subgovernment and Congressional Initiatives in Review of Military Policy

At certain times during the post-war period, Congress has become dissatisfied with its subordinate role in the formation of military policy.[65] Its attempts to capture a more important position have taken two forms. First, Congress has enlisted the aid of agencies that have a general responsibility to provide it with information.[66] Without conferring a specific mandate to investigate, congressmen have encouraged research bodies to analyze whatever statistics and opinions they can obtain from national security and military experts in the hope of generating alternatives to the annual military budget. Second, Congress has created new political subunits that could supplement the scrutiny of budget appropriations performed by the commit-

65 The shelves of libraries are lined with hearings and reports reflecting Congress's involvement with military budgeting, policy, and spending since World War II. During the 1950's, however, and especially after the Korean War, Congress had no real leadership role in the military arena. Only with the launching of Sputnik by the Soviets in 1957, and growing fears of the missile gap did some members of Congress begin to show critical interest in military policy. Investigatory hearings into airpower and missile programs, civil defense, and then more generally into policy planning, began to occur more frequently and to achieve more public exposure. *See, e.g., Study of Airpower: Hearings Before the Subcomm. on the Air Force of the Senate Comm. on Armed Services,* 84th Cong., 2d Sess. (1956); *Inquiry into Satellite and Missile Programs: Hearings Before the Preparedness Investigating Subcomm. of the Senate Comm. on Armed Services,* 85th Cong., 1st & 2d Sess. (1957-1958); *Civil Defense: Hearings Before the House Comm. on Government Operations,* 85th Cong., 2d Sess. (1958); *Organization and Management of Missile Programs: Hearings Before the House Comm. on Government Operations,* 86th Cong., 1st Sess. (1959); *Organizing for National Security: Hearings Before the Subcomm. on National Policy Machinery of the Senate Comm. on Government Operations,* 87th Cong., 1st Sess. (1961).

Congressional dissent in these areas, as is often the case, grew out of uneasiness in the military itself. Within the Air Force and the Navy especially, dissenters to the Eisenhower policies were becoming more vocal. Congress itself, however, had no clear, consistent alternative strategic program. Rather, some favored missile development, while others sought sea-based (Polaris) missiles, and still others sought new bomber programs.

See E. Kolodziej, *supra* note 3, at 261-324.

> The ability of Congress to influence strategic policy depended critically on its willingness to oppose the President's defense spending ceilings and to generate public support for its collective views. An insufficient number of legislators or legislative leaders were prepared to undertake either task fully.

Id. at 320.

66 *See* text accompanying notes 82-103 *infra.*

tees.[67] The fresh perspective of these new bodies might have been expected to result in a significant reordering of priorities in military spending and a reduction in wasteful spending practice.

This Section will suggest that these efforts, while properly directed at congressional weaknesses in knowledge and political independence, have failed to overcome the authority of the military subgovernment. The subgovernment could exclude or engulf these challengers because Congress gave them no ongoing independent status or interest in putting forward coherent alternatives to Pentagon proposals that inevitably raise military spending.

A. *Initiatives in Information Control*

Congress has sanctioned the gathering of information about military policy and expenditures by both internal and external groups. Congressional oversight committees investigate particular programs in a search for waste in military procurement and official corruption. Outside agencies and consultants take a broader role in examining both spending practices and military requirements. Neither of these developments has represented more than a temporary incursion into the exclusive domain of military information. The military subgovernment owes minimal cooperation to these groups and can allow them to flounder when the specific problems that gave them life disappear.

1. Oversight Committees

Congress first delineated its specific responsibility for overseeing the expenditure of funds by military in the Legislative Reorganization Act of 1946, which provided:

> Each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee. . . .[68]

67 *See* text accompanying notes 104-120 *infra*.

68 2 U.S.C. § 190d(a) (1976). *See also* J. SALOMA, CONGRESS AND THE NEW POLITICS 135 (1969).

Since 1946, military oversight has been exercised by numerous committees in both houses, including the Preparedness Investigating Subcommittee of the Senate Armed Services Committee; the Subcommittee on National Security and International Operations of the Senate Governmental Affairs Committee;[69] the Subcommittee for Special Investigations of the House Armed Services Committee; the Military Operations Subcommittee of the House Government Operations Subcommittee; and the Subcommittee on Military Applications of the Joint Committee on Atomic Energy.[70]

These committees have held hundreds of hearings investigating abuses in government contracting and spending. Prominent examples of such investigations include the 1961 investigation of the Permanent Investigating Subcommittee of the Senate Government Operations Committee into profits awarded on the Nike, Bomarc and Atlas missile contracts.[71] This same subcommittee later investigated the award of the production contract for the TFX (F-111) medium-range, interservice fighter/bomber to General Dynamics rather than Boeing.[72] In 1968 and 1969, a series of hearings was held by the Joint Economic Committee, which examined the economic impact of Vietnam war spending, close ties between military contracting firms and the Pentagon, procurement competition, and cost overruns on particular weapons systems.[73] The JEC hearings played a major role in leading to the creation of the Commission on Government Procurement in 1969. This

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69 The Governmental Affairs Committee is the new name for what was the Senate Government Operations Committee. 35 CONG. Q. WEEKLY REP. 161 (1977). The Committees on Government Operations of each house were created by the 1946 Act out of the preceding Committees on Expenditures in the Executive Department. J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 133 (1965).

70 R. SANDERS, *supra* note 27, at 173 (1973).

71 *Pyramiding of Profits and Costs in the Missile Procurement Program: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations,* 87th Cong., 2d Sess. (1961-1962) (chaired by Sen. McClellan (D.-Ark.)); S. REP. No. 970, 88th Cong., 2d Sess. (1964). *See also* M. ARMACOST, THE POLITICS OF WEAPONS INNOVATION: THE THOR-JUPITER INNOVATION (1969).

72 One observer called this investigation "the most searching and highly publicized inquiry into a weapon system in the post-World War II period." R. SANDERS, *supra* note 27, at 173. *See* R. ART, THE TFX DECISION: MCNAMARA AND THE MILITARY 1-9, 79-82, 111-155 (1968).

73 *The Acquisition of Weapons Systems: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.,* 91st Cong., 1st & 2d Sess. (1969-1970) (chaired by Sen. Proxmire).

group, which combined congressional, industry and executive representatives, examined the entire structure of government procurement and produced a series of recommendations for reform. One of the recommendations adopted by Congress was the creation of a new oversight subcommittee of the Senate Government Operations Committee, the Subcommittee on Federal Spending Practices, Efficiency, and Open Government. This subcommittee has the particular task of supervising the new Office of Federal Procurement Policy in the White House Office of Management and Budget.[74]

The Joint Committee on Defense Production, which has general jurisdiction over federal stockpiles, industrial defense, the Office of Emergency Preparedness, and the Cost Accounting Standards Board, has been active recently in reviewing DoD contracting practices. It has investigated such areas as conflict-of-interest in contractor hiring practices, DoD standards of conduct in dealing with contractor employees, and DoD auditing procedures.[75]

These oversight investigations of spending policies, practices and abuses, while numerous, have had little impact on the power of the military subgovernment. Hearings on excess profits have produced some alterations in the way the Pentagon calculates the level of profits made on military contracts.[76] But hearings on past awards of specific contracts cannot change the location of those contracts. The impact of such hearings on subsequent contract awards is at best inconclusive.[77] Hearings on cost overruns have not prevented new overruns, as recent

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74 *See, e.g., Major Systems Acquisition Reform, Part 1, Air Combat Fighter Program: Hearings Before the Subcomm. on Federal Spending Practices, Efficiency, and Open Government of the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. (1975); *Major Systems Acquisition Reform Part 2: Hearings Before the Subcomm. on Federal Spending Practices, Efficiency, and Open Government of the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. (1975); *Oversight of Federal Spending Reform: Hearings Before the Subcomm. on Federal Spending Practices, Efficiency, and Open Government of the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. (1976).

75 *See, e.g., Department of Defense/Industry Relations: Conflict of Interest and Standards of Conduct: Hearings Before the Joint Comm. on Defense Production*, 94th Cong., 2d Sess. (1976).

76 A 1976 study by the Pentagon, investigating contractor profits led to new administrative measures to widen the basis on which contractor profits are calculated. *See* U.S. DEPT. OF DEFENSE, PROFIT '76 SUMMARY REPORT (1976).

77 *See* Kurth, *The Political Economy of Weapons Procurement: The Follow-On Imperative*, 62 AM. ECON. REV. 304, 304-11 (1972).

cost increases in the F-15 fighter and B-1 program demonstrate.[78]

The failure of oversight committees to provide a continuing source of facts about military spending practices can be explained by their dependence upon actions of the subgovernment. First, the ability of the subgovernment to resolve internal disputes destroys the very subject matter of oversight hearings. Because of the overwhelming numbers of military contracts and DoD-contractor meetings, Congress cannot monitor every contract or every military spending practice. It usually initiates an oversight hearing only after an inter-service rivalry or a feud between a service and the Defense Department thrusts an issue into the general attention of Congress.[79] A number of post-war oversight hearings have aired strategic issues resulting from such disagreements, including the state of U.S. air power, missile development, and the efficiency of DoD policy planning.[80] Given their origin in Pentagon squabbles, however, such hearings tend to reflect executive branch disputes rather than an independent effort by members of Congress to define new alternative policies or strategies. Hearings may help accelerate demands for spending in new strategic areas, such as missiles. On the other hand, oversight hearings which encourage greater arms control and reduce strategic spending are rare, perhaps because disputes over increased strategic spending and arms levels rarely arise inside the Pentagon. Moreover, hearings initiated by an individual congressman often are designed as much to give a member political prominence as they are to maintain congressional oversight.

A second reason for the limited impact of congressional oversight on the military is that the committee with the most accurate information on the Pentagon and the greatest opportunity to maintain long-term supervision — Armed Services — is the least inclined to investigate seriously Defense Department practices. As a member of the subgovernment,

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78 *See* AVIATION WEEK AND SPACE TECHNOLOGY, January 24, 1976, at 19; G. ADAMS, *supra* note 56, at 5-9.

79 *See* note 34 *supra*.

80 *See* note 62 *supra*. The chosen investigative instrument of the 1946 Act, the Government Operations Committee, was especially involved in oversight of missile policy and of general Pentagon security planning. *See* M. ARMACOST, *supra* note 71.

however, the Armed Services Committee has no incentive to undertake such scrutiny. The most meaningful oversight hearings have been conducted by members of Congress on other committees and subcommittees such as Government Operations and Defense Production, but these committees suffer from diverse responsibilities or limited life.[81]

2. Consulting Agencies

Congress could solicit help, under its investigatory powers, from a number of research corporations. Some of these organizations, such as the Brookings Institution, have significant programs in military research.[82] But resort to outside experts has been highly sporadic; their impact has been limited to participation in congressional debates on specific weapons systems.[83] Any extended research on military issues for Congress has come from two official agencies whose duties are specified by statute: the General Accounting Office (GAO) and the Congressional Research Service (CRS).

The most significant existing resource is the General Accounting Office (GAO), created by the Budget and Accounting Act of 1921.[84] This office is independent of the executive and under the control of the Comptroller General of the United States and reports directly to Congress. Initially, the GAO's responsibility was limited to auditing the spending vouchers of government agencies, before or after the expenditure had been made. For 25 years Congress tended to ignore the results of this audit. However, in 1946, Congress passed the Legislative Reor-

81 This is one of the primary reasons for the attractiveness of membership on the Government Operations Committee: "[I]t takes the operations of government in general as its bailiwick, splits into nearly autonomous subcommittees, and holds investigations. In short, it has the power to publicize — both issues and Senators." Polsby, *Goodbye to the Inner Club*, in CONGRESSIONAL BEHAVIOR 108 (N. Polsby ed. 1971). The Joint Committee on Defense Production will be abolished by July 1, 1977. *See* 35 CONG. Q. WEEKLY REP., Supp. at 47 (April 30, 1977).

82 Brookings, for example, produced one of the major studies questioning the utility of the B-1 manned, penetrating strategic bomber, and proposed as an alternative a stand-off bomber. *See* A. QUANBECK & A. WOOD, MODERNIZING THE STRATEGIC BOMBER FORCE: WHY AND HOW (1976).

83 Congress did make some use of outside experts such as Professor George Rathjens, formerly of the DoD and Professor Jerome Weisner, former Science Advisor to President Kennedy, during the ABM debates of the late 1960's. R. SANDERS, *supra* note 27, at 238-39.

84 31 U.S.C. § 41 (1976).

ganization Act,[85] giving the GAO the authority to analyze the expenditures of each executive branch agency in order to "enable Congress to determine whether public funds have been economically and efficiently administered and expended."[86]

The 1950 Budget and Accounting Procedures Act[87] further expanded the GAO's powers, requiring it to prescribe accounting procedures for Federal agencies, to help them implement such procedures, and to audit the financial transactions of every agency. The GAO has grown considerably since that time.[88]

As the official auditor of executive agencies, the GAO has been active in scrutinizing military spending practices on behalf of Congress. This work has been a source of major controversy between the agency and the executive branch. After the Korean War, for example, Comptroller General Joseph Campbell directed the agency to examine industrial profits and wasteful government expenditures.[89] In 1958, this scrutiny was extended to the field of missile management. The GAO requested documents from the Air Force Inspector General, which the latter refused to provide. The Eisenhower administration defended the Air Force action, citing executive privilege; the Navy followed suit by refusing to supply additional audit data.[90]

Continual GAO criticism of military spending practices ultimately led to limitations on the agency. Pentagon and industry complaints to the Committee on Government Operations, the congressional committee charged with GAO oversight, led to critical hearings in 1965, the replacement of Comptroller Gen-

85 Legislative Reorganization Act of 1946, Ch. 753, 60 Stat. 812 (codified in scattered sections of 2, 15, 31 U.S.C.).

86 31 U.S.C. § 60 (1976).

87 Budget and Accounting Procedures Act of 1950, ch. 946, 64 Stat. 832 (codified in scattered sections of 31 U.S.C.).

88 Since that time, the GAO has grown to nearly 5000 employees, serving Congress in multiple ways: giving testimony before committees, assigning staff to work on committees, issuing reports on pending legislation, and submitting its own audits and reports on government spending. GAO reports are widely distributed: the Government Operations, Committees the Appropriations Committees, relevant legislative committees, and individual members of Congress with specific interests receive them. *See* R. BROWN, THE GAO: UNTAPPED SOURCE OF CONGRESSIONAL POWER 12-13, 17 (1970).

89 M. GREEN, J. FALLOWS & D. ZWICK, *supra* note 21, at 127.

90 C. MOLLENHOFF, *supra* note 33, at 223-30.

eral Campbell with Elmer Staats, and an agreement by the GAO not to include contracting company names in its audits.[91]

Nevertheless, the GAO has continued to play an important role in overseeing military spending. The Office worked closely with the congressional investigation into cost overruns on the Air Force C5A transport, and aided the Senate Committee on Government Operations in its examination of the TFX/F-111 fighter-bomber program.[92] In 1970, Congress urged the GAO to undertake cost-effectiveness analyses of military projects. The GAO established a division for this work and has since conducted audits of such programs as the B-1 bomber and the Space Shuttle program.[93]

Hostility from the military subgovernment has reduced the effectiveness of the GAO as an evaluator of military claims in two ways. First, the GAO's ability to supply critical analysis and alternative information to Congress is limited by its difficult relations with the Pentagon, which has resisted independent GAO review of military requirements and of internal Pentagon discussions of alternative weapons.[94] The GAO's practice of seeking Pentagon comments on its research also delays the application of the results to current budgeting.[95]

Second, the tendency of the military committees to absorb and neutralize investigating bodies[96] has made the GAO very protective of its work. Moving toward closer working ties with congressmen and their staffers has remained difficult.[97] As a

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91 Staats is described by one source as a "cautious bureaucrat." M. GREEN, J. FALLOWS & D. ZWICK, *supra* note 21, at 127.

92 R. BROWN, *supra* note 88, at 85.

93 *See* Fitzgerald, *The Expanded Role of the General Accounting Office*, 3 THE BUREAUCRAT 398 (1975). *See also* R. SANDERS, *supra* note 27, at 232-33; GAO, B-1 AIRCRAFT PROGRAM (1976); GAO, STATUS AND ISSUES RELATING TO THE SPACE TRANSPORTATION SYSTEM (1976).

94 *See* R. SANDERS, *supra* note 27, at 234.

95 *See* J. HARRIS, *supra* note 69, at 165. *See also* Fitzgerald, *supra* note 93, at 393-94.

96 *See* text accompanying notes 76-81 *supra*.

97 "While some groups in GAO are making strides in this direction, significant unrealized potential remains." Fitzgerald, *supra* note 93, at 390. The House Appropriations and Government Operations Committees and the Joint Economic Committee are the most frequent consumers of GAO work. GAO findings still are underutilized by committees involved in authorization or oversight. *See id.* at 397; S. BAILEY, *supra* note 18, at 88. Individual congressional requests for GAO research have not been institutionalized or even made on a regular basis but rather have tended to serve the immediate, often political, short-term needs of the member in question. *See* J. HARRIS, *supra* note 69, at 167, 175.

result, Congress rarely asks it to examine or propose major budgetary alternatives.

Another official source of information independent of the Pentagon is the Congressional Research Service (CRS). The CRS was established in 1946[98] as a research aid within the Library of Congress. Its primary function for its first years of operation was to provide information for individual congressmen who were interested in a particular area or who needed information to respond to the question of a constituent. Until 1970, however, the CRS was generally ignored by committees asking policy questions or examining budgetary alternatives.[99]

In 1970, the CRS obtained a greater responsibility for influencing policy in that it was given authority to analyze legislative proposals at the request of legislative committees.[100] Its staff grew to 778 by 1976.[101]

CRS projects have the potential to help define congressional attitudes toward military spending issues. In February, 1976, for example, the CRS issued a report, requested by Senator John Culver (D.-Iowa) of the Armed Services Committee, on comparative U.S.-Soviet force strength.[102] This report, prepared by senior CRS analysts, was widely used in Congress to demonstrate Soviet military superiority over the United States, justifying increased U.S. military spending. However, the potential contribution of the CRS to Congress' budgetary and legislative business remains largely untapped. The agency suffers from the same inability to penetrate the Pentagon's control over military information and the transitory nature of its issue concerns that have weakened the GAO.[103]

Thus the new postwar efforts at developing centers of military

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98 The CRS was originally established as the Legislative Research Service. Its name was changed in 1970. *See* 2 U.S.C. § 166 (1976).

99 E. KOLODZIEJ, *supra* note 3, at 479.

100 *See* 2 U.S.C. § 166(d)(1) (1976).

101 Malbin, *Congressional Staffs — Growing Fast, But in Different Directions,* 8 NAT. J. 958, 961 (July 10, 1976).

102 J. COLLINS & J. CHWAT, UNITED STATES/SOVIET MILITARY BALANCE: A FRAME OF REFERENCE FOR CONGRESS, CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS (Senate Armed Services Comm. Print 1976).

103 *See* R. SANDERS, *supra* note 27, at 237. The duties given the CRS by the 1970 Act are broader than those given either to the GAO or Congressional Budget Office (CBO). *See* 2 U.S.C. § 166(d)(1976).

information that assess and challenge the assumptions of the Pentagon independently of the weak scrutiny of the military budget within the subgovernment have had only a marginal impact on military spending. They fail because the agencies lack the power to counterbalance the resources and continuing self-interest of the subgovernment in perpetuating growth in the military budget. The agencies invest their time and personnel in congressional opposition to and investigation of particular projects, often after the money has been spent. Once these projects disappear, the agencies retreat and the ordinary course of review and acceptance resumes. Any requests for more complete data on military needs receives a rebuff from the Pentagon. Unless Congress decides to grant these agencies the authority and the manpower to demand information from the Pentagon and generate comprehensive budget alternatives, they will continue to offer little opposition to the promotion of spending projects by the military subgovernment.

B. *New Political Subunits*

Congress has tried to interpose new barriers to uncontrolled military spending by creating committees that would share responsibility for budget review with the older appropriations committees. The most significant examples are the revitalized House and Senate Armed Services Committees and the House and Senate Budget Committees. But the theory that competition among military committees and the generation of budget alternatives would reduce the momentum behind Pentagon spending proposals has not been borne out in practice. These additional committees have been either incorporated into the subgovernment through distribution of new contracts to members or driven off by the sheer magnitude of the review responsibility when the committee possessed other duties.

1. The Armed Services Committees and Section 412(b) Reform

Specific review represents a relatively recent addition to the powers of the Armed Services Committees. Through the 1950's they played a role of relative insignificance in considering the

budget. The Committees limited themselves to authorizing general categories of expenditure. Each service was given a large, continuing general authorization to purchase a certain number of weapons.[104] The Air Force, for example, was allowed to procure aircraft measured up to a certain total of airframe tons or 24,000 aircraft, a large leeway.[105] In contrast, the Armed Services Committees exercised considerably more detailed authority with regard to such issues as military pay, manpower levels, and military construction.[106] What the Armed Services Committees lacked was responsibility for considering budgetary items equal to that of their Appropriations Committees counterparts. They did not authorize expenditures for defined programs before they were appropriated. No committee in Congress, in other words, was responsible for systematically matching weapons systems expenditures to DoD policies and programs.

In an effort to give greater authority to the Armed Services Committees and at the same time add another layer of scrutiny to military budget proposals, Congress in 1959 passed the Russell Amendment to the Military Construction Bill (Section 412(b)):

> No funds may be appropriated after December 31, 1960, to or for the use of any armed force of the United States for the procurement of aircraft, missiles, or naval vessels unless the appropriation of such funds has been authorized by legislation enacted after such date.[107]

Starting in FY 1962, procurement budgets for major weapons systems would have to be considered and voted on by *both* the Armed Services and Appropriations Committees, in that order.[108] In giving the Armed Services Committees the power to

104 Gordon, *The Military Budget: Congressional Phase,* 23 J. POL. 690 (1961).

105 *Id.* at 691.

106 The Armed Services Committees clearly had low prestige as a result. Based on 1960 interviews in the Pentagon and the Executive Office of the President, Gordon noted that they were "often regarded with a kind of gracious toleration that borders on contempt." *Id.* at 692.

107 Pub. L. No. 86-149, § 412(b), 73 Stat: 3 (1959).

108 This meant four sets of hearings, rather than two, and perhaps a delay in the consideration of the budget, about which the Eisenhower administration was not happy. *See* H. Stephens, *supra* note 35, at 148. Gordon, *supra* note 101, at 696. Moreover, the change was resisted by the Appropriations Committee Chairman in the House,

authorize major weapons systems, some members of Congress saw section 412(b) as a way to draw the Committees into substantive policy and planning.[109] Efforts to do so were thwarted, however, by resistance from other committees and the Eexecutive. One example of this resistance was the debate over the manned bomber program in the early 1960's.[110] Secretary of Defense Robert McNamara opposed putting the B-70 program into full production as the successor to the B-52, seeing it as unnecessary and not cost-effective. The House Armed Services Committee, strongly allied to the Air Force in supporting the high-altitude bomber project, authorized $220 million for bomber production in FY 1962. The House Appropriations Committee, however, transferred the B-70 appropriation from Procurement to the Research and Development category of the budget, thereby removing it from Armed Services jurisdiction.

The following year, in 1962, the House Armed Services Committee authorized $491 million for B-70 procurement, far above the Pentagon request. The Committee also expanded its jurisdiction by initiating an amendment to section 412(b) which required authorization for "research, development, test or evaluation of aircraft, missiles, or naval vessels."[111] The Committee's B-70 authorization also challenged the Executive, since it "directed" the Pentagon to spend the authorized amount. Congress withdrew the challenge, however, when Armed Services' Chairman Carl Vinson (D-Ga.) backed down in a face-to-face meeting with President Kennedy on the issue and agreed to change "directed" to "authorized" in the bill.

The available evidence suggests that Section 412(b) has neither substantially increased Congress' real power over the military budget, nor encouraged more effective policy debates on the Hill. Although by 1969, Armed Services specifically authorized roughly 32 percent of the total military budget, congressional changes in Pentagon budget requests between 1960

Rep. George Mahon (D-Tex.), who saw it as an infringement on his committee's role. *Id.* at 697.

109 Dawson, *supra* note 46, at 45.

110 E. KOLODZIEJ, *supra* note 3, at 410-17, provides much of the basis for the discussion that follows.

111 In 1963, this jurisdiction was again expanded to cover all research and development funding. H. Stephens, *supra* note 35, at 149-50.

and 1970 remained, for the most part, incremental and small.[112]

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112 *See* Table II, Congressional Changes in President's Budget Requests, by Appropriation Title, as restructured by Kanter, *supra* note 20, at 132:

TABLE II

	President's Budget Request (in Millions)	Congressional Change (%)
FY 1960		
Personnel	11,625	+0.11
O&M	10,512	−0.65
Procurement	13,348	−0.09
RDT&E	3,772	+1.19
Total	39,257	−0.06
FY 1961		
Personnel	11,813	+0.18
O&M	10,527	−0.59
Procurement	13,085	+3.32
RDT&E	3,910	+6.85
Total	39,335	+1.68
FY 1962		
Personnel	12,746	−0.46
O&M	11,793	−0.53
Procurement	16,860	−1.10
RDT&E	4,790	+9.48
Total	46,189	+0.58
FY 1963		
Personnel	13,050	−1.12
O&M	11,569	−0.03
Procurement	16,445	+1.23
RDT&E	6,843	+2.62
Total	47,907	+0.18
FY 1964		
Personnel	13,235	−2.90
O&M	11,792	−0.66
Procurement	16,725	−6.09
RDT&E	7,262	−4.31
Total	49,014	−3.66
FY 1965		
Personnel	14,597	−0.20
O&M	12,396	−0.67
Procurement	13,756	−2.43
RDT&E	6,772	−4.06
Total	47,471	−1.51
FY 1966		
Personnel	14,560	+0.27
O&M	12,472	+0.17
Procurement	11,412	−0.07
RDT&E	6,709	−2.07
Total	46,852	−0.18

Indeed, Section 412(b) has reinforced the military's political influence by making the Armed Services Committees worthy of incorporation into the subgovernment. The advantages to military spending from the addition of these committees has been manifested in two ways. First, the attempt to increase the responsibility of the Armed Services Committees produced friction between those committees and the Appropriations Committees and tended to increase expenditures. The committee rivalry has been expressed in greater accommodation to military demands because the Congress did not reward economy.[113] As a result, the Armed Services Committees sometimes

	President's Budget Request (in Millions)	Congressional Change (%)
FY 1967		
Personnel	18,676	+0.29
O&M	15,675	+0.18
Procurement	16,408	+1.43
RDT&E	6,905	+1.14
Total	57,664	+0.70
FY 1968		
Personnel	22,001	−1.00
O&M	19,136	−1.46
Procurement	22,917	−4.00
RDT&E	7,273	−2.25
Total	71,584	−2.30
FY 1969		
Personnel	23,014	−1.92
O&M	22,787	−4.49
Procurement	23,254	−14.07
RDT&E	8,006	−5.68
Total	77,074	−6.75
FY 1970		
Personnel	24,377	−3.31
O&M	21,792	−4.28
Procurement	20,887	−14.58
RDT&E	8,222	−10.37
Total	75,278	−7.49

Line-item consideration was given by the Armed Services Committee to military construction, research and development, military family housing, much of procurement, and some personnel expenditures. The Committee had only category authority for the remainder, including personnel expenditures and operating and maintenance expenses. *Id.* at 131.

113 Committee rivalry through the 1960's was more intense in the House than in the Senate. House members could not be on both the Appropriations and Armed Services Committees. In the Senate, on the other hand, there were overlaps in the membership

struggle to restore cuts enacted by the Appropriations Committees.[114] Some observers have argued that Section 412(b) was passed not so much to enhance the ability of Congress to affect the executive's proposed defense budget as to ensure the ascendancy of the Armed Services Committees as the principal spokesmen of Congress on military policy,[115] thereby enhancing the fragmentary nature of the congressional review process.[116]

Second, as the Armed Services Committees gained more responsibility for review of military policy, they drew closer to the Pentagon and the military industry. This state of affairs persists. The Senate Armed Services Committee is dominated by senators who have warm ties with the Pentagon.[117] Any criticism of Pentagon proposals can be traced to internal disagreements within the military, such as inter-service rivalry or service objections to the plans of the Secretary of Defense. Outside dissenters have almost no access to the committee. Their testimony, if heard at all, is restricted to the last day of hearings and consists of a parade of witnesses testifying before a few inattentive members of the committee.[118]

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of the two committees. Senator Richard Russell (D-Ga.) was chairman of both the Armed Services Committee and the Defense Appropriations Subcommittee from 1963 to 1968. The two groups held joint hearings from 1968 to 1969. The 1970 Legislative Reorganization Act set in motion the elimination of such overlaps. *See* Fisher, *Senate Procedures, supra* note 43, at 39-41. Such reductions in committee membership overlaps have led to increasing hostility between Senate Committees. *See* S. BAILEY, *supra* note 18, at 59.

114 The close ties between the Committee and the Pentagon has led one observer to call it "the ratifying arm of the Joint Chiefs of Staff." Hersh, *supra* note 4, at 89.

115 *See* E. KOLODZIEJ, *supra* note 3, at 381. *See also* Gordon, *supra* note 104, at 701. *But see* Dawson, *supra* note 46, at 43.

116

> The major defect of Section 412(b) . . . was not informational. It was political. Section 412(b) emphasized existing divisions in Congress along committee lines at the expense of overall congressional power in defense policy. By stressing committee prerogatives and the question of what committee should make decisions, not what decisions should be made, Section 412(b) weakened congressional cohesion which is a prerequisite for the effective assertion of Congress' authority, especially in the face of growing centralization in the executive branch.

E. KOLODZIEJ, *supra* note 3, at 422-23.

117 Many senators close to the Pentagon are found on the Senate Armed Services committee including its chairman, John Stennis (D-Miss.), Henry Jackson (D-Wash.), Strom Thurmond (R-S.C.), John Tower (R-Tex.), and Barry Goldwater (R-Ariz.).

118 *See* Dexter, *supra* note 2, at 377; Dawson, *supra* note 46, at 43, 46; Kanter, *supra* note 20, at 135.

The House Armed Services Committee operates in a similar way. Its chairman has always been known as a friend of the military, whether Carl Vinson (D-Ga.), who was close to the Navy, Mendel Rivers (D-S.C.),[119] Edward Hebert (D-La.), or the current chairman, Melvin Price (D-Ill.). The Committee jealously guards its authority to define programs and resists appropriations subcommittee efforts to usurp this prerogative.[120]

Thus the Armed Services Committees cannot be expected to serve as a disinterested guardian of the public interest in budgetary economy. The same methods of lobbying and project distribution used to subdue the military appropriations committees have brought the Armed Services Committees into the realm of the military subgovernment. Congress can prevent this process of absorption only by immunizing members of review committees from the promises of the Pentagon and military contractors and creating an incentive for reducing expenditures.

2. The Budget Committees

Congress' failure to exercise independent, comprehensive control over the military budget has been repeated to varying degrees in all areas of the federal budget. In response to its declining role in the budgetary process, as well as to the impoundment decisions of the Nixon administration,[121] Congress enacted both structural and procedural reforms in the 1974 Budget and Impoundment Control Act.[122] This Act created a new Budget Committee in each house, with 15 members in the Senate and 23 in the House of Representatives. These commit-

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119 His campaign slogan "Rivers Delivers" was a testimony to the flow of construction money to military facilities in and around his South Carolina district.

120 Fenno, *The Internal Distribution of Influence: The House*, in READINGS ON CONGRESS, *supra* note 2, at 221.

121 *See generally* Note, *Presidential Impoundment: Constitutional Theories and Political Realities*, 61 GEO. L.J. 1295 (1973); Note, *Impoundment of Funds — The Courts, the Congress and the President: A Constitutional Triangle*, 69 NW. U. L. REV. 335 (1974). Impoundment claims by the Executive have been rejected in several cases. *See* Train v. City of New York, 420 U.S. 35 (1975); Local 2677 v. Phillips, 358 F. Supp. 60 (D.D.C. 1973); State Highway Commission v. Volpe, 347 F. Supp. 950 (W.D. Mo. 1972), *aff'd* 479 F.2d 1099 (8th Cir. 1973).

122 Pub. L. No. 93-344, 88 Stat. 297 (1974). *See* Havemann, *supra* note 38, at 1619 for much of the following text.

tees are responsible for drawing up a First Budget Resolution by May 15 of each year, specifying target spending ceilings for 14 categories of Federal Expenditure, one of which is "national defense."[123]

Authorization and appropriations committees take these ceilings into account in considering their parts of the budget. The relevant authorization committees report their bills on May 15. Appropriations committees must then report out all spending bills by seven days after Labor Day. Within another week, both houses pass new concurrent budget resolutions which may direct the appropriations or authorization committees to cut back on spending authority.[124] By September 25, a reconciliation bill must be passed, by both houses, adjusting the budget bill ceilings and the appropriations amounts to each other.

The Act also added to Congress' information resources for confronting and critiquing Pentagon proposals, by creating a Congressional Budget Office (CBO). This office is responsible for examining each budget area (e. g., defense, agriculture, education) to derive alternative budget totals and subtotals for the Budget Committees by April 1 of each year. It also serves as a source of information for appropriations committees, revenue committees, other committees and individual members. The CBO staff includes military analysts, some of whom have worked in the Pentagon.

The scheme created by the Act poses both possibilities and problems for Congress. The new Budget Committees, aided by the CBO, could be the vehicle for comprehensive congressional review of the military budget. Furthermore, since the Budget Committees have jurisdiction over the entire federal budget, they can make trade-offs between defense expenditures and expenditures in other areas.

While the Budget Committee process is still too young to be judged definitively, its first two years of operation (FY 1976 and FY 1977) indicate that the new process may not greatly increase congressional control over military policy. The Budget Com-

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123 The resolution must also contain revenue estimates, an appropriate surplus or deficit for the coming fiscal year and five-year projections of all these items.

124 They may also ask the tax committees for new taxing authority to make up the gap.

mittees must tread a thin line between, on the one hand, stepping on the toes of the Appropriations and Armed Services Committees which have traditionally had jurisdiction over the military, and on the other hand, merely becoming another piece in Congress' fragmentary approach to control over military policy. There is no assurance that rivalries which have hindered the performances of existing committees will not in a similar fashion hamper the Budget Committees. In fact, to date, in order to avoid such rivalries, the Budget Committees have not strayed very far into the substance of military policy or spending.[125] They have not yet tried to link military budget needs to foreign policy objectives in any systematic way. Nor have they seriously questioned the level of military expenditures as compared to other areas in the budget.[126] Instead, they have taken a fiscal approach, allocating the projected total revenue so that each area receives substantially the same proportion of the total budget as it did the previous year. This approach has been successful in avoiding conflict with Appropriations and Armed Services Committees, particularly in the House.[127] But it also indicates that this latest reform is not the final answer to expanding congressional influence over military policy through the budgetary process. The military subgovernment can force the Budget Committees to retreat when they intrude on the substance of military policy because review is only one of their responsibilities.

In sum, new congressional committees cannot be relied upon to control the military budget without a narrower definition of

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125 Former House Budget Committee Chairman, Brock Adams (D-Wash.), when asked by House Armed Services Committee Chairman Melvin Price (D.-Ill.) to compare the budget resolution and the military authorization bill, replied: "I have rarely commented on authorization bills because, as I stated during House debate on this measure, the function of such bills is to set upper limits on budget authority." Havemann, *supra* note 38, at 1620. There has been greater friction in the Senate, however, particularly with the Armed Services Committee. In 1975, Budget Committee Chairman Edmund Muskie (D-Me.) challenged the military authorization bill, which exceeded the budget ceiling, on the floor of the Senate and won 48-42. *Id.* at 34. *See also* Jasper, *A Congressional Budget: Will it Work This Time?*, 3 THE BUREAUCRAT 429-43 (1975).

126 In 1977, Rep. Parren Mitchell (D-Md.), a Budget Committee member, introduced an amendment to the Budget Committee Resolution asking for several itemized transfers of funds from the military budget to a variety of social expenditures. The amendment was defeated 306-102, 123 CONG. REC. H3646-52 (daily ed. April 27, 1977).

127 *See* Havemann, *supra* note 38, at 1620.

their responsibilities and a change in the normal incentives for their members. Committees whose jurisdictions cross a number of subject areas will be incapable of devoting sufficient staff and other resources to pose a credible challenge to military requests. Committees whose roles are more specific, however, will be coopted by the military subgovernment if the self-interests of members lie in greater military spending in their districts. A more powerful check on the subgovernment requires a committee with information sufficient to form reasonable alternatives and incentives to reduce military expenditures.

IV. Conclusion: Challenging the Military Subgovernment

The preceding analysis gives good reason to be pessimistic about the prospects for successful resistance to the hegemony of the military subgovernment. Pentagon and military contractor influence on the review proceedings of congressional military committees seems pervasive. Furthermore, Congress has not created countervailing centers of research and political influence that can place continuous pressure upon the military and the congressional committees to spend wisely and reform costly contracting practices. It should not be surprised, then, when military expenditures absorb larger portions of the total budget and cost overruns threaten fiscal stability. Delegation of all responsibility for scrutinizing budget requests to military subcommittees promotes a narrow consideration of alternative forms of spending and the predominance of the personal interests of subcommittee members.

To subject military budgets to the same constraints that face other spending proposals, Congress must reclaim some of the decision-making power it has granted to the military subgovernment. It must either challenge the conclusions of the military subcommittees on the floor or expand the review process to allow dissent and more thorough inquiry at the initial stages. This section will examine recent attempts to challenge military expenditure bills before final approval and assess their effectiveness. Then suggestions for more regular scrutiny will be outlined and discussed.

A. *Institutional Malcontents and Alternative Constituencies*

Recent temporary but strong challenges to particular weapons systems on the floor of Congress have been launched by politically influential groups. Generally these groups arise from two sources. First, groups of congressmen whose districts have been shortchanged in the distribution of military spending or whose jurisdictions can only be benefitted by domestic spending that is diverted from military purposes have united to oppose certain projects.[128] Second, groups outside Congress coalesce to protest an unpopular program in sufficient numbers to make their desires heard. These alternative constituencies can focus publicity and public opinion to create demands that Congress must respect. Both sources of opposition lead to a greater degree of scrutiny of Pentagon proposals than the military subgovernment exerts when the proposals are processed.

Congressmen disgruntled by the maldistribution of military spending have provided a potent source of skepticism about proposed spending projects which otherwise might have passed unnoticed through the congressional budgetary process. For instance, the Northeast-Midwest Economic Advancement Coalition, a group of 204 congressmen, formed in response to what its members believed to be a disproportionately high allocation of military funds to the South and West.[129] In a letter to President Carter, the group cited the fact that the proposed military budget for FY 1978 called for more money to be spent on military construction in Georgia than in the combined 16 states of the Northeast and Midwest. It also cited the fact that military construction in its members' states would total $101 million, barely 10 percent of that invested in the 12 southern states. Thus, an imbalance in the benefits derived from defense contracting benefits provoked greater congressional criticism of Pentagon proposals.

The Vietnam War spawned the second source of sporadic

128 It has become increasingly clear, for example, that military spending, while it may create jobs in the industry itself, deprives others of employment. Alternative forms of government spending are likely to create far more jobs. *See* G. ADAMS, *supra* note 56, at 16-24. Bezdek, *The 1980 Economic Impact — Regional and Occupational — of Compensated Shifts in Defense Spending*, 15 J. REGIONAL SCI. 183 (1975).

129 *See* Boston Sunday Globe, March 20, 1977, at 22, col. 1.

resistance to the usual congressional acquiescence in military budget requests, alternative constituencies. During the early years of the war, it had been difficult for Congress to resist executive branch pressures for increased spending. DoD budgets sailed easily through Congress, while reprogramming drew even more war spending out of the reach of congressional war critics.[130] Groups that began as adversaries to the war itself directed their attention at these increased military expenditures that helped finance the war effort. In response to the alternative constituencies, Members of Congress for Peace through Law (MCPL) was established in the late 1960's. With 28 Senate and 70 House members by 1970, MCPL focused specifically on foreign and defense issues, and was the focal point for congressional opposition to the war.

The alternative constituencies also dissolved the consensus that had previously existed on weapons not directly related to the Vietnam War, such as strategic armaments. Certain groups became committed to broader alterations in American military priorities. Thus, when the issue of the need for an Anti-Ballistic Missile (ABM) system arose in 1969, existing alternative constituencies such as the Council for a Livable World, could lobby Congress and build opposition to the program.[131] Within Congress, the MCPL, under the leadership of Senator Mark Hatfield (R-Ore.), responded to such groups and nearly killed the ABM system.[132]

The proposed B-1 bomber system also activated alternative constituencies, and thereby promoted stricter scrutiny of the proposal in Congress. Groups such as the American Friends Service Committee and Clergy and Laity Concerned have jointed with unions, environmental lobbyists, and others to create a campaign to oppose the B-1 bomber program. These groups have tried to educate the public through letters, slide shows, and press campaigns, as well as lobby in Congress. Moreover, MCPL was one of the first groups in Congress to criticize the B-1 bomber program.[133] The efforts of these

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130 *See* text accompanying notes 35-37 *supra.*

131 Hersh, *supra* note 4, at 91-92.

132 *See* W. PROXMIRE, *supra* note 14, at 112.

133 Members of Congress for Peace Through Law, Report on the B-1 Bomber

groups produced widespread opposition to the program within Congress.[134]

Despite some successful challenges to the military subgovernment, both institutional malcontents and alternative constituencies possess two major weaknesses as opponents of military spending. First, opposition to the military subgovernment from either source is not likely to be permanent. The opposition of Congressmen whose districts do not benefit greatly from military base or defense industry locations can be undercut by reallocating defense spending.[135] The opposition of Congressmen who are responding to the pressure of an alternative constituency may die when the issue which motivates that constituency is resolved. The longevity of such opposition is also limited by the fact that even where an alternative constituency has become linked to a group in Congress, this alliance lacks the powerful and permanent ally in the executive branch that the military subgovernment has in the Pentagon. The absence of a link to a committed element of the executive bureaucracy precludes continuity of effort. Nothing exists to keep a coalition together once the issue which originally initiated it fades away other than a fleeting loyalty to liberal ideals.

The second shortcoming of the floor challengers is that they do not develop comprehensive alternatives to the military budget. Opposition from either source tends to be connected with one particular spending program or one particular policy, rather than with a broader range of military issues. Opposition stemming from the allocation of military contracts is not likely to concentrate on changing the substance of military strategy, but rather upon the location of defense spending. Opposition stemming from a single issue constituency also will not result in tougher congressional scrutiny of military proposals not involving that issue. The military subgovernment could agree to withdraw a controversial program, increase expenditures in another area, and accomplish the same result. Only an exten-

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Program, *reprinted in* 120 CONG. REC. S8567 (daily ed. May 20, 1974) (prepared by Sen. McGovern and Rep. Seiberling).

134 Opposition came from, among others, Senators George McGovern (D-S.D.), John Culver (D-Iowa), William Proxmire (D-Wisc.) and Gary Hart (D-Colo.) and Representatives Les Aspin (D-Wisc.) and Philip Addabbo (D-N.Y.).

135 *See* Boston Globe, March 31, 1977, at 23, col. 7-8.

sive review of military spending can detect such diversions and prevent waste.

Although both sources of previous opposition to the policies generated by the military subgovernment are limited, they at least show that independent congressional scrutiny of Pentagon proposals can lead to changes in military policy. If Congress is to increase its influence over the Pentagon in a more permanent and broader fashion, it must create institutions that will continually challenge the assumptions and influence of the military subgovernment.

B. *Expanded Review of Military Spending*

The experience with previous congressional attempts to control the military budget suggests that opposition to excessive military spending and wasteful spending practices must be a strong and continuing presence in government to challenge effectively the authority of the military subgovernment. Congress has a choice of methods for introducing and validating different views about military spending. First, it can retain present committee review and examines the committees' judgments more thoroughly as a body. Critical congressmen could be heard in floor sessions; their staff members and interest groups could prepare the statements. Some rule of automatic floor review could be established so that military spending bills would not be pushed without adequate consideration.

Second, Congress can add new layers to committee review and require compromise before the appropriations bills reach the floor. A new military budget review committee could be formed with members who have an incentive to cut spending either by their district's inability to use military projects or by an informal agreement that funds released from undesirable military programs would be devoted to domestic needs. The choice of one of the two options should be based upon a consideration of the original purposes for military committee specialization and the susceptibility of each type of review to domination by the military subgovernment.

General floor review of military spending is unlikely to put any significant restraints upon growth in expenditures. The virtues of specialization in particular subject areas and the con-

comitant greater ability to interpret technical information would be foregone in any congressional attempt to examine military budget requests as a body. Moreover, general review would not counterbalance the sway exercised by the military subgovernment over key members of Congress through the distribution of subcontracts. These legislators could shepherd military appropriation bills through floor discussion by judicious use of parliamentary procedure and political favor-trading. Opponents of increased spending could find their views shut out of serious consideration by all members of Congress. As a result of its ignorance about the implications of various military budget alternatives and the truncated process of adversarial debate, Congress as a whole would be reluctant to challenge the decisions of the military subcommittees as to the size and composition of the military budget. The initial resistance to spending increases which encouraged the initiation of a general floor review procedure would die away, leaving no permanent institution with the power and desire to curb the influence of the military subgovernment.

A new level of committee review for the military budget could compensate for some of the traditional weaknesses of congressional scrutiny in information and freedom from Pentagon manipulation. Information agencies such as the GAO and CRS would have a specific group of legislators to give them direction and support against the unwillingness of executive agencies to fulfill their responsibilities of disclosure to Congress. Furthermore, a new committee could develop staff resources and expertise to gather and interpret military information in an intelligent fashion. Unlike the general Budget Committees the new military budget committees would not face conflicting responsibilities and priorities of review. Zero-base budgeting[136] might become a suitable form of yearly reevaluation when the committee developed accurate sources of information and the expertise to use them.

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136 A "Zero-base budgeting" bill was considered in the last Congress and currently is under consideration. S.2925 was jointly introduced by Senators Edmund Muskie (D-Me.) and William Roth (R-Del.) in 1976; for a discussion of its rationale and major provisions as well as its demise, *see* 32 CONG. Q. ALMANAC 504 (1976); Note, *Zero-Base Sunset Review,* 14 HARV. J. LEGIS. 505 (1977).

An independent military budget committee could also undercut the political influence of the military subgovernment over review procedures. Composed of congressmen whose districts are not committed to increases in military spending as a matter of economic survival, the committee could force the Pentagon to trim its requests to more reasonable levels. Budget ceilings and the necessity for bargaining could also encourage inter-service rivalries within the Pentagon for more limited budgetary resources. Information generated by such competition would allow the budget committee to improve its own formulation of alternatives. Finally, opponents of increases in spending would have access to a receptive forum in which to make known and publicize their views. Thus the interposition of a committee whose incentives lie in controlling the military budget and whose approval must be obtained before military expenditures can pass to the floor of Congress would restore an honest weighing of the competing demands of military and domestic needs upon national resources. Congress can no longer afford to abdicate the responsibility for allocating government funds to the executive branch and the pressure of the military subgovernment.

Whatever the shape of its reform effort, Congress must resolve to counterbalance the special advantages that favor the military subgovernment in its goal of increasing military expenditures. To improve its understanding of military needs and budget alternatives, Congress must be willing to take on a more active role in the formation of foreign policy and to test its powers to obtain data from a recalcitrant military bureaucracy in the federal courts. Moreover Congress must dispel the old myths about its inability to keep sensitive military information secret. To strengthen its resistance to political manipulation, Congress must either attack the close ties among congressional military committees the Pentagon and private contractors or empower other groups who can force compromise. Nothing less than a full recognition of the military subgovernment's power would promote the kinds of legislative remedies that can achieve permanent reductions in the military budget.

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ZERO-BASE SUNSET REVIEW

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Reformation of government has become a top priority at both the state and national level. One innovation that is sweeping the country is the sunset concept — automatic termination of agencies or programs unless reprieved by the legislature. Along with zero-base budgeting — the review of spending programs from the ground up — sunset legislation is currently under consideration by Congress Mr. Licata explains these concepts, reviews their history, and analyzes their benefits and faults. He also undertakes a critique of S. 2, the current proposal before Congress, and argues for substantial revision. The Model Federal Sunset Act which follows this Note incorporates the improvements suggested by Mr. Licata, most notably the synergistic combination of the sunset concept with zero-base performance review.

Introduction

One of the more significant issues in the 1976 presidential campaign was "big government." The platforms of both major parties endorsed specific proposals to limit the size of the federal bureaucracy and to make it more responsive to the needs of the country.[1] In just the few months since his election, President Jimmy Carter has already taken several steps toward reform.[2]

This Note will focus on two of the most important aspects of potential reform: "sunset" legislation and zero-base budgeting. "Sunset law" is the popular name for a statute which provides

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1 The Republican Platform specifically endorsed President Ford's Agenda for Government Reform Act, S. 3428, 94th Cong., 2d Sess., 122 Cong. Rec. S1739 (daily ed. May 13, 1976). *See* 34 Cong. Q. 2294 (1976). The Democratic Platform, while not referring to any pending legislative proposal, did endorse zero-base budgeting, mandatory reorganization, and sunset laws. *See* 34 Cong. Q. 1916 (1976).

2 President Carter, in his first address to the American people from the White House, endorsed the concepts of sunset legislation and zero-base budgeting. N.Y. Times, Feb. 3, 1977, at 22, col. 5. The President subsequently announced that the fiscal 1979 budget will reflect zero-base budget analysis. N.Y. Times, Feb. 23, 1977, at 14, col. 3; Business Week, April 18, 1977, at 160.

for the periodic termination of government agencies unless they are able to justify their existence.[3] Zero-base budgeting is a managerial technique which requires that each agency or department justify every budget dollar it seeks, rather than merely any requested increase over the previous year's funding.[4] It also requires an assessment of the impact of different levels of funding, including zero, on the operation of a program or an agency.[5]

The history of both concepts will be discussed, with particular emphasis on recent attempts to implement them on the state level. The Note will compare S. 2925,[6] a combination sunset/zero-base proposal considered in the 94th Congress, with S. 2,[7] the Federal Sunset Act of 1977, currently under scrutiny in the 95th Congress. S. 2 will be critiqued and proposals for its improvement will be offered. A Model Federal Sunset Act, prepared by the Harvard Legislative Research Bureau, follows this Note and combines the sunset and zero-base budgeting concepts into a single legislative proposal.

I. SUNSET: A LIMITED LIFE

A. *Historical Background*

1. The Problem of Regulatory Failure

Richard Olney, Attorney General under President Grover Cleveland and a prominent railroad industry lawyer, may have been among the first to recognize the problem of bureaucratic malaise and the tendency of government agencies to become "captives" of their clientele when he advised his clients to drop their opposition to the first great regulatory commission, the Interstate Commerce Commission. In 1892 he counseled, "The older such a commission gets to be, the more inclined it will be

3 The term was apparently coined by Craig Barnes, a Denver lawyer active in the drive to enact the nation's first sunset law in Colorado. It refers to the unavoidable "end of the day" for terminated agencies. Simison, *New "Sunset Laws" Seek to Curb Growth of Big Government*, Wall St. J., June 25, 1976, at 1, col. 1.
4 *Id.*
5 Leone, *How to Ride Herd on the Budget*, NATION, May 22, 1976, at 626.
6 94th Cong., 2d Sess., 122 CONG. REC. S1044 (daily ed. Feb. 3, 1976).
7 95th Cong., 1st Sess., 123 CONG. REC. S144 (daily ed. Jan. 10, 1977).

to take the business and railroad view of things. . . . The part of wisdom is not to destroy the Commission, but to utilize it."[8]

More recently, Washington attorney Lloyd N. Cutler has observed the tendency of regulatory bureaucracies to become impotent: "[A]gencies 'age,' much like human beings. Almost all agencies have been viewed as more vigorous and successful in their early years, and less effective as they grow older."[9] Similarly, Common Cause, the "citizens' lobby," has criticized regulatory agencies on the grounds that many "operate with almost no press or public attention, are widely considered to be dominated by the special interests they were set up to oversee, and are vulnerable to conflicts of interest."[10] Numerous other problems, including delays, increased consumer costs, and lack of coordination between federal, state, and local agencies, also plague the federal government's regulatory agencies.[11]

Former United States Supreme Court Justice William O. Douglas encountered the difficulties of regulatory agencies as chairman of the Securities and Exchange Commission and was among the first to suggest a limited lifespan for government

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8 R. FELLMETH, THE INTERSTATE COMMERCE OMISSION xv (1970).

9 Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1408 (1975).

10 7 IN COMMON 15 (1976).

11 Scholars and commentators have long lamented the problems of the federal bureaucracy. Much of the discussion has focused on the independent regulatory agencies, which comprise what is pejoratively referred to as the "headless fourth branch" of government. REPORT OF PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 40 (1937). These agencies exercise broad rule-making and adjudicatory powers over various sectors of the economy and are generally governed by boards whose members serve for specified terms, rather than at the pleasure of the President. Because these agencies have such a widespread impact on economic activity in the United States, they have been the subject of close scrutiny and much criticism. For varying analyses of the problems facing the federal regulatory apparatus, *see* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-86 (1975); M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); R. FELLMETH, *supra* note 8; REPORT OF THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION (1971); *Regulatory Reform — 1974: Hearings Before the Senate Comm. on Government Operations*, 93d Cong., 2d Sess. (1974); *Regulatory Reform — 1975: Hearings Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. (1975).

Many of the criticisms leveled at regulatory agencies may fairly be extended to the executive branch as a whole. The federal establishment has become a labyrinth of commissions, agencies, programs, councils, departments, and bureaus. Logically, the sunset concept is nearly as applicable to the rest of the executive branch as it is to the regulatory agencies. The early development, however, has largely focused on its application to regulatory agencies. The Model Act adopts this limited application, for reasons which are discussed at text accompanying notes 189-95 *infra*.

organizations.[12] Douglas suggested to President Franklin D. Roosevelt that every agency should be abolished ten years after creation. Roosevelt, Douglas reported, was amused by the suggestion but saw fit to ignore it.[13] Accordingly, a massive regulatory apparatus became one of the legacies of the New Deal.[14]

In a similar vein, Professor Theodore Lowi of Cornell University later advocated a mandatory termination clause for every act creating a government organization.[15] Such a provision, Lowi argued, would disrupt the cozy relationships between the regulator and the regulated, because, "as the end of its tenure approaches, an agency is likely to find its established relations with its clientele beginning to shake from exposure, new awareness, and competition."[16] A self-destruct clause, he suggested, "may ultimately be the only effective way to get substantive evaluation of a program and an agency."[17]

The lack of regular and systematic evaluation of all agencies is a cause of overlapping programs, inefficiency and waste.[18] In a 1974 study published by the Urban Institute, it was noted that "the federal government as a whole and most federal agencies have no overall system for objectively evaluating program and project effectiveness."[19] One reason for this shortcoming is that the sophisticated techniques necessary for evaluating federal programs, and making appropriate use of these evaluations, have not been developed.[20] This is largely due to the difficulty of measuring the effectiveness of bureaucratic activity. In the business world, balance sheets provide an accurate gauge of success or failure. Unfortunately, there is no equivalent method

12 "The great creative work of a Federal agency must be done in the first decade of its existence if it is to be done at all. After that, it is likely to become a prisoner of the bureaucracy." W. O. DOUGLAS, GO EAST, YOUNG MAN 297 (1974).

13 *Id.*

14 Kohlmeier, *The Spurt and the Sputter*, 8 NAT'L J. 638 (1976). Not surprisingly, much of the discussion of regulatory reform post-dates the New Deal. For a brief overview of the history of various reforms aimed at the independent regulatory agencies, *see* L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW 166-74 (4th ed. 1976).

15 T. LOWI, THE END OF LIBERALISM 309 (1969).

16 *Id.*

17 *Id.*

18 *See* 34 CONG. Q. 956 (1976).

19 J. WHOLEY, J. SCANLON, H. DUFFY, J. FUKUMOTO & L. VOGHT, FEDERAL EVALUATION POLICY 22 (1974).

20 "[T]he act of evaluating the impact of Federal programs . . . has not evolved far beyond the stage of cave-drawing." Havemann, *Congress Tries to Break Ground Zero in Evaluating Federal Programs*, 8 NAT'L J. 706 (1976).

of analyzing governmental efficiency.[21] Effective evaluation is further hampered by the failure of Congress to specify unambiguous goals for many legislative enactments. This lack of clarity in congressional directives obscures the evaluation of agency performance. Not only are the means of attaining congressional ends in dispute, but the ends themselves are often uncertain or discordant.[22]

2. The Inadequacy of Current Legislative Oversight

Formal congressional concern with ongoing performance evaluation, commonly referred to as oversight, dates back to the Legislative Reorganization Act of 1946,[23] which directed legislative committees to "exercise continuous watchfulness" of program performance in areas under their jurisdiction. A further attempt at legislative oversight was made with the adoption of the Intergovernmental Cooperation Act of 1968,[24] which required quadrennial committee review of grant-in-aid programs with no expiration dates. The General Accounting Office became the major instrument for Congressional review upon passage of the Legislative Reorganization Act of 1970,[25] which directed the Comptroller General to study and analyze the results of federal programs. The Congressional Budget and Impoundment Control Act of 1974[26] strengthened the oversight role of the standing committees by allowing them more flexibility in performing analysis and evaluation. In addition, the Comptroller General's program evaluation duties under the 1970 Act were clarified and strengthened by amendments which empowered him to establish an Office of Program Review and Evaluation and to develop evaluation techniques.[27]

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21 Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 84 (1969).

22 An egregious example of the latter difficulty can be found in the congressional directive of objectives to be furthered by the Civil Aeronautics Board in the exercise of its authority. *See* 49 U.S.C. § 1302 (1970).

23 Pub. L. No. 79-601, § 136, 60 Stat. 832 (1946) (current version at 2 U.S.C. § 190d(a) (Supp. V 1975)).

24 Pub. L. No. 90-577, § 601, 82 Stat. 1106 (1968) (codified at 42 U.S.C. § 4241 (1970)).

25 Pub. L. No. 91-510, § 204, 84 Stat. 1168 (1970) (codified at 31 U.S.C. § 1154 (1970)).

26 Pub. L. No. 93-344, §§ 701, 903(b), 88 Stat. 297 (1974) (codified at 2 U.S.C. § 190(d) (Supp. V 1975)).

27 Pub. L. No. 93-344, §§ 702(a), 801(a), 88 Stat. 297 (1974) (codified at 31 U.S.C. §§

Despite these mandates, congressional oversight, the "neglected stepchild" of the legislative process,[28] has not been conspicuously successful in providing meaningful evaluation of program and agency performance. One student of the oversight function has observed that:

> The specialization of committees and the protection of their particular jurisdictions has encouraged an emphasis upon control of specific agencies and programs leading to an identification between those doing the reviewing and those being reviewed, rather than a critical evaluation of procedures. The primary outcome of the process has been to enhance a committee's position in Congress through control of access to a bureaucratic agency rather than the increased efficacy of administration.[29]

Equally important, the lack of meaningful analytic criteria for government programs has also hampered effective legislative oversight.[30]

B. *State Experimentation*

As Justice Brandeis noted, it is "one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory."[31] The most innovative efforts to correct the bureaucratic syndrome and improve the legislative evaluation process have been made by the states. Much of the impetus for the current reform movement in Washington originated at the state level, and S. 2, the major pending federal sunset bill, is modelled after bills developed in various statehouses.

1151-1154 (Supp. V 1975)). *See generally* S. REP. No. 688, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3568.

28 Rosenthal, *Legislative Review and Evaluation — The Task Ahead*, 45 STATE GOV'T 43 (1972).

29 T. HENDERSON, CONGRESSIONAL OVERSIGHT OF EXECUTIVE AGENCIES 2-3 (1970).

30 *See* A. DOWNS, INSIDE BUREAUCRACY 24-40 (1967).

The Model Act seeks to attack these traditional oversight problems in two ways: first, specialized committees are established in the House and Senate to conduct the sunset reviews, and second, the zero-base review technique sets out a uniform system for the evaluation and analysis of agency performance.

31 New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1931) (dissenting opinion).

1. The Colorado Sunset Model: Development and Passage

The first attempt to implement the sunset concept was a provision in the proposed Texas Constitution of 1975. That constitution contained a sunset provision limiting all statutory state agencies having appointed officers to a ten-year lifespan unless renewed by law.[32] Institutions of higher education were exempted from this provision, and agencies with outstanding bonds were not to be terminated unless the legislature first provided an alternate means of servicing the debt.[33] Texas voters rejected the constitution in a statewide referendum, but the sunset proposal was not blamed for the defeat.[34]

Although the Texas sunset provision failed with the rest of the constitution, officials of the state Common Cause organization in Colorado soon laid groundwork in 1975 to secure passage of a sunset bill for Colorado.[35] Colorado Common Cause offered the sunset proposal after a comprehensive study of the boards and commissions within the state's Department of Regulatory Agencies.[36] That project concluded that "many of the agencies designed by the legislature to regulate in the public interest tended to become self-serving and protective of the profession or industry they were created to regulate."[37] Hearings on a sunset proposal were held throughout the state in late 1975, and additional public attention was focused on the matter by the Interim Judiciary Committee of the Colorado legislature, which had already begun studying regulatory reform.[38]

A bill to enact the sunset concept was introduced in the Colorado General Assembly early in 1976. The bill drew sup-

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32 State Legislative Report, National Conference on State Legislatures, May 27, 1976 (on file at the *Harvard Journal on Legislation*).

33 *Id.*

34 Simison, note 3 *supra.*

35 Kopel, *Sunset in the West,* 49 STATE GOV'T 135 (1976).

36 Staff memorandum prepared for Illinois Legislative Council, Springfield, Illinois (on file at the *Harvard Journal on Legislation*).

37 *Id.*

38 For a more detailed discussion of the drafting of the proposal and the methods by which Colorado Common Cause attracted widespread public and press support for the concept, *see Hearings on S. 2925 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations,* 94th Cong., 2d Sess. 79 (1976) (statement of Sidney B. Brooks) [hereinafter cited as *Hearings on S. 2925*].

port from legislators of every ideological stripe.[39] With several refinements, it cleared the legislature with overwhelming approval and was quickly signed into law.[40]

2. The Colorado Sunset Model: An Analysis

a. *Statutory Provisions:* The Colorado statute[41] begins with a statement of legislative finding that state agencies and programs had proliferated without sufficient legislative oversight or regulatory accountability. A total of thirty-nine separate boards, divisions, and commissions are slated for termination over a 6-year cycle. Thirteen bodies are scheduled to expire on a rotating basis on July 1 of every odd year, starting in 1977.[42] The affected organizations license or regulate a broad spectrum of occupations ranging from barbers to hearing aid dealers. Agencies in related areas are to be reviewed simultaneously, facilitating consolidation of agency functions where appropriate.[43]

The heart of the Colorado statute is a provision which authorizes the legislature to extend the existence of any terminated agency for a period of not more than six years.[44] If no affirmative action is taken by the legislature, the agency is abolished. It is this action-forcing mechanism which gives sunset laws their teeth:[45] rather than forcing the legislature to act to abolish an agency, they require legislative action to save the agency. The burden of persuasion is not on an agency's opponents but on its supporters. All the pitfalls of the legislative process work against continuation of an agency rather than for it.[46]

Prior to the termination of any agency, the legislative audit committee is required to conduct a performance audit of that

39 Peirce, *Colorado's Fresh, Significant Sunset Proposal*, Denver Post, March 8, 1976, at 18, col. 1.
40 Common Cause, Sunset: A Common Cause Proposal for Accountable Government 7 (June 1976) (on file at the *Harvard Journal on Legislation*).
41 1976 Colo. Sess. Laws, ch. 115, § 1(1) [hereinafter cited as the Colorado Act].
42 *Id.* §§ 1(2)-(4).
43 Peirce, *supra* note 39.
44 The Colorado Act, *supra* note 41, § 1(6).
45 *Hearings on S. 2925*, *supra* note 38, at 214 (statement of John Gardner).
46 *Id.* at 73 (testimony of Gerald Kopel).

agency. This audit is to be completed at least three months prior to the termination of the agency.[47] The statute also mandates that public hearings on the termination of the agency be held in each house by the committee with normal legislative jurisdiction.[48] These committees, as well as the audit committee,[49] are to consider nine criteria, including the extent to which the agency has operated in the public interest, recommended legislative reforms for the benefit of the public, and encouraged public participation in making its rules and decisions.[50] The audit and public hearing provisions are designed to provide "a solid case for judgment" on whether or not to extend the life of an agency.[51]

Finally, the act provides for a one-year grace period after abolition to allow the agency to phase out its business. During this period the agency's powers and authority continue.[52] In addition, termination of an agency has no effect on the claim or right of any citizen against the agency, or on any claim or right of the agency which is subject to litigation.[53] In addition to allowing the agency to wrap up its affairs, the grace period will allow the agency to muster support for its continuation and will limit the ability of committee chairmen to "bottle up" extension legislation.[54]

b. *Difficulties with the Colorado Statute and Favorable Initial Results:* Proponents of the Colorado sunset legislation recognize that, as a "first draft,"[55] it had inherent limitations which could seriously affect its success. Because of these limitations, the Act was initially focused on regulatory agencies, rather than all departments of the state's government.[56]

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47 The Colorado Act, *supra* note 41, § 1(7).
48 *Id.* § 1(8)(a).
49 *Id.* § 1(7).
50 *Id.* § 1(8)(b). The other criteria are the extent to which the agency has permitted qualified applicants to serve the public, complied with affirmative action requirements, handled public complaints efficiently, and tried to assess the impact of both industry problems and the agency's actions affecting the public.
51 Peirce, *supra* note 39.
52 The Colorado Act, *supra* note 41, § 1(5).
53 *Id.* § 1(11).
54 Peirce, *supra* note 39.
55 Address by Bruce Adams, National Conference of State Legislatures' Conference on Sunset Legislation 11 (April 23, 1977) (on file at the *Harvard Journal on Legislation*).
56 Simison, *supra* note 3.

The chief doubt about the sunset law was whether the legislature, facing many problems and limited time in session, could devote adequate attention to the essential process of critical review of the agencies slated for abolition.[57] The fear was that legislators may be forced to vote on the basis of insufficient information or lobbying by pressure groups. Worse yet, renewal of agency charters might become a matter of *pro forma* legislative routine, undermining the law's purpose altogether.

Another shortcoming of the Colorado Act is that it strikes only at organic statutes which *create* regulatory agencies, ignoring the substantive provisions which define the duties and responsibilities of such agencies. This raises the possibility that an agency might be abolished, while the activities it was formerly charged with conducting continue to have the force of law. Thus, state law may require cosmetologists to secure a license, but termination of the Board of Cosmetologists would eliminate the only agency authorized to issue one.[58] Presumably, at least some of the activities of a terminated agency would need to be continued. The Colorado legislature must be careful, then, to insure that it transfers the essential duties of a terminated agency to a different organization. There is unfortunately no provision in the Colorado Act to insure that such transfers occur.

Despite these imperfections in the Colorado Act, its initial operation is encouraging. Even before sunset reviews began, there was evidence that agencies targeted for review conducted thorough housecleanings.[59] Moreover, of the first five agencies reviewed by the Senate committees to date, three have been terminated and the other two received substantial changes.[60] Such radical results may not continue indefinitely. But as Colorado Governor Richard D. Lamm has properly pointed out, the real test of sunset review is whether agencies are more responsive and accountable, not merely how many are terminated.[61]

57 *Id.*

58 Address by Bruce Adams, *supra* note 55.

59 *Id.* at 6. For instance, the Shorthand Reporters Board, which had been criticized for certifying less than 3% of the applicants in 1975, increased its certification rate to 50% and updated its procedures.

60 *Id.* at 7.

61 *Id.* at 6.

3. Other State Efforts

In the short time since the Colorado General Assembly enacted its sunset law, every other state in the country has examined the idea.[62] Ten states have enacted sunset laws,[63] and in two states sunset bills await the signatures of the governors.[64] In another dozen states, sunset legislation has passed one house of the legislature.[65]

The experience in some other states can illustrate the pitfalls of poorly-considered sunset legislation. The Alabama sunset law, for instance, required the legislature to vote over two hundred agencies up or down, one right after another, with a two hour limit on debate for each agency.[66] As could be expected, the crush of work resulted in few detailed evaluations and little reform.[67]

Just as debilitating to the sunset concept may be its headlong application to the whole gamut of government activity. The Alabama, Arkansas, and Louisiana legislatures may have jeopardized its efficacy by taking on too much at once. After all, sunset review is still in developmental stages and evaluative techniques have not been fully refined. An overambitious sunset law may, as a practical matter, restrict a legislature to superficial evaluation and reduce sunset review to an exercise in paper-shuffling.[68]

Six of the ten state sunset laws are directed primarily at regulatory activities.[69] Common Cause, one of the major supporters of sunset legislation, and instrumental in securing its passage in many states, has advocated this approach[70] and lobbied against overly-broad legislation in many states.[71] The

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62 *Id.* at 2.
63 *Id.* As of April 20, 1977, the states are Alabama, Arkansas, Colorado, Georgia, Florida, Louisiana, New Mexico, Oklahoma, South Dakota, and Utah.
64 *Id.* at 3. The states are Montana and Indiana.
65 *Id.*
66 *Id.* at 5.
67 *Id.* at 6.
68 *See* text accompanying notes 189-95 *infra*.
69 Address by Bruce Adams, *supra* note 55, at 14.
70 *Id.* at 13.
71 *Id.* at 14. The states include Florida, Iowa, Oklahoma, Nebraska, and Utah.
A quite current survey of sunset activity at the state level is included as an addendum to Bruce Adams' address.

Model Act which follows this Note adopts the same limited approach.

II. Zero-Base Budgeting: From the Ground Up

A. *Business Origins: Private Sector Innovation*

The management technique which has come to be known as zero-base budgeting (ZBB) was first developed and implemented in the private sector and was thereafter adapted for use by several state governments. An examination of the original development and application in the private sector is helpful in understanding its potential for accomplishing meaningful reform in government.

1. Development and Implementation

It is generally conceded that ZBB was first used by Texas Instruments, Inc. The man responsible for its development, Peter A. Phyrr, published the seminal article describing the concept in 1970.[72] As formulated by Texas Instruments, ZBB involved sectioning corporate service and support operations into a series of "decision packages." Each decision package describes a specific activity in such a manner that management can (1) evaluate and rank it against other activities competing for the same or similar limited resources, and (2) decide whether to approve it or disapprove it.[73] Manufacturing operations were generally exempted from ZBB review, since levels of production are determined by sales volume, and a production level necessarily dictates certain expenditures for commodities, labor, and overhead.[74]

Decision packages were, to the extent possible, designated at "ground level" by managers operationally responsible for the activities under consideration.[75] Packages were then ranked in order of decreasing benefit to the company.[76] The packages were initially ranked by the same managers who prepared them. The next management level would review the initial

72 Phyrr, *Zero Base Budgeting*, 48 Harv. Bus. Rev. 111 (1970).
73 *Id.* at 112.
74 *Id.*
75 *Id.* at 114.
76 *Id.* at 116.

rankings, make modifications where necessary, and forward the results to the next higher level. This process continued until top management completed a final evaluation. To avoid inundating upper review levels with an unmanageable number of packages to assess, Texas Instruments imposed a "cutoff expense line" at each organizational level.[77] Reviewers at the next higher level concentrated only on activities ranked below the specified cutoff. For example, a ground-level section manager might have ranked ten packages and passed them on. At the next level, if a fifty percent cutoff were imposed, the reviewer would "skim off" from the top of the list as many packages as account for fifty percent of last year's budget for that section, and evaluate only those packages ranked below the fifty percent line.[78] At the next higher level of management, an eighty percent cutoff might have been established, in which case the only packages reviewed would be those given the lowest priority in the previous ranking, accounting for twenty percent of the available allocation for that division. Thus, at the final step in the budgeting process, the number of packages to be analyzed would remain manageable.[79]

Phyrr was enthusiastic about the approach. He found it to be a flexible and powerful tool.[80] He has since noted that ZBB "is readily adaptable to organizations that have significantly different operations, needs, and problems."[81] By 1974, the idea had spread to dozens of companies including Magnavox, Xerox, and United California Bank.[82] Some notable successes were reported, such as Southern California Edison Co., which used ZBB to eliminate some $21 million in spending from its 1974 budget.[83]

2. Problems Encountered with ZBB in Business

Almost certainly, the most significant stumbling block to ZBB's success was resistance from low-level managers who had

77 *Id.* at 117.
78 This may, of course, be more or less than half of the packages on the list. The fifty percent cutoff refers to a monetary percentage.
79 Phyrr, *supra* note 72, at 117-18.
80 *Id.* at 119.
81 P. PHYRR, ZERO-BASE BUDGETING 2 (1973).
82 Murray, *Tough Job of Zero Budgeting.* DUN'S REV., October 1974, at 71.
83 *Id.*

the initial responsibility to designate and rank decision packages. When initially confronted with ZBB, "managers are annoyed and even fearful of a new tool that is going to probe into their bailiwicks and force them to pin down precisely every activity they run and how much it costs."[84] Opposition from the front-line managers can spell disaster for a budget review program.[85]

The process can also be onerously time-consuming and can generate unmanageable paperwork. One firm which implemented ZBB, for example, found its managers working seven-day weeks to meet their obligations.[86] This results mainly from the difficulty of developing a cost analysis for each separate function. Developing some sophistication with the ranking process can likewise be a trying experience.[87]

Finally, ZBB can become a mechanical process, stifling the creativity of management and employees, if it is performed routinely.[88] Top-level management may be prone to reject all new ideas and innovations summarily. Reviewers must be sure to take a fresh look at the rankings each year and make detached and objective evaluations without relying on the previous year's rankings.

B. *Application to Government*

1. The Need for Reform

The traditional method of preparing a governmental budget is to start with the previous year's budget and expand upon it.[89]

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84 Murray, *supra* note 82, at 71-72.

85 There is perhaps particular reason to fear bureaucratic resistance in the federal government in light of past experience with budgetary innovations like PBB and MBO. *See* notes 94 & 95 *infra*.

Robert Havemann, writing an overview for the Joint Economic Committee's 1969 study of PPB, identified a "basic resistance by many Federal employees to economic analysis" as a "primary impediment" of the PPB system. JOINT ECONOMIC COMM., 91ST CONG., 1ST SESS., ANALYSIS AND EVALUATION OF PUBLIC EXPENDITURES: THE PPB SYSTEM 7 (Comm. Print 1969). When the shift from PPB to the Management By Objectives system was made in 1973, the failure of agency officials to try to measure the costs and benefits of alternative programs under PPB was cited as a key reason for its abandonment. Havemann, *Administration Report/OMB Begins Major Program To Identify and Attain Presidential Goals*, 5 NAT'L J. 783, 788 (1973).

86 Murray, *supra* note 82, at 72.

87 *Id.*

88 *Id.* at 128.

89 *See, e.g.*, A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 136, 150

> Because most of the budget is a product of previous decisions, the largest determining factor of the size and content of this year's budget is last year's budget. The budget is thus like an iceberg: By far the largest part of it is below the surface, outside the control of anyone. Long-ranging commitments have been made; this year's share is included as part of the annual budget. There are mandatory programs, such as veterans' pensions, whose expenses must be met. Powerful political support makes the inclusion of other activities inevitable. Budgeting, therefore, is incremental, not comprehensive. . . . [Those] who make the budget are concerned with relatively small increments to an existing base.[90]

This technique has been properly characterized as "mindless and irrational."[91]

Increasing attention has been given to the importance of budget policies over the past few years. Congress has begun to exercise control over the priorities for federal spending[92] through adoption of the Congressional Budget Act of 1974.[93] In the mid-1960's, the executive branch first attempted to implement a comprehensive system of budget review called Planning-Programming-Budgeting (PPB).[94] It was replaced in

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(1964); Smithies, *Conceptual Framework for the Program Budget*, in D. NOVICK, PROGRAM BUDGETING 24 (2d ed. 1969); D. MUNDEL & J. STEINBRUNER, A PRELIMINARY EVALUATION INNOVATION IN THE STATES 197-203 (1971); Lindbloom, *Decision Making in Taxation and Expenditure*, in NATIONAL BUREAU OF ECONOMIC RESEARCH, PUBLIC FINANCES: NEEDS, SOURCES, AND UTILIZATION 306 (1961).

90 Wildavsky, *The Annual Expenditure Increment*, 33 PUB. INTEREST 84, 89 (1973).

91 *Id.*

92 SENATE COMM. ON GOVERNMENT OPERATIONS, REPORT ON S. 2925, S. REP. No. 1137, 94th Cong., 2d Sess. 25 (1976) [hereinafter cited as REPORT ON S. 2925]. *See, e.g.*, Adams, *Disarming the Military Subgovernment*, 14 HARV. J. LEGIS. 459 (1977).

93 *See* note 26 *supra*; *see generally* Fisher, *Congressional Budget Reform: The First Two Years*, 14 HARV. J. LEGIS. 413 (1977).

94 In 1965, President Johnson launched an ill-fated attempt to institute a comprehensive evaluation program in the executive branch, Planning-Programming-Budgeting (PPB). 2 PUB. PAPERS 916 (1965). Budgetary evaluation as contemplated by the PPB system was primarily a means of enabling decision-makers to allocate scarce funds among competing needs and demands. At its heart was a requirement for "rigorous, measurable goal specification and evaluation of outputs of alternative programs in relation to goal achievement." H. GROVES & R. BISH, FINANCING GOVERNMENT 410 (1973). A variety of techniques were employed: cost-benefit analysis, cost-effectiveness analysis, operations research, and systems analysis.

Allen Schick, in a leading article, outlined a number of reasons for PPB's failure: (1) lack of training and expertise by the program evaluators; (2) imposition of a uniform system on widely varying departments, with no freedom for the various agencies to design their own systems or procedures; (3) the Bureau of the Budget's failure to demonstrate its commitment to the program; and (4) insufficient financial and staff

1973 by a different approach in the short-lived Management by Objectives (MBO) program.[95] The failure of each program attests to the hazards of poorly conceived or implemented attempts at reform.

Increasing concentration on the budgetary process, however, indicates a growing awareness among high officials of the urgency of controlling the runaway growth in the federal bureaucracy. The sheer size and complexity of the federal government is awesome. There are over 1030 programs for domestic assistance, administered by 52 agencies, which in fiscal year 1976 provided nearly $60 billion to state and local governments.[96] Within this maze of programs, there is wasteful duplication and division of responsibility: there are 228 health programs, 83 housing programs, and 156 income security and social service programs.[97] Under the broad heading of community development, a total of 259 different programs are maintained.[98] Even when the categorization is narrowed, the picture remains murky: 28 separate programs are concerned

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resources devoted to the concept, both at BOB and in the agencies. Schick, *A Death in the Bureaucracy: The Demise of Federal PPB*, 33 PUB. AD. REV. 146 (1973).

Another commentator has cited further lessons to be learned from the PPB experience:

> The oft maligned [PPB system] . . . did not fail because of inadequacies in the concept, but because of the weight of its procedures, the amount of paper work required, and the highly technical nature of the evaluations required. The same fate easily could await zero-based periodic program review and evaluation unless major efforts are made to guard against it.

Hearings on S. 2925, supra note 38, at 283 (statement of David B. Walker).

95 MBO was implemented in twenty-one agencies, including the eleven cabinet departments, in a letter from President Nixon dated April 18, 1973. The process consisted of two parts: (1) setting objectives with particular emphasis on results to be achieved by the agencies themselves, review and clearance by the Office of Management and Budget, and final approval by the President; and (2) "tracking," or follow-up, to insure that programs and activities were complying with the defined objectives. Havemann, *supra* note 85. Dissent soon developed, particularly among the lower level program managers and career civil servants who found that MBO required measurement of goals that were largely immeasurable, such as eliminating "discrimination in housing," or assuring "high-quality health care for veterans." Havemann, *Ford Endorses 172 Goals of Management By Objective Plan*, 6 NAT'L J. 1597 (1974). The system went into "suspended animation" when Roy L. Ash, who supervised its implementation, was replaced by James T. Lynn as director of OMB. Havemann, *supra* note 20. MBO was last used in fiscal year 1975. For an excellent discussion of MBO, *see Symposium on Management By Objectives in the Public Sector*, 36 PUB. AD. REV. 1-45 (1976). *See also* R. ROSE, MANAGING PRESIDENTIAL OBJECTIVES (1976).

96 REPORT ON S. 2925, *supra* note 92, at 25.

97 Muskie, *Effective Government: Our Next Big Challenge*, 8 NAT'L J. 458 (1976).

98 REPORT ON S. 2925, *supra* note 92, at 26.

with veterans' medical services, 27 programs provide vocational education, and over 50 programs serve handicapped youth.[99]

These various programs are administered by a vast array of agencies, bureaus, commissions, and councils. The growth of such organizations has been extraordinary.[100] From 1960 to 1974, a total of 329 governmental bodies were created, while only 126 were abolished, for a net growth of 203.[101] In 1975 alone, 46 new units were created, while only five were terminated.[102]

As a consequence of this mushrooming federal establishment and its bewildering labyrinth of operations,[103] program goals are frequently thwarted by an unwieldly and unresponsive bureaucracy.[104] Furthermore, the government's size, a result of individual legislative initiatives enacted in piecemeal fashion,[105] has prevented realistic evaluation of program effectiveness. The incremental budgeting process is at least partially due to the perhaps insuperable difficulty of critically examining the individual merits of each separate spending request.

The bloated bureaucracy and the inefficiency it spawns have eroded public faith and confidence in the efficacy of government. Opinion polls have shown that a significant percentage of the American public believes that special interests dominate the bureaucratic decision-making process and that the government fails to spend money wisely.[106] The 1976 platforms of both major parties recognized public frustration and alienation with formal governmental processes.[107] Public apathy and disdain regarding government has been termed the "most dangerous social trend"[108] facing the nation. This wide-

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99 *Id.* at 25-26.

100 *Id.* at 27.

101 *Id.*

102 SENATE COMM. ON GOVERNMENT OPERATIONS; 94TH CONG., 2D SESS., SUPPLEMENT TO 1976 ORGANIZATION OF FEDERAL EXECUTIVE DEPARTMENTS AND AGENCIES (Comm. Print 1976).

103 For an example of complex program organization, see the chart labelled "Economic Development Programs of the Federal Government" in *Hearings on S. 2925, supra* note 38, at 387.

104 Muskie, *supra* note 97.

105 *Id.*

106 *Hearings on S. 2925, supra* note 38, at 213 (testimony of John Gardner).

107 *See* note 1 *supra*.

108 *Hearings on S. 2925, supra* note 38, at 45 (testimony of Rep. Martin Russo (D-Ill.)).

spread dissatisfaction with bureaucratic performance justifies new methods of assessing and controlling the allocation of federal dollars.

2. ZBB in State Government: The Georgia Experiment

As with sunset laws, the first experimentation with zero-base budgeting in the public sector occurred at the state level.[109] Georgia was the first to use ZBB, and the story of how the state came to do so has been frequently cited. Jimmy Carter, while waiting to be sworn in after winning the 1970 gubernatorial election, read Phyrr's article in the *Harvard Business Review* and asked Phyrr to help implement a ZBB program in his administration. Phyrr became a consultant to the Georgia Bureau of the Budget in order to oversee the experiment.[110]

Zero-base budgeting was initiated throughout the executive branch of the Georgia state government, which encompassed 65 "major" agencies with aggregate expenditures of approximately $1.5 billion.[111] Immediate full-scale implementation in the executive branch, rather than a phased approach, was chosen partially for political reasons: Carter could not succeed himself as governor and it was thought that complete development of the concept might take several years.[112] Although budgets for the legislative and judicial branches were initially exempt from zero-base review, the judiciary later adopted the method in preparing its funding request.[113]

Operational experience with ZBB in a small pilot program led to the development of standard forms and procedures for statewide use.[114] Uniform review procedures for all agencies were promulgated by the budget office, and training sessions

109 The U.S. Department of Agriculture experimented with a form of zero-base budgeting in the early 1960's, but with only minimal success. Wildavsky & Hammann, *Comprehensive Versus Incremental Budgeting in the Department of Agriculture*, in F. LYDEN & E. MILLER, PLANNING, PROGRAMMING, BUDGETING: A SYSTEMS APPROACH TO MANAGEMENT 151, 161 (1967). That zero-base approach, however, was intermingled with PPB. *See* note 94 *supra*. The first governmental use of the Phyrr model was in Georgia.

110 Wall St. J., March 1, 1977, at 1, col. 6.

111 *Hearings on S. 2925*, *supra* note 38, at 321 (testimony of Peter A. Phyrr).

112 *Id.* at 321-22.

113 *Id.* at 346.

114 *Id.* at 322. For a detailed presentation of the ZBB forms used in Georgia, *see id.* at 86-120.

were held to familiarize government officials with the plan.[115] The program was designed to require each agency to justify every dollar sought in appropriations requests, regardless of whether the funds were to be used to continue or expand existing programs, or to develop and implement new programs.[116] During its first year of operation the Georgia plan allowed each agency a great deal of discretion in deciding the lowest level within its organizational structure at which ZBB would be implemented.[117] In subsequent years, however, those agencies which had only partially employed zero-base review began extending it deeper into their structures.[118]

The program was originally scheduled for use in the preparation of Carter's first budget in fiscal year 1972. But when a shortage of $57 million in general revenue developed, which was the equivalent of five percent of planned general fund expenditures, the ZBB method was applied retroactively to the fiscal 1971 budget Carter had inherited. Rather than ordering a uniform cut of five percent, the Carter Administration used its zero-base analysis to make reductions in the budgets of various agencies ranging from zero to fifteen percent.[119]

Although hard data concerning the operation of zero-base budgeting in Georgia are scarce, Phyrr has supplied some quantitative analysis: 47 state troopers in administrative positions were replaced with clerks and radio operators for a savings of $180,000;[120] a mental health institution quadrupled its rehabilitative services with only a five or six percent budget increase by eliminating unnecessary maintenance activities;[121] and six beekeepers employed by the Department of Agriculture were "found" and promptly terminated.[122] Phyrr has been unable to calculate any figure on total savings realized through the implementation of ZBB in Georgia, although he points out that during Carter's administration services were expanded

115 *Id.*
116 *Id.* at 121 (summary of zero-base budgeting procedures in Georgia).
117 *Id.* at 322 (testimony of Peter A. Phyrr).
118 *Id.*
119 *Id.* at 349.
120 *Id.* at 323.
121 *Id.* at 322.
122 *Zero-base Budgeting in Georgia,* 8 NAT'L J. 707 (1976).

without a tax increase as a result of channelling savings back into program delivery.[123] In contrast, a different study of the Georgia experience found that ZBB had had questionable impact and that there was considerable dissatisfaction among departmental budget analysts with the technique.[124] Nonetheless, Governor George Busbee, who succeeded Carter, has continued the program.

Since its adoption in Georgia, zero-base budgeting has been implemented in several other states. In New Mexico, improvements generated by the technique were found to be "neither as great as originally anticipated nor as minimal as detractors would claim."[125] On the other hand, New Jersey successfully utilized ZBB to cut spending by three percent, after a 21-year period in which average spending rose 14.7 percent annually.[126] Several other states, including Texas and Illinois, have adopted ZBB either throughout their state governments or in various departments.[127]

3. Difficulties with ZBB

Even Phyrr has acknowledged that problems may arise in the zero-base approach. A major difficulty is that "many bureaucrats feel threatened by a process which evaluates the effectiveness of their programs."[128] This resistance was exacerbated in Georgia because department heads had no input into the original decision to adopt ZBB.[129] The action of Governor Carter in presenting them with a *fait accompli* "seemed to have a detrimental effect on their attitudes toward the system."[130]

Another major problem is that government officials, just as business managers, are likely to experience trouble in formulat-

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123 *Hearings on S. 2925, supra* note 38, at 349 (testimony of Peter A. Phyrr).

124 Minmier & Hermanson, *A Look at Zero-Base Budgeting — The Georgia Experience*, 26 ATLANTA ECON. REV. 5, 8 (1976).

125 LaFaver, *Zero-Base Budgeting in New Mexico*, 47 STATE GOV'T 108, 112 (1974).

126 Scheiring, *Zero-Base Budgeting in New Jersey*, 49 STATE GOV'T 174, 177 (1976).

127 Bell, *State Administrative Organization Activities, 1974-75*, in THE BOOK OF THE STATES: 1976-1977, at 59 (The Council of State Governments).

128 Phyrr, *The Zero-Base Approach to Government Spending*, in *Hearings on S. 2925, supra* note 38, at 341.

129 Minmier & Hermanson, *supra* note 124, at 7.

130 *Id.*

ing decision packages, developing criteria for analysis, and ranking the packages appropriately.[131]

Some additional pitfalls of ZBB have been noted: (1) major efforts must be made to educate lawmakers, as well as bureaucrats, about the technique; (2) ZBB does not deter agencies from "padding" their decision packages, and padding is inevitable where legislative cuts are anticipated; (3) historical cost and performance data are rarely available by decision package, and estimates must be employed; (4) agencies may attempt to manipulate priority listings by ranking popular items lower than items which seem less likely to receive funding; and (5) budget preparation time needs to be relatively lengthy, particularly while the method is being implemented.[132]

In addition, the nature of justifying budget requests necessarily involves subjective judgments. To justify an appropriation for a given program, it must be shown that the anticipated benefits from that program outweigh the potential benefits obtained by spending the same money on some other program, or by cutting taxes. Obviously, there is no clear and convincing test for justification in these terms. Some argue that true justification is impossible, and that zero-base budgeting mistakenly presupposes that it can be done.[133]

Zero-base budgeting, as most of its advocates admit, is neither a comprehensive remedy for bloated spending nor a guaranteed method of achieving responsive government. At bottom, it may ony be superior to other ways of cutting a budget.[134] Any decision to implement ZBB in the annual budgetary process should be made with awareness of the aforementioned problems and recognition that ZBB requires detailed and difficult work. Furthermore, there is still relatively little empirical evidence upon which to judge the merits of ZBB. Whether or not ZBB can in fact force annual performance reviews as a means of eliminating unnecessary spending

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131 Phyrr, *The Zero-Base Approach to Government Spending*, in *Hearings on S. 2925*, *supra* note 38, at 341.

132 LaFaver, *supra* note 125, at 111-12.

133 L. MEREWITZ & S. SOSNICK, THE BUDGET'S NEW CLOTHES: A CRITIQUE OF PLANNING-PROGRAMMING-BUDGETING & BENEFIT-COST ANALYSIS 63 (1971).

134 Leone, *supra* note 5, at 626.

is a question which, like the effectiveness of sunset laws, may depend for its resolution on further experience.

4. ZBB in the Sunset Review Process

Whatever its potential value as a tool for improving the annual budgetary process, ZBB techniques are complementary to the sunset review process.[135] A necessary component of effective sunset review is a meaningful program evaluation system. ZBB is one promising method of conducting the sunset review. In fact, Louisiana currently requires the use of zero-base procedures as an evaluative aspect of its sunset process.[136] S. 2925, the federal sunset bill considered in the 94th Congress, also provided for zero-base review of expiring programs. Unfortunately, S. 2, the main proposal currently under consideration, has eliminated the zero-base feature[137] and most of the evaluation criteria contained in S. 2925. The Model Act retains both the zero-base terminology[138] and the detailed performance review criteria.[139] This is desirable because any sunset decision must necessarily consider the consequences of the abolition of the agency or program under review. ZBB, with its emphasis on determining the impact of differing levels of program activity, including zero, seems well-suited for evaluation of agency abolition. With the adaptations contained in the Model Act, ZBB should enhance the likelihood of the sunset concept's success.

III. The Federal Sunset Proposal

S. 2, introduced by Senator Muskie on January 10, 1977,[140] is a comprehensive sunset bill, affecting virtually all programs of

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135 Address by Bruce Adams, *supra* note 55, at 8.

136 *See* 1976 La. Sess. Law Serv. (West), Act No. 277, § 1(3).

137 The terminology was dropped because it was considered to be distracting attention from the sunset proposal itself. Interview with Lee Lockwood, Counselor to the Intergovernmental Relations Subcommittee of the Senate Committee on Government Operations (April 22, 1977).

138 *See* Adams, *Sunset Proposal for Accountable Government*, 28 Ad. L. Rev. 536-37 (1976).

139 *See id.* at 534-36. It is significant that virtually all state sunset laws contain evaluation criteria to guide the legislators and evaluators in sunset reviews. *See* Address by Bruce Adams, *supra* note 55, at 9.

140 123 Cong. Rec. S145 (daily ed. Jan. 10, 1977). Numerous similar proposals were

the federal government. Although it has eliminated many of the specific review requirements contained in its predecessor, S. 2925, the legislation remains a substantial response to the need for more effective program evaluation.

A. *S. 2: Provisions*

Title I contains the heart of the federal sunset legislation.[141] It sets out the basic schedule for review and termination of programs over a five-year period.[142] Elimination of a program is to be accomplished by termination of all provisions of law which would authorize or provide a new budget authority for it.[143] A prohibition on budget authority for a program may be deferred by an extension resolution.[144]

Budget authority is defined in terms of the 1974 Congressional Budget Act.[145] The federal proposal applies only to laws

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introduced in the 94th Congress and received limited attention. Among the more important of these were: (1) The Regulatory Reform Act of 1976, S. 2812, 94th Cong., 1st Sess., 121 CONG. REC. S22,659 (daily ed. Dec. 18, 1975), which provided for termination of regulatory agency rules, with certain exceptions, if comprehensive regulatory plans were not adopted after a five-year review; (2) The Agenda for Government Reform Act, S. 3428, *supra* note 1, which embodied the Ford Administration's approach to reform and would have required an annual presidential assessment of needed changes. Congress would have had until November 15 of each year to enact the President's proposals or substitute its own. If the deadline was not met, the presidential proposal would have become the pending business in both chambers of Congress until action was taken; and (3) S. 2067, 94th Cong., 1st Sess., 121 CONG. REC. S12,101 (daily ed. July 9, 1975), which would have limited the period of authorization for new budget items and required comprehensive review of existing programs for which continued budget authority was proposed. None of these bills survived the committee stage of the congressional process, primarily due to the influence of Senator Muskie, sponsor of S. 2925, in the Senate Committee on Government Operations. *See generally* 34 CONG. Q. 1309-10 (1976). *See* note 209 *infra*.

141 REPORT ON S. 2925, *supra* note 92, at 33. Throughout the discussion of S. 2, the Senate Report on S. 2925 will be cited where the provisions of the two bills are substantially equivalent.

142 All programs scheduled to expire in a given year would end on September 30, the last day of the federal fiscal year. For example, all programs within the functional categories of National Defense, Recreational Resources, Farm Income Stabilization, Disaster Relief and Insurance, Health Research and Education, and Veterans Housing expire on September 30, 1979. S. 2, *supra* note 7, § 101(a). Also, the termination dates of programs are distributed by functional categories over the five-year period in such a way as to balance the workload of the congressional committees which are to review the programs under their normal legislative jurisdiction. REPORT ON S. 2925, *supra* note 92, at 32-33.

143 REPORT ON S. 2925, *supra* note 92, at 33.

144 *See* text accompanying note 179 *infra*.

145 S. 2, *supra* note 7, § 2(a)(1). Budget authority is "authority provided by law to enter into obligations which will result in immediate or future outlays involving

which provide basic authorization for general appropriations bills, and focuses on individual programs rather than organic legislation creating the departments and agencies themselves.[146] Significantly, substantive authorization provisions for the conduct of government are not subject to sunset termination.[147]

Continuation of programs beyond their termination date is allowed only if Congress acts to provide specific new budget authority.[148] This requirement not only permits the extension of programs found to be meritorious, but also will end the practice of appropriating funds for a program under a nonspecific authorization for an indefinite period.[149] Two major exceptions to this continuation provision are made: (1) new budget authority may be enacted without a previous authorization in the case of an emergency; and (2) new budget authority for one fiscal year beyond a program's termination date may be provided by either house of Congress if an authorization for it has been passed or reported in that house, and if new budget authority was available for the program in the preceding fiscal year. These provisions, not contained in S. 2925, are intended to give Congress sufficient latitude to meet the exigencies of an emergency.[150]

The Comptroller General is required to file reports identifying the programs facing termination and presenting a variety of information concerning each one.[151] A section which provides that neither house of Congress may consider legislation authorizing the extension of programs beyond their next review date[152] is the principal enforcement mechanism[153] of S. 2. When combined with a section providing that the next review

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Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government." 31 U.S.C. § 1302(a)(2) (Supp. V 1975).

146 REPORT ON S. 2925, *supra* note 92, at 33. A limited number of budget authorizations, providing for payment of interest on the national debt, and retirement and disability insurance, are exempted from the termination scheme.

147 *Id.*

148 S. 2, *supra* note 7, § 104(a).

149 REPORT ON S. 2925, *supra* note 92, at 36.

150 *Id.* at 36-37.

151 *See* S. 2, *supra* note 7, §§ 102(a), (b).

152 *Id.* § 101(c)(1).

153 REPORT ON S. 2925, *supra* note 92, at 37.

date applicable to a program is exactly five years after the last review,[154] the restraint on legislative action has the effect of limiting all future authorizations to five years or less. This also precludes passage of extension legislation without a favorable program evaluation.

A simplified system of conducting sunset reviews is outlined in Title II. Congressional committees are required to conduct a sunset review of each program within their legislative jurisdiction prior to the program's termination date. The sunset review is to be a systematic evaluation of a program to determine whether its merits justify its continuation at all, and if so, whether it should be continued at a level less than, equal to, or greater than the existing level. Significantly, the review "shall be undertaken in the scope and the detail the committee having jurisdiction deems appropriate."[155] Only minimal requirements are imposed on Committee reports, due by May 15 of the review year,[156] which recommend the continuation of a program. These are: (1) an identification of the problems or needs that the program is intended to address; (2) a qualitative and quantitative statement of the program's objectives and anticipated accomplishments; (3) an identification of any other programs having similar, conflicting, or duplicative objectives, and an explanation of how the program avoids duplication or conflict with such other programs; (4) an assessment of the consequences of eliminating the program, of consolidating it with another program, or of funding it at a lower level, taking into consideration similar or duplicative programs; and (5) a projection of the anticipated needs for the program, including an estimate of when, and the conditions under which, the program will have achieved its goals.[157]

The agency administering the program under review is required, upon request, to submit information and assistance to the reviewing committees.[158] Results of prior audits and reviews of a program must be submitted by the Comptroller General to the committees by October 1 of the year preceding

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154 S. 2, *supra* note 7, § 2(c).
155 *Id.* § 201(b).
156 *Id.* § 201(c).
157 *Id.* § 201(d).
158 *Id.* § 202(a).

the termination date.[159] In addition, the Comptroller General, Congressional Budget Office, and Congressional Research Service must furnish information and analyses upon request.[160]

By comparison, the zero-base review system set out in S. 2925 was considerably more detailed. According to its Title II scheme, the legislative committees responsible for a program review were to adopt plans for the conduct of the zero-base review by April 1 of the year preceding the review date.[161] These plans were to specify the priority to be given to the zero-base review, the criteria and standards to be applied in the review, and the information and analyses which would be required from the agency administering the program and the congressional support agencies.[162] The zero-base review to be conducted under S. 2925 would have been carried out under explicit statutory requirements, rather than "in the scope and the detail the committee having jurisdiction deems appropriate." Aside from the factors carried over to S. 2, these requirements included: (1) a statement of the performance and accomplishments of the program in each of the last four completed fiscal years and of the budgetary costs incurred in operating the program; (2) a statement of the number and types of beneficiaries or persons served by the program; (3) a summary for the last three fiscal years of the number and cost of personnel employed in carrying out the program, including those under contract; (4) an assessment of the effect of the program on the national economy; (5) an assessment of the degrees to which the policies of the program, as expressed in its rules and regulations, coincide with congressional objectives in establishing the program; (6) an evaluation of the reporting and record keeping requirements and activities of the program; and (7) an incremental analysis of program operation between the level below which it would not be feasible to carry on the program and the current level of operation.[163] At each incremental cost level, an analysis of the services to be provided, the number of employees required, a ranking of service priori-

159 *Id.* § 202(b).
160 *Id.* § 202(c).
161 S. 2925, *supra* note 6, § 201.
162 *Id.* § 203.
163 *Id.* § 204.

ties, and a statement of the impact on the national economy was required.[164] In addition to this more stringent burden on the Congressional committees, S. 2925 also required the agency administering the program under review to submit a zero-base review in accordance with the plan adopted by the committee.[165]

The final provision in Title II of S. 2 is carried over from Title III of S. 2925. The section would make changes in the Legislative Reorganization Act of 1970[166] designed to improve the process of ongoing program review aside from the periodic sunset review. The amendment changes section 236 of the Legislative Reorganization Act to require every executive agency which has been audited by the General Accounting Office (GAO) to report within six months thereafter to the GAO and to Congress on actions taken by the agency to correct deficiencies noted by the GAO study.[167]

Title III creates a "Citizens' Commission on the Organization and Operation of Government." This 18-member non-partisan commission, patterned after the Hoover Commissions, would study the organization and methods of operation of all departments of the executive branch, and report to Congress and the President by September 30, 1980.[168]

In Title IV, the sunset termination and review procedures of Titles I and II are extended to operate upon all "tax expenditure provisions." A "tax expenditure provision" is defined as any provision of the federal tax laws "which allows a special exclusion, exemption, or deduction in determining liability for any tax or which provides a special credit against any tax, a preferential rate of tax, or a deferral of tax liability."[169] The Joint Committee on Internal Revenue Taxation would develop a termination schedule for all tax expenditure provisions,

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164 *Id.* § 204(a).
165 *Id.* § 206(a).
166 31 U.S.C. § 1176 (1970).
167 S. 2, *supra* note 7, § 203(a).
Another provision contained in S. 2925, which would have amended § 201 of the Budget and Accounting Act of 1921, 31 U.S.C. § 11 (Supp. V 1975), to require the President to submit additional information pertaining to program objectives and achievements in his annual budget has unfortunately been deleted from S. 2.
168 S. 2, *supra* note 7, at §§ 303(a)-(b).
169 *Id.* § 401(a)(1).

which the 95th Congress would adopt.[170] The schedule is to provide for termination of each provision on December 31 of one of the five consecutive years after 1978.[171] The sunset reviews, to be conducted by the House Ways and Means Committee and the Senate Finance Committee, would "determine if the merits of the tax expenditure provision justify its continuation rather than termination, or its continuation at a level less than, equal to, or greater than the existing level."[172] Like Title I,[173] Title IV contains a basic enforcement mechanism which prevents enactment of any new tax expenditure provision without a termination date, and also prevents continuation of an existing provision absent completion of the sunset review.[174] These reviews, like their Title II counterparts,[175] are to be conducted in whatever scope and detail the committees find appropriate, and again, requirements for the contents of the review are minimal:

> an assessment of the degree to which the original objectives of the tax expenditure provision have been achieved (including a statement of the number and types of beneficiaries or persons served) expressed in terms of the performance, impact, or accomplishments of the provision and the problem it was intended to address, and an analysis of the costs of the provision.[176]

As in Title II, there are provisions requiring the Department of the Treasury, Comptroller General, and congressional support agencies to assist the committees in preparing the reviews.[177]

Finally, Title V is devoted to a number of miscellaneous provisions. Each federal agency must submit to Congress the same statements of requests for new budget authority and estimated outlays in a fiscal year that the agency submits to the President or the OMB.[178] Perhaps the most significant provision is the definition of the "extensive resolution," which

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170 *Id.* § 402.
171 *Id.*
172 *Id.* § 401(a)(4).
173 *See* text accompanying notes 152-54 *supra.*
174 S. 2, *supra* note 7, § 403.
175 *See* text accompanying notes 155-57 *supra.*
176 S. 2, *supra* note 7, § 401(a)(4).
177 *Id.* § 412.
178 *Id.* § 501(a).

under Title I may be used to defer for one fiscal yėar the operation of the sunset termination. The section empowers Congress to adopt a joint resolution to accomplish the deferral, and sets out various parliamentary rules, such as time deadlines, debate limits, and quorum requirements.[179]

Two significant features of S. 2925 not present in S. 2 are: (1) a requirement that the OMB study the feasibility of establishing a zero-base budgeting system for the Executive Branch in its annual budgeting process;[180] and (2) a provision which would have terminated the principal bill at the end of the first five-year review cycle. Thus, S. 2925 provided for its own sunset, in order to force a review of whether or not it had been effective.[181]

B. *S. 2: Significant Problems*

1. Lack of ZBB Provisions

It is important to recognize that neither S. 2 nor its predecessor originally required zero-base budgeting in the preparation of annual budgets. S. 2 has abandoned all references to the ZBB concept, and S. 2925 dodged the issue by requiring an OMB study of the matter. Thus, the bills provide no congressional response to the general problems of incremental budgeting.[182]

As discussed earlier,[183] zero-base budgeting would require careful implementation and time for adjustment. But if the zero-base review provisions of S. 2925 are restored to S. 2, the sunset review will be harmonized with the annual ZBB procedures President Carter will implement in 1979.[184] The continuity, experience, and expertise which would develop could then be readily transferred to the sunset evaluations. Employment of ZBB in the preparation of annual federal budgets, therefore, will not only be a welcome response to the budget

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179 *Id.* § 504.

180 S. 2925, *supra* note 6, § 601. This issue may have been mooted by President Carter's announcement that he will implement annual ZBB review. *See* note 2 *supra.*

181 S. 2925, *supra* note 6, § 606.

182 *See* text accompanying notes 85-91 *supra.*

183 *See* text accompanying notes 129-34 *supra.*

184 *See* note 2 *supra.*

control dilemma, but could also enhance the quality of the sunset review process.

President Carter, by taking the initiative in introducing ZBB to the federal government, has provided executive impetus to the budget reform movement. Executive-sponsored attempts to implement annual zero-based budgeting, without a congressional imprimatur, may face the same fate as PPB and MBO.[184a] Although there is much reason to question whether zero-base budgeting, relying on low-level management to develop decision packages and initial rankings, can actually help eliminate waste from the vast federal establishment, it is clear that the key to its ultimate success lies with the bureaucracy itself. The front-line public servants must accept ZBB and commit themselves to making it work. PPB and MBO were launched by executive edict, and were undone in large part by the administrators, who were unwilling to devote the time and energy necessary to make them work.[185] Zero-base budgeting, if accomplished by an Act of Congress after a full airing in legislative process, may receive a better reception from the managers who must carry it out. The text of S. 2925 provided a convenient location for the inclusion of a zero-base budgeting directive.[186] S. 2, in eschewing the zero-base terminology, presently contains no logical nexus for the convenient insertion of such language. It may be, therefore, that congressional action on zero-base budgeting might more easily be contained in separate legislation. Several bills have been introduced in the 95th Congress which would require use of ZBB in the congressional budgeting process.[187]

The Model Act makes no provision for the use of ZBB in the preparation of annual budgets. This is primarily because it is designed to serve only as a sunset bill, and as such, is not as

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184a *See* text accompanying notes 94-95 *supra*.

185 *See* notes 85, 94 & 95 *supra*. Numerous factors, of course, contributed to the downfall of the two concepts. Notable among these was objection to the considerable amounts of paperwork generated by each. *See Yesterday's Panacea, PBB Is Out; Today MBO Is In*, 5 NAT'L J. 788 (1973).

186 *See* note 167 *supra*.

187 Three different bills in the House of Representatives would require the use of zero-base budgeting in the congressional budgetary process by amending the Congressional Budget Act of 1974. H.R. 521, H.R. 612, & H.R. 978, 95th Cong., 1st Sess. (1977).

concerned with the incremental budgeting problem. But it is almost certain that implementation of annual ZBB would complement and enhance the use of ZBB in sunset review, if merely by unifying budget makers under a single system. In any event the ZBB/sunset combination, applied at first on a limited basis, seems desirable. The two processes "are complementary — not competitive — approaches; they can coexist as a comprehensive set of procedures for legislative and executive review of government programs and expenditures."[188]

2. The Scope of S. 2

S. 2, as a sunset proposal, has serious deficiencies. The worst of these is that S. 2 takes a comprehensive approach, imposing termination dates on almost all entities of the federal government. It tries to cover a plethora of programs and tax expenditure provisions rather than to attempt a trial run in a limited area. This reflects the Senate Government Operations Committee's position that selecting out certain programs or agencies for the initial trial runs would jeopardize "the principle of neutrality, thereby conceivably making the process politically unworkable."[189] In support of its all-inclusive approach, the committee examined the impact of a comprehensive sunset law on committee workloads and ordered the termination schedule in S. 2925 in a way designed to equalize the burden. The workload nonetheless remains heavy.[190] Although the termination schedule in S. 2 has been further refined, the workload under any comprehensive sunset scheme will be extensive. The Senate Labor and Public Welfare Committee examined its review responsibilities under S. 2925 and concluded that implementation of a sunset law applicable to programs in its jurisdiction would require the addition of 44 staff members within five years and an annual additional "consultative budget" of $50,000.[191]

188 *Hearings Before the Task Force on the Budget Process of the House Comm. on the Budget*, 94th Cong., 2d Sess. 51 (1976) (statement of Allen Schick).

189 REPORT ON S. 2925, *supra* note 92, at 15.

190 One improvement that would reduce the burden is to lengthen the review cycle to ten years rather than the present five. *See* Adams, *supra* note 138, at 529. This suggestion has been incorporated into the Model Act.

191 *Hearings on S. 2925 Before the Senate Comm. on Rules and Administration*, 94th

The conclusion of the Government Operations Committee notwithstanding, it is likely that the sunset concept could be unfairly discredited by taking on too much too soon and being swamped by the sheer size of the federal establishment.[192] The broad, across-the-board implementation of the PPB evaluation has been cited as a contributing factor in that program's downfall.[193] Evaluation is a difficult task, requiring substantial commitments of time, labor, and funding. To seek comprehensive evaluation through an all-encompassing sunset bill may be to burden the system prematurely.

Another drawback of the broad sweep of S. 2 is that it sets all budget authority on a five-year renewal schedule. This emanates from the Government Operations Committee's concern over the increase in use of permanent authorizations. A persuasive case can be made, however, on behalf of at least some permanent authorizations.[194] Furthermore, the termination of a great many federal programs is simply beyond the realm of possibility.[195] While improved oversight of such agencies may be desirable, it is unwise to subject them to the threat of sunset and thereby jeopardize the concept's workability in areas where it is more critically needed.

The Model Act is limited to the major federal regulatory agencies. This will allow an immediate study of an area under considerable criticism[196] and refinement of the review techniques in a limited context before their extension to wider areas of the federal bureaucracy. Given recent criticism of the quality of congressional oversight of the regulatory apparatus,[197] the

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Cong., 2d Sess. 37 (1976) (memorandum of Senate Committee on Labor and Public Welfare).

192 Adams, *supra* note 138, at 530.

193 Schick, *supra* note 94, at 148.

194 A number of the permanent provisions involve assuring individuals of a basic income or necessities. An example is Supplemental Security Income, which operates under a permanent authorization, 42 U.S.C. § 1381 (Supp. V 1975), and provides for the subsistence needs of aged, blind, and disabled persons. It seems unnecessary to subject impoverished, elderly, and handicapped persons to the threat of losing their benefit payments. *Hearings on S. 2925 Before the Senate Comm. on Rules and Administration*, *supra* note 191, at 50-53 (memorandum of the Senate Committee on Finance).

195 It is highly unlikely that, for example, the Tennessee Valley Authority, the Center for Disease Control, or air traffic controllers would be abolished. 34 CONG. Q. 3258 (1976).

196 *See* note 11 *supra*.

197 *See, e.g.*, N.Y. Times, Feb. 10, 1977, at 1, col. 5.

Model Act's focus seems particularly appropriate. In addition, the Model Act proposes the creation of special committees in the House and Senate to conduct the zero-base reviews. This is a short-term solution to the workload problem, but is designed to allow the development of a pool of expert staff which could then be distributed to the regular standing committees should a decision be made to extend the sunset provisions to other areas of the government.[198] Finally, the Model Act mitigates the committee workload obstacle by requiring that the detailed zero-base reviews be prepared by the Comptroller General. The committees would be free to devote more time to studying the report and holding public hearings.

3. The Review Process

The elimination of specific zero-base criteria contained in S. 2925 leaves S. 2 without significant guidelines for program reviews. The Title II requirements of S. 2925 were continually subjected to complaints that they were too burdensome and restrictive. The Rules Committee, for example, found the requirements too rigid and disruptive of existing committee timetables.[199]

If the congressional record of oversight activities were more impressive, these contentions might have merit. But, historically, congressional attempts at oversight have been sporadic, haphazard, and inadequate.[200] A major goal of sunset legislation is to assure that programs are thoroughly reviewed in order to allow an educated decision on whether the agencies should be abolished.[201] Permitting each congressional committee to set the applicable review standards can only perpetuate inadequate oversight. Detailed evaluation provisions should be

198 It will also mitigate the problem of oversight committee co-optation. *See* notes 29 & 30 *supra* and accompanying text.

199 SENATE COMM. ON RULES AND ADMIN., REPORT ON S. 2025, S. REP. No. 1263, 94th Cong., 2d Sess. 10-11 (1976).

200 "We in Congress have too often satisfied ourselves with the rhetoric of legislation, leaving the hard work of oversight — fundamental Congressional responsibility — to be carried on in a hit-or-miss fashion rather than with the steady diligence it deserves." 123 CONG. REC. S144 (daily ed. Jan. 10, 1977) (remarks of Sen. Muskie). *See generally* N.Y. Times, *supra* note 197.

201 *Hearings on S. 2925 Before the Senate Comm. on Rules and Administration*, *supra* note 191, at 53 (memorandum of Senate Committee on Finance).

added to S. 2 if it is to achieve its purposes. Clearly-delineated guidelines for review will not be an onerous burden, particularly if the scope of the Act is narrowed to review of regulatory agencies.[202] The Model Act retains the detailed zero-base review provisions of S. 2925.

4. Interest Group Influence

Whether sunset legislation can function effectively in the face of interest group activity is an open question. Professor Lowi has pointed out that much of the tangled array of federal agencies and programs is due to "interest-group liberalism" — the policy of seeking to satisfy all who make concerted demands and protect vested interests rather than restructuring and reallocating government resources to meet changing needs.[203] Early in the 95th Congress, attempts to reform the Senate committee system were turned back largely due to the lobbying activities of powerful organizations.[204] Many interest groups may view their role in the sunset process as maintenance-oriented. They will support the extension of agencies which treat them as a clientele. In a political system "uniquely designed for maintenance,"[205] sunset legislation is designed to improve the position of reformers because all the pitfalls of the legislative process will now militate against continuation of a program. If, however, interest group pressure is able to override a committee's finding on the floor of the legislature, or, more likely, influence the development of the committee finding itself, sunset could be sapped of its potential. The best antidote for interest group pressure may be to insure representation of the "public interest" in the review process by such groups as Common Cause or public interest law firms. Unfortunately, at present it seems that the only way to guarantee such input would be through a government agency devoted to

202 *See* text accompanying notes 189-95 *supra*.
203 T. Lowi, *supra* note 15, at 310.
204 S. Res. 4, 95th Cong., 1st Sess., 123 Cong. Rec. S8 (daily ed. Jan. 4, 1977) would have reorganized the standing committee system by reducing the number of committees from 31 to 15. This plan was vitiated by extensive lobbying, resulting in the reinstatement of 10 of the 16 committees originally proposed for abolition. 35 Cong. Q. 279 (1977); N.Y. Times, Feb. 5, 1977, at 1, col. 3.
205 T. Lowi, The Politics of Disorder 54 (1971).

representing the public interest in the sunset evaluation. This potential solution in itself has an obvious drawback: the agency might soon succumb to the same bureaucratic malaise which has infected many agencies of high purpose before, especially since the "public interest" is difficult to determine in many situations. Moreover, creation of another government agency is symptomatic of the type of thinking which has led to the need for a sunset law. In short, one may have to fall back upon a general faith in the legislative process, bolstered by the new leverage of reformers.

5. Agency Impact

Sunset legislation necessarily has implications for agencies which administer programs scheduled for evaluation. Agency independence could be threatened. An organization which aggressively pursues its duties invariably makes enemies. The legislative process is fraught with roadblocks and an agency or program could conceivably be eliminated in the legislative maze by an influential legislator. The fear of rankling a key legislator could well have a chilling effect on an agency's activity.[206]

Another drawback of sunset review is its potential impact upon agency morale. The periodic trauma of threatened program abolition, with its resultant loss of jobs, may dishearten agency personnel. Advocates of sunset, of course, argue that a periodic review will give agency employees, lulled into complacency by heretofore unchallenged job security, a much-needed jolt. But the periodic termination threat could result in unease, uncertainty, and distraction as the sunset deadline approaches, particularly if a renewal bill becomes mired in the legislative mill. This potentially adverse effect on agency *esprit de corps* should not be ignored.

6. Good Faith Review

Perhaps the most crucial question facing the sunset concept is whether legislators will carry out the reviews in good faith. The successful operation of sunset legislation depends upon candid,

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206 Licata, *Sunset Laws: Limited Lifespan for State Agencies?*, ILL. ISSUES, February 1977, at 22 (on file at the *Harvard Journal on Legislation*).

objective assessments of program performance. If legislators use the upcoming termination process to exert a chilling effect on potential regulatory decisions, the sunset system could do more harm than good. Similarly, the tradition of legislative "logrolling" — the practice of trading votes in a coalition-building process — could give rise to difficulties. Obviously, a series of votes on the continuation of government programs offers lawmakers numerous opportunities to "cut deals" and "swap votes" for the rescue of pet programs. Sunset laws contemplate evaluation of programs on the basis of their merits and are not intended to furnish a source of political chits. If legislators bargain away votes on continuation of programs, the concept will be undermined.[207]

One might also be concerned where scandal erupts in a program immediately before or during the review process. Years of good performance could conceivably be overshadowed by the adverse publicity of a scandal, which may be exaggerated for a brief period. Temporary public pressure might force the ill-advised termination of an entire program. This is a possibility which bears on the advisability of enacting a sunset law, though there is no apparent way to fashion a legislative remedy.

IV. Conclusions

The difficulties involved in zero-base budgeting and sunset laws are not insubstantial, but neither are the problems they seek to solve. Uncontrollable spending, a mushrooming federal establishment, and declining public support for government are complex and knotty matters. It is unlikely that any remedy will be without faults or latent shortcomings. Sunset laws periodically force the legislative branch to examine what it has created; whether this will produce constructive results is debatable. Similarly, zero-base budgeting is a method of requiring administrators to identify the waste in their operations; whether waste will be eliminated is uncertain. It may well be that the federal government has become too big to be effectively harnessed. The gravity of the problem, however, urges

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207 *Id.*

innovation,[208] and both concepts have numerous benefits. If merged so that the strengths of each concept complement the other, meaningful reform seems possible.

The Model Act adopts a three-part approach: (1) Title I establishes new committees of the House and Senate to conduct the intensive review of government agencies contemplated by Title III; (2) Title II establishes a format for the repeal of provisions of law which create certain independent regulatory agencies; and (3) Title III outlines the process by which agencies may be continued in existence, with a periodic in-depth zero-base review.

This Act was drafted with sensitivity to the possibility of its later extension to additional areas of the federal government. In its present form, it is intended to operate as a "pilot test" for the sunset concept. It must be remembered that there is to date a paucity of experience with sunset laws. To attempt too much too soon could result in the failure of the sunset concept. It must be given an opportunity for testing and experimentation: sunset should be phased in slowly or it is likely to depart quickly. This Model Act provides a solid foundation upon which a comprehensive sunset program can be built — after Congress has had an opportunity to study and refine the process.[209]

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208 Launching the "Hundred Days" of legislation to pull America out of the Depression, President Franklin D. Roosevelt implored his New Dealers: "Take a method and try it. If it fails, try another. But above all, try something." W. MANCHESTER, THE GLORY AND THE DREAM 80 (1973).

209 As this Note was going to press, a new bill, the Regulatory Reform Act of 1977, S. 600, 95th Cong., 1st Sess. (1977), was introduced by Senators Percy, Byrd, and Ribicoff. It adopts some features of the Model Act, including a limited scope emphasizing the independent regulatory agencies. S. 600 also wisely lengthens the review period to an eight-year cycle, but perhaps goes too far in that direction by providing for a ten-year hiatus between each review cycle. The bill also provides detailed review criteria, though it relies upon existing standing committees rather than create a new review committee as suggested in the Model Act. Nor does S. 600 utilize the zero-base review concept. In other respects, S. 600 meets many of the criticisms raised about S. 2 by this Article.

STATUTE

A MODEL FEDERAL SUNSET ACT*

HARVARD LEGISLATIVE RESEARCH BUREAU

An Act

To require periodic zero-base review of certain independent federal regulatory agencies, and to establish criteria and techniques for the conduct of such evaluations.

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*The Model Act was drafted for the Senate Committee on Government Operations by four members of the Harvard Legislative Research Bureau: Anthony R. Licata, Project Director, of the Class of 1979; Tad M. Kramarczyk, of the Class of 1977; Mark A. Pridgeon, of the Class of 1978; and Charles E. Cheatham, of the Class of 1979, all at Harvard Law School.

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I. SHORT TITLE AND DEFINITIONS

Section 101 *Short Title*

This Act may be cited as the Federal Sunset Act of 1977.

Section 102 *Definitions*

For purposes of this Act—

(1) The term "Committee" means the Senate Committee on Regu-

latory Review or the House Committee on Regulatory Review, as the case may be.

(2) The term "Attorney General" means the Attorney General of the United States.

(3) The term "Comptroller General" means the Comptroller General of the United States.

(4) The term "independent regulatory agency" refers to a regulatory agency identified in Title III of this Act.

II. ESTABLISHMENT OF HOUSE AND SENATE REGULATORY REVIEW COMMITTEES

Section 201 *Regulatory Review Committee of the House of Representatives*

(a) Clause 1 of Rule X of the Rules of the House of Representatives is amended by redesignating paragraphs (q) through (v) as paragraphs (r) through (w), respectively, and by inserting after paragraph (p) the following new paragraph:

"(q)(1) Committee on Regulatory Review, to consist of 23 Members as follows:

"(A) five Members who are members of the Committee on the Budget;

"(B) five Members who are members of the Committee on Government Operations;

"(C) eleven Members who are members of other standing committees;

"(D) one Member from the leadership of the majority party; and

"(E) one Member from the leadership of the minority party.

"(2) No Member shall serve as a member of the Committee on Regulatory Review during more than two Congresses in any period of five successive Congresses beginning after 1978 (disregarding for this purpose any service performed as a member of such committee for less than one half of a full session in any Congress). All selections of Members to serve on the Committee shall be made without regard to seniority."

"(3) The Committee shall have the duty —

"(A) To make all studies and reports required to be made by Title IV of the Federal Sunset Act of 1977;

"(B) To make continuing studies of the effectiveness of

independent regulatory agencies and make recommendations concerning the improvement thereof;

"(C) To review and make recommendations concerning proposed legislation affecting independent regulatory agencies; and

"(D) To review and make recommendations concerning the effectiveness of the Federal Sunset Act of 1977, including any proposals to continue the effective period of that Act."

Section 202 *Regulatory Review Committee of the Senate*

(a) Paragraph 1 of rule XXV of the Standing Rules of the Senate is amended by adding at the end thereof the following new subparagraph:

"(s) (1) Committee on Regulatory Review, to which committee shall be referred all matters relating to the Federal Sunset Act of 1977.

"(2) Such Committee shall have the duty —

"(A) To make all studies and reports required to be made by the Federal Sunset Act of 1977;

"(B) To make continuing studies of the effectiveness of independent regulatory agencies and make recommendations concerning the improvement thereof;

"(C) To review and make recommendations concerning proposed legislation affecting independent regulatory agencies; and

"(D) To review and make recommendations concerning the effectiveness of the Federal Sunset Act of 1977, including any proposals to continue the effective period of that Act."

(b) The table contained in paragraph 2 of rule XXV of the Standing Rules of the Senate is amended by inserting after —

"Public Works .... 16."

the following:

"Regulatory Review .... 15."

(c) Paragraph 6(h) of rule XXV of the Standing Rules of the Senate is amended by inserting immediately after the word "Budget" the following:

",or the Committee on Regulatory Review,"

(d) Each meeting of the Committee on Regulatory Review of the Senate or any subcommittee thereof, including meetings to conduct hearings, shall be open to the public, except that a portion or portions of any such meeting may be closed to the public if the Committee or subcommittee, as the case may be, determines by

record vote of a majority of the members of the Committee or subcommittee present that the matters to be discussed or the testimony to be taken at such portion or portions —

(1) will disclose matters necessary to be kept secret in the interests of national defense or the confidential conduct of the foreign relations of the United States;

(2) will relate solely to matters of Committee staff personnel or internal staff management or procedure;

(3) will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise to expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual;

(4) will disclose the identity of any informer or law enforcement agent or will disclose any information relating to the investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement; or

(5) will disclose information relating to the trade secrets or financial or commercial information pertaining specifically to a given person if —

(A) an Act of Congress requires the information to be kept confidential by Government officers and employees; or

(B) the information has been obtained by the Government on a confidential basis, other than through an application by such person for a specific Government financial or other benefit, and is required to be kept secret in order to prevent undue injury to the competitive position of such person.

(e) Paragraph 7(b) of rule XXV of the Standing Rules of the Senate and section 133A(b) of the Legislative Reorganization Act of 1946 shall not apply to the Committee on Regulatory Review of the Senate.

COMMENT: Title II of the Federal Sunset Act of 1977 is closely patterned after Title I of the Congressional Budget Act of 1974,[1] which created the House and Senate Budget Committees. Specific technical provisions — such as designation of committee members and provision for open meetings — are not parallel because they are being incorporated into the already-existing structure of the rules for each body.

The establishment of a new committee in each house for the

1 Pub. L. No. 93-344, §§ 101-102, 88 Stat. 297 (1974).

purpose of conducting the Title IV oversight may be justified in a number of ways. First, new committees concerned solely with periodic reviews of terminated agencies would alleviate the workload problem which was the basis of considerable criticism of S. 2925. Second, the model bill would provide an integrated approach to the entire sunset system. Uniform review methods could be developed, standardized forms employed, and comprehensive procedures adopted. Third, the separate committees would allow development of an expert staff which could provide a pool of talent upon which other committees could draw if and when the sunset concept is expanded to other areas of the federal government.[2] Fourth, the consolidation of review in a single committee in each house would greatly facilitate the intensive study which must be given to the actual operation of sunset prior to its extension to other areas.[3]

In addition, it should be noted that the Model Act is the first step in a phased approach: if sunset is found to be successful in this limited context, it can be expanded to other areas of the government. Such an expansion would necessitate a shift to the "normal legislative jurisdiction" approach for review because a comprehensive sunset program would be too extensive for any one committee to carry out.[4]

III. REPEAL DATES

Section 301 *Repeal Dates for the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Maritime Commission*

The following provisions of law are hereby repealed, effective September 30, 1979:

(1) Section 11 of the Act of February 4, 1887 (24 Stat. 383, the Interstate Commerce Act of 1887), as amended.

(2) Section 201 of the Act of August 23, 1958 (72 Stat. 741, the Federal Aviation Act of 1958), as amended.

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2 *See* Note, *Zero-Base Sunset Review,* 14 HARV. J. LEGIS. 505, 537 (1977).
3 *Id.*
4 *Id.* at 536.

(3) Section 101 of the Reorganization Plan Numbered 7 (75 Stat. 840).

Section 302 *Repeal Dates for the Federal Power Commission, the Federal Trade Commission, and the Federal Communications Commission*

The following provisions of law are hereby repealed, effective September 30, 1981:

(1) Section 1 of the Act of June 10, 1920 (41 Stat. 1063, the Federal Water Power Act of 1920), as amended.

(2) Section 1 of the Act of September 26, 1914 (38 Stat. 717, the Federal Trade Act of 1914), as amended.

(3) Section 1 of the Act of June 19, 1934 (48 Stat. 1064, the Federal Communications Act of 1934), as amended.

Section 303 *Repeal Dates for the Securities and Exchange Commission, the Commodities Futures Trading Commission, the National Labor Relations Board, and the Equal Employment Opportunity Commission*

The following provisions of law are hereby repealed, effective September 30, 1983:

(1) Section 4 of the Act of June 6, 1934 (48 Stat. 885, the Securities Exchange Act of 1934), as amended.

(2) Section 101 of the Act of October 23, 1974 (88 Stat. 1389, the Commodities Exchange Act of 1974).

(3) Section 3 of the Act of July 5, 1935 (49 Stat. 451, the National Labor Relations Act of 1935), as amended.

(4) Section 705 of the Act of July 2, 1964 (78 Stat. 258, the Civil Rights Act of 1964), as amended.

Section 304 *Repeal Dates for the United States International Trade Association, the Farm Credit Board, and the Consumer Product Safety Commission*

The following provisions of law are hereby repealed, effective September 30, 1985:

(1) Section 330 of the Act of June 17, 1930 (46 Stat. 696, the Tariff Act of 1930).

(2) Sections 5.7 and 5.8 of the Act of December 10, 1971 (85 Stat. 617, the Farm Credit Act of 1971), as amended.

(3) Section 4 of the Act of October 27, 1972 (86 Stat. 1210, the Consumer Product Safety Act of 1972).

Section 305 *Repeal Date for this Act*

This Act shall cease to be effective on September 30, 1987.

COMMENT: Title II specifies the scope of the sunset proposal. It limits the operation of sunset to the independent regulatory agencies. Included in this category are commissions and boards of the federal government whose members serve for specified terms, and not at the discretion of the President. These agencies regulate significant portions of the national economy, require special expertise in carrying out their functions, and frequently possess adjudicatory powers. It is this Title which, when combined with Title II, establishes the "pilot test" of sunset legislation on the federal level.

Initial application to nearly all of the independent regulatory agencies was chosen with several goals in mind:

(1) The area of the federal government to which the initial sunset experiment is applied should be a field already in need of review and reform.[5]

(2) The subject matter of sunset review should be reasonably conducive to predetermined analytic techniques. Any inquiry regarding the efficacy of the regulatory apparatus would almost certainly have to use criteria and data analyses similar to those required by Section 303. Furthermore, because the chosen regulatory agencies have a substantial impact on a great many private businesses as well as on the general public, substantial input will be generated during the public hearings phase of the review process. Application of sunset to less visible areas of the government could result in a lack of public input.

(3) Ideally, an entire field should be subject to the review in order to maintain the objective neutrality inherent in the concept and to avoid charges of "singling out" targets for extinc-

5 *Id.* at 507 n.9.

tion. A compromise, however, is necessary since some independent regulatory agencies are unsuited for immediate sunset review. Most notably, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board were excluded. Since they are essential to the national economy and banking structure, these agencies should not be subjected to sunset review until more is known about the efficacy and problems of the review process. This is consistent with the "pilot" approach of this sunset proposal. Other independent regulatory agencies were also excluded for similar reasons and to make the number of agencies to be reviewed manageable.

(4) Once chosen, the agencies should be divided into reasonably homogeneous components, in order to facilitate review in any given year and to enable consolidation and elimination of overlap where appropriate. Title IV relies primarily on two factors for organizing the agency termination dates: (a) functions of the agencies, and (b) relative age of the agencies. Thus, functionally related agencies will be reviewed at the same time, and newer agencies which presumably are less in need of reorganization, will be undisturbed for a few years. Section 401, governing the first stage of the review cycle, requires review of transportation-related regulation: the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Maritime Commission. Section 302 deals with several relatively old agencies: the Federal Power Commission, the Federal Trade Commission, and the Federal Communications Commission. Section 303 affects agencies which regulate the exchange of stocks, commodities futures, and employment activities: the Securities and Exchange Commission, the Commodities Futures Trading Commission, the National Labor Relations Board, and the Equal Employment Opportunity Commission. Section 304, governing the last stage of the review cycle, provides for the repeal of the three agencies too newly constituted for adequate performance review at earlier stages: the U.S. International Trade Association, the Farm Credit Board, and the Consumer Product Safety Commission.

Title III follows the pattern of existing sunset legislation in Colorado and elsewhere, explicitly defining the scope of the

sunset provisions by listing the agencies, boards, and commissions to be affected.[6] The provisions of law affected by Title III are those which *create* regulatory agencies, rather than those which provide budget authority for them. S. 2925[7] and S. 2[8] presumably adopted the budget authority approach to agency and program termination because they were comprehensive bills.[9]

Finally, Section 305 provides for a sunset of the sunset bill.[10] This is in order to force an evaluation of the concept's success and the desirability of its continuation and expansion.

IV. METHOD OF REVIEW

Section 401 *Timetable for the Sunset Review*

The timetable for zero-base review of an agency the repeal date for which is September 30 of a year is as follows:
On or before —

May 1 of the preceding year	**Committees adopt plan for zero-base review of the agency, report the plan to their respective Houses, and transmit copies to the agency, and the Comptroller General.**
October 1 of the preceding year	**Comptroller General furnishes results of prior audits and the zero-base review of the agency to the Committees.**
December 1 of the preceding year	**Agency submits its own zero-base review to the Committees.**
May 15 of the year	**Committees report results of zero-base review and hearings, together with any proposed legislation to continue the existence of the agency.**

6 *Id.* at 512 n.42.
7 94th Cong., 2d Sess., 122 CONG. REC. S1044 (daily ed. Feb. 3, 1976).
8 95th Cong., 1st Sess., 123 CONG. REC. S144 (daily ed. Jan. 10, 1977).
9 *See* Note, *supra* note 2, at 526-33.
10 This section is based upon S. 2925, *supra* note 7, § 606.

Section 402 ***Review Procedures for the Regulatory Review Committees***

(a) On or before May 1 of the year preceding the year in which occurs the repeal date of an agency, the committees of the Senate and House of Representatives shall adopt, and report to their respective Houses, a plan for a zero-base review of such agency. The plan for a zero-base review shall include —

(1) the priority which should be given to the zero-base review of such agency, taking into consideration the other agencies for which dates occur in the same year;

(2) the criteria and standards to be applied in the zero-base review of such programs;

(3) the extent to which the elements specified in Section 403 shall apply in the zero-base review of such agency;

(4) the information, analyses, and reports, if any, to be requested pursuant to Section 407 from the Congressional Research Service, Office of Technology Assessment, and the Congressional Budget Office to assist the committee in the zero-base review of such program; and

(5) the scope and detail of the report to be submitted under Section 405 by the agency scheduled to be abolished. The committee may modify its plan for the zero-base review of an agency, and report such modification to its House.

(b) The committee shall transmit a copy of the plan for the zero-base review of an agency adopted by it under subsection (a) to the agency and to the Comptroller General on the same day which such plan is submitted to its House.

(c) The committee may consolidate the zero-base review plans of two or more agencies scheduled to be repealed in any year into a single report, provided that such report clearly specifies for each agency the matters required under subsection (a).

COMMENT: Title IV of the model legislation is closely patterned after Title II of S. 2925,[11] and virtually adopts verbatim its review process. However, there are some significant changes which deserve special consideration. The model bill eliminates the provision in S. 2925 requiring a mandatory adoption date for a tentative review plan by the committees, in favor of extending from April 1 to May 1 the date for final adoption of the

11 *See* note 7 *supra*.

review plan. This is to allow more time for receipt of input from various sources and more careful consideration of the zero-base review plan's elements. If properly developed, the review plan can help determine the ultimate success of the performance review itself. Sufficient time should be allowed, therefore, for the committee staffs to prepare the document carefully.

Section 403 *Criteria for Sunset Review*

Each zero-base review of an agency performed pursuant to Section 404 and Section 405 of this Act, shall, to the extent provided in the plan adopted (or as modified) pursuant to Section 402(a), include, but not be limited to —

(1) an identification of the objectives intended for the agency and the problem or need which the agency was intended to address;

(2) an assessment of the degree to which the original objectives of the agency have been achieved, expressed in terms of the performance, impact, or accomplishments of the agency. Such assessment shall employ procedures or methods of analysis which the committee determines to be appropriate to the type or character of agency functions;

(3) a statement of the performance and accomplishments of the agency in each of the last four completed fiscal years and of the budgetary costs incurred in the operation of the agency;

(4) a statement of the number and types of beneficiaries or persons served by the agency;

(5) a summary statement, for each of the last three fiscal years, of the number, by grade, and cost of personnel employed by the agency, and a summary statement of the cost of personnel employed under contract in carrying out the agency's functions;

(6) an assessment of the effect of the agency's regulatory practices on the national economy, including but not limited to the effects on competition, economic stability, employment, productivity, and price inflation including costs to consumers and businesses;

(7) an assessment of the degree to which the overall policies of the agency, as expressed by its rules, regulations, orders, standards, criteria, and decisions, meet the objectives of the Congress in establishing the program;

(8) an evaluation of the reporting and record keeping requirements of and activities of the agency, including the management and control of information and records and the value of the

information gathered compared to the costs to respondents, and an assessment of methods to reduce and simplify the reporting and recordkeeping requirements and to provide the sharing of information among departments and agencies and with State and local governments and the private sector;

(9) an analysis of the services and performance estimated to be achieved if the program were continued. Such analysis shall include, but not be limited to, the following cost levels—

(A) The priority level of activity or performance which shall be the level of activity (i) below which it is not feasible to carry on the agency's functions effectively, or (ii) 75 percent of the current budget authority, whichever is lower.

(B) If appropriate, an incremental service and performance level which can be provided at a cost between the priority level and the current level of budget authority.

(C) If appropriate, an incremental service and performance level above the level considered under subparagraph (B).

The information provided for each incremental cost level shall include (i) a projection of the services and performance that would be provided, (ii) a ranking of service priorities, (iii) an estimate of the personnel requirements, including services to be performed under contract, and (iv) a statement of the impact on the national economy; and

(10) an assessment of the degree to which the agency has promoted public participation in its decision-making processes.

COMMENT: In this section, a tenth element, requiring consideration of the degree to which the agency has promoted public participation in its decision-making process, has been added to the list contained in S. 2925 of factors to be considered in the zero-base review. This element will have a desirable impact, in that it should prompt the regulatory agencies to begin more active solicitation of public input in order to satisfy the requirement. It should be noted that Section 403 allows considerable flexibility in the nature of the zero-base review, since Section 402 requires the plan to state the *extent* to which the Section 403 factors must be met. The review plan may, if the committees so determine, virtually eliminate Section 403 factors deemed inapplicable to a particular agency.

Section 404 ***Amendment to the Legislative Reorganization Act of 1970***

(a) Section 204 of the Act of October 26, 1970 (84 Stat. 1168, The Legislative Reorganization Act of 1970, as amended) is hereby amended by adding at the end thereof the following:

"(f) The Comptroller General shall prepare and submit to Congress the zero-base reports required by Section 404(b) of the Federal Sunset Act of 1977."

(b) On or before October 1 of the year preceding the year in which occurs the repeal date for an agency, the Comptroller General shall complete a zero-base review of the agency prepared in accordance with the plan adopted pursuant to Section 402, and shall transmit such report to the Committee, together with the results of prior audits and reviews of such agency.

COMMENT: Perhaps the most significant variance between the Model Act and S. 2925 is that Section 404 requires that the Comptroller General prepare and submit the zero-base reviews to Congress. Section 404(a) amends the legislation defining the Comptroller General's duties to conduct review and evaluation of government programs,[12] thus giving him the statutory authority to prepare the performance reviews. Section 404(b) requires that the performance review by completed by October 1 of the year preceding the repeal date. Preparation of the performance reviews by the Comptroller General is desirable for three reasons: (a) it will permit the coordination of routine audits and other reviews of the agency with the periodic zero-base review; (b) the Comptroller General's staff will be able to develop expertise in the preparation of the reviews, which will be necessary for potential expansion of sunset to other areas of the government; and (c) the committee staff will be required only to study the results of the Comptroller General's work and to conduct public hearings, rather than having to prepare the review itself. The latter requirement is desirable because the committee's evaluation should be conducted independently of the in-depth contacts likely to result from preparation of the zero-base review. By removing the duty of preparing the review

12 31 U.S.C. § 1154 (Supp. V 1975).

from the committee staff, the Model Act enables the staff to maintain a neutral but critical perspective not only on the agency, but also on the quality of the review report.

Section 405 ***Assistance of Other Agencies and Departments of the Government***

(a) On or before December 1 of the year preceding the year in which occurs the repeal dates of an agency, the agency shall submit to the committee its own zero-base review and analysis. The review shall be in accord with the review plan adopted by the committee for such agency pursuant to Section 402 and may be submitted to the committee after December 1 if a later date is specified in its zero-base review plan.

(b) To assist in the review process, the agency, and any other agency or department of the Government, shall provide the committee with such information and assistance as may be requested pursuant to its review plan for such agency.

Section 406 ***Committee Reports, Recommendations, and Public Hearings***

(a) On or before May 15 of the year in which occurs the repeal date of an agency, the committee shall complete a study and analysis of the zero-base review plans submitted to it pursuant to Sections 404 and 405 of this Act, and shall submit a report of its findings, together with its recommendations and any proposed legislation for the continuance of such agency, to its House. The committee may submit the results of the reviews of two or more related agencies in a single report.

(b) The committee, in making its study, shall conduct public hearings concerning the agency at which members of the public, representatives of industries regulated by the agency, and representatives of the agency itself, shall be permitted to testify and present evidence.

COMMENT: This section adds a specific requirement that public hearings be held as part of the committee's review process, with a guaranteed opportunity for members of the public to be

heard. No such express provision is contained in S. 2925 or S. 2. This provision will encourage public input into the committee review process.

Section 407 *Assistance of the Congressional Budget Office, the Office of Technology Assessment, and the Congressional Research Service*

(a) Consistent with the discharge by the Congressional Budget Office of its duties and functions under the Congressional Budget Act of 1974, the Director of the Congressional Budget Office, at the request of the committee pursuant to its zero-base review plan for the agency, shall furnish to the committee information and analyses to assist it in carrying out its duties under this title.

(b) Consistent with the discharge by the Office of Technology Assessment of its duties and functions under the Technology Assessment Act of 1972, the Director of the Office of Technology Assessment, at the request of the committee pursuant to its zero-base review plans for an agency, shall furnish to the committee information, analyses, and reports to assist it in carrying out its duties under this title.

(c) At the request of the committee pursuant to its zero-base review plan for an agency, the Director of the Congressional Research Service shall furnish to the committee information, analyses, and reports to assist it in carrying out its duties under this title.

Section 408 *Enforcement Mechanism*

(a) Any bill to continue the existence of any agency which is abolished under this Act shall contain a provision establishing a termination date for such agency not more than four years from the effective date of its continuation.

(b) It shall not be in order in either the House of Representatives or the Senate to consider any bill or resolution, or amendment thereto, which continues the existence of any agency which is abolished under this Act, unless the report required by Section 406(a) has been submitted to the House of Representatives or the Senate, as the case may be.

COMMENT: This section embodies the enforcement mechanism

of the sunset model. Subsection (a), by prohibiting any extension of an abolished agency for more than four years, creates the periodic review function. Subsection (b) prohibits consideration of any extension legislation unless a zero-base review has been completed. Without these provisions, it would be possible to defeat the sunset purpose by either passing extension legislation for an indefinite period or ignoring the review process.

Section 409 *Preservation of Claims and Rights*

Nothing in this Act shall be construed to cause the dismissal of any claim or right of any person against any agency abolished under this Act, or any claim or right of such agency against any person, which is subject to litigation. Such claims and rights, and the obligation of defending against such claims and exercising such rights, shall be assumed by the Attorney General whenever an agency is abolished.

COMMENT: This section insures that any claims of a repealed agency subject to litigation are preserved. The section is based on similar provisions which have been included in state sunset legislation. It seems desirable to include such a provision in the legislation in order to preclude any possible questions on the subject.

STATUTORY COMMENT

THE FAIR CREDIT BILLING ACT AND TWO-TIER PRICING

JAMES E. ROUEN*

In rapidly growing numbers, consumers are using credit cards to pay for their retail purchases. Mr. Rouen argues that the structure of retail pricing forces cash customers to subsidize the cost of credit card operations. The Fair Credit Billing Act of 1974 attempted to eliminate this inequity by promoting two-tier pricing for cash and credit purchasers. Amendments to the Act in 1976, however, hindered two-tier pricing by prohibiting surcharges for credit purchasers. Mr. Rouen advocates an elimination of the ban on surcharges and a refocusing of the law to carry out the original legislative intent: placing the cost of credit card transactions on the consumers who benefit from them.

The ever-growing use of credit cards has raised new issues in the economics of retail pricing. Among these is the issue of who should bear the cost of the credit card billing apparatus. The Fair Credit Billing Act of 1974[1] and its 1976 Amendments[2] deal with this issue by attempting to promote differential pricing for cash and credit retail purchases. This Comment will analyze the economic aspects of credit card retail purchases, the potential effect of differential pricing, and the impact of the Fair Credit Billing Act and its Amendments. The Comment will then suggest approaches to statutory revision.

I. THE ECONOMICS OF THE CREDIT CARD TRANSACTION

The Fair Credit Billing Act deals with three-party credit card transactions.[3] These are sales in which the seller is a person

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1 Fair Credit Billing Act, § 167, 15 U.S.C. § 1666f (Supp. V 1975) (amended 1976).

2 Fair Credit Billing Act Amendments of 1976, Pub. L. No. 94-222, § 3(a), (c)(1), (d), 90 Stat. 197.

3 *See* Fair Credit Billing Act, § 167, 15 U.S.C. § 1666f (Supp. V 1975) (amended 1976).

other than the card issuer,[4] as opposed to in-house credit sales in which the seller himself extends credit. A three-party transaction involves an issuer, a merchant, and a customer of the merchant.[5] The contract between issuer and merchant invariably includes an individually negotiated[6] "merchant discount," which provides that the merchant's sales slips will be redeemed by the issuer at less than face value. The merchant discounts generally range from two to four percent,[7] although they may be higher.[8] Thus the credit card issuer, after billing the customer for the full retail price, remits less than full retail price to the merchant. This difference provides revenue for the card issuer and imposes a cost on the merchant for each credit sale he makes.[9]

The three-party credit card transaction raises two fundamental economic questions. First, does the present system of retail credit sales equitably distribute the costs of the credit card billing apparatus?[10] Second, does the credit system promote overall economic efficiency?

The costs of the credit card system appear at first glance to fall upon the merchant, since he receives less than the full retail

4 *Id.*

5 In the case of bank-issued cards there may also be one or more correspondent banks with which the merchant deposits his sales slips or at which the purchaser banks.

6 Conversation with Michael Maw, General Counsel; Interbank Card Association (Feb. 1, 1977).

7 In 1972, merchant discounts averaged slightly under three percent. *Inaccurate and Unfair Billing Practices: Hearings on S. 1630 and S. 914 Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing, and Urban Affairs*, 93d Cong., 1st Sess. 215 (1973) [hereinafter cited as *Hearings on S. 1630 and S. 914*] (statement of D. W. Hock). In 1974 and 1975, merchant discounts averaged 2.85 percent. *FCBA Two-tier Pricing and Procedures for Federal Reserve Board Regulation Writing: Hearings Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 93 (1975) [hereinafter cited as *Hearings on FCBA Two-tier Pricing*] (statement of Glenn Hodges).

8 The merchant discount is higher especially for "travel and entertainment" cards, such as the American Express Card, which are often used for business convenience and which the corporate customer pays off without finance charges. The highest merchant discount charged by American Expresss is five percent. THE AMERICAN EXPRESS, March 1977, at 1(newsletter for cardmembers).

9 As early as 1970, Congress heard testimony on the economic effects of three-party credit card transactions on small businessmen. *See The Impact of Credit Cards on Small Businesses: Hearings Pursuant to H. Res. 66 Before the Subcomm. on Special Small Business Problems of the House Select Comm. on Small Business*, 91st Cong., 2d Sess. 108 (1970).

10 *See Fair Credit Billing: Hearings on S. 652 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 1st Sess. 263 (1971) [hereinafter cited as *Hearings on S. 652*] (statement of Fairfax Leary, Jr.); *id.* at 286 (statement of John A. Spanogle).

price from the card issuer.[11] In order to receive the same rate of return he earned before contracting with the credit card issuer, the merchant may have to raise his prices to compensate for the merchant discount on credit purchases.[12] The merchant might be inclined to raise prices only for credit customers. However, the credit card issuers, prior to 1974, precluded that option by including prohibitions of two-tier pricing in their form contracts with merchants.[13] Under such form contracts, the merchant is compelled to raise his prices equally for all customers. The cost of the credit system is passed on not only to the credit customers who benefit from the system, but also to the cash customers who benefit not at all.[14]

Proponents of the present credit card billing system have argued that credit cards offer certain economies to merchants, which offset the merchant discount and thus eliminate the added cost burden that might be passed on to cash customers.[15] They point to the reduced costs of protecting cash and reduced dangers of theft and embezzlement,[16] the avoidance of bad checks,[17] the elimination of often unprofitable in-house credit plans,[18] and increased sales volume yielding lower unit costs.[19]

Many of these claims are of dubious validity. Expenditures

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11 *See* Consumers Union, How to Compile a Consumers' Directory of Merchants Offering Discounts for Cash 1-5 (1975); *see generally* Gibson, A Study of the Strategy and Operational Significance of the Credit Card for Commercial Banks 106-108 (1967) (unpublished doctoral thesis in Baker Library, Harvard Business School).

12 *See* Consumers Union, *supra* note 11, at 3, 5.

13 *See* Note, *Consumer Protection: The Fair Credit Billing Act*, 28 OKLA. L. REV. 586, 595 n.45 (1975); *cf.* Note, *Price Fixing and Tying Arrangements Between Credit Card Issuers and Retailers*, 28 WASH. & LEE L. REV. 371 (1971) (discussing the antitrust implications of contractual prohibitions of two-tier pricing).

14 *See* Consumers Union, *supra* note 11, at 4-5.

15 *See The Fair Credit Billing Act Amendments of 1975: Hearings on H.R. 10209 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Housing*, 94th Cong., 1st Sess. 81-82 (1975) [hereinafter cited as *Hearings on H.R. 10209*] (statement of Kenneth V. Larkin).

16 *See Hearings on S. 1630 and S. 914*, *supra* note 7, at 251 (written statement of American Bankers Association); *Hearings on S. 652*, *supra* note 10, at 361 (written statement of American Bankers Association); *Hearings on FCBA Two-tier Pricing*, *supra* note 7, at 58 (statement of Glenn Hodges).

17 *See Hearings on H.R. 10209*, *supra* note 15, at 81 (statement of Kenneth V. Larkin); *Hearings on FCBA Two-tier Pricing*, *supra* note 7, at 80, 81 (statements of Glenn Hodges and Matthew Hale).

18 *See Hearings on H.R. 10209*, *supra* note 15, at 76 (statement of Kenneth V. Larkin).

19 *See Hearings on H.R. 10209*, *supra* note 15, at 89 (statement of Maurice Segall); *Hearings on FCBA Two-tier Pricing*, *supra* note 7, at 172 (statement of Maurice Segall); Bonk, *Bank Credit Cards: Addition or Erosion?*, STORES, November 1975, at 5.

for cash registers would not necessarily decline with decreased cash sales; a store would still need one register per sales desk. While sales volume may rise in the short run for a particular merchant who begins to honor credit cards, there are other less obvious effects that offset these benefits. First, there are immediate effects on other retailers, who lose sales to the merchant selling on credit. One merchant's increased sales and lower unit costs are matched by others' decreased sales and higher unit costs.[20] Second, in the longer term, as more merchants accept credit cards, credit becomes a less important factor in a buyer's preference for one merchant over another.

Studies of in-house credit systems show that they rarely post net losses equal to the merchant discounts.[21] Large department stores and retailing chains generally refuse to accept third-party cards. As of August 1976, only 14 stores toward the bottom end of the list of the 100 largest department stores accepted Mastercharge.[22] For large stores, at least, the card issuers' promise of cost savings[23] does not appear to be convincing. Costs of in-house credit vary widely for smaller stores.[24] However, unlike large department stores, they often lack the market power to refuse to accept credit cards when their competitors offer them as a major competitive advantage. For many stores, then, it seems likely that accepting credit cards follows from competitive pressures to attract new customers, rather than from any cost savings over in-house credit.[25]

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20 Credit cards could conceivably increase the total amount of consumer buying. *But see* note 29 *infra*.

21 For example, figures for the J.C. Penney chain show a net loss for its in-house credit system of $8.4 million in 1976, or 0.4 percent of the value of its credit sales. *Hearings on S. 1630 and S. 914*, *supra* note 7, at 97 (statement of Kenneth Axelson). It is unclear whether smaller retailers would tend to experience higher or lower costs for in-house credit. A 1971 study by the accounting firm of Touche, Ross & Co. analyzed the in-house credit systems of eight Arizona retailers, which together accounted for 90 percent of that state's two-party revolving credit sales. Some showed net profits and others net losses on credit operations, with the weighted average a net loss of 2.3 percent of credit sales. *Id.* at 105, 117 (written materials submitted by Touche, Ross & Co.). During approximately the same period, three-party credit card issuers charged merchant discounts averaging "slightly under 3%" nationwide. *Id.* at 215 (statement of D. W. Hock).

22 *Department Stores Begin Adopting Bank Cards*, BANKING, August 1976, at 62.

23 *See Hearings on H.R. 10209*, *supra* note 15, at 89 (statement of Maurice Segall).

24 *See Hearings on S. 1630 and S. 914*, *supra* note 7, at 105-117 (written materials submitted by Touche, Ross & Co.).

25 *See* Gibson, *supra* note 11, at 95-97.

Obviously, the retailer's cost in the merchant discount is mitigated to some extent by savings in his costs of in-house credit. However, substituting credit card costs for in-house credit costs does not alleviate the inequity in the distribution of the costs of credit. Whether a cash customer is subsidizing credit cards or subsidizing in-house credit, the inequity remains that he is paying for someone else's benefit. The card issuers' argument about costs of in-house credit implies not that we should ban two-tier pricing for credit card purchases, but that we should adopt two-tier pricing both for credit card *and* for in-house credit purchases. So long as retailers have no option to charge differential prices, cash customers will be forced to pay extra for the additional costs of both types of credit sales.

The inequity of this situation lies not only in making one group pay the costs of another group's benefits, but also in placing that cost largely on the shoulders of the poorest consumers. Credit card eligibility requirements deny cards to those with incomes below approximately $10,000 per year.[26] Purchasers with low incomes are thus compelled to pay cash. With "unitary pricing," where cash and credit customers pay the same price, those purchasers who are not wealthy enough to get credit cards are forced to subsidize the cost of the credit card operation. The less affluent credit card users also tend to subsidize the cost of the card issuers' operations by incurring the high interest charges[27] for extended repayment, or "revolving credit." Those who benefit from using credit cards are the most wealthy buyers, who can take full advantage of credit services and can pay their credit bills promptly without incurring the "revolving credit" charges. Thus, in the end, it is the low income purchaser who suffers most from the added burden placed on cash purchases, and the wealthier buyer who benefits most from shifting the costs of credit away from credit purchasers.

The second basic economic issue in credit card transactions is overall economic efficiency. In a market economy, economic efficiency depends on the ability of decision-makers to weigh

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26 *See Hearings on H.R. 10209, supra* note 15, at 2 (statement of Rep. Annunzio).

27 Banks usually assess an 18 percent interest rate in connection with revolving credit card accounts. *Id.* at 92 (statement of John Dillon).

both the costs and the benefits of alternative courses of action. Only if the social cost, or overall cost to the economy,[28] is reflected in the price of an item can a person rationally choose the alternative the social cost of which is less than the benefit he expects to gain. When social costs are not fully reflected in the price, a person will often choose a course of action with social costs greater than its benefits, and which is therefore inefficient.

In credit card transactions, this means that a retail price which does not reflect the additional costs of credit payments to the card issuer and the merchant will encourage a buyer to use his credit card when the convenience of credit is worth less to him than the social cost of that manner of payment. As a result, the buyer invokes the costly credit billing apparatus, not because the benefit outweighs the cost, but because he does not have to bear that cost or take it into account. When a credit buyer bears absolutely no extra cost for using his card, as in a unitary price system, he will use the credit system far more often than is warranted by a cost-benefit comparison. The economy then becomes burdened with costly billing operations not justified by considerations of efficiency.[29]

The problems of credit card transactions are thus two-fold: distributive inequity and economic inefficiency. The distributive issue, since it has a more immediate and obvious effect on identifiable individuals — cash customers — has drawn the greater public attention and has inspired action in both the courts and the Congress.

II. Two-Tier Pricing

Concerned primarily with the distributive inequity between cash and credit customers, Consumers Union[30] brought suits against credit card issuers to strike down the form contracts

28 *See* R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 77 (1973).

29 A possible counterargument in favor of credit cards is that they stimulate the economy by inducing purchases of consumer goods. However, since the Federal Reserve Board sets target rates of money supply and spending growth, it could compensate for any major increases in these variables caused by use of credit cards.

30 Consumers Union of the United States, Inc., Mt. Vernon, N.Y., is a nonprofit organization which publishes *Consumer Reports* and provides information and counsel concerning consumer goods and services.

prohibiting two-tier pricing.[31] Consumers Union sought to place the cost of credit cards upon credit card customers by encouraging a system of two-tier pricing.[32] Out-of-court settlements between Consumers Union and the issuers were the first step toward permitting differential pricing for credit card transactions.[33]

Two-tier pricing would introduce a differential between the cash price and credit price of retail merchandise.[34] This would permit a retailer to adjust the credit price to reflect the added cost of credit card transactions, while setting a lower price for cash customers to correspond with the lower cost of cash sales. Prices reflecting the differences in cost eliminate distributive inequities by placing the costs of credit services on those who benefit from them.

Two-tier pricing also attacks the efficiency problem. When the added costs of credit become fully reflected in the retail price, customers will use credit cards only when the benefits of use outweigh the additional cost.[35]

The price differential might theoretically take several forms. A merchant might post a cash price and charge credit card users a premium at the register. Or he might allow cash discounts at the register from a posted credit price. Finally, he might just post two prices, one for cash and one for credit.

Opponents of two-tier pricing allege two potential problems: unfair advertising and price increases.[36] The former problem arises when only the cash price is posted. If a credit card user decides to purchase an item, based on the posted price, and then finds out at the cash register that an additional charge will be applied to him, he has been misled. At that point he may be

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31 Blitz v. Suburban Trust Co., Civ. No. 74-313 (D.D.C. 1974) (case settled); Blitz v. American Express, Civ. No. 74-314 (D.D.C. 1974) (case settled).

32 *See* Consumers Union, *supra* note 11, at 3-8.

33 In the settlements the credit card issuers agreed not to forbid merchants to implement two-tier pricing. *Id.* at 7.

34 Such price differentials already exist in commercial trade credit. *See Hearings on FCBA Two-tier Pricing, supra* note 7, at 93 (statement of Glenn Hodges).

35 *See Hearings on H.R. 10209, supra* note 15, at 93 (survey indicated that about 70 percent of credit card users would consider switching to cash payment if discounts were offered).

36 *See Hearings on FCBA Two-tier Pricing, supra* note 7, at 170 (written statement of Maurice Segall); *Hearings on H.R. 10209, supra* note 15, at 89 (statement of Maurice Segall).

impatient or too embarrassed to complain, or he may have foregone opportunities at other, perhaps more convenient stores with more forthright pricing. This problem can be avoided by simply requiring that the higher credit price be posted.

The price increase problem concerns the effect of differential pricing on the overall price level.[37] Will a merchant create a two-tier price system primarily by giving a discount from the old unitary price to cash customers, or by placing a surcharge on the old unitary price for credit customers? Or will the cash and credit prices straddle the old unitary price, so that consumers in the aggregate will pay the same average price as before? Confusion about the nature of price modifications likely to result from two-tier pricing and about the relative importance of the goals of inhibiting price increases and of preventing unfair advertising has played a major role in the course of legislation on two-tier pricing.

III. Legislation Relating to Two-Tier Pricing

The Fair Credit Billing Act[38] (FCBA) of 1974 was the first legislation to deal with two-tier pricing. The FCBA proscribed any contracts between credit card issuers and merchants which prohibited "discounts."[39] This removed the primary obstacle to two-tier pricing, in an effort to redistribute more fairly the credit costs being imposed on cash customers.[40]

The FCBA left the form of two-tier pricing up to the discretion of retailers. The term "discount" was not defined in the FCBA.[41] Theoretically, the term could encompass a reduction either from the former unitary price or from a new posted credit price, or could broadly describe any form of price differential. The precise definition of permitted discounts bears directly on the problems of unfair advertising and price increases. However, there is no evidence that the FCBA intended to do anything more than remove contractual

37 *See Hearings on FCBA Two-tier Pricing, supra* note 7, at 144-57 (statements of D. Jaffe & T. Russell).
38 Fair Credit Billing Act, § 167, 15 U.S.C. § 1666f (Supp. V 1975) (amended 1976).
39 Fair Credit Billing Act, § 167, 15 U.S.C. § 1666f (Supp. V 1975) (amended 1976).
40 *See Hearings on S. 1630 and S. 914, supra* note 7.
41 Fair Credit Billing Act, § 167, 15 U.S.C. § 1666f (Supp. V 1975) (amended 1976).

impediments to differential pricing.[42] By leaving the resulting form of two-tier pricing to the private sector, the FCBA avoided dealing directly with the advertising and pricing issues.[43]

The pricing issue came to the fore in 1975, when Representative Annunzio (D-Ill.) introduced a bill designed to clarify and amend the FCBA.[44] The bill defined "discount" as a reduction from the "regular price."[45] But "regular price" was not defined.[46] The bill distinguished "surcharges" from "discounts,"[47] permitting the latter but creating a penalty for imposing the former.[48] This bill was intended to prevent merchants from using two-tier pricing to raise the new credit price above the earlier unitary price.[49] Congressman Annunzio

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42 *See generally Hearings on S. 1630 and S. 914, supra* note 7.

43 It is debatable whether the FCBA's encouragement of discounts on cash sales extended also to surcharges on credit sales. The issue was not addressed at the time the FCBA was passed. *See generally Hearings on FCBA Two-Tier Pricing, supra* note 7. In fact, when the distinction between "discount" and "surcharge" later became important, the FCBA's co-sponsors disagreed about what they had meant the act to include. *Id.* at 85.

The Federal Reserve Board, charged with interpretation and administration of the statute, appealed to Congress for clarification. Letter from Arthur F. Burns to Sen. Proxmire (September 16, 1975) (on file at the *Harvard Journal on Legislation*). The Board's belief was that the FCBA's reference to "discount" included "surcharge," or else the act would be giving fairly explicit sanction to those card issuer contracts which forbade surcharges. *Hearings on FCBA Two-Tier Pricing, supra* note 7, at 3 (statement of Federal Reserve Board Governor Jeffrey Bucher). In fact, the issuers more often forbade surcharges than discounts. For example, Interbank (Mastercharge) rule 9.04 (6) (13) required merchants to promise "not to require of any Interbank cardholder to pay any part of any merchant discount, whether through *any increase in price* or otherwise." Comments of Donald I. Baker, Department of Justice, before the Board of Governors of the Federal Reserve System (on file at the *Harvard Journal on Legislation*) (emphasis added). Limiting the FCBA to "discounts" in the strict sense of the word would thus fail to reach many or most of the contract practices the act was designed to forbid.

Interestingly, consumer advocates are split on the relative desirability of discounts and surcharges. Consumers Union and the Federal Trade Commission favor all forms of two-tier pricing. *Hearings on H.R. 10209, supra* note 15, at 26. The Consumer Federation of America, however, favors "discount only" two-tier pricing. *Id.* at 6; *Hearings on FCBA Two-tier Pricing, supra* note 7, at 119-24 (statements of Kathleen Reilly).

44 H.R. 10209, 94th Cong., 1st Sess. (1975); *Hearings on H.R. 10209, supra* note 15, at 3-5.

45 *Id.* § 2.

46 *Id.*

47 "Surcharge" was defined as "any means of increasing the regular price to a card holder which is not imposed upon customers paying by cash, check, or similar means." *Id.*

48 *Id.* § 3.

49 *See Hearings on H.R. 10209, supra* note 15, at 2 (statement of Rep. Annunzio).

stated that "H.R. 10209 will help consumers by permitting cash discounts which will reduce prices for cash customers. Credit card users will continue to pay the regular price for items — unburdened by surcharges."[50] The bill thus appears to have been directed primarily at the potential price increase problem of two-tier pricing.

Shortly after the Annunzio bill cleared the House,[51] the Senate passed a two-tier pricing bill, S. 2594,[52] which had been introduced by Senators Proxmire and Biden. In contrast to the House version, the Senate bill defined "discount" as *any* "differential," but limited all differentials to five percent.[53] The Senate and House agreed on a compromise bill similar to the House version, adding the Senate's five percent limit[54] and a provision that the statute would expire three years after its enactment.[55] The compromise bill was enacted by both houses as the Fair Credit Billing Act Amendments of 1976.[56]

The essential change wrought by the new law is the prohibition of merchants' surcharges on credit purchasers, subject to criminal and civil sanctions.[57] The law continues to prohibit form contracts which forbid merchants to offer discounts,[58] thus creating a legal distinction between surcharges and discounts. It exempts discounts of five percent or less from the disclosure requirements[59] of the Truth in Lending Act[60] and exempts card issuers from state usury liability that might flow from cash discounts.[61]

The Amendment's distinction between discount and sur-

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50 *Id.*

51 H.R. 10561 passed the House by 398 to 3 on November 17, 1975. 121 CONG. REC. H11,291 (daily ed. Nov. 17, 1975).

52 S. 2594, 94th Cong., 1st Sess. (1975). The bill passed the Senate on December 8, 1975 as a rider to S. 2672, which extended the unrelated State Taxation of Depositories Act, Pub. L. No. 93-100, 87 Stat. 342 (1973). *See* 121 CONG. REC. S21,406 (daily ed. Dec. 8, 1975).

53 S. 2594, 94th Cong., 1st Sess. (1975).

54 H.R. 10561, 94th Cong., 1st Sess. (1975). 121 CONG. REC. H11,279 (daily ed. Nov. 17, 1975).

55 15 U.S.C.A. § 1666f (West Supp. June 1976).

56 *See* 122 CONG. REC. S1548 (daily ed. Feb. 6, 1976); 122 CONG. REC. H817 (daily ed. Feb. 9, 1976).

57 *See* 15 U.S.C. § 1611(3) (1970); 15 U.S.C. § 1640(a) (1970).

58 15 U.S.C.A. § 1666f(a)(1) (West Supp. June 1976).

59 15 U.S.C.A. § 1666f(b) (West Supp. June 1976).

60 15 U.S.C. § 1601 (1970).

61 15 U.S.C.A. § 1666f(j)(c) (West Supp. June 1976).

charge is based on the measuring stick of "regular price," which the statute does not define.[62] If the regular price is deemed to be the previous unitary price, as Congressman Annunzio suggested,[63] then the surcharge prohibition will have a major impact on merchants' pricing decisions. No merchant who adopts two-tier pricing could raise his credit price above the level of his previous unitary price. Under this restraint a rational merchant would be unlikely to institute differential pricing. First, if his sales volume proved to be the same under two-tier as under unitary pricing, he would normally need a cash price somewhat lower and a credit price somewhat higher than the previous unitary price in order to realize the same net profit. Second, in an inflationary economy a merchant will often need to raise prices for reasons independent of credit cards and two-tier pricing. Such price increases, however, will appear to be surcharges if they raise the credit price above the unitary price. To avoid the statutory risks of civil and criminal penalties, a merchant would likely avoid two-tier pricing entirely.[64]

Another possible statutory interpretation is that "regular price" means the posted price of retail goods. This interpretation would permit a merchant to set any level of two-tier prices, so long as he posted the higher — presumably credit — price. This interpretation would avoid the inhibition against adoption of two-tier pricing and would answer the objections directed at the potential for unfair advertising. It would, however, abandon Representative Annunzio's goal of restraining price increases.

In the Hearings on H.R. 10209, Congressman Annunzio espoused the first statutory interpretation:

> I favor this legislation because surcharges on credit cards, now being proposed in the Senate, would put a terrible

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62 *See* H.R. 10561, 94th Cong., 1st Sess. § 2(a) (1975). The undefined standard of "regular price" in the amendment parallels the undefined standard of "discount" in the FCBA.

63 *See* note 50 *supra*.

64 American Express has urged its cardholders to notify its offices if required to pay an extra charge for using the American Expresss Card, saying, "In the United States, extra charges are against the law." THE AMERICAN EXPRESS, March 1977, at 1 (newsletter for card members). Such pressure from cardholders will increase merchants' fears of becoming entangled with the anti-surcharge law if they employ two-tier pricing.

> burden on million [sic] of consumers . . . Let me illustrate how a surcharge works. If an item now has a regular price of $10, under a surcharge a credit card customer would pay $10.50, and a cash customer the regular $10 price. As you can tell, the credit card customer has been penalized. The cash customer who was intended to benefit from a cash discount, still pays the old price and so has no benefit.[65]

The bill's reference to "regular price" clearly meant, to its sponsor, the earlier unitary price of $10. By this interpretation, the merchant could not raise his credit price above $10.

It is a different question, however, what "regular price" meant to the 398 Congressmen who voted for the Annunzio bill.[66] If Congress had intended "regular price" to mean previous unitary price, it could have included that definition in the statute. However, since the statute leaves "regular price" undefined, other Congressmen were not constrained to adopt the Annunzio interpretation. It is unlikely that Annunzio's view was broadly shared, since his interpretation would strongly deter merchants from implementing two-tier pricing, which was the intent of Congress in passing the FCBA in the first place.[67]

In January 1977, the Federal Reserve Board proposed to resolve this ambiguity in the definition of "regular price." In a proposed regulation the Board defined regular price as "the tag or posted price."[68] Where both a cash and a credit price are posted, the higher or credit price is deemed to be the "regular" one.[69] Where neither price is posted, the credit price is deemed to be the "regular one."[70] This regulation, if approved, would adopt the second statutory interpretation discussed above.

The primary advantage of the proposed regulation is that it clearly resolves the ambiguity concerning discounts, surcharges, and regular prices, so that merchants can adopt two-tier pricing without risk of criminal and civil penalties, so long as they post their higher price. The regulation thus furthers the

65 *Hearings on H.R. 10209, supra* note 15, at 1 (statement of Rep. Annunzio).
66 121 CONG. REC. H11,291 (daily ed. Nov. 17, 1975).
67 *See Hearings on FCBA Two-Tier Pricing, supra* note 7, at 93 (statement of Sen. Proxmire).
68 42 Fed. Reg. 781 (1977) (to be codified in 12 C.F.R. § 226.2(tt)).
69 *Id.*
70 *Id.*

intent of the FCBA of encouraging two-tier pricing and eliminating distributive inequities between cash and credit customers. The primary objection to the regulation is that it appears to run contrary to the intent of the 1976 Amendments to restrain price increases.[71]

As a matter of policy, it is by no means clear that Congress should attempt to restrain absolute price increases in a two-tier system. Controlling two-tier retail prices entails all the economic distortions and administrative burdens of general wage-price controls.[72] Moreover, the prohibition of "surcharges" is not a workable means to control retail prices. Given continuing inflation, a discount system with differential prices of $9.50 and $10.00 is likely to change to differential prices of $11.00 and $11.50 over a period of time. Does inflation turn a "discount" into a "surcharge"? A rational price control system cannot rest on such a vague and arbitrary distinction. There is no valid reason to single out two-tier retail prices for special price control scrutiny.

Some testimony before Congress expressed a fear that retailers would use differential prices to increase their average revenues.[73] However, any price higher than the market price, like any profit higher than normal, depends on market power.[74] If a retailer does have market power, he can raise prices — with or without two-tier pricing. If the merchant's previous unitary price reflects some degree of market power, his two-tier prices will not, on average, be higher; they will reflect the same degree of market power.

Differential pricing will induce increases only if it augments the market power of retailers. But the structure of the retail market makes this very unlikely. Market power depends on barriers to the entry of new competitors into markets with limited numbers of sellers.[75] However, retailing is one of the

71 This objection appears in comments received by the FRB concerning the proposed regulation. *See, e.g.*, Letter from Nicholas Ferrante to Theodore Allison, Secretary of the Board of Governors of the Federal Reserve System (Jan. 17, 1977) (on file at the *Harvard Journal on Legislation*). .

72 *See generally* C. GRAYSON, CONFESSIONS OF A PRICE CONTROLLER (1974).

73 *See, e.g., Hearings on H.R. 10209, supra* note 15, at 89-90 (statement of Maurice Segall).

74 *See* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 10 (1970).

75 *See id.*

more competitive markets in the economy.[76] Not only do retailers abound in most areas, but the unprecedented mobility of today's shopper greatly increases the geographical size of local retail markets. Along with extensive retail advertising, this factor makes it very difficult for a retailer to enjoy any market power from barriers to competition by other retailers.

These economic policy considerations argue against attempts at two-tier price control and in favor of the proposed Federal Reserve Board regulation. The regulation eliminates the false issue of price control and encourages two-tier pricing. The proposed regulation also directly affects the fair advertising issue in two-tier pricing. By requiring that the higher price be posted, the regulation prevents "bait-and-switch" tactics — the luring of credit buyers with low marked prices, only to charge them a higher price at the sales counter.

IV. Conclusion and Recommendations

The two-tier pricing provisions of the Fair Credit Billing Act expire in 1979.[77] Future revisions should aim to promote the original objective of the Act: to encourage two-tier pricing in order to place the cost of credit cards on credit customers rather than on cash purchasers.[78] The distributive inequity that motivated the original bill persists in the credit card billing system. Two-tier pricing has won general congressional, approval as a solution to this problem,[79] but it has not been implemented to any significant extent by merchants.[80] Although it is impossible to predict the extent to which merchants will ever accept two-tier pricing, there are statutory obstacles that must be removed before two-tier pricing can be given a fair chance.

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76 *See Hearings on H.R. 10209, supra* note 15, at 28, 41 (statement of Paul Gewirtz, citing study by economists D. Jaffee and T. Russell, The Effects of Credit Cards on Retail Pricing).

77 Fair Credit Billing Act Amendments of 1976, Pub. L. No. 94-222, § 3(c)(2).

78 *See Hearings on FCBA Two-Tier Pricing, supra* note 7, at 93 (statement of Sen. Proxmire).

79 *Id.*

80 *See, e.g., Hearings on H.R. 10209, supra* note 15, at 56-58 (statement of David Roll) (explaining why Atlantic Richfield's branded dealers and other merchants have felt inhibited from adopting two-tier pricing).

The greatest obstacle to two-tier pricing is the statutory penalty for surcharges on credit purchases. Since many merchants feel that two-tier pricing will require a credit price higher than the former unitary price, the prohibition on surcharges inhibits merchants from adopting two-tier pricing.[81] The ambiguity of "surcharge" and "regular price" in the 1976 Amendments makes it doubtful in many cases whether a particular two-tier pricing system is within the dictates of the law.

The proposed Federal Reserve Board Regulation defining "regular price" as the posted retail price[82] helps to resolve this problem. It would permit merchants to set any level of two-tier prices, so long as they post the higher price. If this regulation is adopted, merchants will be able to raise their new credit price above the old unitary price without risking criminal and civil penalties. The requirement of posting the higher price will suffice to avoid the unfair advertising problem.[83] Required posting of the credit price will also generate competitive pressure to prevent merchants from setting an excessively high price for credit sales.

Aside from the unfair advertising problem, the main purpose of the surcharge prohibition is to prevent price increases.[84] This objective can be better served either through competition in the retail market or through general retail price guidelines. The surcharge prohibition, therefore, is an unnecessary obstacle to the legislative goal of two-tier pricing. Eliminating the ban on surcharges, and permitting differential pricing in general, would simplify the statute. By making the statutory intent clear for businessmen who must interpret it, Congress would encourage wider experimentation with two-tier price systems, free from the risk of statutory penalties.

These proposed statutory changes would refocus the Fair Credit Billing Act on its original purpose, the promotion of

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81 *See id.; Hearings on FCBA Two-Tier Pricing, supra* note 7, at 33-51 (statement of Atlantic Richfield Co.); *id.* at 23-33 (materials received from Dorman-Winthrop Clothiers); *id.* at 159-63 (letter and materials received from 4 day [*sic*] Tire Stores, which uses a two-tier system).

82 42 Fed. Reg. 780-81 (1977).

83 *See* text accompanying note 36 *supra*.

84 *See* text accompanying note 50 *supra*.

two-tier pricing. Such changes would give merchants the pricing freedom they need if two-tier pricing is to become a reality, and would encourage needed economies in the use of consumer credit. Finally, these proposals would create the opportunity to shift the costs of the growing credit system onto the credit buyers who use it and benefit from it.

STATUTORY COMMENT

THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976: IMPROVING THE RAILROADS' COMPETITIVE POSITION

FORREST N. KRUTTER*

The severe deterioration in the competitive position and financial viability of the nation's railroads prompted Congress to pass the Railroad Revitalization and Regulatory Reform Act of 1976. The most significant aspect of the Act is its intent to promote competition among the railroads and between railroads and other modes of transportation. Mr. Krutter analyzes those parts of the Act which implement Congress' policy of encouraging competition and notes particularly the potential difficulties with the compensatory rate requirement and market dominance tests which limit the railroads' freedom to adjust rates. He calls upon the Interstate Commerce Commission to interpret these and other standards in light of the clear congressional purpose to improve the railroads' competitive position.

I. A SHORT HISTORY OF RAILROAD REGULATION

The Railroad Revitalization and Regulatory Reform Act of 1976[1] is the latest congressional response to the dramatic deterioration in the financial position and ability to compete of America's railroads over the last century. The present rail regulatory system is a response largely to the conditions of the industry at the end of the nineteenth century. Railroads were then the chief method of long distance travel over land for both freight and passengers. They were the first industry subjected to regulation by a federal commission.[2] The purpose of the regulatory commission, the Interstate Commerce Commission (hereafter the I.C.C. or the Commission), was to prevent the

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1 Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified in scattered sections of 45, 49 U.S.C.).

2 The Interstate Commerce Commission was established in 1887 by the Cullom Act, ch. 104, 24 Stat. 379 (1887) (currently codified at 49 U.S.C. §§ 1-5 (1970)). At that time its jurisdiction was limited to interstate railroads.

railroads from charging excessive rates or employing other abusive practices.[3] However, by 1920, Congress felt the additional need to protect the railroads from competition among themselves in order to assure their continued vitality. The Transportation Act of 1920 provided for the regulation of mergers and abandonments, and empowered the Commission to set minimum rates.[4] Many of the railroads were in weak financial condition and Congress believed that a plan to combine weak and strong railway companies would strengthen the health of the industry.[5] Regulation of mergers, it was thought, would aid the implementation of the plan,[6] and minimum rates would prevent rate wars and ruinous competition.[7] A recapture clause provided that excessive profits would be redistributed to the weaker railroad companies.[8] The Commission did not promulgate a plan until 1927. Due to the opposition of the railroad industry, the plan was never implemented, and it was finally abandoned in 1940.[9]

During the 1920's and 1930's the railroad industry suffered a triple blow, attributable to the depression and to the growth of the trucking and barge industries. The depression severely affected the railroads, many of which had been in poor

3 Section 1 required that "[a]ll charges made for any service rendered or to be rendered in the transportation of passengers or property . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Sections 2 and 3 prevented unlawful personal and locality discrimination between shippers under similar circumstances. *See* text accompanying notes 95-96 *infra*. Section 4 prohibited charging more for transport over a shorter distance than over a longer distance under similar circumstances. The Commission was empowered to make special exceptions. Section 5 forbade the pooling of revenues between railroads. 24 Stat. 379-80.

4 Transportation Act of 1920, ch. 91, §§ 402, 407, 418, 41 Stat. 477, 481, 485. The Act produced major changes in the scheme of railroad regulation. The Act provided for the return of railroads seized during World War I. During the war the railroad property had substantially depreciated, and Congress sought to restore the prosperity of the industry through changes in governmental regulation.

5 The Commission was instructed to develop a merger plan that would result in a limited number of rail systems. The systems were to be arranged so that they could "employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties." 41 Stat. 481.

6 *Id.* at 482.

7 *Id.* at 485.

8 *Id.* at 489.

9 The Commission was no longer required to promulgate a merger plan, and mergers approved by the Commission no longer had to be in harmony with an overall plan. Transportation Act of 1940, ch. 722, § 7, 54 Stat. 905.

financial condition throughout the 1920's. Congress reacted to the plight of the railroads by making it easier for them to reorganize and restructure their services.[10] The second blow to the rail industry was the growth of the trucking industry. All levels of government invested heavily in highways and roads, allowing the trucking industry to provide shippers with better service than had been possible before. In addition, the trucking industry was accused of gaining traffic through predatory, below-cost pricing. In order to combat "excessive" competition by the use of lower rates, the railroads successfully lobbied for the passage of the Motor Carrier Regulatory Act of 1935.[11] This brought motor carriers, with certain exceptions, under the jurisdiction of the I.C.C. The Commission was given power to set rates[12] and determine routes.[13] The trucking industry, however, continued to gain at the expense of the railroads.

The third blow to the railroads was the growth of the barge industry. Congress had authorized the government to run a barge line in 1920 in order to provide for competition with the railroads.[14] This successful government corporation, later sold to a private firm in 1953, proved a model for others and the barge industry grew. Congress authorized large sums of money to construct, maintain and operate the waterways. As in the case of motor carriers, through the lobbying of the rail industry, the barge industry's rates were brought under the jurisdiction of

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10 Act of March 3, 1933, ch. 204, 47 Stat. 1474 (currently codified at 11 U.S.C. § 205 (1970)) (adding Section 77 of the Bankruptcy Act of 1898); Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211. The purposes of the Emergency Railroad Transportation Act of 1933 were to encourage the elimination of duplicative services and facilities, control practices that led to loss of earnings, avoid waste, promote financial reorganization of the carriers, and study other means of improving transportation. A Coordinator of Transportation was appointed to promote these goals.

11 Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (currently codified at 49 U.S.C. §§ 301-327 (1970)).

12 49 U.S.C. § 316(e) (1970).

13 49 U.S.C. §§ 306, 307. The Motor Carrier Act of 1935 forbade the operation of motor carriers over any interstate route without a certificate of public convenience and necessity from the I.C.C. The Commission, through the requirement of a certificate, has greatly restricted entry into the motor carrier field. *See* Smith, *Concentration in the Regulated Motor Carrier Industry,* in TRANSPORTATION RESEARCH FORUM PROCEEDINGS OF 1972 (1972).

14 Transportation Act of 1920, ch. 91, 41 Stat. 458. The congressional policy was "to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." *Id.* at 499.

the I.C.C.,[15] but the industry continued to compete effectively with the railroads.

Despite a revival during World War II, during which rail traffic reached record levels, the rail industry continued its decline. In 1947 the railroads carried nearly two-thirds of intercity freight, but by 1973, their share had dropped to 39 percent.[16] Despite a spectacular growth in the number of intercity trips taken by passengers on all modes of transportation, rail passenger traffic dropped so low as to jeopardize its survival as a private enterprise. The decline in rail passenger traffic led to the establishment of a government corporation, the National Rail Passenger Corporation, to operate most of the nation's passenger rail service, which by that time had accelerating deficits.[17] In 1970 the Penn Central, the major railroad in the Northeast, went bankrupt.[18] Despite attempted reorganization, operating deficits during receivership were so large that the federal district court threatened liquidation of the railroad if government support were not forthcoming.[19] In 1973 the Regional Rail Reorganization Act established a government corporation, the Consolidated Rail Corporation (Conrail), to consolidate and run the bankrupt Northeast railroads.[20] Though the legislation envisions that Conrail will eventually be able to earn a profit, that certainly will not be true in the near future.

The Railroad Revitalization and Regulatory Reform Act of 1976[21] (hereafter RRRRA or the Act) was enacted to allow the

15 49 U.S.C. §§ 901-923 (1970).

16 S. REP. No. 499, 94th Cong., 1st Sess. 2 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6.

17 Amtrak, or the National Rail Passenger Corporation, was created in 1970 because private railroads were unable profitably to continue the operation of most passenger routes. 45 U.S.C. §§ 501, 541 (1970). Since its incorporation Amtrak's deficits have steadily increased. In fiscal year 1972, $170 million was appropriated for Amtrak by Congress. By fiscal year 1977 the appropriation was increased to almost $484 million. THE BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 1973, at 377 (1972); THE BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 1977, at 264 (1976).

18 *See, e.g.*, N.Y. Times, June 22, 1970, at 1, col. 8. For a description of the problems leading to the bankruptcy of the Penn Central, *see* J. DAUGHEN & P. BINZEN, THE WRECK OF THE PENN CENTRAL (1971).

19 N.Y. Times, July 4, 1973, at 1, col. 3. *See also* In re Penn Cent. Transp. Co., 382 F. Supp. 831 (E.D. Pa. 1974).

20 Regional Rail Reorganization Act of 1973, 87 Stat. 985 (partly codified at 45 U.S.C. §§ 701-794 (Supp. V 1975)). The Regional Rail Reorganization Act provided for the continued operation of the Penn Central and other bankrupt Northeast railroads through loans from the government.

21 *See* note 1 *supra*.

railroads to regain their financial strength so as to remain an integral part of the nation's transportation network.[22] The Act can be divided for analysis into three general parts. The first part is designed to make the I.C.C. more efficient and to give the Secretary of Transportation a more important role in the operation of the Commission.[23] The second part deals with government spending for the benefit of the rail industry.[24] The third part attempts to encourage competition among the nation's various types of transportation by limiting government regulation of the railroads.[25] This Comment begins by describing briefly these three general areas of the RRRRA. Then it analyzes in greater detail the most significant portion of the Act — that aimed at encouraging the railroads to compete with other modes of transportation and with each other.

II. Major Provisions of the Act

A. *Refining Regulatory Procedures*

One major portion of the RRRRA seeks to streamline I.C.C. procedures and to coordinate the operations of the I.C.C. with the Secretary of Transportation, primarily with regard to railroad mergers. One of the major solutions proposed for the rail system's problems over the last fifty-five years is the merger of strong and weak companies. The mergers supposedly would result in a number of strong railroad companies all capable of competing with each other and with other modes of transportation.[26] The I.C.C. has been criticized for not acting on proposed mergers with sufficient speed. For example, in the Rock

22 The goal of a balanced, competitive transportation network was first announced in the National Transportation Policy, included in the Transportation Act of 1940, ch. 722, 54 Stat. 899 (currently codified at preamble to 49 U.S.C. § 1 (1970)).

23 RRRRA, §§ 301-403, 901-906, 90 Stat. 31 (1976). Sections 301-312 deal with the internal procedures of the Commission. Sections 401-403 require more expeditious action by the Commission on mergers and enlarge the Secretary of Transportation's role.

24 *Id.* §§ 501-810. Sections 501-517 authorize financing for capital improvements and maintenance. Sections 601-619 implement the Regional Railroad Act of 1973 and provide for financing of Conrail. Sections 701-706 provide funding for improvement of the passenger rail line between Boston and Washington. Sections 801-810 provide funding for the assistance of local governments in subsidizing needed rail branch lines.

25 *Id.* §§ 201-212. These sections deal with railroad ratemaking.

26 *See* Transportation Act of 1920, ch. 91, 41 Stat. 482; S. Rep. No. 499, *supra* note 16, at 18-21.

Island merger case, the Commission considered the merger for nearly a decade before the Rock Island Railroad went bankrupt and the proposed merger collapsed.[27] In the new Act, Congress has fashioned an expedited procedure for railroad mergers which forces the Secretary of Transportation to take a major role in studying merger proposals.[28] Congress has imposed strict time limits on the actions of the Commission and the Secretary to ensure that the Commission will dispose of all applications within two and one-half years.[29]

The Act encourages the Secretary to study potential railroad mergers in order to suggest combinations which would strengthen the railroad industry.[30] The Secretary is also encouraged to facilitate mergers through the mediation of disputes which may arise in connection with any proposed merger.[31] Previously the Commission relied on the parties to come forward with the evidence and analysis. Action by the Secretary is expected to bring national transportation policies

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27 The Senate Report on the Act specifically mentioned the proposed Rock Island-Union Pacific Railroad merger as an example of the problem of delay. The Commerce Committee noted that:

> [B]etween the years 1955 and 1970, there were 59 merger applications presented to the I.C.C. . . . [O]f the 59 mergers (proposals) 18 were denied, withdrawn, dismissed or consolidated. Of the balance 22 took more than 1 year; 12 took more than 2 years; 8 took more than 3 years; 6 took more than 4 years; 4 took more than 5 years; 3 took more than 6 years; 2 took more than 7 years; and 1 took more than 8 years to decide.

S. REP. No. 499, *supra* note 16, at 19.

28 Before passage of the RRRRA all merger applications had to be approved by the Commission. It considered the following factors: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion of, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. 49 U.S.C. § 5(2)(c) (1970). These criteria remain intact.

The expedited procedure of the Act requires an initial investigation by the Secretary of Transportation. Regardless of whether the Secretary approves the plan, the proposal can then be forwarded to the Commission which can give its approval if the proposal is in the public interest. 49 U.S.C.A. § 5(3) (West Supp. 1977). There is a danger that the expedited procedure will merely complicate the approval process by involving two bureaucracies rather than one.

29 The merger provisions of the Act are dealt with in RRRRA §§ 401-403, 90 Stat. 61-66 (1976). The Secretary is given six months to study the proposal and the Commission is given an additional two years to make a final decision. If the proposal is submitted directly to the Commission, the Commission is given two and one half years to make a final decision. 49 U.S.C.A. §§ 5(3)(d), (2)(g)(v), (vi) (West Supp. 1977).

30 49 U.S.C.A. § 1654(a), (b) (West Supp. 1977).

31 49 U.S.C.A. § 1654(d) (West Supp. 1977).

into merger proceedings instead of limiting the Commission's attention to submissions of the parties before it.[32]

The Act also creates an Office of Rail Services Planning within the Commission to: (a) assist the Commission in evaluating plans concerning railroad mergers and consolidations; (b) assist the Commission in developing policies concerning the economic regulation of transportation; (c) assist state and local governments in determining whether to provide rail service subsidies; and (d) study rail transportation needs.[33] The Office is expected to improve the Commission's ability to consider the requirements of national transportation policy outside the context of any specific case.[34]

In order to improve the quality of railroad proceedings before the Commission, the Act permanently establishes the Office of Rail Public Counsel. The Public Counsel will evaluate and present the views "of communities and users of rail service which, for whatever reason, such as their size or location, might not otherwise be adequately represented in the course of the hearings and evaluations conducted under the [Interstate Commerce] Act."[35] This office had been established by the Commission to assist communities and shippers in presenting their views on the reorganization of the Northeast railroads to the Commission. The Act now makes the office permanent and independent of the Commission.[36]

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32 S. REP. No. 499, *supra* note 16, at 19-20. In his investigation of the merger proposal the Secretary is to consider whether the result of the merger will be a more "rational" rail system. 49 U.S.C.A. § 5(3)(f)(iv)(F) (West Supp. 1977).

33 S. REP. No. 595, 94th Cong., 2d Sess. 170, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 184-85.

34 The Office of Rail Services Planning was created to

> assist the Commission in developing, with respect to economic regulation of transportation, policies which are likely to result in a more competitive, energy efficient, and coordinated transportation system which utilizes each mode of transportation to its maximum advantage to meet the transportation service needs of the Nation; ... [and] conduct an ongoing analysis of the national rail transportation needs, evaluate the policies, plans, and programs of the Commission on the basis of such analysis, and advise the Commission of the results of such evaluation.

45 U.S.C.A. § 715(d)(2)(4) (West Supp. 1977).

35 49 U.S.C.A. § 266(4)(d) (West Supp. 1977).

36 The Senate Commerce Committee proposes to incorporate the Public Counsel into an independent agency for consumer advocacy should such an agency be established. S. REP. No. 499, *supra* note 16, at 64. *See also* H.R. 6805, 95th Cong., 1st Sess. (1977) (bill to establish an independent agency to represent consumers before federal agencies).

The Act contains a number of other provisions to improve the operation of the I.C.C. The Commission is instructed to develop a uniform cost and revenue accounting system for the railroads which will better reflect their financial conditions.[37] The exclusive jurisdiction of the Commission to authorize railroad securities issues must now be shared with the Securities and Exchange Commission.[38] This shared jurisdiction will allow the S.E.C. to apply its rules and expertise in the field of securities regulation to railroad securities issues to assure investors that railroad securities will be regulated to the same extent as other public offerings.[39]

B. *Government Expenditures and Loans for the Rail Industry*

The second major portion of the RRRRA authorizes government expenditures and loans for the rail system. The Act establishes a Railroad Rehabilitation and Improvement Fund which is designed "to provide capital which is necessary to furnish financial assistance to railroads . . . for facilities maintenance, rehabilitation, improvements, and acquisitions, and such other financial needs as the Secretary approves. . . ."[40] In the past, many railroads have deferred necessary maintenance because of insufficient revenues and an accounting system which did not adequately reflect the effects of deferred

37 49 U.S.C.A. § 20(3)(b) (West Supp. 1977). Four major problems have been noted with the current I.C.C.-mandated railroad accounting system: (1) the railroad system of accounts is structurally deficient and does not reveal relevant cost information to assist in evaluating the reasonableness of rates; (2) the underlying theory of the railroad accounting system deviates from generally accepted accounting principles in some respects; (3) many instructions and accounting texts for use with the railroad system of accounts are ambiguous or silent about certain accounting issues; and (4) many of the terms, captions, and titles in the railroad system of accounts are obsolete or unclear. The current accounting system has been blamed for encouraging deferred maintenance by not adequately revealing its effects on the railroad's books. *See generally* Young, *A New Regulatory Accounting System for Railroads,* 43 I.C.C. PRAC. J. 457 (1976). An accounting system which adequately presents the true costs of railroad operations is crucial to the economic regulation envisioned in the RRRRA. *See* text accompanying note 97 *infra.*

38 15 U.S.C.A. § 77c(a)(6) (West Supp. 1977).

39 The Act extends the protection of the federal securities laws to investors in railroad securities by repealing certain exemptions under the laws administered by the Securities and Exchange Commission. S. REP. No. 595, *supra* note 33, at 136.

40 45 U.S.C.A. § 822(b) (West Supp. 1977).

maintenance on the railroads' assets.[41] The goal of the Fund is to provide capital to make up for deferred maintenance on the line and to improve the line as well so that speeds can be increased above those currently possible.[42] The National Rail Passenger Corporation (Amtrak), for example, is instructed to improve rights-of-way in the Boston-to-Washington corridor in order to increase the speed of passenger service and generally to improve rail service on this heavily travelled route, where air and highway congestion has become serious.[43]

The Act also deals with the abandonment of branch lines. Although abandonment of rail lines continues to require Commission approval, the Act allows shippers or the government to stop rail abandonments by purchasing the line or by subsidizing the "difference between the revenues which are attributable to such line and the avoidable costs of providing rail freight service on such line, together with a reasonable return on the value of such line . . . ."[44] The Act authorizes subsidies to states to be applied to rail lines which railroads cannot afford to operate but which are needed by the communities or shippers affected.[45]

The RRRRA implements the plan formulated by the United States Railway Association pursuant to the Railroad Reorganization Act of 1973,[46] which deals with the reorganization of the Northeast's railroads. The final system plan indicates which lines will be operated by Conrail and which lines will be abandoned if not subsidized. A number of labor protection provisions are inserted to protect railroad employees.[47] It is hoped that this Act will finally resolve the problems created by the bankruptcy of the Penn Central and other Northeast rail-

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41 *Cf. id.* § 824.
42 *Id.* §§ 851, 853.
43 *Id.* § 853. The Congress has set specific goals for travel time between Boston, New York, and Washington.
44 49 U.S.C.A. § 1a(5)(ii)(A) (West Supp. 1977).
45 *Id.* § 1654(f)-(o).
46 45 U.S.C. §§ 717-718 (Supp. V 1975) (United States Railway Association directed to formulate and submit to Congress a final system plan); 45 U.S.C.A. § 718(d) (West Supp. 1977) (approval of final system plan by Congress).
47 45 U.S.C.A. §§ 701-706 (West Supp. 1977). These provisions include severance pay for those who are laid off because of the reorganization.

roads. It is now up to Conrail to show that the Northeast railroads can be operated at a profit.

C. *Promoting Competition in the Rail Industry*

While these two general parts of the RRRRA do make some important changes in the regulation of the rail system, they are for the most part refinements of the existing regulatory structure. The third aspect of the Act, however, represents a new conceptual approach to railroad regulation. It seeks to substitute competition for regulatory control. The primary means by which Congress in the RRRRA sought to improve the rail system's competitive position was to increase the railroads' flexibility in setting rates. Instead of relying so completely on the I.C.C., Congress sought to allow greater scope for the operation of market forces in the rail industry. If the railroads are made more competitive, the regulatory and subsidization provisions described above need be only a temporary expedient.

The railroad industry is one of the most intensively regulated industries in the country. Almost all railroad rates are regulated by the Commission. Under the Transportation Act of 1920 the Commission was empowered to set maximum and minimum rates as well as to prescribe rates.[48] The Interstate Commerce Act required the railroads to file every change in rates between any two points or for any commodity.[49] The Commission could suspend any change which it suspected might be unjust or unreasonable.[50] Any rate which it later found to be unjust or unreasonable was unlawful. If the rates had been too high, refunds had to be made to any shipper who could prove that he had paid the unlawful rate.[51]

The RRRRA allows the railroads to decrease rates as long as they cover variable costs[52] in order to compete freely among

48 41 Stat. 485 (1920).
49 49 U.S.C. § 6(3) (1970).
50 The Commission could have found that the current rate was unjust and unreasonable because it was either too high or too low. If it so found, it could set a new rate (or a minimum or maximum rate). Unlike when the Commission was considering a rate change, the burden of proof in changing a current rate was on the Commission. *Id.* § 13(1).
51 *Id.* § 15(7). *See* Atchison, T. & S.F. Ry. v. United States, 279 U.S. 768 (1929).
52 49 U.S.C.A. § 1(5)(b) (West Supp. 1977).

themselves, and more importantly, with other modes of transportation.[53] However, the railroads may not decrease their rates so low as to be considered predatory or otherwise to constitute an unfair competitive practice detrimental to "competition which is necessary in the public interest."[54] The Commission still retains the power to disapprove rates which discriminate among shippers, routes, or ports.[55]

The Act also allows the railroads greater flexibility in raising rates. This flexibility is accomplished through five major innovations in railroad regulation. First, if the Commission finds that a railroad does not have market dominance over the traffic covered by the rate change, it may not limit the rate increase. Market dominance is defined as the absence of effective competition from other carriers or modes of transportation.[56] Thus, where trucks or barges provide an effective alternative for shippers who currently use the railroads, the Commission may not limit railroad rate increases on the ground that the proposed rate exceeds a just and reasonable maximum for the services rendered.

Second, the Act provides for a two-year experiment with rate zone freedom. The RRRRA allows increases or decreases of up to seven percent from the existing rate on a specific service (as opposed to general rate increases) without interference from the Commission. If the rate change is outside this "no-suspension range," the Commission may exercise its authority to suspend the new rate until it can determine whether or not the proposed rate is lawful.[57] However, the Commission's power to suspend rates which are not covered by the experimental seven percent "no-suspension" range is limited to a period of seven months, or ten months if a written report is sent to Congress explaining the need for the longer time period.[58]

Third, the Act allows a railroad planning a major capital

53 Section 101(b)(2) of the Act states that one of the policies of the Act is "to foster competition among all carriers by railroad and other modes of transportation . . . ." 45 U.S.C.A. § 801 (West Supp. 1977).

54 Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202(f)(2), 90 Stat. 39. Scattered provisions of the Act are cited to the session law because they are not codified in the United States Code.

55 *Id.* § 202(f)(3), (4).

56 49 U.S.C.A. § 1(5)(b) (West Supp. 1977).

57 *Id.* § 15(8)(b)-(d).

58 *Id.* § 15(8)(b).

expenditure to submit a rate which, if not disapproved in six months, will be free from attack by the Commission for five years as not being just and reasonable or as discriminating between shippers or routes.[59] However, if the rate is found to reduce the going concern value of the railroad, the Commission may, at any time, revise the rate to a level sufficient to provide revenues equal to the variable costs of providing the service.[60]

Fourth, the railroads are allowed to set separate rates for services which are provided in addition to basic transportation.[61] Finally, the railroads are permitted to set demand-sensitive or peak-period rates.[62]

In return for allowing the railroads greater price flexibility, Congress has restricted their ability to act in concert to set prices through associations which are exempt from the antitrust laws. The Act forbids such an association from either: (1) acting on rates which affect only a single carrier; (2) allowing carriers that cannot practically participate in a route from engaging in the setting of the rate for that traffic; or (3) jointly protesting before the I.C.C. rates set by members of an association by independent action.[63]

Congress hoped that these innovations in rate setting practices established in the RRRRA would foster greater competition in the rail industry. The following sections of this Comment will consider whether or not these provisions are likely to have the desired effect.

III. The Power to Decrease Rates and the Compensatory Rate Requirement

The Act promotes rate flexibility by removing restrictions on the railroads' power to set rates where competition from other transport modes exists. Section 202(b) provides that:

> Each rate for any service rendered or to be rendered in the transportation of persons or property by any common car-

59 *Id.* § 15(19).
60 *Id.*
61 *Id.* § 15(18).
62 *Id.* § 15(17).
63 *Id.* § 5c(5)(a). The Commission forbade rate bureaus from protesting rates filed independently by railroads shortly before the Act was passed. Rate Bureau Investigation, 349 I.C.C. 811, 861 (1975), *aff'd on rehearing*, 351 I.C.C. 437 (1976).

> rier by railroad subject to this part shall be just and reasonable. . . . No rate which contributes or which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable . . . on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered.[64]

With this amendment Congress sought to end the thirty-five-year-old problem of how the Commission should handle intermodal rate competition. The problem had its origins in the economics of railroad operation and the National Transportation Policy which had comprised a preamble to the Interstate Commerce Act.[65]

From an economist's point of view, railroads serve many markets. Each different origin-destination pair can be seen as a distinct market because shippers and consignees cannot easily change the origin or destination of their goods. The shippers may, however, have alternative ways to move their goods. Between some points there may be inland waterways navigable by barges or excellent highways as well as one or more railroads, while between others there may be few alternative methods of transport. There are a number of factors that affect the existence of transportation alternatives, including geography (e.g., the location of rivers and interstate highways), distance, and the location of population centers and industry, mining, and agriculture. Furthermore, each general type of commodity can also be seen as a separate market due to its handling characteristics (*e.g.*, passengers, bulk, packaged, etc.) and, more importantly, its elasticity of demand for transport. The demand for transportation of some commodities, for example finished

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64 49 U.S.C.A. § 1(5)(b) (West Supp. 1977).

65 [It is] the national transportation policy of the Congress to provide for fair and impartial regulation of modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail . . . adequate to meet the needs of the commerce of the United States. . . . All of the provisions of this [Interstate Commerce] Act shall be administered and enforced with a view to carrying out the above declaration of policy.

49 U.S.C. § 1 (1970) (preamble). For the relevance of the National Transportation Policy to the problem of intermodal competition and minimum rates, *see* text accompanying notes 70-81 *infra*.

diamonds, may be highly inelastic. The number of finished diamonds that will be transferred between two points will not be greatly affected by a rise in the transport costs nor will the traffic increase much with a decrease in costs. On the other hand, the demand for transport of commodities the transportation costs of which are a large portion of the cost of the item, such as sand and gravel, is highly elastic. A small decrease in rates may greatly increase the amount of traffic or switch the traffic from one mode of transportation to another.[66]

An unregulated railroad, looking at its many markets, would set its rates so that, at the amount of transport services sold, the incremental (or marginal) revenue from the last unit of transport would equal its incremental (or marginal) cost in that market. In every competitive market the railroad will be forced to lower its rates to meet the rates charged by its competitors. It will be willing to do so as long as the rates contribute to fixed costs. This condition will be satisfied if the rates exceed the average variable costs of providing the service. This is so because the railroad's fixed costs, by definition, are not greater or less because of the service offered in that market and must be covered regardless of the amount of traffic actually transported.[67]

On the other hand, in some markets where the railroad has a monopoly and the demand for transport is inelastic, the unregulated railroad would set the rate far above its incremental costs. This traffic would cover a much larger portion of the fixed costs than the competitive traffic.

In the long run, only those markets in which rates covering average long-run variable costs can be charged will be served by a railroad. Since more costs are variable in the long run, those average variable costs will be higher. Thus many services which could be economically offered in the short run would not be remunerative in the long run.[68]

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66 *See* D. LOCKLIN, ECONOMICS OF TRANSPORTATION 146-69 (7th ed. 1972).

67 *See generally* Rules to Govern the Assembling & Presenting of Cost Evidence, 337 I.C.C. 298 (1970); Pennsylvania Railroad — Merger — New York Central R.R., 327 I.C.C. 475 (1966).

68 *See* Robinson, *On Reorganizing the Independent Regulatory Agencies,* 57 VA. L. REV. 947, 989 n.121 (1971); Roberts, *Transport Costs, Pricing, and Regulation,* in TRANSPORTATION ECONOMICS 1-39 (Nat'l Bur. of Econ. 1965); Baumol, Bonbright, Brozen,

Trucking and barge companies strongly favor the use of fully-allocated costs as a floor below which the rates of any mode of transportation could not be lowered. Fully allocated costs include variable costs and the traffic's pro rata share of fixed costs. Since the difference between fully-allocated and variable costs for barges and trucks is much less than for railroads,[69] holding rates up to fully-allocated costs does not significantly restrict the rate flexibility of these modes of transport. The fact that trucks and barges have a higher ratio of variable to fixed costs is substantially caused by government policy.[70] The right-of-way for motor carriers is paid for by the government[71] and the carriers pay a fuel tax which is a direct function of use and therefore a variable cost.[72] The right-of-way for barges is provided, free of charge, by the U.S. Army Corps of Engineers.[73] By contrast, railroads have substantial fixed costs, which are not as heavily subsidized by government. These include a large portion of their land, track, terminals and equipment. Consequently, railroads have favored the use of average variable costs rather than fully-allocated costs as a floor on rates.

The I.C.C., during the fifties, became "the giant handicapper"[74] in intermodal competition. The Commission would not allow railroads to lower their rates if to do so would prevent other modes of transport from being able to compete with the

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Dean, Edwards, Hoover, Pegrum, Roberts & Williams, *The Role of Cost in Pricing of Railroad Services*, 35 U. CHI. J. BUS. 357 (1962).

69 *See* D. LOCKLIN, ECONOMICS OF TRANSPORTATION 651-52 (7th ed. 1972).

70 The Federal Government's basic policy has been to promote the development of several different modes of transportation. In this century, the railroads and pipelines are the only competing forms of transportation which have not benefited substantially from public expenditures to improve rights-of-way and facilities. This approach has significantly changed the relationships between the railroads and their competitors.

S. REP. No. 499, *supra* note 16, at 3.

71 23 U.S.C. §§ 120, 301 (1970). *See also* Federal Highway Act of 1956, ch. 462, § 209, 70 Stat. 397.

72 *See* I.R.C. §§ 4061, 4071.

73 23 U.S.C. § 5 (1970). *See also* Act of March 3, 1811, ch. 46, 2 Stat. 606.

74 The phrase was coined by Senator Smathers in his testimony on the meaning of "inherent advantages" in the National Transportation Policy in relation to intermodal competition. According to Senator Smathers the Policy was not meant to allow the Commission to hold up the rates of rail carriers for the benefit of other carriers. *Hearings on S. 3778 Before the Senate Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 178 (1958).

railroads for the traffic involved.[75] The Transportation Act of 1958 included a provision which prohibited the Commission from holding up the rates of one mode solely to protect the traffic of another mode. However, a proviso was added which greatly restricted the importance of that provision. It instructed the Commission to give due consideration to the National Transportation Policy in setting rates in intermodal competition cases.[76]

Interpreting this provision, the Supreme Court held that the National Transportation Policy required the Commission to protect transportation modes with an inherent advantage (as measured by, for example, service and cost) from destruction by the railroads.[77] Even with this amendment the Commission commonly held up minimum rail rates to a level that enabled regulated water and motor carriers to compete with railroads at rates which covered the water or motor carrier's fully allocated costs.[78]

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75 The policy of intermodal rate differentials was upheld by the Supreme Court in Alabama Great S. R.R. v. United States, 340 U.S. 216 (1951). The Commission had held that the rate on a route that was partially rail and partially barge should be lower than the rate on the all-rail route between the same origin and destination because the all-rail route had better service and could still compete with the lower-priced rail-barge route. *See* Rail and Barge Joint Rates, 270 I.C.C. 591 (1948). *See also* Petroleum Products in Ill. Territory, 280 I.C.C. 681 (1951) (railroad rates which would have taken all of the traffic away from the motor carriers denied the carriers an opportunity to compete and therefore violated the National Transportation Policy).

76 49 U.S.C. § 15a(3) (1970). "The Janus-like section 15a(3) prohibits the Commission from holding up rates to protect the traffic of any mode of transportation, yet also requires that 'due consideration' be given to the 'objectives of the national transportation policy' under which it may be necessary to hold up rates." Goodman, *Recent Trends in Transport Rate Regulation,* 70 MICH. L. REV. 1225, 1266 (1972).

77 ICC v. New York, N.H. & H. R.R., 372 U.S. 744 (1963), *vacating and remanding* 199 F. Supp. 635 (D. Conn. 1961), *reversing* Commodities — Pan-Atlantic S.S. Corp. 313 I.C.C. 23 (1960). The Court remanded the case to the I.C.C. on the grounds that rate reductions for railroads were to be denied only if the Commission explicitly found and explained the inherent advantages that were to be protected by the rate differential. *See also* Seatrain Lines, Inc. v. United States, 233 F. Supp. 199 (D.N.J. 1964), where the district court found that the "perils of the sea, infrequency of sailings, longer time in transit, lack of bunching of cars at the interchanges, restrictions on size of cars handled, labor difficulties and strikes affecting coastwise shipping" required the coastal water carrier to maintain lower rates than the rail service.

78 *See, e.g.,* Gasoline & Fuel Oil from Friendship, N.C. to Va. & W. Va., 305 I.C.C. 673 (1959) (motor carriers found to provide better service than rail; therefore a one-cent differential between rail and motor rates was justified); Newsprint Paper from Tenn. & Ala. to Houston, Tex., 313 I.C.C. 669 (1961) (ten percent differential between rail and barge rates set in order to allow barges to compete for the traffic). *See also* Harbeson, *The Regulation of Interagency Rate Competition Under the Transportation Act of 1958,* 30 I.C.C. PRAC. J. 287 (1962).

In a recent intermodal rate case before the Supreme Court, the Commission defended its rejection of a rail rate equal to a competing water carrier rate.[79] The proposed rail rate covered the variable costs of the service but did not cover "full" costs. The Commission had found the water carrier to have an inherent advantage over the railroads even though the railroads had lower variable costs.[80] The Supreme Court upheld the Commission and ruled that it could use full costs in determining the carrier with the inherent advantage and could protect that carrier through maintenance of a higher minimum rate for the competing railroad.[81]

The RRRRA is a reaction to this long line of Commission and court decisions preventing the railroads from competing at rates which covered their variable but not their full costs. Given the weak condition of the railroad industry and the strong arguments of economists that it was irrational to force railroads to cover their full costs on all shipments, Congress limited the Commission's power to prevent railroads from lowering their rates.[82] The test established in the Act for permissible rates is

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79 American Commercial Lines v. Louisville & N. R.R., 392 U.S. 571 (1968).

80 Ingot Molds, Pa. to Steelton, Ky., 326 I.C.C. 77 (1965), *rev'd sub nom.* Louisville & N. R.R. v. United States, 268 F. Supp. 71 (W.D. Ky. 1967), *rev'd sub nom.* American Commercial Lines v. Louisville & N. R.R., 392 U.S. 571 (1968).

81 The Court noted:

> The very words of the statute speak of "preserving" the inherent advantages of each mode of transportation. If all that was meant by the statute was to prevent wholly noncompensatory pricing by regulated carriers, language that was a good deal clearer could easily have been used. . . .
>
> But nothing we say here should be taken as expressing any view as to the extent that [49 U.S.C.] § 15a(3) constitutes a categorical command to the I.C.C. to use fully distributed costs as the only measure of inherent advantage in intermodal rate controversies. As was stated in the *New Haven* case, it "may be" that after due consideration another method of costing will prove to be preferable in such situations as the present one. All we hold here is that the initial determination of that question is for the Commission.

American Commercial Lines v. Louisville & N. R.R., 392 U.S. 571, 589-90 (1968).

82 49 U.S.C.A. § 1(5)(b) (West Supp. 1977). There is some evidence that the Commission has been moving in this direction on its own. The Commission has allowed railroads to lower their rates to variable costs in order to compete with unregulated carriers on the grounds that they could not enjoy the freedom of being exempt from regulation and, at the same time, claim the protection of the Interstate Commerce Act. *See* Wooden Furniture, El Segundo, Cal. to Chicago, Ill., 332 I.C.C. 37 (Div. 2, 1967); Wine, Pacific Coast to the East, 329 I.C.C. 167 (1966); Grain in Multiple-Car Shipments — River Crossings to the South, 325 I.C.C. 752 (1965). It should be noted that the I.C.C. has no rule imposing fully-allocated costs as a floor on transportation prices. Wine, Pacific Coast to the East, 329 I.C.C. 167, 171 (1966). One prominent economist argues that the I.C.C. has rarely denied a rate reduction which meets the standards of

that the rate must contribute to the going concern value of the carrier.

> A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier . . . proposing such rates. . . . The Commission shall not include in variable costs any expenses which do not vary directly with the level of service provided under the rate in question.[83]

The purpose of this change clearly is to allow railroads to compete more freely. As the Senate Report on the Act explains, "If railroads are to regain lost traffic, or even to retain present traffic, they must be able to lower their rates, innovate new services, and respond to new and changing circumstances."[84]

The Act delegates to the Commission, however, an inordinate degree of discretion in the extent to which it permits rate freedom. The Commission's exercise of this discretion may frustrate the congressional purpose. The Commission may suspend a change in rates for seven months upon the complaint of an interested party, or upon its own initiative, if the resulting rate is more than seven percent greater or less than the rate on the first of the year in which the rate change occurs.[85] Moreover, after a two-year period, the Commission will regain the power to suspend rule changes even where the new rate varies from the old by less than seven percent.[86]

Even within the two-year period, the seven-percent limitation on the Commission's power to suspend rates may prove illusory. The Act permits the Commission to suspend a rate if it is challenged as being discriminatory or constituting "a competitive practice which is unfair, destructive, predatory, or oth-

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incremental cost analysis. Baumol and Walton, *Full Costing, Competition Regulatory Practice,* 82 YALE L.J. 639, 654 (1973). And the Chairman of the Commission has testified that "[t]he Commission generally shares the view that traffic should move at or above the variable cost level. . . ." *Hearings on H.R. 12891, H.R. 5385, H.R. 13487, H.R. 10694, and S. 1149 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce,* 93d Cong., 2d Sess. 341 (1974) [hereinafter cited as *Hearings*].

83 49 U.S.C.A. § 1(5)(b) (West Supp. 1977).

84 S. REP. No. 499, *supra* note 16, at 11.

85 49 U.S.C.A. § 15(8)(c)(iii), (iv) (West Supp. 1977).

86 This "no-suspension" zone experiment expires February 5, 1978. *Id.* § 15(8)(c)(i).

erwise undermines competition which is necessary in the public interest."[87] Rates are usually challenged by intermodal competitors on the ground that they are so low as to constitute destructive or unfair competition.[88] Competitive modes usually claim that the challenged railroads set rates at predatory levels in order to take the traffic away from them and to force them out of business with the intention of later raising their rates in the absence of competition.[89] But a rate is not "predatory" if a railroad can leave it at a given level indefinitely, which is the case with pricing above variable costs.[90] Under the Act,

87 Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202(f)(2), 90 Stat. 39.

88 According to John Creedy, President, Water Transport Association,

> Destructive competition by means of discriminatory rate reductions applied selectively only to water-competitive traffic and therefore prejudicial to water competitors, is a power tactic which as a path to market expansion or increased profits, is no more to be condoned for the railroads than for any other enterprise seeking private gain.

Hearings, supra note 82, at 483.

89 In American Commercial Lines v. Louisville & N. R.R., 392 U.S. 571 (1968), the barge lines claimed that pricing at variable costs was predatory. In passing, the Court noted:

> It seems apparent, however, that in a case where the sole reason that a rate below fully distributed cost is necessary to attract such additional traffic is the competition of another mode of transportation, the continued existence of that competition is also the sole economic justification for maintaining the rate at a relative level that favors one shipper over others. If the competing carrier is driven out of business because of its inability to match the railroad's lower rates set on an out-of-pocket basis, the economic justification for permitting the continuation of those low rates would seem to disappear. . . . The obvious reason for this position is that permitting a railroad to raise its rates once it had effectively destroyed a competitor in one area would enable it to price on an out-of-pocket basis in competition with another carrier in a different area thereafter and, in turn, drive that carrier out of business. Eventually a railroad could eliminate all its competitors whose out-of-pocket costs were higher than its own. After this was accomplished the railroad could reprice all its services on a fully distributed cost basis, thereby eliminating all discrimination between its shipper customers.

Id. at 587 n.16.

Neither the barges or the truck carriers are suddenly going to disappear from the transportation industry. The railroads are simply not able in the 1970's, as they were in the 1880's, to drive out competitors. There are some transportation jobs where barges have the advantage by any cost measure (especially since the federal government provides a free right of way). Also, there are many commodities for which shippers will gladly pay a premium for the better service motor carriers are able to provide. Unregulated prices will allow shippers to make economically rational choices between carriers. Railroads have often been viewed as the classical deep-pocket company which will eagerly use predatory pricing to drive its competitors out of business. This is hardly an accurate picture in a decade when many railroads are in bankruptcy and most others earn below-normal returns on investment.

90 *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 HARV. L. REV. 697, 716-18, 732-33 (1975).

however, rates could still be outlawed as predatory even though they are above variable costs.

In addition, the Act's restriction that no rate "undermine competition which is in the public interest"[91] is conducive to the argument that setting railroad rates below fully-allocated costs is a practice which undermines truck/rail/barge competition. This reading of the statute would defeat the Act's purpose. In order to preserve the rate flexibility which the RRRRA is meant to achieve, the Commission should make clear that it will not consider a rate which contributes to the going concern value of the railroad as unfair, predatory, or destructive. If any railroad engages in predatory pricing or unfair competition, the antitrust laws, which forbid such practices in other industries, can be invoked.[92]

The Act further provides that the Commission may investigate a rate change even though it might not be able to suspend it. In any investigation of the lawfulness of a rate change, the Act instructs the Commission specifically to consider "proof that such proposed changed rate . . . will have a significantly adverse effect . . . on the competitive posture of shippers or consignees affected thereby."[93] But any rate change will adversely affect some shippers relative to others. Where there is a rate increase on a particular route, shippers using that route will suffer relative to shippers using routes on which there is no increase.[94] Conversely, if there is a rate decrease on a route, shippers on that route will gain an advantage over their competitors. Thus, the "significantly adverse effect" criterion provides little guidance to the I.C.C., as it depends almost entirely upon what the Commission considers to be significant. It therefore provides an additional opportunity for the Commission unjustifiably to regulate rate changes.

The Interstate Commerce Act provides adequate protection to shippers in its prohibitions of personal or local rate discrimi-

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91 Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202(f)(2), 90 Stat. 39.

92 The Sherman Act § 2 provision against attempts to monopolize should prevent railroads from lowering their rates below variable costs with the intent of driving out competitors. *See* Huron Valley Publishing Co. v. Booth Newspapers, 336 F. Supp. 659 (E.D. Mich. 1972).

93 49 U.S.C.A. § 15(8)(f) (West Supp. 1977).

94 *See, e.g.,* Increased Freight Rates and Charges, 341 I.C.C. 288, 336 (1972).

nation;[95] the "significantly adverse effect" language is unnecessary. The courts have long recognized that differences in rates attributable to the existence of unregulated competition are justified and are not discriminatory.[96] The results of the competition promoted by the Act cannot be considered discriminatory merely because some shippers might be adversely affected.

Even if the Commission were to allow rate reductions to approach the railroads' variable costs, there could still be controversy over what constitutes those variable costs.[97] For example, in 1970 the Commission promulgated several formulas to aid the railroads in determining variable and fully allocated costs.[98] Under the Commission's formulas, variable costs include expenses that vary directly with traffic (so-called out-of-pocket costs or short-term variable costs) and costs which are partially variable and partially constant over time.[99] The Commission's reasons for using these relatively long-term variable costs instead of out-of-pocket costs, which would be the minimum costs that an unregulated firm would use, is that rates in a regulated industry are quite stable over long periods of time.[100] However, lack of variation in prices over time is more

95 49 U.S.C. §§ 2-4 (1970). *See* L. T. Barringer & Co. v. United States, 319 U.S. 1 (1943).

96 L. T. Barringer & Co. v. United States, 319 U.S. 1, 7 (1943); Texas & Pacific Ry. v. United States, 289 U.S. 627, 636-37 (1933).

97 The American Association of Railroads has strongly argued that the existing costing formula is inadequate and conceptually deficient. Submission of the Views of the American Association of Railroads, Interstate Commerce Commission Ex Parte No. 320, at 69 (1976). Even the Commission has refused to give its formulas prima facie validity in its own rate-setting cases. "Parties to Commission proceedings may continue to rely on formula-based costs, as modified, so long as the method of allocating expenses and the variability factors utilized are appropriate for the carriers' services for which the costs are presented." Rules to Govern Assembling & Presenting Cost Evidence, 337 I.C.C. 298, 324 (1970).

Congress in section 307 of the Act instructed the Commission to set up uniform cost and revenue standards which would identify and define direct cost accounts for determining fixed and variable costs and indirect cost accounts for determining fixed, common, joint, and constant costs, including the cost of capital. 49 U.S.C.A. § 20(3)(b)(ii), (iii) (West Supp. 1977). *See* text accompanying note 37 *supra*.

98 Rules to Govern Assembling & Presenting Cost Evidence, 337 I.C.C. 298 (1970).

99 *See id.* at 330-31; Barr, *The Impact of the I.C.C.'s Cost Section's Studies on Railroad Freight Rates in the U.S.*, 42 I.C.C. PRAC. J. 707 (1935). Although they are not determinative, the Commission's formulas for calculating variable costs assume a five to ten year period.

100 Rules to Govern Assembling & Presenting Cost Evidence, 337 I.C.C. 298, 330 (1970). The short-term concept is important where prices fluctuate in response to supply and demand.

an imperfection in the regulatory system than a situation to be encouraged through costing formulas.[101] It is the regulatory process that causes prices to remain constant relative to one another.[102] If rates become more flexible, the justification that rates, once set, will remain constant for years will no longer be true. Thus some compromise between the relatively long-run variable costs employed by the Commission, which might be used by a firm whose prices were difficult to change, and short-run variable costs, which would be used by a firm whose prices were easily changed, is needed.

The RRRRA can be a major step in freeing the railroads from past I.C.C. rate "handicapping." The change in minimum rate regulations to allow railroads to compete with other carriers at any compensatory rate should improve the railroads' position. However, there are a number of restrictions in the Act that should be reconsidered. The seven-percent limitation on the Commission's power to suspend lower rates should be extended beyond the two-year period and more than a seven-percent swing in rates should be allowed.[103] Also, the limitations on "unfair competition" should be strictly construed so as to prevent other carriers from stopping railroad rate reductions on the ground that intermodal competition will be destroyed. Finally "variable costs" should be interpreted as medium-run variable costs[104] in order to allow more rate setting flexibility.

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101 Unlike the rail industry, in the unregulated barge industry prices will fluctuate rapidly in response to demand. On the Tennessee River, monthly rates have varied between premiums of 5.7 percent to discounts of 42.9 percent from the published tariffs. The Secretary of Transportation found that "the market for barge grain transportation is quite flexible and is functioning to meet the ever-changing demands without excessive price fluctuations or equipment shortages." C. BRINEGAR, THE BARGE MIXING PROBLEM: A STUDY OF THE ECONOMIC REGULATION OF DOMESTIC DRY BULK COMMODITY TRANSPORTATION 2-3 (1973).

102 The sheer complexity of the published tariffs works to keep relative rates constant. Almost every commodity and every origin-destination pair has its own rate. In addition, the need to prove that a proposed rate change is just and reasonable discourages attempts to change existing rates.

103 The purpose of the two-year period was to allow time to study the effects of the provision. The Act requires the Secretary and the Commission to report to Congress on the impact of these provisions on shippers and carriers in all modes of transportation and to make proposals for legislative action by October 5, 1977. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 202(g), 90 Stat. 39. The two-year period is clearly insufficient to prepare such a report, and the provision will expire before Congress has had an opportunity to study the report adequately.

104 Over the medium term all expenditures except for fixed capital investment are

IV. The Power to Increase Rates and the Market Dominance Tests

The RRRRA gives railroads greater freedom to raise rates as well. The Act distinguishes between rates on specific commodities and those applying generally throughout the rail system.

A. *Raising Specific Commodity Rates*

Rates on specific commodities may be raised where a railroad does not have "market dominance."[105] Economic regulation of the railroad industry developed at a time when the railroads were the unquestioned leaders in national transportation. Congress, in response to this domination, encouraged the growth of other modes of transportation.[106] Now, however, the railroads have lost considerable traffic volume to other modes of transportation.[107]

Where the railroads face competition from other modes of transportation, Congress, in the RRRRA, has recognized that maximum rate regulation is not required to insure that rates are not unreasonably high.[108] However, Congress still feared

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likely to be variable. These fixed capital investments include road, buildings and rolling stock.

105 49 U.S.C.A. § 1(5)(b) (West Supp. 1977). The Act defines market dominance as the absence of effective intermodal and intramodal competition. Congress expected the concept of market dominance to have some relation to the antitrust laws. The Commission, in promulgating rules for determining market dominance, is to consider the views of the Attorney General and the Federal Trade Commission. *Id.* § 1(5)(c), (d). The antitrust concept of monopoly was to be considered in deciding which rail rates were to be regulated and which were not.

106 The development of water carriers was encouraged in the Transportation Act of 1920. *See* note 14 *supra.* The Congress forbade railroads from owning water carriers that operated through the Panama Canal. 49 U.S.C. § 5(14) (1970). Congress feared that railroads would destroy water competition by gaining control of water carriers. *See also* § 5(2), which limits railroad ownership of motor carriers to those situations where it would serve the public interest, would enable the railroad to use motor vehicles to public advantage in rail operations, and would not unduly restrain competition.

107 Investigation of Railroad Freight Service, 345 I.C.C. 1223, 1246 (1976). The reforms of the Act are predicated on the belief that rail no longer has the monopoly power in most markets that it had at the turn of the century. Rail today moves only 30 percent of all intercity freight tonnage. Transportation Association of America, Transportation Facts and Trends 4 (11th ed. 1976). As the Commission has noted, "[t]he powerful and growing threat of intermodal competition is a further deterrent to the [Penn Central] Transportation Company in the use of its size and strength in a manner not obviously consistent with the public interest." Pennsylvania R.R. — Merger — New York Central R.R., 327 I.C.C. 475, 515 (1966).

108 The weakening of maximum rate regulation was "designed to permit rates to be

that some shippers and rural communities would have no alternative to the railroad to ship or receive their goods, and the railroad might exploit its monopoly position in those areas by setting unreasonably high rates.[109] The Act, therefore, limits the railroad's freedom to raise rates to those situations in which the railroad does not have market dominance.[110] Market dominance is defined as "an absence of effective competition from

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set by the forces of competition in those situations in which effective competition exists." H.R. REP. No. 781, 94th Cong., 2d Sess. 148 (1976).

109 This fear is similar to that expressed in the area of abandonment. *See,* S. REP. No. 499, *supra* note 16, at 44. There a major question is whether abandonment will significantly affect the communities involved and the shippers within those communities. In both cases the basic question is whether motor carriers (or water carriers, if available) are a substitute for rail service at a reasonable price. The Commission has often authorized abandonment upon a finding that substituted service by another mode will be available to the affected shippers or patrons even if more costly or less convenient. *See* New York S.&W.R.R. Abandonment of Operations, 312 I.C.C. 157 (1960). *See also* 49 C.F.R. § 1121.1(j) (1976); T. HUMPHREY, FRAMEWORK FOR PREDICTING EXTERNAL IMPACTS OF RAILROAD ABANDONMENT 27-34 (Studies in Railroad Operations and Economics No. 17, 1975).

110 49 U.S.C.A. § 1(5)(b) (West Supp. 1977).

Canada has also wrestled with the problem of railroad regulation and market dominance. The Canadian National Transportation Act, CAN. REV. STAT., ch. R-2, § 278 (1970), provides railroads with much greater flexibility than does the Interstate Commerce Act, as amended by the RRRRA. Although the Canadian system uses analogous tests for market dominance, a much greater showing must be made before the railroad's rates are subjected to regulation. Limitations on rate increases are available only for shippers who have no "alternative effective and competitive service by a common carrier other than a rail carrier or carriers or a combination of rail carriers." *Id.* A shipper who is "captive" to a railroad and dissatisfied with the rate charged by it must first try to negotiate a lower rate. If the shipper is unable to negotiate a satisfactory rate he may ask the Canadian Transport Commission to set a maximum permissible rate that can be charged him by the railroads. The Canadian Transport Commission will set the maximum rate at two hundred fifty percent of long-run variable costs. In order to determine what the long-run variable costs of the service are, the Canadian Transport Commission considers route, seasonality of the movement, minimum tonnage per shipment, and handling characteristics. If the Canadian shipper desires to take advantage of the maximum rate thus set, he must agree to ship all his goods by rail for a minimum of one year. The railroad may terminate the maximum rate if it can show that the shipper has other alternatives to rail. The Canadian Transport Commission may vary the maximum rate after the first year if the railroad or shipper can show that long-run variable costs have changed since they were first calculated.

The Secretary of Transportation has proposed a system similar to the Canadian system. He proposed a ceiling of 150 percent of the specific fully-allocated costs of that traffic where there was no alternative, effective, and competitive service from other modes of transport. S. 2842, 92d Cong., 1st Sess. § 205 (1971). The costs would be those of the specific service involved. *See Hearings on S. 2362, S. 1092, S. 1914, S. 2635, S. 2841, S. 2842, and S. Con. Res. 56 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce,* 92d Cong., 1st Sess., pt. 1, at 232 (1972). Basing cost calculations on the specific railroad involved, as the Canadian system does, would be a departure from current I.C.C. practice, which is to base them on industry averages. This practice has created significant problems. *See* Habeson, *Toward a More Compensatory Rail Rate,* 40 I.C.C. PRAC. J. 145, 147 (1973).

other carriers or modes of transportation, for the traffic or movement to which a rate applies."[111] A finding that a rail carrier does not have market dominance ends all inquiry into whether the rate is unreasonably high. The Commission must decide whether there is market dominance within ninety days.[112] However, during that period, the Commission may suspend the rates until a finding is made that there is no market dominance unless precluded by the "no suspension" rule. This rule generally applies when the aggregate rate increase since the first of the year amounts to less than seven percent.[113]

The Commission has promulgated regulations to implement the market dominance test. Under the regulations any one of three situations creates a rebuttable presumption that there is market dominance:

> (1) Where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year . . . ; (2) Where the rate in issue exceeds the variable cost of providing the service by 60 percent or more; (3) Where affected shippers or consignees have made a substantial investment in rail-related equipment or facilities which prevents or makes impractical the use of another carrier or mode.[114]

These presumptions may be rebutted by evidence that the railroad does not have market dominance. Even if the presumption cannot be rebutted and market domination is established, the proposed rate increase may still be lawful. However, the railroad has the burden of showing that the proposed rate is "just and reasonable,"[115] the same test that was employed prior to the 1976 Act for all rate changes that were challenged as excessive.[116]

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111 49 U.S.C.A. § 1(5)(c)(i) (West Supp. 1977).

112 *Id.* § 15(9).

113 *Id.* § 15(8)(c)(iii). A rate increase may be suspended, notwithstanding the fact that it is within the seven percent range, upon an allegation that it is discriminatory. Moreover, the "no-suspension" rule will expire at the end of 1977. *See* text accompanying notes 85-88 *supra*. The Act further provides that "[a] finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such exceed a just and reasonable maximum." 49 U.S.C.A. § 1(5)(b) (West Supp. 1977).

114 41 Fed. Reg. 44,183 (1976) (to be codified in 49 C.F.R. § 1109.1(g)(1)-(3)).

115 49 U.S.C.A. § 15(8)(f) (West Supp. 1977).

116 *See* 49 U.S.C. § 15(7) (1970) (amended 1976); 49 U.S.C.A. § 1(5)(b) (West Supp. 1977). *See generally* Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800 (1973).

The first test, whether the proponent handled seventy percent or more of the involved traffic during the preceding year, is a logical test for market dominance. A market share test has long been used in cases under section 2 of the Sherman Act wherein monopoly is alleged.[117] In line with the congressional directive that the regulations "provide for a practical determination without administrative delay,"[118] the market share requirement provides a simple test for market domination.

The presence of a high market share, however, should not be the sole determinant of market domination.[119] Even if a railroad has a large market share, it may not have market dominance. For example, the railroads may be forced to keep their rates down due to the presence of potential competition from other modes of transportation which would gain large amounts of traffic if the railroad rate were increased. The impact of potential competition "on the edge of the market" has been recognized in actions under section 7 of the Clayton Act.[120] The presence of a high market share may only indicate that through low, yet compensatory, rates and good service the railroad has captured a large portion of the market. If the railroad does have strong potential competitors, then the problem of market dominance does not exist. Maximum rate regulation should be restricted to those cases where there is no feasible transportation alternative to railroads, a rare circumstance in this nation with its highly developed highway system and waterway network.

The existence of potential competitors presents a difficult

117 *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); American Tobacco Co. v. United States, 328 U.S. 787, 797 (1946); United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 307 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954). There is some question as to whether a seventy percent market share is high enough for market dominance. *But see* Initial Submission of the U.S. Department of Justice in Interstate Commerce Commission Ex Parte No. 320, 26 (1976) [hereinafter cited as Justice Department Submission].

118 49 U.S.C.A. § 1(5)(d) (West Supp. 1977).

119 A serious problem in any case which deals with market shares is determining the appropriate market. Congress envisioned a quick administrative test and not the complicated analysis that attends a Sherman Act § 2 action. S. Rep. No. 499, *supra* note 16, at 47. The Justice Department suggests that the relevant market be "shipments of the same commodity or substitute commodities which are moving to the same destination from comparable distance." Justice Department Submission, *supra* note 117, at 32.

120 United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173 (1964).

problem of proof.[121] One good indication of the absence of potential competitors and the presence of monopoly power is whether rates are at a "competitive" or a "monopoly" level. However, it is very difficult to determine what a monopoly rate, as opposed to a competitive rate, is in practice.[122] Theoretically, the best measure of monopoly rates is marginal costs. If a railroad were in a perfectly competitive market its price would be set at marginal cost; monopoly prices would be set far above marginal cost. However, marginal costs are difficult to measure and therefore are not a practical measure of the existence of monopoly rates.[123]

Another measure of monopoly rates is total costs. Over the long run, rates should equal total costs, including a reasonable return on investment. Thus one might expect that a rate far above total costs would indicate market dominance. However, total costs for a particular route are difficult to measure because of the difficulty in allocating fixed costs among different routes. The Commission's formulas for total costs necessarily assign fixed costs arbitrarily. Thus both marginal and total costs are impractical measures of a reasonable rate.

Since neither marginal nor total costs can be used to indicate the presence of monopoly rates, the Commission was forced to rely on variable costs. Variable costs are useful not for their utility in determining the competitive rate, but because they indicate the economic floor on rates.[124]

The second rebuttable presumption is aimed at providing a quick administrative test of whether the rate is prima facie competitive. It relies on variable cost, rather than marginal or fully-allocated cost. Under this test a railroad is presumed to have market dominance (and must prove that its rates are "just and reasonable") if it charges or proposes to charge a rate sixty

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121 *See id.*

122 *Cf.* United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

123 *Cf.* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act,* 88 HARV. L. REV. 697, 714-19 (1975).

124 Marginal costs of a railroad are either greater, lesser, or equal to average variable costs. Where marginal costs are less than average variable costs, the latter is the proper floor for a rate. Where marginal costs are greater than average variable costs, the Commission should not, in theory, be allowed to set rates at less than marginal costs since some output is being produced at a net loss to the railroad. However, given the inability to measure marginal costs, we must use the floor of average variable costs as a substitute. *Id.*

percent above variable cost.[125] In effect the Commission is saying that a rate sixty percent above the minimum indicates market dominance and justifies regulation since variable cost is the recognized minimum below which rates may not be set.[126]

While the Commission may be justified in basing its second test of market dominance on the recognized rate floor of variable cost, it is certainly arguable that the sixty percent figure is so low that it is not a reliable indicator of true market dominance.[127] Under the Canadian railroad regulatory system, for example, a presumption of market dominance is not made until the rate exceeds variable cost by 150 percent.[128]

If the variable cost standard provided a quick and easily agreed-upon basis for computing a range within which railroad rates could fluctuate without interference, there would be an advantage to the use of the variable cost presumption. However, there are also problems in determining variable cost.[129] The Act instructs the Commission to issue a uniform cost and revenue accounting system for railroads which will allow identification of fixed and variable costs.[130] This system may result in an agreed level of variable costs for a given service.

Since market shares or variable costs alone are unreliable, the Commission can best implement the congressional goal of allowing competition to regulate rates by finding market dominance only in those cases where the proposed rate exceeds

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125 Though this does not create the converse presumption that there is no market domination if rates are below one hundred sixty percent of variable costs, a range of rate zone freedom may tend to develop between variable costs and sixty percent above variable costs.

126 *See* text accompanying note 83 *supra*.

127 There is a wide range of disagreement about what percentage of variable costs should be used to indicate the presence or absence of market dominance. The original House version of the RRRRA proposed that no rate below one hundred ten percent of variable cost could be found to be unjust or unreasonable. H.R. 10779, 94th Cong., 1st Sess. § 301(b) (1975), *reprinted in* H.R. REP. No. 725, 94th Cong., 1st Sess. 11 (1975). *See also* note 67 *supra*.

128 CAN. REV. STAT., ch. R-2, § 278(2) (1970).

129 There have been many criticisms of the cost formulas adopted by the Commission. These formulas result in eighty percent of operating expenses, rents and taxes, fifty percent of the investment in road, and one hundred percent of the investment in equipment being considered as variable costs. *See* A. FRIEDLAENDER, THE DILEMMA OF FREIGHT TRANSPORT REGULATION app. A (1969); Harbeson, *Toward a More Compensatory Rail Rate*, 40 I.C.C. PRAC. J. 145 (1973). *See also* note 98 *supra*.

130 *See* text accompanying note 37 *supra*.

variable costs by sixty percent or more *and* the railroad has a very large market share. This would provide a range of rates wherein railroads could operate free of administrative delay from Commission procedures. Once the Commission has promulgated a formula for calculating variable costs, any rate which would be between one hundred percent and one hundred sixty percent of variable costs could be implemented almost immediately.[131]

Under the third test promulgated by the Commission, market dominance is presumed to exist where there are affected shippers who have invested in equipment which restricts them to the use of rail[132] in reliance on the continued regulation of maximum rates by the Commission. These shippers are permitted to allege that the railroads have market dominance over their traffic for an interim period. This would not prevent the railroads from raising their rates; rather it would force the railroads to show that the rates were just and reasonable. It must be remembered, however, that one of the problems of the rail industry in the past has been cross-subsidization of high cost industries and geographically distant points. Shippers should not be allowed to claim reliance on continued excessively low rates for a long period of time in order to keep the rates down.[133]

B. *Raising System-Wide Rates*

The RRRRA also deals with system-wide rates. The maximum rate regulations promulgated by the Commission do not

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131 A thirty-day waiting period is still required between the publication of a rate change and its implementation. 49 U.S.C. § 6(3) (1970). Also, if the rate is not covered by the "no suspension" rule it could be suspended until the end of the ninety-day period given the Commission to determine market domination. 49 U.S.C.A. § 15(9) (West Supp. 1977).

132 It is important to consider the type of investment the shipper has made and the extent to which the shipper has actually been precluded from using other modes of transportation. For instance, if the investment is in rolling stock then the shipper has not been precluded from using other modes of transport, since rolling stock can be sold. Only major *fixed* investments should be considered.

133 The problem of future shipper investment in rail-related equipment and facilities is addressed in the Act by providing for rates set before railroad or shipper capital investments are made. 49 U.S.C.A. § 15(19) (West Supp. 1977). *See* text accompanying notes 150-57 *infra*. This provision, which allows railroads to set a rate for five years, is a far better method of handling shipper reliance.

apply to system-wide rates.[134] In single-commodity rate increases Congress aimed at substituting competition for regulation. That expectation is not as strong in the case of general rate increases prompted by inflationary tendencies affecting the entire industry.[135] On the other hand there was concern in Congress about the general railroad rate levels.[136] Congress recognized that in an inflationary economy the railroads require the ability to raise their rates generally to cover increasing costs in a timely fashion. It directed the Commission to study and promulgate reasonable standards and procedures for the establishment of adequate revenue levels.[137] Ideally these rules would allow for some range of general increase to go into effect without bureaucratic delay. The level of this automatic increase could be limited to some percentage of the rate of inflation in the general economy over the time period since the last general increase was granted. This might allow the railroads to raise their rates when they felt it was necessary without waiting for an administrative body to deliberate on the

134 42 Fed. Reg. 44,183 (1977) (to be codified in 49 C.F.R. § 1109.1). The regulations are aimed, with some exceptions, at specific rate increases, not general rate increases which raise all rates a certain percentage. The term "market dominance" is not easily applied to a large number of markets in the aggregate. The concern of the market dominance test is to protect shippers and communities dependent on rail. The problems of these isolated markets cannot be addressed in a general rate increase proceeding.

The Commission has recognized, however, that the market dominance regulations may apply to separate rates for distinct rail services, discussed in text accompanying notes 158-74 *infra*. *See* 42 Fed. Reg. 9,024 (1977) (to be codified in 49 C.F.R. § 1109.15(h)(3)). Under the market dominance regulations, however, detailed information on each route must be provided to show that there is no market dominance. 41 Fed. Reg. 44,183 (1976) (to be codified in 49 C.F.R. § 1109.1(a)).

135 General rate increase petitions are presented by all or a large number of railroads. The Commission then adjudicates these increases on the basis of aggregate railroad financial data. The I.C.C. insists on the use of averages even if the carriers would prefer another approach. *See generally* Barrett, *Regulation — The Winds of Change*, 42 I.C.C. PRAC. J. 560 (1975).

136 *See* S. REP. No. 499, *supra* note 16, at 11.

137 49 U.S.C.A. § 15a(4) (West Supp. 1977). Adequate revenues are required to maintain a sufficient rate of return on investments and pay interest on borrowed funds. Congress was concerned that without a reasonable rate of return on investment there would be a gradual reduction in investment in railroad plant. S. REP. No. 499, *supra* note 16, at 10.

According to the American Association of Railroads, railroad earnings are far below the economy average and rank last among groups of non-financial corporations in their ratio of net income to net worth. In 1973 while the average rate of return for railroads was 3.5 percent, the average corporation had a rate of return of 12.0 percent. *Hearings*, *supra* note 82, at 417.

subject. After the presumptively valid increase is approved, it could be reviewed by the Commission along with any proposed increase above the level automatically allowed. The Commission would be encouraged to act expeditiously in order to limit the time the higher rates, if found unreasonable, were in effect, since the Commission would only be able to reduce the rates prospectively.[138] This scheme would fulfill the congressional purpose of giving the railroads greater flexibility in pricing and an opportunity to earn an acceptable return on their investment.

The maximum rate regulation changes should allow the railroads greater flexibility in setting their rates. It is hoped that railroad management, with its newly increased freedom, will be able to shift its focus from Commission regulation to the marketplace.[139] If the Commission changes the definition of "market dominance" to correspond to those markets in which rates are above sixty percent of variable costs *and* the market share of the railroads is greater than seventy percent of the market, it would give the railroads an opportunity to offer competitive services at competitive rates, while earning a fair return on their investment.

V. Pricing Policies of the Act That Increase the Railroad's Freedom to Change Rates

The RRRRA contains three other important provisions which promote rate competition. The first change permits railroads to set rates in advance for five years where either the railroads or shippers are making major capital expenditures which affect the service to be provided under the proposed rate.[140] The second change allows the railroads to price sep-

138 Under the current law if a rate is not suspended the I.C.C. may order the railroad to keep records of who has paid the increased rates so that they may be refunded to the extent the rate is found unlawful. The accounting order is limited to seven months, the time limit for suspensions, unless extended to ten months by a report to Congress. 49 U.S.C.A. § 15(8)(e) (West Supp. 1977).

139 According to the Senate Committee, "[i]n placing a premium on the status quo and focusing managements' attention on the intricacies of the complex regulatory schemes, the present regulatory system has sapped the ability of railroads to respond, compete, innovate, and develop their full service capacity." S. Rep. No. 499, *supra* note 16, at 11.

140 49 U.S.C.A. § 15(19) (West Supp. 1977).

arately distinct rail services in accordance with cost and demand for those services.[141] The third provision encourages railroads to use demand-sensitive and peak-period pricing.[142]

A. *Long-Term Pricing to Promote Capital Expenditure*

One of the congressional policies in the 1976 Act is to increase "the attractiveness of investing in railroads and rail service related enterprises."[143] The Commission has been accused of stifling innovation and investment by delaying and changing proposed rate decreases brought about by investments in innovative services.[144] As an example, critics cite the "Big John" car case of the mid-1960's.[145] In that case the Southern Railway invented a new type of car, nicknamed the "Big John," which would carry grain at greatly reduced cost due to its increased capacity and light all-aluminum construction. The innovation allowed the Southern Railway to compete economically on grain shipments over 240 miles with barge lines. Barge line operators challenged the lower rates as unlawful. The rates were finally approved, but not until after four years of Commission consideration.[146] Such extended periods of delay,

141 *Id.* § 15(18).

142 *Id.* § 15(17).

143 45 U.S.C.A. § 801(b)(2) (West Supp. 1977).

144 *See* Barrett, *Regulation — The Winds of Change,* 42 I.C.C. PRAC. J. 560 (1975).

145 Grain in Multiple-Car Shipments — River Crossings to the South, 318 I.C.C. 641 (Div. 2 1963), *rev'd,* 321 I.C.C. 582 (1963), *rev'd sub nom.* Cincinnati, N.O. & T.P. Ry. v. United States, 229 F. Supp. 572 (S.D. Ohio 1964), *vacated and remanded sub nom.* Arrow Transp. Co. v. Cincinnati, N.O. & T.P. Ry., 379 U.S. 462 (1965), *on remand* 325 I.C.C. 752 (1965).

146 The Southern Railway's reduced rates on large grain shipments, made possible by "Big John" cars, originally were to be effective August 10, 1961. 318 I.C.C. at 642. The Commission suspended the rates until March 9, 1962 (which was the longest it could suspend the rates under 49 U.S.C. § 15(7) (1970)). The Commission had not completed its investigation of the rates at that time, so the Southern voluntarily postponed the effective date of the rates until August 7, 1962. The rates were again postponed due to a pending collateral civil action to enjoin the railroad from instituting the rates until the Commission found that they were lawful. In 1963, the Supreme Court held in the collateral action that the federal courts were powerless to enjoin the operation of proposed rates at the expiration of the seven month suspension period. Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963). The Commission, in 1963, though recognizing the major cost savings brought about by the new cars, declared the new rates unlawful. The Commission feared that the new rates would hurt barge competitors and raised the new rate. The Commission also feared that grain mills along the Tennessee River would be unduly prejudiced because they could not take advantage of the lower rates. 321 I.C.C. at 616-17. The decision of the Commission was appealed by the railroads. The district court reversed the Commission's decision as

during which new rates may not be put into effect, are due to the Commission's attitude that the railroads must prove an innovation is effective before they will be allowed to implement it.[147] The section of the Act entitled "Rate Incentives for Capital Investment"[148] is aimed at preventing such discouragement of investment and innovation in the future.[149]

The new provision allows a rail carrier to file a rate which may be effective for up to five years where the implementation of the proposed new rate would require one million dollars in investment by the carrier, shipper, or an interested third party.[150] Under this section the carrier files a notice of intention to institute such a rate with the Commission, setting forth the proposed capital expenditures and rates on traffic. The Commission has six months to disapprove the rate under the "just and reasonable" standard. If the Commission fails to disapprove the rate the carrier may implement it within six additional months, to be effective for five years. During those five years the Commission would not be able to set aside the rate as unlawful unless it became discriminatory or reduced the going concern value of the firm. If it became non-compensatory the Commission could only raise the rate to cover variable costs.[151]

One significant problem with this provision is that it requires the carrier to implement the proposed rates within twelve months of the time they are proposed, which is only six months after the railroad knows whether the Commission will set aside the rates. Since a substantial capital expenditure is required, it may not be possible to complete many such capital investments

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based on inadequate findings. 229 F. Supp. at 572. On appeal, the Supreme Court remanded the case to the Commission for reconsideration in light of the district court's findings. 379 U.S. at 642. The Commission found the Southern's rates lawful in 1965. 325 I.C.C. at 752. This case illustrates the problems of the I.C.C. in handling minimum rate cases as well as the stifling effect the Commission has had at times on innovation in the rail industry.

147 *See* Barrett, *Regulation — The Winds of Change*, 42 I.C.C. PRAC. J. 560, 567 (1975).

148 49 U.S.C.A. § 15(19) (West Supp. 1977).

149 Kahn, *The Reformation of Railroad Regulation*, 43 I.C.C. PRAC. J. 509 (1976).

150 49 U.S.C.A. § 15(19) (West Supp. 1977). The third party could possibly be a state or local government which might agree to purchase a branch line under the subsidy provision of the RRRRA. *See* 49 U.S.C.A. §§ 1a(6), 1654(f)-(o) (West Supp. 1977). Using this guaranteed rate a locality might be able to retain an important industry.

151 49 U.S.C.A. § 15(19) (West Supp. 1977).

within six months. Thus the railroad may either be required to institute a proposed lower rate before it is justified by cost savings from the investment or to forego the use of the rate sought under this section.[152]

Besides encouraging railroads to invest in capital improvements, the section is expected to encourage shippers to make investments which would allow them to take better advantage of rail transport.[153] Shippers do not wish to invest large amounts of money in committing themselves to rail transport only to find that the rates on the commodity from their plants have been drastically increased.[154] By allowing railroads to file a rate which would be good for five years, shippers are able to rely on the level of rail rates in investing in rail-related equipment or facilities. This would allow railroads, in effect, to promise a rail rate to a shipper in return for the shipper's investment. But the problem of having to implement the rate within six months, discussed in relation to railroad investment, recurs with shipper investments: the railroad, in instituting a five-year rate to allow shippers the freight cost predictability necessary to induce investment in rail-related equipment and facilities, would have to gamble that its proposed five-year rate would be cost-justified.

If the railroad were merely to guarantee the current rate, this timing consideration would not present a problem. It is not clear, however, that a railroad can guarantee a current rate. Under the prior law a contract between a shipper and a carrier,

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152 There is also a danger a railroad will not be free to change rates when it gains more knowledge of the cost structure of the service, given the new investment. This problem does not appear to have been addressed in the Act. This could be due to the fact that when the section was written the main concern may have been encouraging more investment in rail cars, main branch lines, yards, sidings, and equipment to load and unload bulk goods from rail where costs are generally known. The hearings in the 93rd Congress on predecessor bills, for example, concentrated on the rail car shortage due to grain exports. *See, e.g., Hearings, supra* note 82, at 308-12, 370-72, 435-39, 589, 623-55.

153 For example, shippers have been encouraged to purchase branch lines that serve them in order to continue service. 49 U.S.C.A. § 1a(6) (West Supp. 1977).

154 This problem was addressed by the Commission in its market dominance test. As noted above, the Commission has decided that significant shipper investment in rail-related equipment and facilities creates a rebuttable presumption that there is market dominance. 41 Fed. Reg. 44,183 (1976) (to be codified in 49 C.F.R. § 1109.1(g)(3)). The provision in the Act for five-year rates is far better suited to the problem of future shipper investment than the Commission's regulations. *See* text accompanying note 133 *supra.*

providing for future transportation at the currently established rate, was automatically terminated by the unilateral action of the carrier in publishing a new tariff calling for a higher rate during the contract period.[155] For this provision to be effective in encouraging shippers to invest in railroad transport, the railroads must be able to guarantee the rates and shippers must be able to rely on that guarantee.[156]

One other problem that may arise under this section of the Act is whether the railroads could guarantee a rate which would be changed only in conformance with a given inflation index. In periods of rapid inflation a five-year guarantee on fixed rates may not be reasonable.[157] Allowing this type of rate mechanism to account for inflation would give the shippers a reasonable estimate of future costs while insuring the railroads adequate revenues.

B. *Separate Pricing for Distinct Services*

A second innovation in ratemaking which appears in the RRRRA is a provision for pricing distinct rail services in accordance with the carrier's cost and the demand for such services.[158] The Act does not define what a distinct rail service is, nor is there much legislative history to shed light on what Congress sought to encourage. The Commission has defined distinct rail services as those services "which are separate from line-haul services necessary for the movement of freight and for which a specific tariff item is published by the railroads."[159] These distinct services could include in-transit inspection, transit privileges,[160] rerouting in transit,[161] and other services which railroads might offer in the future.

155 Armour Packing Co. v. United States, 209 U.S. 56 (1908).

156 According to the former General Counsel of the Commission, the Act is intended to permit contract rates. Kahn, *The Reformation of Railroad Regulation,* 43 I.C.C. PRAC. J. 509, 513 (1976).

157 The Act does not mention whether a rate set by a railroad under this provision could be raised under a general rate increase. However, given current practice in rate setting, all rates not specifically excluded from a general rate increase are included. If the rate has been guaranteed at a specific amount (instead of in a specific relation to other rates) and does not provide for general rate increases or an adjustment for inflation, then the railroad would be held to the rate.

158 49 U.S.C.A. § 15(18) (West Supp. 1977).

159 42 Fed. Reg. 9024 (1977) (to be codified in 49 C.F.R. § 1109.15(b)(1)).

160 Transit privileges allow raw material to be sent to a manufacturing plant to be

To illustrate the rationale behind a separate price for a distinct rail service, consider in-transit inspection of grain. This service allows the shipper to have his grain stopped en route for grading.[162] On Western and Southern Railroads one in-transit inspection of grain is granted as part of the transport service though only about 55 percent of the shippers of grain use this service.[163] Thus those who use the service are subsidized by those shippers who do not. The shipper who does not wish to utilize the service is not free to negotiate for a lower rate,[164] even though the cost to the railroad of transporting the grain without inspection is less.[165]

Congress' purpose in allowing a rate for a distinct rail service is to "enable shippers and consignees to evaluate all transportation and related charges and alternatives."[166] A separate rate allows shippers to assess the specific value of the extra service to them and thus serves to ensure that the service is used only by those for whom the service is economically beneficial.[167]

The Commission was authorized to allow separate charges for distinct rail services before the RRRRA.[168] It interpreted

processed. The finished product is then shipped to market. The rate is the through rate applicable from the origin to the market and not the higher sum of the rates on the intermediate routes. D. LOCKLIN, ECONOMICS OF TRANSPORTATION 603-05 (7th ed. 1972).

161 Rerouting involves changing destinations after the shipment has left its origin point.

162 Grain is inspected in-transit instead of at the origin because of the fear of purchasers that the grain might deteriorate while in transit, leaving the purchaser with a lower quality of grain than expected. There is also a greater danger of bias if the grain is inspected at the producer's locality. The problem with inspection at the destination is that if the grade is different than expected, it may be too expensive to send the grain to another market. *See* Atchison T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800, 803 (1973).

In-transit inspection of grain was originally required by federal law. United States Grain Standards Act of 1916, ch. 313, 39 Stat. 482. But the law was repealed due to the difficulties of enforcement that arose with the growth of trucking. United States Grain Standards Act of 1968, Pub. L. No. 90-487, 82 Stat. 761.

163 This was true for the year before the separate charge for in-transit grain inspection for Southern and Western Railroads was temporarily instituted. Inspection in Transit, Grain and Grain Products, 349 I.C.C. 89, 95 (1975).

164 Railroads are required to charge only rates that are lawfully published and are not allowed to discriminate between shippers. 49 U.S.C. §§ 2, 3(1), 6(1) (1970).

165 The extra cost of in-transit inspection is incurred because a freight car must be used approximately an additional three days for each grain shipment. There are also additional costs from switching cars on and off the main line and from clerical expenses.

166 49 U.S.C.A. § 15(18) (West Supp. 1977).

167 *See* W. NICHOLSON, MICROECONOMIC THEORY, 181-88 (1972).

168 49 U.S.C. § 6(1) (1970). Pursuant to this section the Eastern railroads have had a

the Interstate Commerce Act to require a railroad that instituted a separate rate for a distinct rail service which had previously been included in the line-haul rate to lower the line-haul rate for those not using the service.[169] The shipper using the distinct service was to pay the full previous line-haul rate.[170] The result of this policy was that the number of shippers using the distinct service decreased, since some shippers were not willing to pay extra for it. Assuming that the cost of the services had been just covered when all shippers contributed toward the cost, revenues no longer covered the full cost of providing the distinct service. But railroads wishing to raise line-haul rates for those using the service faced the difficult task of proving the rates just and reasonable[171] for each line on which the distinct service was offered under Commission policy.[172]

In the RRRRA, however, Congress explicitly authorized the establishment of distinct service rates and instructed the Commission to encourage the use of this method of pricing.[173] If this section is not to become a nullity it must be interpreted as

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separate charge for in-transit inspections of grain for a number of years. Inspection in Transit, Grain and Grain Products, 349 I.C.C. 89, 90 (1975).

169 Transit Charges, Southern Territory, 332 I.C.C. 664 (1968) (proposed new transit charges covering services previously included under the line haul rates found not to be just and reasonable). *See also* note 170 *infra*.

170 Inspection in Transit, Grain and Grain Products, 349 I.C.C. 89 (1975), *on remand from* Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade, 412 U.S. 800 (1973).

In this case the railroads petitioned the Commission for a separate rate for in-transit inspection of grain on Western and Southern railroads because of the increasing shortage of rail cars and the economic rationality of distinct service pricing. The rate for the distinct service was in line with the costs of the service, but the railroads did not lower their line-haul rates for the traffic. Thus, those shippers who did not use in-transit inspection services continued to pay the same rate as before; those who used the services paid a higher rate. The Commission approved this change and the district court affirmed. Wichita Bd. of Trade v. United States, 352 F. Supp. 365, 368 (D. Kan. 1972). But the Supreme Court held that the Commission's procedures in approving the rate violated the Interstate Commerce Act because the Commission did not adequately set forth the reasons for switching from its earlier policy of requiring the line-haul rates to be lowered to reflect the absence of the distinct service. 412 U.S. at 806. On remand, the Commission reversed itself, reaffirming its earlier position. 349 I.C.C. 89 (1975). *See also* Transit Charge on Soybeans at Points in the South, 351 I.C.C. 366 (1975).

171 Under the RRRRA, by contrast, the railroads must now prove their rates just and reasonable only if they have market dominance. *See* text accompanying notes 108-13 *supra*. Thus railroads are now only forced to prove that they do not have market dominance. 42 Fed. Reg. 9024 (1977) (to be codified in 49 C.F.R. § 1109.15(h)(3)). But this is still a substantial disincentive, given the complexities of showing lack of market dominance.

172 Inspection in Transit, Grain and Grain Products, 349 I.C.C. 89 (1975).

173 49 U.S.C.A. § 15(18) (West Supp. 1977).

allowing railroads greater flexibility in setting their new line-haul rates after separation of distinct services. The Commission's regulations under this Act, which follow the Commission's old policy,[173a] frustrate the purpose of this provision. In order to carry out Congress' intent as well as to allow competitive forces to determine rail rates to the fullest extent possible, the Commission's regulations should allow a railroad that establishes a separate price for a distinct rail service to raise its rate for those using the distinct service so that they fully cover the costs of providing that service[174] without having to show that such rates are just and reasonable on every route for which they are offered.

C. *Pricing for Demand and Peak Periods*

The third innovation provided by the RRRRA permits demand-sensitive and peak-period pricing. Under the Interstate Commerce Act, before it was amended by the RRRRA, rates filed by carriers could not differ between peak and non-peak periods of demand.[175] In the unregulated barge industry, by contrast, rates are quite responsive to demand. Seasonal increases in demand result in higher transportation rates and in slack seasons large rate discounts are the norm.[176] This conforms with traditional economic theory in which firms bid

173a *Compare* 42 Fed. Reg. 9024 (1977) (to be codified in 49 C.F.R. § 1109.15) *with* Inspection in Transit, Grain and Grain Products, 349 I.C.C. 89 (1975).

174 The costs of providing the distinct rail services are easily ascertained and do not vary significantly from route to route. But distinct service charges affect thousands of routes and it is impractical to show that there is no market dominance on each route. Rather, the Commission should consider whether the railroads have market dominance in the transportation of the goods affected by the new charge generally. If other modes of transportation carry a large portion of the total shipments, then the Commission could find that there is no market dominance. In deciding this the Commission could look specifically at different regions of the country or other appropriate categories.

The American Association of Railroads has suggested another possible test. This test would create a rebuttable presumption that the through rate, without the distinct service, is reasonable without reduction if less than fifty percent of the shippers took advantage of the distinct service while it was included in the rate. Submission of the American Railroad Association, Interstate Commerce Commission Ex Parte No. 331, at 9-10 (1976). *See also* 42 Fed. Reg. 9025 (1977) (O'Neal, C., concurring). This proposal has the virtue of providing a practical test which can be used expeditiously.

175 Carriers were free to submit changes in rates needed with thirty days notice. The Commission, of course, had the power to suspend these changes, as it did all rate changes. Also, the sheer complexity of the rate structure made it difficult to change rates on a seasonal basis.

176 C. BRINEGAR, THE BARGE MIXING RULE PROBLEM 2-3 (1973).

against each other for goods or services until that firm which can most productively use a particular item eventually wins out.[177] Because of the absence of such a rationing device in the rail industry, there have been severe freight car shortages at certain peak periods.[178] In the RRRRA Congress instructed the Commission to set standards

> . . . for the establishment of railroad rates based on seasonal, regional, or peak period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads.[179]

These standards should improve the allocation of scarce rail equipment during peak periods of demand by encouraging shippers which are able to ship during non-peak periods to do so.

The Interstate Commerce Commission has recently developed standards for implementing the new section on demand-variable rates. The standards by which the Commission will be guided include the statutory considerations quoted above and the "ability of the affected industry within a specific area to react positively to the proposed demand-sensitive rate."[180] Thus, one of the primary considerations in approving a variable rate will be the shipper's ability to vary the amount of shipments made over time. However, the fact that a shipper cannot easily vary his shipments over the year does not mean that demand-sensitive rates on his products accomplish no purpose. The higher rates reflect the need to ration the use of freight cars.[181] By paying higher rates than other consignors

177 *See, e.g.*, W. NICHOLSON, MICROECONOMIC THEORY 331 (1972).

178 *See, e.g.*, N.Y. Times, May 23, 1973, at 65, col. 2.

179 49 U.S.C.A. § 15(17) (West Supp. 1977).

180 42 Fed. Reg. 9022 (1977). The Commission also will consider "[t]he need to encourage ratemaking innovation by railroad management." *Id.* This accords with the congressional policy of giving flexibility to railroad management, a theme that runs throughout the Act.

181 The higher rates perform the dual function of rationing freight cars and increasing the revenue to the railroads, which are two of the goals of Congress under this section. 49 U.S.C.A. § 15(17) (West Supp. 1977).

are willing to pay, a shipper is indicating that the marginal utility of his products (as measured by the demand for his product at its destination) is greater than the marginal utility of shipping other consignors' products.[182] Under the usual situation it is possible to vary shipments through time. However, varying shipments increase inventory costs. Thus, the demand-sensitive rates force the shipper to consider whether the inventory costs are greater than the extra cost for shipping when the demand for freight cars is high, ensuring the economically rational use of scarce freight cars. Whether or not a particular industry will react to these peak-period rates is not determinative of the success or failure of the rates to allocate freight cars in a rational manner. Since the same freight cars may be used for shippers in many different industries and areas, the demand-sensitive rates will be effective if any of the industries or areas respond to them. The question should be whether the demand-sensitive rates proposed will accomplish their goal of equalizing the overall supply and demand for rail cars.[183]

The Commission in its regulations has also given railroads increased freedom to cancel demand-sensitive rates which are not effective.[184] This freedom should encourage railroads which are considering offering demand-sensitive rates to experiment with them, without fear that they will be locked into the rates by the Commission. The Commission regulations also limit the degree to which shipper investments will prevent cancellation of a rate:

> Shippers' investments made for the purpose of availing themselves of the incentive [of shipping during non-peak

182 The higher rates can be seen as a rent on scarce goods, *i.e.*, rail cars. *See* W. NICHOLSON, MICROECONOMIC THEORY 332-34 (1972).

183 An alternative would be to have the Commission ration the scarce freight cars pursuant to its authority to transfer rail cars to different parts of the country during emergencies, including those caused by the shortage of equipment. 49 U.S.C. § 1(15) (1970). *See, e.g.*, 38 Fed. Reg. 9668, 18,659 (1973). The Commission has clearly been unsuccessful at rationing in the past.

184 42 Fed. Reg. 9022 (1977) (to be codified in 49 C.F.R. § 1109.10(e)(6)).

This was opposed by Commissioners Murphy and Christian, who argued that the Act does not permit the Commission voluntarily to relinquish its jurisdiction to suspend cancellations of demand-sensitive rates. *Id.* at 9024. But the very purpose of the Act is to increase rail flexibility by decreasing Commission control and to allow market forces to work. Under the Act the Commission should try to substitute the forces of the marketplace for the maneuvers of the hearing room.

> periods] . . . will only be considered where: (i) The rate has been in effect for at least two years without substantial change; or (ii) The shipper can show that the carrier has made representations regarding the duration of the rate schedule and that the shipper has in fact relied on such representations to his detriment.[185]

Detrimental reliance may be the best test for considering whether shipper investments should prevent cancellation of a rate, since the railroads can largely control the extent to which shippers rely on the duration of the rate. Moreover, shippers who wish to assure themselves of continued variable rates may seek a promise from the railroads as would be the case if the railroads were unregulated.[186] The rule that shippers' investments will only be considered where the rate "has been in effect for at least two years without substantial change," however, seems overly strict, since it is unreasonable for shippers to rely on current railroad rates just because they have been in effect for two years in an age of rapid change in the economy. While railroad rates based on seasonal, regional, or peak-period demand for rail services will increase the economic rationality of railroad rates, the Commission's regulations are only a first step toward permitting greater rate flexibility.

D. *Conclusion*

These three amendments to the Interstate Commerce Act are aimed at allowing railroads to act more competitively in their rate practices. In competing for traffic with unregulated portions of the transportation industry, it is essential that railroads be allowed the same flexibility that other carriers have.[187] The changes should incidentally result in better service for

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185 49 C.F.R. § 1109.10(e)(7).

186 This would be similar to the Act's authorization of a railroad's agreement on rates in return for a shipper's agreement to invest, discussed above in connection with rates that encourage capital incentive. *See* text accompanying notes 153-56 *supra.* Thus shippers and rail carriers are being encouraged to deal with each other directly as would occur in a free market rather than through the Commission.

187 Congress recognized that these innovations would help remedy the competitive disabilities which result from the fact that 100 percent of railroad freight is regulated while only 7 percent of commodities traveling by water carrier are regulated and only 40 percent of commodities carried by truck are regulated. 121 CONG. REC. H12,753 (daily ed. Dec. 17, 1975) (remarks of Rep. Anderson).

shippers. Through assurances of stable rates in return for capital investment, pricing of individual services which reflect the economic costs to the railroad of providing the services, and demand-sensitive rates which encourage shippers to use railroads more during non-peak periods and less during peak periods, shippers are better able to evaluate transportation alternatives and to purchase those services in an economically rational manner.

VI. Restrictions on Rate Agreements and Other Anti-Competitive Practices

Congress has taken steps in the RRRRA to give the railroads greater flexibility in setting competitive rates. However, Congress has also recognized that in a free market firms will sometimes try to restrain competition in order to reap monopoly profits.[188] In the RRRRA, Congress took steps to weaken anti-competitive forces within the rail industry.[189]

Rate bureaus, *i.e.*, associations of railroads which operate primarily to set rates on rail routes,[190] constitute one important anti-competitive force in the railroad industry. They operate under an exemption from the antitrust laws granted by the Commission pursuant to the Reed-Bulwinkle Act.[191] Rate bureaus are useful in providing machinery for carriers to set rates on shipments which must go over more than one line.[192]

188 *See, e.g.*, Sherman Act, 15 U.S.C. §§ 1-7 (1970). The Interstate Commerce Act banned the pooling of freight of different railroads and the pooling of earnings. This ban sought to prevent the establishment of a monopoly where there was intramodal competition. Act to Regulate Commerce of 1887, ch. 104, § 5, 24 Stat. 379 (currently codified at 49 U.S.C. § 5(1) (1970)).

189 *See* S. Rep. No. 499, *supra* note 16, at 15.

190 Rate bureaus existed before the 1887 Act to Regulate Commerce and the 1890 Sherman Act. *See* United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1897); *Hearings on S. 942 before the Senate Comm. on Interstate Commerce*, 78th Cong., 1st Sess. (1943). The intent of the framers of the 1887 Act was to stop railroads from agreeing on rates and suppressing competition. Georgia v. Pennsylvania R.R., 324 U.S. 439, 459 (1945). However, these bureaus continued to exist after the passage of the Sherman Act. In 1945, at the instance of the State of Georgia, the Supreme Court declared that railroad rate bureaus violated § 1 of the Sherman Act. *Id.* In 1948 Congress, over President Truman's veto, passed a statute which empowered the Commission to exempt rate bureaus from the operation of the antitrust laws. Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948) (currently codified at 49 U.S.C. § 5b (1970)). There are also rate bureaus for water and motor carriers. *See* 49 U.S.C. § 5b (1970).

191 49 U.S.C. § 5b (1970).

192 S. Rep. No. 44, 80th Cong., 1st Sess. 8-13 (1947). The Commission is empow-

The number of joint rates that need to be set is higher than might be expected because any connecting line which can serve a route must be allowed to participate in setting a joint rate for that route. Thus on traffic from A to C through B, where X railroad serves the route from A to B and Y and Z railroads serve the route from B to C, the X railroad must agree on joint rates for interline traffic with Y and Z since both, by law, must be permitted to participate in the traffic.[193] In fact, on major routes, large numbers of carriers are involved since the railroads (or combinations of railroads) which serve major traffic points can have routes which are very circuitous.[194]

Pursuant to the goal of increasing competition, the RRRRA limits the operation of the rate bureaus in a number of respects. They may no longer participate in agreements with respect to single line rates or permit any carrier to participate in agreements with respect to rates on interline movement unless the carrier can participate in such movement.[195] The effect of these rules is to restrict rate bureaus to those areas where they are necessary to operate an integrated rail network. If competition is to serve as the basis for setting rates in the rail industry, it is necessary to foster intramodal competition between rail carriers as well as intermodal competition with other carriers.[196]

The justification for a rate bureau is not strong where the bureau acts on rates which affect only single lines or where railroads participate in setting rates for routes in which they physically cannot participate. This type of action by the rate bureaus has been justified on the theory that rates on different routes were interrelated and, if a railroad unilaterally adjusts its rates, it may cause unjust discrimination or undue prejudice

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ered to establish joint rates if the carriers do not voluntarily do so. 49 U.S.C. § 15(3) (1970). However, it is in the railroads' interest to establish joint rates.

193 49 U.S.C. § 15(8) (1970) (currently codified at 49 U.S.C.A. § 15(10) (West Supp. 1977)).

194 *See generally* I.C.C. BUREAU OF ECONOMICS, CIRCUITRY OF RAIL CARLOAD FREIGHT (Statement No. 68-1, 1968); J. SLOSS, T. HUMPHREY, & F. KRUTTER, AN ANALYSIS AND EVALUATION OF PAST EXPERIENCE IN RATIONALIZING RAILROAD NETWORKS 24-39 (Studies in Railroad Operations and Economics No. 16, 1975).

195 49 U.S.C.A. § 5b(5)(a)(i),(ii) (West Supp. 1977).

196 The Commission has recognized, in promulgating its market domination rules, that "a carrier participating in the rate or in such discussion or consideration does not provide effective competition to the proponent rail carrier for the involved traffic or movement." 41 Fed. Reg. 44,183-84 (1976).

against its shippers or against shippers on competitors' lines.[197] Thus, it was argued that there was no practical alternative to consultation among all interested carriers and shippers before changes were made in rates.[198] However, where shippers are adversely affected by competition among rail carriers, there is no reason for them to consult with the railroads in the region in order to promote rate uniformity or restore the status quo. A few shippers have realized that the setting of rates by rate bureaus discourages innovations and bold action in rate setting.[199] Promoting competition among rail carriers should bring about a more rational price structure for rail services.

The changes in rate bureau practices can have only a limited beneficial effect on competition. The complex regulatory mechanism discourages competition and encourages joint action in a number of ways. The complexities in the rate regulatory system tend to keep rates stable relative to one another and this stability works against the development of competition. Nevertheless, Congress, by limiting the subjects with which rate bureaus may deal, has begun to restrict the anti-competitive environment fostered by the rate bureaus.

VII. CONCLUSION

The Railroad Revitalization and Regulatory Reform Act of 1976 takes a first step in the direction of substituting competition and the concepts of the antitrust laws for the regime of complete economic regulation of the railroad industry. However, the system of detailed regulation remains essentially intact. Complex tariffs must still be filed with the Commission.

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197 When a railroad increases its rates, the shippers on its lines are competitively disadvantaged in relation to competitors on other lines whereas when one railroad's rates are decreased, the shippers on its lines are given an advantage over their competitors.

198 H.R. REP. No. 1100, 80th Cong., 1st Sess. 8-10 (1947), *reprinted in* [1948] U.S. CODE CONG. & AD. NEWS 1849-54.

199 A shipper organization known as the Committee on Modern Efficient Transportation has complained that:

> . . . [t]he vast collectivization of rate decisions now endemic in railroad rate making is one of the major reasons for delay and rigidity in railroad rate making. Committee pricing accounts for a portion of the railroads' competitive disabilities vis-a-vis carriers in other modes . . . and their frequent costly failures to seize market opportunities.

Hearings, supra note 82, at 566.

The Commission itself only begrudgingly accepted the desirability of competition in the industry when promulgating its regulations pursuant to the Act. A basic theme throughout these regulations is that ratemaking freedom for railroads is an exception to the general rule that the railroads must justify rate innovations through the production of detailed data. The Commission's presumption in these regulations is that the railroads need to be controlled to protect shippers as well as the railroads themselves; the Act has made this presumption rebuttable through proof by the railroad.

The Act should be seen as a recognition that the robber barons of the nineteenth century have disappeared. Their monopoly over most routes and for many commodities has been destroyed through strong competition by trucks and barges. The spirit behind the legislation supports the proposition that the railroads must be allowed to fight for their survival. Though shipper interests need to be considered, Congress has recognized that the railroads must be given an opportunity to earn adequate profits so as to retain capital in the industry.[200]

The days when it was assumed that the Commission knew best how to protect railroad profits as well as the public interest have come closer to an end. Instead Congress is turning to the principle of competition, with its assumption that the railroads themselves, through intelligent management, can best make decisions on rates and operations. Should they falter, the antitrust laws are there to prod them along. Where the antitrust laws do not operate, as with rate bureaus, or where there is no competition, the Interstate Commerce Commission remains to protect the public interest. The Railroad Revitalization and Regulatory Reform Act of 1976 is an admission that the current regulatory arrangements are inadequate, and that some action must be taken to allow the railroads to fight for their economic survival without the restrictions of the omnipresent hand of the Interstate Commerce Commission.

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200 *See* 45 U.S.C.A. § 801 (West Supp. 1977).

STATUTORY COMMENT

GOVERNMENT IN THE SUNSHINE ACT: A DANGER OF OVEREXPOSURE

ROBERT W. SLOAT*

"Open government" has become the rallying cry of civic reformers of the 1970's. Overwhelming majorities in both Houses of Congress lent their support to the open meeting principle last year by passing the Government in the Sunshine Act, which opens to public observation the deliberations of multi-headed federal agencies. To counteract perceived agency preferences for secret government, the Act generates incentives for openness and erects obstacles to closure. In the words of a prime sponsor, "Open government becomes the easy way out."[1]

Yet legitimate interests, Mr. Sloat argues, are threatened by these open meeting requirements. Though the Act allows exemptions from open meetings when certain specified types of information trenching on important interests such as personal privacy, national security, and trade secrets are to be discussed, closure of such meetings is not mandated but rather is left to agency discretion. Under the new legislation, Mr. Sloat contends, the agencies are encouraged to disregard the nondisclosure interests, whatever may be their merits. Collateral protection of these interests is explored through examination of the "reverse-FOIA" cases that have arisen under the Freedom of Information Act. But a "reverse-Sunshine" remedy, Mr. Sloat concludes, will only be a limited source of protection for those whose legitimate interests are threatened by improper disclosure; such persons' interests in confidentiality are severely and unnecessarily endangered under the Act.

Introduction

The past decade has seen an ever-widening flow of legislation opening government actions to public scrutiny.[2] The work of the House Special Subcommittee on Government Information

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1 122 CONG. REC. H7873 (daily ed. July 28, 1976) (remarks of Rep. D. Fascell (D-Fla.)).

2 *See generally* S. REP. No. 354, 94th Cong., 1st Sess. 4-7 (1975), from which the history in this paragraph is drawn [hereinafter cited as SENATE REPORT].

in 1955[3] began a legislative inquiry which led ultimately to the enactment of the Freedom of Information Act in 1966.[4] While Congress was conducting major oversight hearings on the FOIA in 1972, it also passed the Federal Advisory Committee Act, which created a presumption that meetings of advisory committees will be open to the public.[5] After many studies and oversight hearings,[6] Congress found it necessary to strengthen the disclosure provisions of the FOIA in 1974.[7] Further, since 1973, both Houses have been opening an increasing number of their committee meetings to public observation.[8]

This trend was extended last year by the enactment of the Government in the Sunshine Act.[9] In the words of the House Report, "this legislation represents a further, logical step in the continuing process of opening governmental decisionmaking to the public at the Federal and State levels."[10] Subject to certain exemptions, the Act requires that all meetings of multi-headed federal agencies be open to the public.

Open government is a central democratic principle.[11]

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3 The subcommittee was chaired by Rep. John E. Moss (D.-Cal.). *Id.* at 4.

4 Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552 (1970)).

5 Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. App. 1 (Supp. V 1975)).

6 *See* H.R. REP. No. 880, pt. 1, 94th Cong., 2d Sess. 4 (1976) [hereinafter cited as HOUSE REPORT].

7 Pub. L. No. 93-502, 88 Stat. 1561 (1974) (amending 5 U.S.C. § 552 (1970)).

8 This trend has been paralleled in the states. In 1950, only one state had an open meeting, or "sunshine," law. SENATE REPORT, *supra* note 2, at 7. Since then, sunshine legislation has been enacted in every state. *See* note 15 *infra.*

9 Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified in scattered sections of 5, 39 U.S.C.). This Comment is concerned solely with the Act's open meeting provisions. § 3(a), 5 U.S.C.A. § 552b (West Supp. 1977). The provisions barring ex parte communications, § 4 (codified in scattered sections of 5 U.S.C.), are not discussed. That part of the Act forbids communication between an interested person outside an agency and an agency decisionmaker regarding the merits of a formal agency proceeding.

10 HOUSE REPORT, *supra* note 6, at 4. *See also* SENATE REPORT, *supra* note 2, at 4.

11 There is, nonetheless, much debate as to how beneficial openness will be. For a critique of the "open meeting principle," *see* Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1200-03 (1962).

Several of the claimed benefits of sunshine laws are discussed in the text accompanying notes 20-21 *infra.* Arguments supporting open meetings of legislative bodies in a democracy are presented in A. PICKERELL & E. FEDER, OPEN PUBLIC MEETINGS OF LEGISLATIVE BODIES — CALIFORNIA'S BROWN ACT 2-4 (1957) (study by University of California at Berkeley) (citing J. WIGGINS, FREEDOM OR SECRECY 19-20 (1956)).

The sunshine concept, however, is not without practical problems. *See, e.g., id.* at 26-27. Professor Wickham argues that governmental bodies should retain "a zone of privacy within which its members can air internal disagreements." Wickham, *Let the Sun Shine In!: Open Meeting Legislation Can Be Our Key to Closed Doors in State and Local*

Nonetheless, it may be anticipated that the dedicated public servants staffing the federal agencies may be reluctant to alter past practice by opening their discussions to public view.[12] Achievement of the goal of openness may require strong measures to counteract agency incentives for secrecy.

At the same time, a strict rule of openness would violate other important interests, such as national security, personal privacy, and protection of trade secrets. Accordingly, Congress has written into the Sunshine Act a series of exemptions reflecting these and other interests.[13] If an agency finds that a meeting is likely to fall within an exemption, and that openness is not otherwise in the public interest, the meeting may be closed.[14]

Hence, Congress has recognized that certain interests should be allowed to prevail over the general policy of openness. Yet the Act merely places those interests within the realm of agency discretion. While the Act provides for exemption from the openness presumption, it does not go on to mandate closure in any case.

This Comment critically examines that aspect of the Government in the Sunshine Act. It suggests that the strong incentives set up for enforcement of required openness will spill over into the range of agency discretion, encouraging openness regardless of the merits of closure and endangering the interests protected by the exemptions. The Comment then explores the possibility that these interests may be vindicated through private enforcement actions, concluding that such a

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Government, 68 Nw. U. L. Rev. 480, 481-82 (1973). *See also Sunshine, Sunlight and Shadow*, N.Y. Times, Feb. 16, 1977, at 30, col. 1 (editorial advising the New York state legislature to be cautious in shutting off all informal private communication between the members of public bodies). Studying the effects of an open meeting requirement on the work of the California State Welfare Board, ten Broek concluded by noting that the board meetings had become less informative and the board members less able to make informed and intelligent judgments as a result of being unable to meet informally with the staff in executive sessions before scheduled public meetings. "To a noticeable degree, the board has tended to become more of a rubber stamp for the staff." ten Broek, *Welfare in the 1957 Legislature*, 46 Calif. L. Rev. 331, 355-56, 360-61 (1958).

12 After eight years of experience under the FOIA, it was found that stronger provisions were needed to produce the desired level of disclosure. *See* text accompanying notes 6-7 *supra*. Experience under the Sunshine Act has revealed similar reluctance by some agencies to go public. *See* notes 121-22 *infra* and accompanying text.

13 5 U.S.C.A. § 552b(c) (West Supp. 1977).

14 *Id.*

remedy is limited, and that adequate protection can be obtained only through corrective legislation.

I. The Background and Structure of the Act

"Sunshine laws," which now have been enacted in each of the fifty states,[15] provide that some segments of the government must open some or all of their meetings to public observation: officials must meet "in the sunshine." These laws are premised on the assumption that governmental action taken in the open is more trustworthy and more reflective of democratic values than that taken in secret.[16]

The federal Government in the Sunshine Act[17] was signed

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15 INTERGOVERNMENTAL PERSPECTIVE 9 (Winter 1977). For a list of most of the state statutes, *see* S. REP. No. 354, 94th Cong., 1st Sess. 52 (1975); Comment, *Government in the Sunshine Act: Opening Federal Agency Meetings,* 26 AM. U. L. REV. 154, 154 n.3 (1976). The provisions of the state statutes are summarized in Hollow & Ennis, *Tennessee Sunshine: The People's Business Goes Public,* 42 TENN. L. REV. 527, 535 n.34 (1975).

16 *See* text accompanying note 20 *infra.*

17 For a description of the provisions of the Act, *see generally* Hirschhorn, *Sunshine for Federal Agencies,* 63 A.B.A.J. 55 (1977); Comment, *supra* note 15.

The origins of the Act may be traced to the Ninety-Second Congress. Late in the second session, sunshine bills were introduced in both Houses of Congress. 118 CONG. REC. 28,973 (H.R. 16450, introduced Aug. 17, 1972, by Rep. D. Fascell, D-Fla.); 118 CONG. REC. 26,902 (S. 3881, introduced Aug. 4, 1972, by Sen. L. Chiles, D-Fla.).

Three days of hearings were held on "government in the sunshine" during the Ninety-Third Congress. *Government in the Sunshine: Hearings on S. 260 Before the Senate Subcomm. on Reorganization, Research, and International Organizations of the Comm. on Gov't Operations,* 93rd Cong., 2d Sess. (1974) [hereinafter cited as *Senate Hearings*]. *See also* SUBCOMM. ON REORGANIZATION, RESEARCH, AND INTERNATIONAL ORGANIZATIONS, SENATE COMM. ON GOV'T OPERATIONS, GOVERNMENT IN THE SUNSHINE, RESPONSES TO SUBCOMMITTEE QUESTIONNAIRE, S. DOC. No. 5890, 93rd Cong., 2d Sess. (1974) (invited responses and materials compiled by the subcommittee regarding S. 260).

The bill was again introduced in the 94th Congress as S. 5, 94th Cong., 1st Sess., 121 CONG. REC. S29, S59-S64 (daily ed. Jan. 15, 1975). It was unanimously approved by the ninety-four senators present on Nov. 6, 1975, 121 CONG. REC. S19,445 (daily ed. Nov. 6, 1975). *See* S. REP. No. 354, 94th Cong., 1st Sess. (1975) [hereinafter cited as SENATE REPORT]; S. REP. No. 381, 94th Cong., 1st Sess. (1975) [hereinafter cited as SENATE JUDICIARY REPORT].

The House bill, H.R. 11656, was introduced on Feb. 3, 1976, by twenty-five representatives. 122 CONG. REC. H670 (daily ed. Feb. 3, 1976). This bill passed the House on July 28, 1976, by a vote of 390 to 5. Passage was vacated, and a similar bill, the amended S. 5, was passed in lieu of H.R. 11656. 122 CONG. REC. H7899-902 (daily ed. July 28, 1976). *See Government in the Sunshine: Hearings Before the Subcomm. on Government Information and Individual Rights of the Comm. on Governmental Operations,* 94th Cong., 1st Sess. (1975) [hereinafter cited as *House Hearings*]; H.R. REP. No. 880, pt. 1, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3665 [hereinafter cited as HOUSE REPORT]; *Government in the Sunshine: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, House of Representatives, Regarding H.R. 11656,* 94th Cong., 2d Sess. (1976) [hereinafter cited as *House Judiciary*

into law on September 13, 1976,[18] taking effect March 12, 1977.[19] Supporters of the legislation cited several justifications for applying the sunshine concept to federal agencies. Senator Abraham Ribicoff (D-Conn.) believed the Act would increase public faith in the government's integrity, enable the public better to understand agency decisions, better acquaint the public with the agency decisionmaking process, and give every member of the public equal access to agency information. Senator Ribicoff also stated that the Act would have a beneficial effect on the quality of agency work by encouraging members to attend meetings regularly and to be prepared.[20] Senator Lawton Chiles (D-Fla.), the primary sponsor of the legislation in the Senate, stated that experience with similar state laws had shown that, instead of impeding government business, openness promoted thorough discussion of issues.[21]

The mandate to open meetings applies only to multiheaded agencies, a majority of whose members are appointed by the President with the advice and consent of the Senate.[22] Hence,

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Hearings]; H.R. REP. No. 880, pt. 2, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3694 [hereinafter cited as HOUSE JUDICIARY REPORT].

Differences between the bills were reconciled in conference. 122 CONG. REC. S15,045, H9261-62 (daily ed. Aug. 31, 1976). *See* H.R. REP. No. 1441, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3726; S. REP. No. 1178, 94th Cong., 2d Sess. (1976) [hereinafter cited as CONFERENCE REPORT].

18 Presidential Statement, 12 WEEKLY COMP. OF PRES. DOC. 1333-34 (Sept. 13, 1976).

19 Government in the Sunshine Act, § 6(a).

20 121 CONG. REC. S19,433 (daily ed. Nov. 6, 1975).

21 *Id.* at S19,432. A commentator has listed several additional benefits of "sunshine": the prevention of the favoring of special interest groups, the elimination of suspicion among the public of improper behavior on the part of agency members, and protection against "Watergate-style" decisionmaking. Markham, *Sunshine on the Administrative Process: Wherein Lies the Shade?*, 28 AD. L. REV. 463, 464-65 (1976).

22 The Act defines "agency" as:

> any agency as defined in section 552(e) of this title [subsection (e) of the Freedom of Information Act], headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency. . . .

5 U.S.C.A. § 552b(a)(1) (West Supp. 1977). Subsection (e) of the FOIA defines "agency" to include "any executive department, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." Freedom of Information Act, 5 U.S.C. § 552(e) (Supp. V 1975). In short, the open meeting provisions apply to agencies that both are covered by the FOIA (and by the Privacy Act, 5 U.S.C. § 552a(a)(1) (Supp. V 1975)) and are headed by a collegial board. HOUSE REPORT, *supra* note 17, at 3. For a discussion of this aspect of the Act, *see* Comment, *supra* note 15, at 164-68.

the Act does not apply to single-headed departments such as Defense, Commerce, and Treasury, nor does it cover single-headed agencies like the Environmental Protection Agency. The Senate Government Operations Committee, which reported the bill, explained the reasons behind this distinction:

> Multiheaded agencies operate on the principle of give-and-take discussion between agency heads. There is a tradition of public dissent; though the agency takes a final action, it does not necessarily speak with one voice. The agency heads are high public officials, having been selected and confirmed through a process very different from that used for staff members. Their deliberative process can be appropriately exposed to public scrutiny in order to give citizens an awareness of the process and rationale of decisionmaking.
>
> The single-headed agency operates differently. Only the single head is ultimately responsible for agency actions, while the staff functions as extensions of the head.[23]

Thus, the Act governs only the meetings of the collegial boards heading some forty-seven agencies.[24]

The central open meeting provision of the Act is subsection (b) of the new section 552b of Title 5:

> Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.[25]

Agencies are required only to allow outsiders to attend; the Act does not confer upon the public a right of participation.[26]

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23 SENATE REPORT, *supra* note 17, at 17. Although Rep. Abzug has suggested that the Act may ultimately cover every agency, *House Judiciary Hearings*, *supra* note 17, at 11 (testimony of Rep. Abzug), the Senate Report points out that the application of sunshine to staff meetings would present many complications, requiring a different approach than that taken in the Act. SENATE REPORT, *supra* note 17, at 17.

24 These agencies are listed in SENATE REPORT, *supra* note 17, at 15-16; HOUSE JUDICIARY REPORT, *supra* note 17, at 13-14.

The Act has been criticized by some congressmen for its use of a generic definition of "agency," rather than an enumeration of agencies to be covered. *Id.* at 37-38 (additional views of Reps. Moorhead and Kindness, concurred in by four others); HOUSE REPORT, *supra* note 17, at 35 (additional views of Rep. Horton, concurred in by seven others). For a defense of the generic definition approach, *see* Comment, *supra* note 15, at 163-64. In case of conflict, the definition, not the list, will prevail. SENATE REPORT, *supra* note 17, at 15; HOUSE JUDICIARY REPORT, *supra* note 17, at 13.

25 5 U.S.C.A. § 552b(b) (West Supp. 1977).

26 *Id.*; SENATE REPORT, *supra* note 17, at 19; HOUSE REPORT, *supra* note 17, at 8.

The framers of the Act intended that the meetings covered would include more than sessions at which formal action is taken. Thus, the sunshine provisions govern all discussion relating to the business of the agency.[27] Still, the Act applies only when a quorum of the members of the agency or subdivision is present.[28]

Subsection (c) lists a variety of types of information that may give rise to exemption from the requirements of the Act. To close a meeting to the public an agency must find that (1) material falling within such an exemption is likely to be discussed and (2) the release of the material to the public is not in the public interest. If a meeting is closed, a verbatim transcript must be made, edited of material meeting the two criteria listed above, and released to the public.[29] This requirement operates to ensure that a remedy is available for wrongfully closed meetings.[30]

The Act provides two types of judicial review. Under paragraph (h)(1), any person may bring a civil action to enforce the requirements of the Act.[31] In addition, paragraph (h)(2) authorizes a federal court reviewing agency action on other grounds to examine any agency violation of the Act.[32]

II. The Operation of the Act

A. *Legitimacy of the Nondisclosure Interests*

Whatever may be the value of open government, other legitimate interests will be threatened by a strict rule of open-

27 House Report, *supra* note 17, at 3, 8.

> [T]he term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e). . . .

§ 552b(a)(2).

The Senate Report indicates that "discussions which effectively predetermine official actions" are covered by the Act. Senate Report, *supra* note 17, at 19.

28 5 U.S.C.A. § 552b(a)(2); *House Judiciary Hearings, supra* note 17, at 12 (testimony of Rep. Abzug); Senate Report, *supra* note 17, at 19.

29 5 U.S.C.A. § 552b(f). In some cases minutes will suffice. *See* text accompanying note 82 *infra.*

30 For the rationale behind this transcript requirement, *see* note 81 *infra.*

31 5 U.S.C.A. § 552b(h)(1).

32 *Id.* § 552b(h)(2).

ness. Sunshine legislation must promote an accommodation between these conflicting interests.[33]

Congress expressly undertook such an accommodation in its Sunshine Act:

> It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.[34]

Like the Freedom of Information Act, the Sunshine Act recognizes overriding nondisclosure interests through a series of exemptions from the openness requirements.[35] Both the Sunshine Act and the FOIA exempt from disclosure the following information:[36] classified information (national defense and foreign policy);[37] personnel matters;[38] matters exempted by statute;[39] trade secrets and confidential business information;[40]

33 *See* Note, *Government in the Sunshine: Judicial Application and Suggestions for Reform*, 2 FLA. ST. U. L. REV. 537, 552 (1974). *See also* Recchie & Chernoski, *Government in the Sunshine: Open Meeting Legislation in Ohio*, 37 OHIO ST. L.J. 497, 507 (1976); Note, *supra* note 11, at 1203.

34 Government in the Sunshine Act, § 2 (Declaration of Policy). "[T]he section explicitly recognizes that the bill must also protect the ability of the Government to carry out its responsibilities, and protect the rights of individuals, such as the right to privacy, or the right to a fair and impartial trial." SENATE REPORT, *supra* note 17, at 11.

35 5 U.S.C. § 552b(c)(1)-(10). The FOIA exemptions are codified at 5 U.S.C. § 552(b)(1)-(9) (1970 & Supp. V 1975).

36 Insofar as the Sunshine exemptions follow those under the FOIA, they should be accorded similar judicial interpretation. SENATE REPORT, *supra* note 17, at 20 (interpretation of exemption (1)); CONFERENCE REPORT, *supra* note 17, at 15 (exemptions (2) and (4)); HOUSE REPORT, *supra* note 25, at 10 ("The adoption of language following that in the Freedom of Information Act [in exemption (4)] is with recognition of judicial interpretations of the FOIA exemption.").

37 5 U.S.C.A. § 552b(c)(1); 5 U.S.C. § 552(b)(1) (Supp. V 1975).

38 5 U.S.C.A. § 552b(c)(2); 5 U.S.C. § 552(b)(2) (1970).

39 5 U.S.C.A. § 552b(c)(3); 5 U.S.C. § 552(b)(3) (1970). The Sunshine Act amends the FOIA exemption so that the exemption in both Acts is narrower than the old FOIA provision. Government in the Sunshine Act, § 5(b). The previous FOIA version referred to matters "specifically exempted from disclosure by statute." The Sunshine Act exemption reads:

> . . . matters specifically exempted from disclosure by a statute (other than section 552 of this title [Freedom of Information Act]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. . . .

5 U.S.C.A. § 552b(c)(3).

matters constituting unwarranted invasions of personal privacy;[41] investigatory records;[42] and bank reports.[43] Exemptions for matters concerning criminal accusation or formal censure;[44] disclosures which would be premature and harmful;[45] and information relating to litigation, arbitration, or adjudication[46] are also included in the Sunshine Act.[47]

The new language is in response to Administrator, FAA v. Robertson, 422 U.S. 255 (1975), which held that information *permitted* to be withheld under a statute was exempt from the FOIA requirements. CONFERENCE REPORT, *supra* note 17, at 14; SENATE REPORT, *supra* note 17, at 26-27; HOUSE REPORT, *supra* note 17, at 9-10. The language was intended to overrule the decision in Administrator, FAA v. Robertson. CONFERENCE REPORT, *supra* note 17, at 14.

Nonetheless, there remains some question as to the degree to which the case has been "overruled." The House version originally required *both*, not merely either, of the conditions of the exemption. HOUSE REPORT, *supra* note 17, at 26. The House Judiciary Committee replaced that version with a standard nearly identical to the one finally enacted, leading Rep. Carlos Moorhead (R-Cal.) to comment: "[A]n unwise attempt to reverse the Supreme Court's decision . . . has been altered." 122 CONG. REC. H7873 (daily ed. July 28, 1976).

> [N]o clear or adequate record exists as to exactly which statutes are affected. Unintended results may occur that could adversely affect personal privacy interests since agencies are now left with no alternative but to hold an open meeting if the wording of the statute is vague and no other exemption applies.
>
> Congressional review of all affected statutes might have been too enormous a task. Nevertheless, by prohibiting discretionary withholding, this exemption supersedes previously enacted statutes which permitted the withholding of information "in the public interest." Only experience under the Act will reveal whether this exemption has gone too far in eliminating discretion.

Comment, *supra* note 15, at 179-80.

40 5 U.S.C.A. § 552b(c)(4); 5 U.S.C. § 552(b)(4) (1970). "This exemption also includes matter subject to certain evidentiary privileges (doctor-patient, attorney-client). . . ." HOUSE REPORT, *supra* note 17, at 10.

41 5 U.S.C.A. § 552b(c)(6); 5 U.S.C. § 552(b)(6) (1970). The Sunshine Act broadens the exemption by substituting "information of a personal nature" where the FOIA refers to "personnel and medical files and similar files."

42 5 U.S.C.A. § 552b(c)(7); 5 U.S.C. 552(b)(7) (Supp. V 1975).

43 5 U.S.C.A. § 552b(c)(8); 5 U.S.C. § 552(b)(8) (1970) "Such reports are prepared by or for such bank regulatory agencies as the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Federal Reserve Board." HOUSE REPORT, *supra* note 17, at 12.

44 5 U.S.C.A. § 552b(c)(5).

45 5 U.S.C.A. § 552b(c)(9). Subparagraph (A) would exempt many regulatory activities of the Federal Reserve Board, the Securities and Exchange Commission, and similar agencies. Discussion of an agency's strategy in labor negotiations is covered by subparagraph (B). *Id.*

46 5 U.S.C.A. § 552b(c)(10). This exemption will add an incentive to agencies to proceed by case-by-case adjudication (which is exempt), rather than by rulemaking (which might not be exempt). *Cf.* NLRB v. Bell Aerospace Co. Division of Textron, Inc., 416 U.S. 267 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); SEC v. Chenery Corp., 332 U.S. 194 (1947).

47 FOIA exemptions for inter-agency memoranda, 5 U.S.C. § 552(b)(5) (1970), and for geological information, 5 U.S.C. § 552(b)(9) (1970), are not included in the Sunshine Act.

These exemptions reflect interests the importance of which has been widely recognized.[48] Professor Douglas Wickham, a proponent of open meeting legislation,[49] notes that there are "situations upon which there is some consensus that openness is undesirable."[50] These include cases involving possible invasions of personal privacy, matters of internal housekeeping, the conduct of official investigations, collective bargaining, and property acquisition.[51]

Personal privacy is one of the important nondisclosure interests. Where agency proceedings focus not on public business but on an individual's private concerns, generally his personal privacy should be protected.[52] This concern is also central to the exemption for personnel matters. That exemption seeks to protect the reputations and privacy of third parties where the public benefit from disclosure is secondary to the privacy interest.[53] It also permits governmental bodies to organize and staff themselves in private to promote operational efficiency.[54]

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48 President Lyndon Johnson declared the necessity for these exemptions when he signed the FOIA:

> At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his Government and to provide information, just as he is — and should be — free to confide in the press without fear of reprisal or of being required to reveal or discuss his sources.
>
> Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure. Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions.

Presidential Statement, 2 WEEKLY COMP. OF PRES. DOC. 895 (July 4, 1966).

49 *See generally* Wickham, *supra* note 11.

50 *Id.* at 485.

51 *Id.* at 490. "Common exceptions include personnel matters, grand juries, and confidential records." Comment, *Government in the Sunshine: Another Cloud on the Horizon,* 25 U. FLA. L. REV. 603, 603-04 (1973). In a later article, Professor Wickham noted state statutes in which several of the exemptions are found. Wickham, *Tennessee's Sunshine Law: A Need for Limited Shade and Clearer Focus,* 42 TENN. L. REV. 557, 571 n.65 — 572 n.68 (1975) [hereinafter cited as Wickham II].

52 *See* Comment, *Open Meeting Laws: An Analysis and a Proposal,* 45 MISS. L.J. 1151, 1173 (1974).

53 Wickham II, *supra* note 51, at 567. *See also* Shurtz, *The University in the Sunshine: Application of the Open Meeting Laws to the University Setting,* 5 J.L. & EDUC. 453, 458 (1976).

54 Wickham, *supra* note 11, at 485. A study of the effectiveness of Florida's sunshine law, conducted by the Center for Governmental Responsibility, University of Florida, revealed some evidence of the need for such an exemption:

Similarly, mandatory disclosure of ongoing official investigations would undermine the legitimate interests of both the investigatory body in pursuing its investigation effectively and of the witnesses called to testify before it in protecting their privacy and personal reputations from unnecessary public scrutiny.[55]

Collective bargaining negotiations cannot effectively be carried out if open to the public.[56] Yet, the Florida sunshine law, for example, allows no exemptions to the open meeting requirements other than those provided in the state constitution.[57] Initially, the state supreme court refused to recognize

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> [T]he University of Florida's governing body, the Board of Regents, recently conducted a search for a new president of the university. It was noted that many felt the search was hampered by the fact that the screening and selection of applicants was necessarily done in the sunshine. It was felt by some that many qualified applicants did not even submit their applications because they felt that the publicity attendant to such meetings would create ill will with their present employers. This same sentiment was echoed by various city commissioners around the state who felt that qualified applicants for the position of city manager were not applying because if they were rejected, their continued working relationships in their present job would be hampered. There is no direct evidence that individuals did not apply but at least some would consider an exemption in the area wise.

Senate Hearings, supra note 17, at 379, 381 (preliminary summary of the project).

55 Wickham II, *supra* note 51, at 566-67. *See also* Wickham, *supra* note 11, at 485; FLA. ST. U. L. REV., *supra* note 33, at 554.

56 "Commentators have long recognized the infeasibility of conducting collective bargaining negotiations in public. The give and take of compromise involves too much loss of face to expect the participants to bargain freely before outside observers." Wickham II, *supra* note 51, at 564.

57 FLA. STAT. ANN. § 286.011 (West 1975). The statute is criticized for its lack of exemptions, especially for personnel matters, in Note, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361, 371, 375 (1971).

Tennessee has also enacted a sunshine law which contains no explicit exemptions. TENN. CODE ANN. §§ 8-4401 to -4406 (Supp. 1976). The Tennessee Supreme Court refused a request that it overturn the statute on the basis that the lack of exemptions rendered the law unreasonable and arbitrary. The court recognized that "there are many well informed persons in addition to appellant who insist that in certain respects it is detrimental to the public interest that closed meetings cannot be held for certain deliberations and decisions." However, if experience reveals the need for a change, "it is the Legislature, not the Judiciary, that must balance the benefits and detriments and make such changes as will serve the people and express their will." Dorrier v. Dark, 537 S.W.2d 888, 895-96 (Tenn. 1976). But as Wickham notes:

> Any suggestions that the Sunshine Law could be significantly improved by amendment have been hooted down in press reports and in speeches by members of the legislature who have become politically identified with the Act in its present form. To date, most of these reports and speeches have consisted of pure rhetoric; there has been little critical analysis. Such facile generalizations as, "If any politician is operating honestly, then he has nothing to fear from the law," exemplify this approach.

Wickham II, *supra* note 51, at 557.

any implicit exemptions.[58] Nonetheless, policy considerations of pragmatism and fairness[59] led the court to find labor negotiations, as well as a straw vote in a hiring decision, exempt from the sunshine mandate.[60]

The confidentiality of trade secrets is also an important interest to be exempted from mandatory disclosure requirements. Trade secrets are of sufficient importance that a preliminary injunction may be granted to prevent their wrongful use and disclosure.[61] Protecting the confidentiality of commercial or financial information is justified by the inequity of allowing a business competitor to gain an undeserved advantage through free access to special business processes developed by another.[62]

Professor Wickham suggests three guiding principles to accommodate the conflicting values between openness and secrecy in specified cases: "(1) a presumption in favor of public access to governmental meetings, (2) a delineation of those situations in which open meetings are not preferred, and (3) enforcement through meaningful and appropriate sanctions."[63] The Government in the Sunshine Act meets Professor Wickham's three-fold test: while openness is presumed and may be enforced, situations have been identified "in which open meetings are not preferred." The exemptions give agencies "ample leeway" to protect information when there is a legitimate public interest in secrecy.[64]

58 *See, e.g.*, Board of Pub. Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971).

59 Comment, *supra* note 51, at 608.

60 Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972). The court construed a state constitutional guarantee of the right of employees to bargain collectively as exempting the negotiations from sunshine requirements, since "meaningful collective bargaining in the circumstances here would be destroyed if full publicity were accorded at each stage of the negotiations." *Id.* at 426.

Closed-door deliberations may also be justified when an agency is acting in a quasi-judicial capacity. *See* FLA. ST. U. L. REV., *supra* note 33, at 553. A lower Florida court held that the legislature had no power to open the meetings of a school board acting in a quasi-judicial capacity in a disciplinary matter, Canney v. Board of Pub. Instruction, 231 So. 2d 34 (Fla. Dist. Ct. App. 1970), but the state supreme court reversed in a 4-3 decision, 278 So. 2d 260 (Fla. 1973).

61 *See, e.g.*, Raybestos-Manhattan, Inc. v. Rowland, 310 F. Supp. 993 (D.S.C. 1969).

62 *See* Note, *Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Toward a More Objective Standard*, 60 CORNELL L. REV. 109, 126-27 (1974).

63 Wickham II, *supra* note 51, at 558.

64 122 CONG. REC. H7874 (daily ed. July 28, 1976) (statement of Rep. Fascell).

Yet, the Act gives equally ample leeway for agencies to disregard the interests protected by the exemptions. And at the same time, the provisions of the Act strongly encourage agencies to open their meetings, without regard to the merits of closure.

B. *Incentives in the Act to Open Agency Meetings*

An examination of the statute reveals that the provisions of the Act strongly encourage agencies to conduct open meetings. First, although the Act identifies exempted interests, it offers them little protection. No vote of the agency members is required if the meeting is to be open.[65] And no outsider has any means under the Act by which to force an agency vote on the question of closure.[66] Even if an agency determines that an exemption applies and the public interest does not require opening, the Act only provides that the open meeting requirement "shall not apply";[67] the Act does not go on to mandate closure. Indeed, no provision in the Act even suggests that it is ever improper to open a meeting. As the Senate Report states clearly, "Closed meetings are never mandated."[68]

The Act does not provide for court review of agency decisions to open meetings, although jurisdiction to review may come from other sources.[69] Paragraph (h)(1) confers jurisdiction on the United States District Courts "to enforce the

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65 Paragraph (d)(1) requires that "[a]ction under subsection (c) shall be taken only when a majority of the entire membership of the agency . . . votes to take such action." The presumptive opening of all meetings is mandated by subsection (b). Subsection (c) comes into play only when an exemption is invoked. If it is apparent to the agency members from the outset that a meeting will not receive the votes necessary for closure, they can avoid the voting process and disclosure of the votes by simply announcing that the meeting will be open, thereby avoiding "[a]ction under subsection (c)."

66 Paragraph (d)(2) provides something resembling a right of intervention:

> Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

But control still rests with agency members: the agency need vote on closure only if the outsider's request is coupled with the request of a member of the agency's collegial board.

67 5 U.S.C.A. § 552b(c).

68 Senate Report, *supra* note 17, at 3.

69 *See* discussion of judicial review in the text accompanying notes 89-95 *infra*.

requirements of subsections (b) through (f)."[70] Paragraph (h)(2) authorizes inquiries only into violations of the Act. Since the statute itself never requires closure, a decision to open a meeting cannot be challenged by either type of action.[71]

C. *The Difficulties in Closing Meetings Under the Act*

An agency member contemplating a vote to close a meeting will be aware of the costs of closure. First, he must consider the additional procedures needed to close a meeting under the Act. Second, an agency member will recognize the potential expense of litigation and the risk of reversal. The following sections of the Comment examine the requirements for and consequences of a closure vote.

1. Administrative Obstacles

Officials desiring to close a meeting can do so only at the cost of complex, expensive, and time-consuming procedures.[72] Any decision to close a meeting initially involves a two-step determination by an agency. First, the agency must find that the meeting is likely to involve information covered by an exemption.[73] Second, the agency must decide that an open meeting would not be in the public interest.[74] Both steps require the agency

70 The basic open meeting requirements of the Act, including the publication and recording requirements, are contained in 5 U.S.C.A. § 552b(b)-(f).

71 Under (h)(2), a court acting under (h)(1) may not "set aside, enjoin, or invalidate any agency action (other than an action to *close* a meeting or to *withhold* information)" (emphasis added).

72 The Act does not impose costs only on closed meetings. All meetings, as defined by paragraph (a)(2), are subject to the notice requirements of subsection (e). In general, an agency must "make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting." 5 U.S.C.A. § 552b(e)(1). However, this requirement may be subject to the exception in paragraph (e)(2). *See* note 87 *infra*.

Open meetings will require certain efforts not needed if a meeting is to be closed. The agency must make provision for public attendance at the meeting: "ample space, sufficient visibility, and adequate acoustics." HOUSE REPORT, *supra* note 17, at 8. If the agency *votes* to open the meeting — although no such vote is required — the vote must be recorded and publicized. 5 U.S.C.A. § 552b(d)(1), (3).

73 5 U.S.C.A. § 552b(c). "Absolute certainty is not required on the part of the agency." SENATE REPORT, *supra* note 17, at 10 (providing for closure of a meeting if it "can reasonably be expected" to disclose exempted information. *Id.* at 56.).

74 Section (c) specifically provides that the exemptions do not apply "in a case where the agency finds that the public interest requires otherwise." The legislative history

members to assess carefully each portion of the planned meeting.

Apart from the agency determination that closure is appropriate, the Act imposes a variety of additional administrative requirements. First, under paragraph (d)(1), no meeting may be closed unless a majority of the entire membership of the collegial board so chooses, by a separate, recorded, non-proxy vote.[75] Paragraph (d)(3) requires the agency to make publicly available, within one day of a closure vote, a written copy of the vote, reflecting the vote cast by each member, a "full written explanation" of the closure, and "a list of all persons expected to attend the meeting and their affiliation."[76] The legislative history makes clear that the explanation must set forth the grounds for the agency's conclusion with specificity.[77] Furthermore, the announcement of this information "must be made in a manner calculated to assure its wide dissemination. . . ."[78]

Paragraph (f)(1) adds another obstacle: "For every meeting

makes clear Congress' intent that a meeting *must* be opened if openness is in the public interest. "[E]ven if the subject matter of the discussion comes within one of the exemptions, it must be an open discussion if the public interest so requires, and the agency has the burden of justifying a decision to close a meeting . . . ." 122 CONG. REC. H9259 (daily ed. Aug. 31, 1976) (statement of Rep. Abzug); *id.* at H9260. *See also* HOUSE REPORT, *supra* note 17, at 3, 9, 10, 13; SENATE REPORT, *supra* note 17, at 20 ("The agency should not automatically close a meeting because it falls within an exemption.").

75 If the vote is taken at a meeting, that portion of the meeting devoted to closing a future meeting is not a "meeting" within subsection (a)(2) and is thus not subject to the openness requirements of the Act. 5 U.S.C.A. § 552b(b).

76 Under subsection (c), the agency is not required to make these disclosures if this information itself falls within one of the exemptions.

77 HOUSE REPORT, *supra* note 17, at 13-14.

> The explanation should not only refer to the specific paragraph in subsection [(c)] which the agency is invoking, but explain why the specific discussion falls within the paragraph cited, the relative advantages and disadvantages to the public of holding the meeting in closed or open session, and why the agency concluded on balance that the public interest would best be served by closing the meeting.

SENATE REPORT, *supra* note 17, at 28.

78 HOUSE REPORT, *supra* note 17, at 14.

> . . . Means of publicizing such information should include posting notices on the agency's public notice boards, publishing them in publications whose readers may have an interest, and sending them to the individuals on the agency's general mailing list or a mailing list maintained for those who desire to receive such material. Publication in the Federal Register, while not mandated by the bill [except for announcement of meetings], provides a further potential means of publicizing these announcements and should be used whenever possible.

Id. at 16; CONFERENCE REPORT, *supra* note 17, at 19.

closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision." It is difficult to ascertain the precise meaning of this subsection.[79] The language appears to imply that the general counsel must make an independent determination on the merits of closure. However, no statement to this effect may be found in any of the relevant reports; thus, the provision may simply require that the General Counsel certify that the agency has complied with the procedures dictated by the Act. The former interpretation would allow the General Counsel, an employee of the agency, to override the agency members' vote in favor of closure; the latter view would grant him much less authority.[80]

Additionally, with respect to most closed meetings, section (f)(1) requires the agency to "maintain a complete transcript or electronic recording adequate to record fully the proceedings."[81] An exception is provided for meetings closed pursuant

79 This provision originated as part of a floor amendment by Rep. Horton. The major thrust of the amendment was to debate the verbatim transcript requirement, and only that deletion aspect was explained and debated. The amendment passed the House by a narrow margin. 122 CONG. REC. H7890-98 (daily ed. July 28, 1976). The verbatim transcript was reinstated in conference for most meetings, but the requirement of approval by the General Counsel remained. CONFERENCE REPORT, *supra* note 17, at 19-20; 122 CONG. REC. S15,044 (daily ed. Aug. 31, 1976) (statement of Sen. Chiles). The legislative history merely restates the statutory language. CONFERENCE REPORT, *supra* note 17, at 19. *See also* Hirschhorn, Sunshine for Federal Agencies, 63 A.B.A.J. 55, 57 (1977).

Given the context in which the provision was introduced, it is logical to conclude that the provision was meant to be a new, independent, substantive barrier to wrongful closure, to counterbalance the removal of the transcript requirement, rather than merely as a check that the agency has followed the proper *procedure* in reaching its closure decision.

80 A copy of the General Counsel's certification, together with a statement from the presiding officer of the meeting, must be retained by the agency as part of the transcript, recording, or minutes. § 552b(f)(1). *See* CONFERENCE REPORT, *supra* note 25, at 19-20.

81 Paragraph (f)(2) makes it clear that this is to be a vertabim transcript.

The House Report defends the verbatim transcript requirement in two ways. First, "once a closed meeting is actually held, most or all of it may turn out to be non-exempt. The existence of the transcript or recording allows the release of the discussion as soon as this fact becomes apparent. . . ." HOUSE REPORT, *supra* note 17, at 15. Second, the transcript will "assure that a citizen has a meaningful remedy when a meeting has been illegally closed, namely, the release by the court of the transcript of the illegally closed portion." *Id.* at 2.

For a discussion of the pros and cons of the transcript requirement, *see* Comment,

to exemptions (8), (9)(A), and (10), for which minutes of the meeting will suffice, provided they are kept in sufficient detail.[82] The verbatim transcript, complete copy of the minutes, or complete electronic recording must be maintained by the agency for two years after the meeting or for one year after the proceeding with regard to which the meeting was held, whichever is later.[83]

Paragraph (f)(2) requires that these transcripts, minutes, and recordings be made available to the public, "except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c)." Thus, the agency may delete information only if it in fact falls within an exemption and disclosure is not required by the public interest.[84] Sources conflict as to whether the editing process requires approval by a recorded vote.[85]

Once the transcript, minutes, or recording has been edited, the agency must make it "promptly available to the public, in a place easily accessible to the public. . . ."[86]

The edited transcript must be furnished at the cost of duplication to any person.[87]

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supra note 15, at 200-02. The *Washington Post* praised the House for deleting the transcript requirement in its version:

> Such House provisions are regarded as serious defects by those who equate most secrecy with corruption and suspect that officials will use any opportunity to evade a sunshine law. In our view, however, Congress should not assume bad faith or try to tie down agencies with quibbling rules that only invite lawsuits and contentiousness. The House approach is much better than the Senate's on this count. Far from being any kind of sell-out, it is a major forward step.

Sunshine and Sense, Washington Post, Aug. 5, 1976, § A, at 14, col. 1 (editorial).

82 5 U.S.C.A. § 552b(f)(1). The exemptions are codified at 5 U.S.C.A. § 552b(c).

83 *Id.* § 552b(f)(2).

84 House Report, *supra* note 17, at 3.

85 To avoid "a considerable expenditure of the time of the senior officials of the agency," the House Judiciary Committee struck the requirements that the deletion vote be recorded and that explanations be given for each deletion. House Judiciary Report, *supra* note 17, at 16. Rep. Fascell has suggested that the deletion process will not necessitate a meeting. *House Judiciary Hearings, supra* note 17, at 3.

However, the editing process would seem to be covered by paragraph (d)(1): "A separate vote of the agency members should be taken . . . with respect to any information which is proposed to be withheld under subsection (c)." If so, subsection (d) would then require that the vote be recorded and a full explanation be given. 5 U.S.C. § 552b(d)(1), (3).

86 5 U.S.C.A. § 552b(f)(2). "If made available in the form of a recording, provision must be made so that the identity of each speaker is disclosed." House Report, *supra* note 17, at 15.

87 In addition, the total number of meetings closed to the public must be reported

The cost of compliance with these procedures may be substantial in terms of time and expense.[88] Except in extreme circumstances, this administrative burden may deter an agency from closing a meeting.

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annually to Congress. The report must also contain the reasons for closing such meetings. 5 U.S.C.A. § 552b(j).

Some agencies may find partial relief from the procedural burdens through the provisions of paragraph (d)(4), which allow certain agencies to close meetings without performing some of the steps required generally.

> Subsection (d)(4) will simplify closing procedures for agencies regulating securities, commodities, and financial institutions, who must often meet on very short notice, and agencies whose primary or sole responsibility is to conduct adjudicatory proceedings. Examples of agencies expected to qualify under this paragraph are the Securities and Exchange Commission, the Federal Reserve Board and the National Labor Relations Board.

HOUSE REPORT, *supra* note 17, at 14. The short-cut procedures are available to agencies a majority of whose meetings may be closed. About 15 agencies have indicated that a majority of their sessions will be closed. Among them are the National Labor Relations Board, the Federal Reserve Board, and the Interstate Commerce Commission. *Federal Agencies Move Out of the Shadows,* BUS. WEEK, March 14, 1977, at 74.

88 The House Report estimates that the costs incurred in connection with the Act will be minimal. HOUSE REPORT, *supra* note 17, at 6. This estimate, however, springs from a built-in assumption that few meetings will be closed:

> An agency closing a portion of a meeting will have to make a transcript or electronic recording thereof. *Thus the more frequently an agency closes meetings, the greater will be the cost.* Considering the approximately 50 covered agencies as a whole, the committee estimates that *relatively few portions of meetings will be closed* and that the costs associated with closings will *therefore* be minimal.

Id. at 5 (emphasis added).

However, there is a dissenting view on the issue:

> It is not possible to estimate the [*sic*] costs of complying with the provisions of H.R. 11656. Certainly the time of a majority of the entire membership of an agency spent in the repeated voting sessions attendant upon closed meetings; the time spent by lawyers and other staff members examining documents; litigation costs arising from actions created by the bill; the administrative burden of preparing a verbatim transcript of each closed meeting, of deleting exempt portions and of providing a copy of the remainder to the public will be significant.

Id. at 36 (additional view of Rep. Horton, concurred in by seven others). *See also* 122 CONG. REC. H9261 (daily ed. Aug. 31, 1976) (statement of Rep. Kindness); Markham, *Sunshine on the Administrative Process: Wherein Lies the Shade?*, 28 AD. L. REV. 463, 481-82 (1976).

Jerry S. Williams, Chairman of the ABA Section on Administrative Law, testified as follows:

> The legislative proposals for the closing of the meetings of the multi-member agencies are exceedingly complex and detailed. In their present form, they will require heavy expenditures of taxpayers' funds and agency manpower simply to comply with the requirements. . . . [T]he complex and stringent requirements concerning notice, agenda, reasons for meetings to be closed, full transcript of all meetings and the editing of those transcripts are unduly burdensome and wasteful for the return they might bring in aiding enforcement of open meetings requirements.

House Hearings, supra note 17, at 120-21.

2. The Risk of Judicial Review

A closure determination is subject to judicial review under two distinct provisions of the Act. The threat of judicial sanction may discourage an agency from closing a meeting.

Paragraph (h)(1) provides for an action to be brought by *any person* in a United States district court to enforce the open meeting requirements of the Act. Since the Act mandates only open meetings, this paragraph does not subject non-closure decisions to review.[89] The Act does not require an individual to pursue or exhaust any appeals within the agency before review is available.[90] Yet, an agency defending in an (h)(1) suit has the burden of justifying its decision.[91] Upon finding a violation of one of the Act's provisions, a court may grant equitable relief, such as an injunction against future violations or an order requiring the release of any part of a transcript, recording or minutes not properly withheld under subsection (c). However, a reviewing court asserting jurisdiction solely on the basis of (h)(1) may not invalidate or enjoin any agency action, other than the decision to close a meeting or withhold information, for a violation of the Act.[92] Furthermore, the statute does not allow a court to award money damages.[93]

A federal court exercising jurisdiction to review agency action under a statute other than the Sunshine Act is authorized by paragraph (h)(2) to examine, at the request of a party, violations of the open meeting requirements. An (h)(2) action, then, is ancillary to another proceeding, whereas an

89 *See* text accompanying note 68 *supra.*

90 House Judiciary Report, *supra* note 17, at 39 (additional views of Reps. Moorhead and Kindness, concurred in by four others).

The Senate version required that a potential plaintiff give the agency notice and a reasonable period to correct the violation before bringing the action. Conference Report, *supra* note 17, at 21. "The conference substitute does not contain the requirement of the Senate bill... because the conferees expect and encourage potential plaintiffs or their attorneys to communicate informally with the agency before bringing suit." *Id.* at 22.

91 5 U.S.C.A. § 552b(h)(1). "The presumption in every instance is that a meeting shall be open to the public, and this presumption may be overcome only by a preponderant showing that the portion proposed to be closed clearly comes within one of the exemptions contained in subsection (c)." House Report, *supra* note 17, at 8. *See also* Hirschhorn, *supra* note 17, at 56.

92 5 U.S.C.A. § 552b(h)(2).

93 House Report, *supra* note 17, at 17.

(h)(1) action is a separate suit requiring no other basis of jurisdiction. A court, reviewing under (h)(2), may invalidate agency action taken at an improperly closed meeting.[94] This relief is not available under (h)(1). Therefore, parties seeking to open meetings planned to be closed or to procure the release of information are likely to bring an (h)(1) action. Parties seeking to invalidate agency action on another ground are likely to tack on a claim for (h)(2) review.[95]

In reviewing agency action under (h)(1) or (h)(2), a court would make a two-step investigation. First, it would review the agency's initial decision to close the meeting; *i.e.*, the court would examine the conclusion that an open meeting would be "likely to" disclose exempted information and that such

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94 SENATE REPORT, *supra* note 17, at 34. Such instances are likely to arise in connection with the judicial review section of the Administrative Procedure Act, under which the reviewing court is directed to "hold unlawful and set aside agency action, findings, and conclusions found to be — . . . without observance of procedure required by law. . . ." 5 U.S.C. § 706(2)(D) (1970).

> The weight to be given violations of the provisions of section 552b would be considered as are other matters covered by this provision in the Administrative Procedure Act. The reviewing court would then be in a position to determine whether the violation was one of material prejudice to the party involved.

HOUSE JUDICIARY REPORT, *supra* note 17, at 6, 17.

However, such relief should be granted only in rare circumstances.

> The conferees do not intend the authority granted to the Federal courts by the first sentence of subsection (h)(2) to be employed to set aside agency action taken other than under section 552b solely because of a violation of section 552b in any case where the violation is unintentional and not prejudicial to the rights of any person participating in the review proceeding. Agency action should not be set aside for a violation of section 552b unless that violation is of a serious nature.

CONFERENCE REPORT, *supra* note 17, at 23. *See also* SENATE REPORT, *supra* note 17, at 34 ("only in rare instances where the agency's violation is intentional and repeated"); HOUSE REPORT, *supra* note 17, at 17 ("in a rare instance"); 122 CONG. REC. H9260 (daily ed. Aug. 31, 1976) ("only where the violation is of a serious nature") (statement of Rep. Abzug).

Experience under state sunshine laws indicates that the courts are reluctant to nullify otherwise proper action taken in violation of an open-meeting law. Wickham, *supra* note 11, at 498.

95 Because the propriety of this drastic relief will in some cases not be ascertainable before trial, this provision opens a wide door for the delay of regulations to which a party may object. Indeed, the Senate Report effectively throws out a welcome mat: "For example, a company challenging the validity of an agency rule, may include in its challenge the fact that the agency adopted the rule in a meeting improperly closed to the public." SENATE REPORT, *supra* note 17, at 34. *See also Sunshine and Shade*, BUS. WEEK, March 14, 1977, at 112 (editorial).

As under (h)(1), decisions to *open* meetings cannot be reviewed and no appeal within the agency is required. *See* note 90 *supra*.

disclosure would not be in the public interest.[96] Second, assuming the agency has not released the entire transcript, the court would review the editing decisions of the agency.[97] To sustain the withholding of material, the court would have to find that the information in fact falls within the scope of an exemption and that its release would not be in the public interest.

If a court finds that an agency has improperly closed a meeting, it may order the release of the entire transcript; even when the meeting was properly closed, if the court determines that certain information should not have been withheld in the editing process, those portions of the transcript may be disclosed.[98] It is certainly possible that this risk of future disclosure of currently closed meetings will inhibit the exchange of opinions in committee meetings. Although only "non-exempt" portions will be released, the exact parameters of the exemptions are unclear and what constitutes "the public interest" is uncertain. Agency members may prefer to remain silent rather than hazard association with an unorthodox or unpopular opinion when the application of an exemption is not quite clear.[99]

96 The use of the term "likely," the public interest provision, and the legislative history may imply an "abuse of discretion" standard. "Absolute certainty is not required on the part of the agency. The section is not intended to require such a showing of certainty in any judicial proceeding invoking this section." SENATE REPORT, *supra* note 17, at 10. However, as Professor Davis points out, the law is currently in a state of confusion regarding the scope of review of informal agency findings. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.00 (Supp. 1976). The APA suggests a substantial evidence standard for formal procedures and, for review in general, a standard that the agency's decisions not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(E), (a) (1970). But the difference between these standards is unclear and inconsistently applied. K. DAVIS, *supra*, § 29.01-8.

97 "In deciding such an action the court may examine in camera any portion of the transcript, recording, or minutes of a closed meeting and may take any additional evidence it deems necessary." CONFERENCE REPORT, *supra* note 17, at 22.

98 A further, pragmatic risk of disclosure has been expressed: "[W]e object to the imposition of an across-the-board transcript and electronic recording requirement. We object because of the very practical and real possibility that privileged subject matter could easily be leaked." HOUSE JUDICIARY REPORT, *supra* note 17, at 41 (supplemental views of Reps. Hutchinson and McClory, concurred in by three others).

99 This has an immensely chilling effect on the kind of derogatory but truthful comment that an agency like the SEC must consider when they [*sic*] consider taking the stock of a company off the trading market because the vice president of the company is dishonest.

> What person is going to say in an open meeting or in a closed meeting of which a verbatim transcript is being made, "I believe that man is crooked . . ."?

122 CONG. REC. H7892 (daily ed. July 28, 1976) (remarks of Rep. McCloskey). *See also* HOUSE JUDICIARY REPORT, *supra* note 17, at 33-34 (letter from Gerald D. Morgan, Jr.,

However, proponents of the Act have pointed out that sunshine legislation in the states does not appear to have had this effect.[100]

The cost of defending in an action directed against closure may be substantial. In addition, subsection (i) provides that whenever a plaintiff "substantially prevails," the court may assess attorneys' fees and other litigation costs against the agency.

An agency's annual report to Congress must include a description of any litigation brought against the agency under the Act, along with the numbers of open and closed meetings and explanations for the closures.[101] Congress may draw unfavorable conclusions from a high number of closures or court reversals of agency determinations. Strained relations between Congress and an agency could become relevant in the process of appropriating funds.

Faced with the potential hazards of litigation under the Act, an agency may be hesitant to close meetings. Although court attacks on decisions to *open* meetings might stem from other

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Vice-President and General Counsel, Overseas Private Investment Corporation) (risk of judicially ordered disclosure will be a deterrent to full and free discussion of sensitive issues which the bill purports to protect).

100 Sen. Chiles argued that "[t]he history of open meeting legislation in the states and in Congress is that such legislation does not in fact inhibit free and frank discussion." 121 CONG. REC. S19,436 (daily ed. Nov. 6, 1975).

However, not all "open meeting legislation" is alike: "While the concepts embodied in H.R. 11656 stem from "Sunshine" or "open meeting" statutes of the States, none of the 49 State statutes, so far as we can determine, has a verbatim transcript requirement for either open or closed meetings." HOUSE REPORT, *supra* note 17, at 34-35 (additional views of Rep. Horton, concurred in by seven others); HOUSE JUDICIARY REPORT, *supra* note 17, at 41-42 (supplemental views of Reps. Hutchinson and McClory, concurred in by three others); 122 CONG. REC. H7891 (daily ed. July 28, 1976) ("[N]ot a single state sunshine or open meetings law contains any requirement for verbatim transcripts.") (remarks of Rep. Horton); *id.* ("No [state] Sunshine Act requires a verbatim transcript of private meetings") (remarks of Rep. McCloskey). The Common Cause state model open meeting statute requires minutes of all meetings, but no verbatim transcript. J. Adams, State Open Meeting Laws: An Overview 24-29 (1974) (published by Freedom of Information Foundation, Columbus, Missouri).

> As for the fact that few, if any States require transcripts, it should be noted that 24 of the 49 state open meeting statutes provide criminal penalties for violations, 2 more impose civil penalties, and 19 render the substantive action taken at an unlawfully closed meeting void or voidable. None of these sanctions is available under this bill, leaving the possible disclosure of the transcript as the only remedy for an improper closing.

122 CONG. REC. H7891 (daily ed. July 28, 1976) (remarks of Rep. Abzug).

101 5 U.S.C.A. § 552b(j).

sources, no such right of action is provided by the Sunshine Act.

D. *Interim Conclusion*

The Government in the Sunshine Act is designed to discourage agencies from holding closed meetings. Given the history of secrecy, this is not an unreasonable approach. For a variety of reasons, agency business traditionally has been conducted behind closed doors. The motivations for secrecy have probably included aversion to the press, mistrust of the public, desire for insulation from informed criticism, elitist conceptions of the public service, the need to hide questionable dealings, and preference for simple convenience. These are no longer to be tolerated. There is no longer an exemption for stage fright.

Faced with the need to overcome often-powerful agency incentives for closure, Congress sought strong counter-incentives on the side of openness. As Representative Dante Fascell (D-Fla.) commented, "What we need is a means to shatter the complacency of officials who needlessly follow practices of secrecy and make it so difficult to operate in such a manner that a policy of open government becomes the easy way out."[102] The counter-incentives spring from the administrative burdens and the possible judicial review attached to each closure choice

Yet, important interests are served by the closure of certain meetings. To be sure, these interests are recognized in the provision of exemptions. But the Act leaves the closure of exempted meetings totally within the discretion of the agency.[103] And that discretion is informed by the heavy incentives for openness. Agencies are both empowered and encouraged to disregard the interests that give rise to the exemptions.[104]

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102 122 CONG. REC. H7873 (daily ed. July 28, 1976). "The Act is designed to encourage open meetings; it is more burdensome to hold a closed meeting and maintain a transcript or tape than it is to hold an open meeting where the recordkeeping provisions do not apply." Comment, *supra* note 1, at 173.

103 That is, if the public interest does not require openness, agencies may or may not open meetings falling within an exemption.

104 The Act has been criticized for leaving the disclosure of the complete transcript of a closed meeting to the discretion of the agencies in question. HOUSE JUDICIARY REPORT, *supra* note 17, at 41 (supplemental views of Reps. Hutchinson and McClory, concurred in by three others) ("This discretion leaves room for arbitrary and tyrannical disregard of individual rights by a majority vote in a bureaucracy.").

Under the Act the exemption interests, though recognized, are given no force. If these values are to be protected against the onslaught of openness incentives generated by the Act, they must be given some independent vitality. What is needed is a device to compel full consideration of these interests by the agency, so that when openness is neither required nor in the public interest, it may be prohibited.

III. Sources of Protection Outside the Act

Individuals or entities adversely affected by an agency decision to release information should have available a device for review of the determination. A cause of action to enjoin an agency from holding an open meeting, or to grant damages for improper disclosure, might be inferred from existing law. Such an action could rest on any of several bases.

A remedy might be inferred from either a constitutional provision or common law doctrine.[105] However, these sources

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Professor Davis levelled similar criticism against the Freedom of Information Act:

> The Act never forbids disclosure. It never protects privileged or confidential information from disclosure; it protects only from required disclosure. No general federal statute prohibits clearly unwarranted invasions of personal privacy. [Davis' article was written prior to the enactment of the Privacy Act. *See* text accompanying note 117-18 *infra.*] Comprehensive legislation about disclosure would deal with required disclosures to the public, forbidden disclosures to the public, required disclosures to parties with special interests, and forbidden disclosures to individual parties as distinguished from disclosures to the public.

Davis, *The Information Act: A Preliminary Analysis,* 34 U. Chi. L. Rev. 761, 806 (1967).

This discretion under the FOIA, coupled with the disclosure incentives, has led some agencies to decide to release business information to competitors of the informant in cases where the exemption was at least arguable, if not definitely applicable. *See* text accompanying note 108 *infra. See also Telling Tales: How Law Is Being Used to Pry Business Secrets From Uncle Sam's Files,* Wall St. J., May 9, 1977, at 1, col. 6.

105 For example, a business whose trade secret may be revealed by an agency might argue it will be deprived of property without due process and just compensation as guaranteed by the Fifth Amendment. Although this argument has not succeeded when release was pursuant to validly adopted regulations providing procedural protections, Pharmaceutical Manufacturers Association v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976), it may be persuasive in other contexts.

Relevant common law doctrines also exist. The District Court for the District of Columbia, in Charles River Park "A," Inc. v. HUD, 360 F. Supp. 212, 213 (1973), enjoined the release of information found to be given in exchange for an "implied promise of confidentiality" on the part of the agency. However, this theory was not relied on in the opinion of the Court of Appeals, which remanded the case for further consideration. 519 F.2d 935 (D.C. Cir. 1975). Furthermore, given the terms of the Sunshine Act, all parties turning over material in the future would seem to be on notice of the likelihood of disclosure.

have not yet been found to provide protection for confidentiality interests in the face of a disclosure statute.

The existence of a judicial remedy may be inferred by analogy to decisions under the Freedom of Information Act. A series of "reverse-FOIA"[106] cases has held, under several theories, that an interested person may block the release of exempt information.[107] These cases, arising in a variety of factual circumstances, suggest that some parties value the secrecy of material enough to litigate the propriety of agency decisions to disclose information. The cases illustrate the possible abuses of disclosure statutes. In one instance, a business attempted to obtain a competitor's financial information, later found by a court to be legally protected. The agency had announced plans to disclose the information, forcing the plaintiff to bring an action or else suffer the loss of confidentiality.[108]

A common reverse-FOIA theory uses the Administrative Procedure Act as a basis for review. That Act grants power to the courts to hear cases brought by persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute. . . ."[109] A court could properly issue an injunction if it found the decision to open the meeting to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."[110] This approach was accepted by the court in *Sears, Roebuck & Co. v. General Services Administration*:[111]

> . . . it seems clear that an agency decision to release data submitted to the agency by a private party is an "agency action" adversely affecting that private party and entitling that party to judicial review. . . .
>
> The Freedom of Information Act does not confer jurisdiction over this action, nor do its exemptions make nondisclosure mandatory. But the policies behind these exemptions provide a sound basis for determining whether release of the documents in question would be "arbitrary, capricious,

106 Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 775 (D.D.C. 1974).

107 *See, e.g.*, GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352 (D. Del. 1975); Charles River Park "A," Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975); McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974).

108 McCoy v. Weinberger, 386 F. Supp. 504 (W.D. Ky. 1974).

109 5 U.S.C. § 702 (1970).

110 5 U.S.C. § 706(2)(A) (1970).

111 384 F. Supp. 996 (D.D.C.), *aff'd on other grounds*, 509 F.2d 527 (D.C. Cir. 1974).

> an abuse of discretion, or otherwise not in accordance with law.["] Those policies will be applied.[112]

Reverse-FOIA actions have also been based on other statutes that compel closure. The FOIA does not apply if material is within an exemption from the disclosure requirement.[113] Therefore, disclosure of material within the trade secrets exemption is not authorized by law. Such a finding brings into play 18 U.S.C. § 1905, a statute forbidding any disclosure of trade secrets and related information "not authorized by law" by employees of the United States or any of its departments or agencies.[114] This theory has been cited with approval several times,[115] and a federal district court in Virginia relied on this

112 381 F. Supp. at 1001. In that case, however, the plaintiff failed to show that the information fell within an exemption. *Id.* at 1003.

The United States District Court for Delaware held in GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352 (D. Del. 1975), that "abuse of discretion" is the appropriate standard of review for an agency decision to release information. Although the court found that this standard of review was narrow, it granted a preliminary injunction on the ground that the CPSC had not taken adequate steps to insure the accuracy of the material to be released.

113 5 U.S.C.A. § 552(b).

114 18 U.S.C. § 1905 (1970) provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Several cases make it clear that this statute cannot be used as the basis for finding information to be within exemption (3) of the FOIA. Sears, Roebuck & Co. v. General Services Administration, 509 F.2d 527, 529 (D.C. Cir. 1974); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 774-75 (D.D.C. 1974); M.A. Schapiro & Co., Inc., v. SEC, 339 F. Supp. 467, 469-70 (D.D.C. 1972); Frankel v. SEC, 336 F. Supp. 675, 678-79 (S.D.N.Y. 1971), *rev'd on other grounds* 460 F.2d 813, *cert. denied* 409 U.S. 889 (1972). However, this theory assumes that the information in question does validly fit within one of the exemptions on some other basis. If the information is exempt from disclosure requirements, then disclosure is "not authorized by law" and is thus prohibited under 18 U.S.C. § 1905.

115 *See* Pharmaceutical Manufacturers Association v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976); Charles River Park "A," Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975). *See also* Comment,

statute to prevent the release of trade secrets under the FOIA.[116]

This 18 U.S.C. § 1905 theory can logically be extended to other statutes as well. As long as the meeting is within an exemption, and the public interest does not require openness, any statute mandating closure should be given effect. The Privacy Act,[117] for example, prohibits disclosure of "any record which is contained in a system of records" (as defined in the Act) without the consent of the person to whom the information pertains.[118]

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supra note 15, at 181 n.107. "The Act [FOIA] leaves officers free to disclose or withhold records covered by the exemptions, but they may then be governed by other statutory law, by the common law, by executive privilege, by executive orders, or by agency-made law in the form of regulations, orders, or instructions." Davis, *supra* note 104, at 766.

116 Westinghouse Electric Corp. v. Schlesinger, 392 F. Supp. 1246, 1248-50 (E.D. Va. 1974).

117 5 U.S.C. § 552a (Supp. V 1975).

118 *Id.* (b) The prohibition contains several exceptions, one of which is for the disclosure of records which would be "required under section 552 of this title." *Id.* (b)(2). Hence, the Privacy Act could not be the basis of a reverse-FOIA action. *However,* the Sunshine Act does not add a similar exception to cover disclosure in an open meeting. Thus, the Privacy Act could serve as a springboard for reverse-Sunshine actions.

Further, the Privacy Act provides for assessment of damages, *id.* (g)(4), reducing the need for temporary restraining orders. In both *Westinghouse, see* note 116 *supra,* and *Sears, see* note 111 *supra* and accompanying text, the parties agreed to non-release of the information pending the outcome of the action, 392 F. Supp. at 1248; 384 F. Supp. at 1000. The *Sears* court noted:

> Such review extends only up to such time as disclosure moots the action. We have not required the agency to withhold information pending court review; defendants in this action have taken that step voluntarily. In future actions, the availability of preliminary injunctive relief to preserve the status quo will depend on the usual factors, including likelihood of success on the merits, etc. In short, such preliminary relief need not be automatic.

384 F. Supp. at 1001 n.7. Because open meetings may be held on notice of just a week or less, the ability to enjoin the opening swiftly will be crucial, especially where no adequate after-the-fact relief is available.

Other statutes limiting or prohibiting public disclosure by federal agencies include 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (1970 & Supp. V 1975) (Equal Employment Opportunity Commission); 39 U.S.C. §§ 410, 412 (1970 & West Supp. 1977) (Postal Service); 15 U.S.C. § 796(d) (Federal Energy Administration); 15 U.S.C. § 78x(b) (Supp. V 1975) (Securities and Exchange Commission); 19 U.S.C. § 2155 (Supp. V 1975) (information given in connection with trade negotiations); 42 U.S.C. § 5916 (Supp. V 1975) (energy information); 26 U.S.C.A. § 7213(a) (West Supp. 1977) (income tax return information); 18 U.S.C. § 798 (1970) (classified information).

Some courts have found within their equitable jurisdiction the power to exempt information which does not fit within any FOIA exemption. "The rule that will be followed, therefore, is this: where agency records are not exempted from disclosure by the Freedom of Information Act, a court must order their disclosure unless the agency proves that disclosure will result in significantly greater harm than good." Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 806

These theories could provide the basis of reverse-Sunshine actions since, like the FOIA, the Sunshine Act neither explicitly forbids nor expressly mandates withholding of exempt information.[119] There are difficulties, however, in applying this theory to the Sunshine Act. First, the statutory theory only applies to certain exemptions. § 1905 is limited to trade secrets and similar information, and the Privacy Act has not yet been used in this fashion. Second, the Sunshine Act is inapplicable only when (1) the material is within an exemption and (2) the agency has found that the public interest does not require release. To find that the Act does not authorize disclosure, a court would have to hold that the agency misapplied one of these tests. Despite the obvious importance of this determination, Congress provided little guidance as to what factors should be considered in evaluating the public interest. Reviewing courts will find it difficult to determine that the public interest did not require that the material be released. As a result, this argument is likely to succeed only in extreme circumstances. Third, the exemptions have been construed narrowly under the FOIA.[120]

With no explicit protection in the Sunshine Act, parties affected by the release of information must rely on such legal theories as those outlined above. Although courts may be per-

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(S.D.N.Y. 1969), *appeal dismissed as moot* 436 F.2d 1363 (2d Cir. 1971); Theriault v. United States, 503 F.2d 390, 392 (9th Cir. 1974) (quoting Benson v. General Services Administration, 415 F.2d 878, 880 (9th Cir. 1969), but taking the paragraph, relating to discovery procedures, out of its context). *Contra* Soucie v. David, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971); *see* Department of Air Force v. Rose, 425 U.S. 352, 361 (1976); EPA v. Mink, 410 U.S. 73, 79 (1973) ("These exemptions are explicitly made exclusive. . . ."). For an overview of the dispute, *see* Rose v. Department of Air Force, 495 F.2d 261, 269 (2d Cir. 1974), *aff'd* 425 U.S. 352 (1976).

Professor Davis argues that the words "Upon complaint, the district court . . . shall have jurisdiction to enjoin the agency from withholding of agency records and to order the production of any agency records improperly withheld from the complaint" are sufficient in the FOIA to "invoke the traditions of equity." Davis, *supra* note 104, at 767.

119 Concededly, the structure of these Acts differs in an important respect. If information falls within an exemption, the FOIA simply "does not apply." 5 U.S.C. § 552(b). On the other hand, if information is exempt under the Sunshine Act, it is still subject to the openness requirements if openness is in the public interest. But this provision of the Sunshine Act only narrows the field of discretion. As under the FOIA, the treatment of exempt material is left to the judgment of the agency.

120 Department of Air Force v. Rose, 425 U.S. 352, 361 (1976); Ethyl Corp. v. EPA, 478 F.2d 47, 49 (4th Cir. 1973); Fisher v. Renegotiation Bd., 473 F.2d 109, 112 (D.C. Cir. 1972); Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied* 400 U.S. 824 (1970).

suaded by these arguments, it is difficult to predict how active courts will be in reviewing decisions to open meetings. Even within the limited area of reverse-Sunshine actions, the exempted interests provide little assurance of protection.

IV. Conclusion

The Government in the Sunshine Act has just recently gone into effect. Regulations have been promulgated, and agencies have begun to work under the open meeting requirements. Agency reaction has been extremely varied. While some agencies have feared increased exposure, others have appreciated the new openness.[121] Certain agencies are resorting to procedural devices to limit the ability of the public to scrutinize their work.[122] Others may avoid holding meetings altogether.[123] Some government bureaus are planning meetings only parts of which will be open, while others object to spectators being led in and out as the discussion topics change.[124] Significantly, some agency members have exhibited a clear reluctance to hold closed sessions.[125] The mixed response of the agencies is further evidence of the uncertainty surrounding the application of the Act.

121 *See* Large, *U.S. Agencies to Let Sun Shine In; Some Prefer Drawn Blinds,* Wall St. J., March 8, 1977, at 1, col. 4 (quoting Bernard Kahn of the Federal Communications Commission: "I don't think the Commission minds allowing the sunshine in, but this is an extremely burdensome procedure.").

122 "Commissioners also have numerous devices for masking public discussions of private matters — for example, a popular tactic at the FPC is to refer to numbered paragraphs of documents that spectators do not have." *Federal Agencies Move Out of the Shadows,* Bus. Week, March 14, 1977, at 74, 75. "Like many other agencies, the governing board of the Tennessee Valley Authority forbids outsiders to bring tape recorders or cameras into the room, though they can take notes. Anyone wanting to watch the doings of the board of directors of the Commodity Credit Corp. is asked to give one day's notice." Wall St. J., *supra* note 121. The TVA also requires prior notice. N.Y. Times, March 13, 1977, at 25, col. 1.

123 "There may be places where these problems will cause agency commissioners to throw up their hands and say, 'The hell with it. Let's not have meetings,'" the CAB's deputy general counsel, Jerome Nelson, recently predicted. In place of meetings, agencies could act through notation voting, or circulation of proposals from commissioner to commissioner, as the ICC now does for most of its decisions. Bus. Week, *supra* note 122, at 75.

124 *Id.*

125 Commissioner Will E. Leonard of the International Trade Commission states, "There is a potential danger of disclosure of business confidences. There have been requests that certain portions of meetings be closed to guard against inadvertent disclosure, but so far these requests have not received the necessary four votes." *Id.* at 74.

The important interests represented by the exemptions in the Act receive no affirmative protection under the Act. Indeed, the Act builds strong incentives for openness and leaves closure, when it is allowed, to the discretion of the agencies. Other federal statutes provide only limited protection to the exemption interests. And experience under the FOIA and the Sunshine Act indicates that, in at least some cases, agency preferences for secrecy will be overcome by the pressures to open meetings.

The courts, cognizant of the important values at issue, should take seriously the Act's Declaration of Policy and the reflection of this policy in the provision of exemptions, affording generous relief to those opposing wrongful disclosure. Public interest groups should be careful in their criticism of agencies that close meetings. As the Act itself concedes, the public interest does not always require sunshine. For agencies that deal often with sensitive areas, a low sunshine rating may indicate careful, balanced (and courageous) solicitude for crucial confidentiality interests.

But adequate protection of the exemption interests is likely to depend on corrective action by Congress. This Act must not be forgotten and buried under the weight of legislative inertia. In addition to the ongoing attention of the congressional committees, a study of the operation of the Act should be commissioned.[126] Such a study should be attentive to both wrongful closure and injurious openness, taking particular note of the reaction of the agencies, the identity of the persons attending the meetings,[127] and the uses to which the disclosed infor-

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126 The Administrative Conference is given power to carry out such an investigation in 5 U.S.C. § 574 (1970).

The Conference was specifically required to submit a report to Congress in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. § 202(d), Pub. L. No. 93-637, 88 Stat. 2183 (1975).

Provision is made for review and evaluation by the Comptroller General in 31 U.S.C. § 1154(a) (Supp. V 1975).

Section 5 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, requires the Comptroller General to make a study on conflicts in waste water treatment.

127 Experience to date indicates that the open meetings are more an information-collecting device for special interests than they are an educational device for the general public. "[T]he act seems sure to lead to larger legal bills [for business], simply because Washington lawyers will be spending more time at the agencies watching out for the interests of their corporate clients." BUS. WEEK, *supra* note 122, at 74. The general

mation is being put. On the basis of careful investigation, further legislation should be considered to mandate protection of these legitimate nondisclosure interests.

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public cannot afford such representation. Nor does the general public often attend. A recent open meeting of the SEC "drew only four members of the public. Spectators are often lawyers or lobbyists with an interest in the S.E.C.'s work . . . . There was not a sport-shirted tourist in sight." N.Y. Times, Apr. 15, 1977, § D, at 1, col. 2.

The requirement that minutes of all *open* meetings be kept and made available to the public, which was deleted from the House Government Operations version, HOUSE REPORT, *supra* note 17, at 3, 28, would have enabled individuals to benefit from the openness of meetings which they are unable to attend.

REVIEW ESSAY

CONGRESSIONAL REFORM: ANALYZING THE ANALYSTS

PHILIP BRENNER*

The proliferation of studies on Congress in recent years has created a formidable maze through which future scholars must wander. Demands for congressional reforms may be perennial, but their persistence cannot be attributed to careful consideration and extension of previous thought. Often there is no basis for comparing the work of various authors who deal with similar issues because they employ different terms and do not distinguish their critiques from previous writings. In this Review Essay, Mr. Brenner provides a map to guide congressional critics through the books and reports that fill the library's shelves. He divides his discussion into two categories of personal and organizational reform to distinguish works that examine the characteristics of members and their election campaigns from those that investigate the structure, rules, and procedures of Congress as a legislative body. By revealing the relationships among the myriad studies in each category, Mr. Brenner gives the reader insight into the way academics think about Congress and how their perspectives might be improved.

Introduction

Despite the jokes about it, despite the derogations that it is a nineteenth century institution hopelessly muddling through the late twentieth century — an institution that is barely influential even at the middle levels of power — the U.S. Congress still attracts the energy and exercises the bile of a host of reformers. In the last decade, advocates of congressional reform have proposed a variety of changes to achieve a wide array of goals. Some of these proposals have even been adopted by the Congress, especially during the last six years.

The changes proposed by political scientists and kindred reformers of Congress tell us much about how Congress has been studied and the way in which it is understood. The sug-

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gested reforms are generally of two types: personal and organizational. The first category of reform includes those which focus on the personal characteristics and ethics of people who become members of Congress and the nature of congressional campaigns and campaign financing. In the second category are those reforms which affect the organizational structure of the Congress, its formal rules and its informal traditions and procedures, such as seniority.

To be sure, the categories are closely related. Both types tend to be advocated for at least one of four reasons. First, there is the goal of *morality*, reflecting the shock and anger felt when Congressmen abuse women sexually, take bribes, or misuse their official position for private gain. In part the anger stems from the fear that public immorality can contribute to the deterioration of our societal system of morals.

Such concerns are related to a second goal of reformers: *legitimacy* of the government. To be legitimate, the government should in theory, be an exemplar of virtue, setting an example with regard not only to morals but to the fundament of the society: adherence to law. Moreover, the government should be a neutral mechanism, an institution above particular interests, so that it can moderate conflict between interests. Once "captured" by a particular set of interests it would no longer appear to be just and fair. Its decisions would not be accepted as legitimate by all parties to a conflict, and it would not be able to serve as a force for maintaining social harmony.

Related to legitimacy is a third purpose of reform: *efficiency*. As the government comes to take on more responsibility for the smooth operation of all aspects of the society, including the production and distribution of non-public goods, its legitimacy becomes linked to its ability to provide services efficiently. Congress is often viewed as a bottleneck and an obstacle to the smooth operation of the government, either because it "gets in the way of" the Executive or because its organization is so cumbersome that it cannot make decisions quickly.

In this way the relative *power* of the Congress vis-à-vis the Executive becomes a fourth interest that animates reformers. Some see a strong Congress as a bulwark against an imperial President, and so as a safeguard to civil liberties. Others, how-

ever, point to the expansion of civil rights under Presidential leadership, against Congressional opposition. In any event, power is a subject that is both imprecise and complex.[1] Most analysts have used the term colloquially to describe the extent to which one branch can achieve its goals in the face of opposition by the other branch. There is a sense that it would express goals which might be antagonistic to those of the Executive if it were not prevented from doing so by its lack of skill, information, and other resources — perhaps even courage. Implicit in this idea is the notion that the Congress represents a set of interests that are different from those represented by the Executive. Opposing views on power, then, often tend to reflect support for different sets of interests.

In this essay I will examine the two types of reform — personal and organizational — by reviewing recent proposals for change in the Congress and by describing some of the reforms that have been adopted. I will then consider what these studies indicate about the way in which Congress is analyzed.

I. Personal and Organizational Reforms

A. *Personal Reforms*

One popular view of the problem with Congress is that the congressmen themselves are the problem. Randall Ripley concisely reflects this position as he writes:

> The machinery of Congress is not inherently deficient. . . . What may be deficient is resolve on the part of a sufficient number of members to make the machinery, the ties to other publics and agencies, and the 'system' work. . . . [T]he critical question is how the people responsible for making the institutions function behave.[2]

The personal foibles and peccadilloes of senators and congressmen are ready copy for journalists and the stock in trade of muckrakers. For example, Warren Weaver, Jr. reviews such "human flaws and appetites" in a chapter entitled "Swinging on the Hill".[3] Drew Pearson and Jack Anderson made their case

1 For an interesting approach to the subject of power and a useful review of the relevant literature, *see* S. Lukes, Power: A Radical View (1974).

2 R. Ripley, Congress: Process and Policy 291 (1975).

3 W. Weaver, Both Your Houses: The Truth About Congress 46-59 (1972).

against Congress by focusing on members' personal attributes.[4] Even members of Congress rail against their colleagues for their lack of courage, determination, and even intelligence. Richard Fenno, Jr. reports that during congressional campaigns, members often "refurbish their individual reputations as 'the best congressman in the United States' by attacking the collective reputation of the Congress."[5]

Emphasis on the personal may reflect moral outrage as much as mere titillation. As an increasing number of cases of improper individual behavior come to light in the wake of Watergate, the very legitimacy of Congress and the government comes into question. Indeed, the larger import of individual lawlessness has been the emphasis of the studies generated by Ralph Nader's Congress Project. For example, the study of the House and Senate Banking Committees, in examining how the committees tend to operate in biased fashion, focuses on the nature of recruitment to the committees and the problems that are associated with campaign finances.[6] Similarly, Mark Green, James Fallows, and David Zwick survey the way in which Congress supports special business interests that provide members with campaign contributions, retain their law firms, and favor them with direct payments.[7]

The Nader studies also contend that the nature of recruitment to Congress contributed to a bias in favor of the wealthy and big business and against minorities, labor, and women. Lawyers predominate, as do men and white Anglo-Saxons.[8] The reformers argue that this recruitment bias affects the sensitivity with which lawmakers will listen to demands from those who are not like themselves.

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4 D. PEARSON & J. ANDERSON, THE CASE AGAINST CONGRESS (1968).

5 Fenno, *If as Ralph Nader Says, Congress is "The Broken Branch," How Come We Love Our Congressmen So Much?*, in CONGRESS IN CHANGE: EVOLUTION AND REFORM 280 (N. Ornstein ed. 1975), For a systematic, though not very probing, report on how members view ethics, *see* E. BEARD & S. HORN, CONGRESSIONAL ETHICS: THE VIEW FROM THE HOUSE (1975).

6 RALPH NADER CONGRESS PROJECT, THE MONEY COMMITTEES (1975) [hereinafter cited as MONEY COMMITTEES].

7 M. GREEN, J. FALLOWS, & D. ZWICK, WHO RUNS CONGRESS? (2d ed. 1976) [hereinafter cited as M. GREEN]. *See also* M. MINTZ & J. COHEN, AMERICA, INC. (1972).

8 For data on the composition of the Congress, *see* 35 CONG. Q. WEEKLY REP. 19-27 (1977). *See also* Zweigenhaft, *Who Represents America?*, INSURGENT SOCIOLOGIST, Spring, 1975, at 119-30; G. Green & R. Shea, Representation and Political Alienation: The Social Class, Ethnic, and Identity of the United States Congress (1976) (National Center for Urban Ethnic Affairs mimeo).

The major issue concerning bias in the recruitment process has been campaign finances. With several House races costing each candidate more than $100,000 and Senate races running over $1 million, charges of earlier reformers — that only the rich could afford a seat in Congress without incurring unmanageable political debts — have become quite cogent. As Senator Joseph Clark (D-Pa.) has said: "The pernicious consequences of reliance on a few wealthy contributors for large donations is [sic] obvious."[9] Congress appears to be less than impartial; the government's credibility is therefore weakened when it continues to claim to rule without bias, to be above class, and so to serve as a neutral surrogate battleground for the resolution of social conflicts.

As Robert Peabody and his co-authors report,[10] the National Committee for an Effective Congress has long been lobbying to obtain the public financing of campaigns, and thereby diminish the pernicious effects of private contributions. More recently, Common Cause has taken the lead in lobbying energetically for public financing of congressional campaigns. It was successful in 1971, 1974, and 1976 in securing passage of legislation that required disclosure of donors to congressional campaigns and set limits on contributions.[11]

In a related effort, both the House and Senate passed legislation in 1976 to toughen the regulations governing registration of lobbyists and disclosure of their activities. But the bills were sufficiently different that a quick compromise could not be reached near the end of the session, and the bills were reintroduced this year.[12] Common Cause has also been a strong advocate of lobbying reform; according to its chairman, John Gardner, ". . . [l]obbying has become one of the most secretive and potentially corrupting ingredients in American politics."[13] Like large campaign contributions, undisclosed lobbying diminishes the appearance of neutrality that the government must maintain in order to secure its legitimacy.

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9 J. Clark, Congress: The Sapless Branch 219 (rev. ed. 1965).

10 R. Peabody, J. Berry, W. Frasure, & J. Goldman, To Enact a Law: Congress and Campaign Financing (1972).

11 *See New Federal Election Law Has Its Critics*, 34 Cong. Q. Weekly Rep. 3032 (1976).

12 *See Time Runs Out for Lobby Revision Bill*, 34 Cong. Q. Weekly Rep. 2683 (1976).

13 *Lobbying Disclosure: Hearings on S.774 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 44 (1975).

Most observers have attributed the passage of new codes of ethics in Congress most immediately to the notoriety that attended disclosure of the Wayne Hays affair and the alleged sexual misconduct of two other representatives, and to the scandal which is still developing over the alleged payment to congressmen of several thousand dollars by the Republic of Korea and Washington-based businessman Tongsun Park.[14] In March, the House passed a code of ethics that limits outside earned income of members to 15 percent of their congressional salary; currently this translates to $8,625 annually. Members are further restricted to earning no more than $750 for any one speech or article. No limit was placed on income derived from investments.[15]

Recent congressional reforms intended to secure the legitimacy of the Congress may also serve to strengthen the Congress vis-à-vis the Executive. The Nader banking committee study, for example, admonished the Congress to eliminate the influence of special interests because "... [t]here is simply no way for Congress to regain power unless it somehow regains public esteem."[16]

B. *Organizational Reforms*

In 1974 Representative Richard Bolling (D-Mo.) sounded the theme of his newly created Select Committee on Committees when he declared, "[h]ampered by decentralized authority, lacking informational resources, stymied by obsolete rules and denying the Speaker his rightful tools, the House of Representatives cannot do its job. It is still, sadly, out of order."[17] Charged with restructuring the committee system in the House of Representatives, the Bolling Committee — as it came to be known — focused on some of the most popular proposals for

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14 *See Scandal Could Harm U.S.-Korea Relations*, 34 CONG. Q. WEEKLY REP. 3337 (1976).

15 *See House Adopts Tough Ethics Code*, 35 CONG. Q. WEEKLY REP. 387 (1977). Other provisions include full disclosure of each member's personal finances, a ban on unofficial office accounts, and restrictions on gifts from lobbyists.

16 MONEY COMMITTEES, *supra* note 6, at 361. *See also* Pincus, *Basic Reforms Now for a Dated Congress*, Wash. Post, Jan. 9, 1977, at C1, col. 1.

17 Bolling, *Committees in the House*, 411 ANNALS 1, 2 (1974). These changes repeat those which framed his earlier critiques: R. BOLLING, POWER IN THE HOUSE (1968); R. BOLLING, HOUSE OUT OF ORDER (1965).

reform of the House. Indeed, proposals for altering the committee structure, along with plans for altering the rules and procedures and the informal mechanisms for organizing the Congress, are the preponderent type of reform suggested by advocates of change. Five items head the list of organizational reforms most frequently advocated: (1) Overturning the seniority system; (2) Changing rules in order to "democratize" the Congress; (3) Increasing party discipline; (4) Altering the committee structure; and (5) Improving the information resources available to the Congress.

1. Seniority

The seniority system has been a favorite target of reformers for decades. In fact it is not a system, but a tradition of awarding the chairmanship of a committee to the person in the majority party who has the longest continuous service on the committee. Advocates of other mechanisms for selecting chairmen — such as election of any committee member by a vote of the whole party caucus — charged that seniority rewarded senility and rendered the Congress incapable of handling complex problems, made the Congress unrepresentative because senior members came disproportionately from the South and rural areas, and contributed to the defeat of liberal legislation because it denied the forces which supported liberal Democratic Presidents a means of disciplining conservative Democrats.[18]

It is clear that the opponents of the seniority system were trying to achieve multiple goals. Some sought to increase the legitimacy of the Congress by removing suspicions that it was not open to all interests equally and enabling it to handle complex problems. Others, in an era of activist Presidents, have viewed ending the seniority system and increasing the legitimacy of Congress as a step toward the more important goal of strengthening Congress' power vis-à-vis the President. Most op-

18 *See, e.g.*, M. GREEN, *supra* note 7, at 58-62; J. CLARK, CONGRESS: THE SAPLESS BRANCH 176-84 (rev. ed. 1965); Brenner, *Committee Conflict in the Congressional Arena*, 411 ANNALS 87, 99-100 (1974). For a discussion of the history of seniority, *see* B. HINCKLEY, STABILITY AND CHANGE IN CONGRESS 70-80 (1971). *See also* Polsby, Gallagher, & Rundquist, *The Growth of the Seniority System in the U.S. House of Representatives*, 63 AM. POL. SCI. REV. 787 (1969).

ponents of seniority, though, simply tended to believe that ending it would aid liberal causes espoused by the Presidents. This latter view may have been shortsighted, because the seniority system is now bringing to positions of power liberal members elected since 1958.[19]

While the seniority system is still much in evidence, it has been eroded during the last six years. In 1971 the House Democratic caucus adopted changes proposed by an ad hoc committee (the Hansen Committee) that it established in part to examine reform of the seniority system. Under the 1971 procedures, chairmen were to be voted on separately, rather than as a slate, if ten members requested such a vote, and no member could serve as chairman of more than one subcommittee. By 1975 the caucus had adopted a rule which automatically brought up each chairman for a secret ballot vote. This rule contributed to the caucus's unprecedented ouster of three chairmen — W. R. Poage (D-Tex.), F. Edward Hebert (D-La.), and Wright Patman (D-Tex.).[20] The power of senior members was further diminished by another rule, also passed in 1975, which prevented senior members from securing all of the positions on key subcommittees for themselves.

2. Rules

The rules of the House and Senate have also served as a target for reformers of Congress. Critics have tended to depict the rules as obstacles to liberal legislation because the rules have permitted a few strategically placed members — who are often conservative — to kill legislation of which they disapprove. Reformers argue that, like seniority, the rules of the legislature favor rural and conservative areas and prevent the Congress from being representative of all interests and responsive to contemporary problems.

Reformers have focused on changing procedures so as to "democratize" the Congress, in the words of one Nader study.[21] This has had two meanings. In one sense, reformers want to

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19 *See* Ornstein & Rohde, *Seniority and Future Power in Congress*, in CONGRESS IN CHANGE: EVOLUTION AND REFORM 72 (N. Ornstein ed. 1975).

20 *See Congressional Reforms Made in 1975*, 1975 CQ ALMANAC 26-29 (1976).

21 MONEY COMMITTEES, *supra* note 6, at 362-63.

open up the process *within* the Congress to allow the participation of more *members.* They have focused on the power of the Rules Committee in the House, the internal rules which govern committees, the filibuster in the Senate, and the way in which members are assigned to committees and subcommittees. For example, the Nader study of the Judiciary Committees called for increased authority for subcommittee chairmen, an increase in the number of subcommittees, and clear jurisdictional definitions for subcommittees of the House Judiciary Committee.[22] Under Emanuel Celler, this committee had had vaguely defined subcommittees, with bills assigned solely at the chairman's discretion. Similarly the Nader critique of tthe Banking Committees called for "more active use of subcommittees."[23]

Reform of committee rules — what came to be known as the "subcommittee bill of rights" — was also the focus of demands from the liberal Democratic Study Group in the early 1970's.[24] Prior to 1971, committee chairmen were able to rule committees in part by controlling the subcommittees through the appointment of staff, assignment of legislation, and in some cases (Ways and Means is a notable example) by not creating subcommittees. Senior members of a committee often would take up most of the positions on a few subcommittees, which would then be assigned the committee's major legislation. Reformers hoped that a change in these procedures, by allowing more members to participate in key decisions and enabling subcommittee chairmen to act with some independence, would make the House more responsive to new problems and would energize members who were frustrated by the long wait that was necessary for any power to be realized. The rules adopted by the House Democratic caucus in 1971 went a long way towards meeting these demands for change.[25]

In the Senate there was less pressure for such changes; under

22 RALPH NADER CONGRESS PROJECT, THE JUDICIARY COMMITTEES 368-69 (1975) [hereinafter cited as JUDICIARY COMMITTEES].

23 MONEY COMMITTEES, *supra* note 6, at 362.

24 *See* Ornstein, *Causes and Consequences of Congressional Change: Subcommittee Reforms in the House of Representatives, 1970-73,* in ORNSTEIN, *supra* note 5, at 90-100. For a history and analysis of the DSG, *see* Stevens, Miller, & Mann, *Mobilization of Liberal Strength in the House, 1955-1970: The Democratic Study Group,* 68 AM. POL. SCI. REV. 667 (1974).

25 *See* Rohde, *Committee Reform in the House of Representatives and the Subcommittee Bill of Rights,* 411 ANNALS 39 (1974).

Lyndon Johnson's leadership, committee assignments had been liberalized and junior members had been given the opportunity for choice positions. Also, senators felt more efficacious than their counterparts in the House simply because of the smaller size of the Senate.[26] Democratization has centered on the filibuster, which, it has been argued, allows a few "unrepresentative" members to thwart both the majority will of the Congress and of the nation.[27] In 1975, the Senate changed Rule 22 — which stipulates the number of Senators required to cut off debate with a cloture vote — to reduce the number needed for cloture from two-thirds of those voting (or 67 if all Senators were voting) to sixty Senators.[28]

Ironically, efforts to curb debate may conflict with goals of reformers to democratize the Congress in a second sense, that of opening up the process to the scrutiny of voters. While filibusters prevent the passage of legislation, they also generate awareness of an issue and so potentially can bring the public into deliberations through letter writing and mass organizing.[29] As conservative New York Times columnist William Safire recently complained, with regard to a new Senate rule further limiting debate, "There ought to be a way for a dissenting group of lawmakers . . . to dramatize and draw public attention to what may be a mistake."[30] Appropriately, Safire went on to link the cut-off of debate to secrecy in the House of Representatives.

Secrecy in Congressional proceedings had been most extreme during the "mark-up" of a bill — the time when a committee drafts a final version, incorporating amendments and striking bargains — and during conference committee meetings. Reformers argued that opening these sessions to public

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26 Moreover, as the Senate became the breeding ground for Presidents, the vaunted "establishment" that Sen. Joseph Clark once decried became less imposing. *Compare* J. CLARK, THE SENATE ESTABLISHMENT (1963) *with* Polsby, *Goodbye to the Senate's Dinner Club*, in ORNSTEIN, *supra* note 5, at 208-15.

27 *See, e.g.*, M. GREEN, *supra* note 7, at 67-69. *But see* Wolfinger, *Filibusters: Majority Rule, Presidential Leadership, and Senate Norms*, in READINGS ON CONGRESS 286-305 (R. Wolfinger ed. 1971).

28 *See Congress Report: Compromise by Senate Eases Anti-Filibuster Rule*, 7 NAT'L J. 397 (1975).

29 *See* Brenner, *Committee Conflict in the Congressional Arena*, 411 ANNALS 87, 98-99 (1974).

30 Safire, *The Tip and Bobby Show*, N.Y. Times, Jan. 10, 1977, at 21, col. 2-3.

scrutiny might diminish the invidious influence of special interests, compel Congressmen to act in ways that were more responsive to the average voter in their districts, enable members to receive "better" information and produce improved "products," and reassure the public that the process was fair, thereby enhancing the legitimacy of Congress.[31] In 1973 the House voted to open up its mark-up sessions unless a majority of a committee voted to close a session. The Senate adopted a similar rule in 1975. Both houses also changed their rules in 1975 to permit open conference committee proceedings.[32]

3. Party Discipline

At least since the appearance of Woodrow Wilson's *Congressional Government* in 1884, proponents of reform in Congress have called for less independence for individual members and committees, and more adherence to party programs. This tends to be true for those who favor a stronger Congress as well as those who support a strong Executive. Richard Bolling, for example, suggested that party discipline is the *sine qua non* of a strong House when he declared:

> The current situation may be tolerated only if Democrats are so uninterested in the programs and policies of their party they are willing to continue to entrust the helm to inept or unfriendly helmsmen. I believe most Democrats in the House are anxious that the House itself should regain effectiveness.[33]

Under the direction of a strong Speaker of the House, this argument goes, the House would not only be able to act with some unity and so challenge an Executive more effectively, but would be more accountable to the voters because they would be able to identify the party as the source of their displeasure or pleasure.[34]

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31 L. RIESELBACH, CONGRESSIONAL POLITICS 373 (1973). *See also* M. GREEN, *supra* note 7, at 284; RALPH NADER CONGRESS PROJECT, THE REVENUE COMMITTEES 287 (1975).

32 *See Congress Report: House Democrats Oust Senior Members from Power,* 7 NAT'L J. 130 (1975).

33 R. BOLLING, POWER IN THE HOUSE 255 (1968).

34 *Id.* at 265-66. For a review of the early sources of the concept of "responsible parties," *see* A. RANNEY, THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT (1962). For a probing critique of the doctrine, *see* Pennock, *Responsiveness, Responsibility, and Majority Rule,* 46 AM. POL. SCI. REV. 790 (1952).

In contrast, other writers who advocate greater party discipline in the Congress tend to favor strong Executive leadership. As James MacGregor Burns wrote in 1949:

> Only by vitalizing our two-party system, by playing national party politics more zealously, and by centralizing control of our parties, will Americans be able to stabilize presidential leadership and foster teamwork in the federal government.[35]

Both camps have focused on the House Rules Committee as an obstacle to the achievement of their objectives.[36] Notably, Burns contrasts a President "representing the overriding interests of the nation" to the Rules Committee, which is composed of "[r]epresentatives who advance local and regional ends."[37] Though Robert Peabody has found that the Rules Committee is often used as a scapegoat by members — that they support the Committee's decisions but criticize the Committee to take the heat away from themselves[38] — the Committee does continually pose a potential obstacle to legislation in the House because all legislation must flow through it. To overcome this obstacle, it has been commonly suggested that the Rules Committee be elected by the caucus every two years, that the 21-day rule in effect for the 81st and 89th Congresses be made permanent, or that the Speaker be permitted to call up legislation out of the Committee and be authorized to appoint new members to the Committee.[39] In this

35 J. Burns, Congress on Trial: The Legislative Process and the Administrative State 193 (1966). In 1963, Burns addressed a sub-theme of *Congress on Trial,* namely that the parties in Congress differed from the Presidential parties and that the two should be brought into congruence to enhance democratic control. J. Burns, Deadlock of Democracy: Four Party Politics in America (1963). On the democratizing role of electoral politics, *see* E. Schattschneider, The Semisovereign People (1960). Schattschneider was also the principal author of a report from the American Political Science Association Committee on Political Parties which called for an Executive-dominant, strictly disciplined two-party system, with the parties split along programmatic lines. *See Toward a More Responsible Two-Party System,* 44 Am. Pol. Sci. Rev. (September, 1950 supplement).

36 *See* Robinson, *Proposed Reforms: Party Responsibility versus Legislative Independence,* in Congressional Reform: Problems and Prospects 151-66 (J. Clark ed. 1965).

37 J. Burns, Congress on Trial: The Legislative Process and the Administrative State 136, 186 (1966).

38 Peabody, *The Enlarged Rules Committee,* in R. Peabody & N. Polsby, New Perspectives on the House of Representatives 143-45 (1963).

39 Robinson, *supra* note 36, at 155-66. *See also* L. Rieselbach, Congressional Politics 369 (1974).

way, it is argued, the Committee would become an arm of the majority party through either the caucus or the leadership.

Again, both camps have argued that a stronger leadership is necessary as part of the revamping of the parties in Congress. Congressman Bolling argues, for example, that "[t]he place to effect change is within the Democratic caucus. . . . It is here that power should be given to the titular party leader, the Speaker."[40] He proposes that the Speaker be given authority to nominate all members of the powerful Ways and Means and Rules Committees, and to nominate the chairmen of all the committees.[41] Under the Speaker's leadership, the caucus would punish all members who do not follow party policy.

In the 94th Congress the House Democrats moved significantly to expand the powers of the Speaker and the caucus, and to weaken the Rules Committee. Previously the Democratic members of the Ways and Means Committee had also sat as the Committee on Committees, the group which effectively decided on committee assignments for all Democratic members. By large majorities, the caucus voted to turn committee assignments over to the Democratic Steering and Policy Committee and to give the Speaker the power to nominate all Democratic members of the Rules Committee, subject to caucus approval.[42] The Steering and Policy Committee, created in 1973, is composed of the four top Democratic Party leaders in the House, eight members appointed by the Speaker, and twelve members elected by regional sub-groups of the caucus. Whether the Speaker and the caucus will emerge as powerful enforcers of party discipline in the House is uncertain. The caucus has exercised its power to oust three party chairmen,[43] but the policy consequences of this are unclear. Speaker Carl Albert was reticent about using the power given to him. And in December 1976, the caucus chose as its new majority leader Jim

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40 R. Bolling, Power in the House 265 (1968).

41 *Id.* at 267-68. For the Executive position, *see* L. Rieselbach, Congressional Politics 366-69 (1973).

42 *See House Party Caucuses Meet; Democrats Adopt Reforms*, 1975 CQ Almanac 27 (1976).

43 *See* text accompanying note 20 *supra*.

Wright (D-Tex.) by a one-vote margin over Phillip Burton (D-Cal.). Wright had indicated that he did not favor vigorous enforcement of liberal party policy, while Burton had been an activist leader of the caucus in the 94th Congress and indicated he would be a strong majority leader.[44]

4. Committee Structure

Echoing Woodrow Wilson's aphorism that Congress on the floor is Congress on display, and Congress in committee is Congress at work, Richard Bolling declared in 1974: "Central to the operation of the House is the committee system." He then went on to indict the committee system as the principal reason behind "the failure of the modern House to provide vigorous national leadership."[45] Indeed, the organization of the Congress has become perhaps the principal focus of reformers in the last ten years. They tend to concentrate their attention on three areas: the number of committees and subcommittees in the House and Senate, the jurisdiction of each committee, and the nature of the congressional budgetary process.

The conventional wisdom among reformers appears to be, as *Washington Post* reporter Walter Pincus declared, that "Congress must cut back on committees and subcommittees." He went on to argue that in seeking to overcome its "lack of professional expertise," Congress had generated a problem for itself by creating "170 or more committees and subcommittees in each house. . . . Almost every subcommittee, to justify its existence, churns out reports or legislation which clog the mails and the floor calendar and accomplish little except to send Congress off in hundreds of different directions."[46]

The proliferation of committees and subcommittees since the 1946 Legislative Reorganization Act — which reduced the number of committees in both houses by more than 75 percent — has

44 *See House Democrats Elect Leaders, Slow Reforms,* 34 CONG. Q. WEEKLY REP. 3291 (1976).

45 Bolling, *Committees in the House,* 411 ANNALS 1, 2-3 (1974). For a similar statement, *see* STAFF OF SELECT SENATE COMM. TO STUDY THE SENATE, 94TH CONG., 2D SESS., THE SENATE COMMITTEE SYSTEM 5 (Comm. Print 1976) [hereinafter cited as SENATE COMMITTEE SYSTEM].

46 Pincus, *Basic Reforms Now For a Dated Congress,* Wash. Post, Jan. 9, 1977, at C1, col. 1.

contributed to an increased workload for members, to the point where they cannot give appropriate attention to any matter. The Senate Select Committee to Study the Senate Committee System found that in 1976 senators averaged more than 14 subcommittee assignments each.[47] Those who advocate a reduction in the number of committees argue that under the present situation the Congress cannot effectively challenge the Executive because the members' attention is so divided. In addition, the legitimacy of Congress might be enhanced, as committees would be forced to draw their members from a broader base if there were only eight or ten committees, and so committees would appear to be more representative.[48]

In contrast, John Bibby and Theodore Lowi — coming from apparently different political perspectives — have argued that the present structure, or even one with more committees, would best keep the Congress strong vis-à-vis the Executive. Lowi argues that since 1946 the power of committee chairmen has increased as committee jurisdictions have grown. Increasing the number of committees, he argues, would spread the power and allow vigorous members the opportunity to get into the action.[49] Bibby contends that the power of the House derives from its "mastery of technical detail" growing out of the large number of specialized committees.[50]

Advocates of committee consolidation would counter that their proposals perpetuate subcommittees. With the "subcommittee bill of rights"[51] in the House, power is shared among Democrats more than it had been even five years ago. Furthermore, subcommittees provide the detailed specialization necessary for technical mastery. However, they note, the present organization of committees does not maximize the possibilities of mastery because overlapping jurisdictions lead to redundancy and wasted effort, and prevent rational use of subcom-

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47 SENATE COMMITTEE SYSTEM, *supra* note 45, at 6.

48 *See* Ornstein, *Towards Restructuring the Congressional Committee System*, 411 ANNALS 147, 148-49, 153 (1974).

49 Lowi, *Congressional Reform: A New Time, Place and Manner*, in LEGISLATIVE POLITICS U.S.A. 368, 370 (T. Lowi & R. Ripley eds., 3d ed. 1973).

50 Bibby, *Reforming the Committees While Retaining the Unique Role of the House*, in *Committee Organization in the House: Panel Discussions Before the House Select Committee on Committees*, vol. II, part 3, 93d Cong., 1st Sess. 528 (1973).

51 *See* text accompanying notes 24-28 *supra*.

mittees. This view leads them to call for jurisdictional changes in tandem with a reduction in the number of committees.[52]

Proponents of jurisdictional changes emphasize that they want to bring coherency to the Congressional policy-making process and reduce the fragmentation which the current committee system promotes. For example, the Senate Select Committee to Study the Senate Committee System stated:

> Areas such as energy, environment, health, transportation, and urban problems have become increasingly important and interdependent. Thus the Senate in the 1970s has been faced with numerous areas of legislation and oversight subject to wide overlap and competition in the historic jurisdiction of its committees.[53]

Currently, a policy area such as education might be covered by five or six legislative committees, in addition to several appropriations subcommittees. This encourages "piecemeal or inconsistent legislation and results in unnecessary delay. Different committees oftentimes promote divergent approaches to these problems. . . . "[54] Thus jurisdictional change proposals tend to accompany plans for reducing the number of committees, as jurisdictions become aggregated into policy areas.

While such overlap tends to be described as "irrational,"[55] some reformers have seen advantages in jurisdictional fuzziness. Lowi, for example, argues that expanding the number of standing committees "would very probably also loosen and expose the rigid and intimate relations between the present standing committees and executive agencies. . . . [O]verlapping jurisdictions produce healthy political competition."[56] Similarly, Lewis Anthony Dexter contends that jurisdictional overlap promotes creativity. Jurisdictional change is an appropriate technique for rationalizing "routinizable aspects of managing,"

52 *See* Peabody, *Committees from the Leadership Perspective,* 411 ANNALS 133, 142-44 (1974). *See also* Ornstein, *Towards Restructuring the Congressional Committee System,* 411 ANNALS 147, 153 (1974).

53 SENATE COMMITTEE SYSTEM, *supra* note 45, at 8. For similar statements regarding particular committees, *see* MONEY COMMITTEES, *supra* note 6, at 363-64; JUDICIARY COMMITTEES, *supra* note 22, at 369-70.

54 SENATE COMMITTEE SYSTEM, *supra* note 45, at 160.

55 This tendency follows from the Weberian paradigm which dominates American political science. *See* FROM MAX WEBER: ESSAYS IN SOCIOLOGY (Gerth & Mills transl. and eds. 1958).

56 Lowi, *Congressional Reform: A New Time, Place and Manner,* in LEGISLATIVE POLITICS U.S.A. 371 (T. Lowi & R. Ripley eds. 3d ed. 1973).

he remarks. "The Senate-in-committee, however, is not engaged in a routinizable process."[57]

Whatever the "rational" benefits might be that would accrue from jurisdictional change accompanied by a reduction in the number of committees, such proposals run into political difficulty because they take away chairmanships from members, reduce the number of chairmanships that are available, and deprive members of control of policies over which they now ride herd. Thus the Bolling Committee proposals and the original plans of the Senate Select Committee were scuttled, respectively, by the House and Senate, though the Senate reforms finally enacted were significant.

On February 4, 1977 the Senate passed a resolution which decreased the number of committees from 31 to 21, and specified that after the current Congress the number would drop to 19, exclusive of joint committees. The resolution categorized committees as "major" and "minor," and further stipulated that each senator would be limited to membership on only two major committees and one minor committee, and to no more than three subcommittees on each major committee and two on a minor committee.[58] In reducing the number of committees, the Senate necessarily changed committee jurisdictions. No longer is there a Commerce Committee and an Aeronautical and Space Sciences Committee; they have been merged into a Committee on Commerce, Science and Transportation. A Committee on Energy and Natural Resources replaces the Interior Committee and locates responsibility for energy policy in one place. In addition, even committees that remained unaffected by the reduction had their jurisdictions altered. For example, the Agriculture Committee lost responsibility for agricultural colleges and obtained responsibility for the school lunch program.[59]

The House was far more ruthless in rejecting the Bolling

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57 Dexter, *The Advantages of Some Duplication and Ambiguity in Senate Committee Jurisdictions*, in SENATE COMMITTEE SYSTEM, *supra* note 45, at 172.

58 *See Senate Approves Committee Changes*, 35 CONG. Q. WEEKLY REP. 279 (1977). The resolution took effect on February 11, 1977. The original select committee proposals called for more drastic reductions in the number of committees. One plan would have decreased the number of standing committees to five. *See Senate Panel Develops Plan to Cut Committees from 18 to Five*, 8 NAT'L J. 1189 (1976).

59 *See Senate Ready to Debate Major Committee Overhaul Approved by Rules Panel*, 35 CONG. Q. WEEKLY REP. 161 (1977).

plan in 1974. That plan would have left unchanged at 22 the number of standing committees, but the committees would have been significantly different. For example, the proposal called for the division of the Education and Labor Committee into two committees. The Post Office and Civil Service Committee would have been absorbed by the new Labor Committee.[60]

Instead the House adopted an alternative proposal recommended by the Hansen Committee. This proposal made minor modifications in committee jurisdictions. For example, it renamed the Public Works Committee as the Public Works and Transportation Committee and gave it formal jurisdiction over urban mass transit with which the committee had already been involved de facto because of its responsibility for the highway trust fund.[61]

The third area of organizational concern for reformers — after reducing the number of committees and altering committee jurisdictions — has been the congressional budgetary process. Typical is Aaron Wildavsky's indictment of the pre-1974 process as "mindless because most of the budget is not subject to scrutiny and irrational because all the possible relevant comparisons are excluded from view."[62] Critics have contended that the incremental quality of the budgetary process prevented rational planning of the federal budget and contributed to inflation and the less-than-optimal allocation of federal expenditures. Reformers also charged that the decentralized, uncoordinated nature of the congressional budgetary process not only drained the federal government, but was also a source of weakness for the Congress vis-à-vis the Executive. Louis Fisher, for example, declared: "Unless Congress can improve its budget capability it will remain a patsy, forever being bulldozed around by executive assaults and encroachments."[63]

60 House Select Comm. on Committees, Committee Reform Amendments of 1974: Report to Accompany H. Res. 988, H.R. Rep. No. 93-916, part II, 93d Cong., 2d Sess. (1974).

61 *See Major House Committee Reform Rejected,* 1974 CQ Almanac 634 (1975). The most significant provisions of the Hansen Committee resolution concerned the rules of the House and the power of the Rules Committee.

62 Wildavsky, *The Annual Expenditure Increment, in Committee Organization in the House: supra* note 50, at 641. Echoing his early work, A. Wildavsky, The Politics of the Budgetary Process (1964), Wildavsky writes: "The largest determining factor of the size and content of this year's budget is last year's budget.... Budgeting, therefore, is incremental, not comprehensive." Wildavsky, *supra,* at 640-41.

63 Fisher, *Congress, the Executive and the Budget,* 411 Annals 102, 113 (1974).

As Allen Schick reports, there have been three types of reform proposals intended to redress Congress' weakness in the budgetary process. The first is "resource improvements through the acquisition of more staff, information, and time"; the second is "power improvements that constrain executive discretion"; and the third is "institutional improvements to make Congress more responsible for total spending, for determining priorities and to end the fragmentation of budget choice in Congress."[64]

In 1972 the newly created Joint Study Committee on Budget Control undertook an examination of the many proposals for reforming the budgetary process. Its efforts were given urgency by President Nixon's series of impoundments in 1973 and 1974.[65] In 1974 Congress passed the Congressional Budget and Impoundment Control Act of 1974.[66] The Act appears to address the three areas of concern that Schick described.[67] It created the Congressional Budget Office (CBO), which was seen "as an authoritative clearinghouse of information and ideas about federal spending." The CBO's services were made available to all members of Congress, and it was hoped that it would provide members with technical support that could be used to challenge Presidential assertions of budgetary power, such as the impoundment of funds. Under Title X of the Act, the Congress is given specific procedures by which it can block impoundments, particularly those undertaken with the purpose of thwarting the congressional intent underlying an appropriation.

Finally, the Act establishes two budget committees, one in each house, which have jurisdiction over the budgetary process. Through two resolutions which they must report out — one in March, before annual authorization bills are passed, and one in

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64 Schick, *Congress Versus the Budget,* in *Committee Organization in the House, supra* note 50, at 625.

65 *See* Fisher, *Congressional Budget Reform: The First Two Years,* 14 HARV. J. LEGIS. 413, 444-46 (1977); Schick, *The Battle of the Budget,* in CONGRESS AGAINST THE PRESIDENT 61 (H. Mansfield ed. 1975). *See also* Ellwood & Thurber, *The New Congressional Budget Process: The Hows and Whys of House-Senate Differences,* in CONGRESS RECONSIDERED (L. Dodd & B. Oppenheimer eds. 1977).

66 Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified at 2 U.S.C. §§ 190d, 601-603; 31 U.S.C. §§ 11-11c, 701, 1020-1020a, 1151-1154, 1301-1353, 1401-1407 (Supp. V 1975).

67 For an analysis of the operation of the Congressional Budget and Impoundment Act, *see* Fisher, *supra* note 65.

September, after passage of appropriations bills — the committees are expected to determine total appropriations within tax and debt levels that have been set by the Congress as desirable. In this way, the total budget can be debated and potentially controlled by the whole Congress, in a manner that permits the Congress to relate means to ends.

5. Information Resources

Perhaps because it is seemingly the least controversial and easiest problem to solve, reforming the information logjam facing Congressmen has been high on the list of proposed changes in the last decade. In 1964, a survey of members' complaints about Congress found that "the most frequently mentioned problems were associated with . . . the lack of information, the volume of legislation to be considered, and the difficulty of making a rational choice from among many conflicting alternatives."[68]

The problem of information has been emphasized primarily by those who seek to strengthen the Congress vis-à-vis the Executive, because the Congress tends to be dependent on the Executive for information that is necessary to make policy. The executive branch has the capability to obtain information, to process it, and to use it because it is hierarchically organized and has a large field network and huge staff, *i.e.*, the executive branch agencies.

As John Saloma notes, a related problem is that "increasingly large bodies of information within the Executive are screened from Congress entirely."[69] This is best illustrated by the way in which the intelligence agencies withhold details from the Congress and manipulate members by the release of selective information.[70] But it also occurs as Presidents claim executive

68 R. Davidson, D. Kovenock, & M. O'Leary, Congress in Crisis: Politics and Congressional Reform 76-78 (1971).

69 J. Saloma, Congress and the New Politics 213 (1969). *See also* L. Rieselbach, Congressional Politics 385 (1973).

70 *See* Brenner, *Congress and the Investigation of Intelligence*, Cuba Rev., June, 1976, at 9-12. *See also* Ransom, *Congress and the Intelligence Agencies*, in Congress Against the President 161-62 (H. Mansfield ed. 1975); Dechert, *Availability of Information for Congressional Operations*, in Congress: The First Branch of Government 167 (A. de Grazia ed. 1966).

privilege for data that might be useful in Congressional deliberations.

The decentralized nature of the legislative branch complicates the problem. Members ultimately must watch out for their own interests, and information is often sought for political as well as technical reasons. Thus each member tends to want his or her own capability to obtain and evaluate data.[71] Similarly, committees tend to prize their autonomy and view information as a source of power, which makes difficult the processing of data received from disparate sources and by different committees.

To reduce these perceived problems related to information, reformers have suggested changes in three areas: staff, internal information processing, and support services. With regard to staff, they have variously proposed: (1) increasing the size of members' personal staffs; (2) increasing the size of committee staffs; (3) raising staff salaries; and (4) increasing the number of "professional" staffers available to members.[72] Some have also emphasized the need for adequate minority party staffing, to give Republicans more opportunity to participate in congressional decision-making.[73]

The purpose of increasing the staff would be to provide the Congress with the personnel necessary for obtaining and using additional information. As one Nader study pointed out: "With a staff of 36 . . . during the Ninety-second Congress, House Judiciary [sic] simply could not keep abreast of developments within its legislative jurisdiction."[74]

The number of staffers in Congress has greatly increased in the last decade. But larger staffs for individual members have not necessarily contributed to their ability to process information necessary for legislating; the members tend instead to use

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71 *See* J. SALOMA, CONGRESS AND THE NEW POLITICS 214-15 (1969). *See also* Janda, *Information Systems for Congress — Revisited,* in *Committee Organization in the House, supra* note 50, at 724-29; N. Ornstein, Information, Resources and Legislative Decision-Making (1972) (unpublished Ph.D. dissertation, Univ. of Michigan).

72 *See, e.g.,* JUDICIARY COMMITTEES, *supra* note 22, at 371; MONEY COMMITTEES, *supra* note 6, at 459-60; L. RIESELBACH, CONGRESSIONAL POLITICS 383 (1973).

73 *See* Saloma, *Proposals for Meeting Congressional Staff Needs,* in *Committee Organization in the House, supra* note 50, at 683-84.

74 JUDICIARY COMMITTEES, *supra* note 22, at 371.

the staff for other purposes, such as constituent services, which increase their chances of re-election.[75]

In 1966 Kenneth Janda argued that the "information gap" between the Executive and the Congress could be reduced substantially by retooling Congress with modern equipment and techniques for information processing.[76] He had obviously hit upon an idea whose time had come, as calls for introducing computer technology to the Congress became the rage.[77] In 1971 the House Administration Committee created a House Information Systems staff. By 1973 it had developed several information systems that are in use today for such purposes as retrieval of information about a bill's status, and even for mailing letters to categorized groups of constituents.[78]

While the Congress had two major research arms — the General Accounting Office and the Legislative Research Service of the Library of Congress — some critics had argued that both had been stymied by the congressmen themselves, through requests for information that prevented in-depth analysis.[79] In an apparent response to such criticism, the Legislative Research Service was expanded under the Legislative Reorganization Act of 1970, and given explicit authority to do independent investigations, to develop policy proposals, and to be involved in policy review. In 1972 the Congress created the Office of Technology Assessment, with the vague purpose of evaluating the way in which programs achieve their goals — especially in the area of technology — in contrast to the General Accounting Office whose purpose is to consider whether an agency is spending its money as it claimed it would.[80] In a

75 For a concise view of the uses and growth of congressional staff, *see* Fox & Hammond, *The Growth of Congressional Staffs*, in CONGRESS AGAINST THE PRESIDENT 103-27 (H. Mansfield ed. 1975). *See also* N. Ornstein, Information, Resources, and Legislative Decision-Making (1972) (unpublished Ph.D. dissertation, Univ. of Michigan).

76 Janda, *Information Systems for Congress*, in CONGRESS: THE FIRST BRANCH OF GOVERNMENT 415 (A. de Grazia ed. 1966).

77 *See, e.g.*, J. SALOMA, CONGRESS AND THE NEW POLITICS 218-32 (1969); L. REISELBACH, CONGRESSIONAL POLITICS 386-88 (1973).

78 The Senate has a similar system in operation. On the House system, *see* Ryan, *Information Systems Support to the U.S. House of Representatives*, in *Committee Organization in the House*, *supra* note 49, at 730-36.

79 *See, e.g.*, Dechert, *supra* note 70, at 204-08.

80 *See* JOINT COMM. ON CONGRESSIONAL OPERATIONS, 93D CONG., 2D SESS., CONGRESSIONAL RESEARCH SUPPORT AND INFORMATION SERVICES 361-454 (Comm. Print 1974).

sense the Congressional Budget Office, created in 1974, acts as a third information arm, supposedly linking the OTA with the GAO by taking into consideration the criteria of efficiency and program goals.

II. The Woods of Congressional Reform, or The Forest and the Trees

Most of the reforms and proposals for reform described in the preceding pages tend to encourage centralization of the federal government and to discourage pluralism and conflict within the government. Campaign finance reform, for example, not only weakens the power of rich contributors; it also diminishes a congressman's reliance on local sources of funding. As John Saloma suggests, what is uniquely local is already difficult to discern "as America continues to develop a more national culture."[81] Removing the financial linkage may propel members to divorce themselves from local interests.

Similarly, reforms that permit party leaders to discipline members who deviate from a party program, that allow the majority party to select chairmen on some other basis besides seniority, that deprive "deviants" of devices, such as the Rules Committee or the filibuster, with which they can impede the efficient flow of legislation, and that reduce the number of power centers — especially in the budgetary process — by decreasing the number of committees, are reforms which tend to centralize the decision-making process in Congress. To be sure, the reforms might have other consequences. An end to seniority *might* lead to conflicts over committee chairmanships which could engage interest groups and raise significant issues.[82] But it appears to be a *sine qua non* for strong party leadership and control.

There is no necessity that a Congress with centralized control act in concert with a President. But critics of these centralizing tendencies have generally regarded them as threats to the checks and balances between Congress and the Executive. Bertram Gross, for example, relates proposals to limit the number of committees on which a member could serve to the way in

81 J. Saloma, Congress and the New Politics 257 (1969).

82 *See* Brenner, *Committee Conflict in the Congressional Arena,* 411 Annals 87, 99-100 (1974).

which such a scheme would limit the information each member could receive. He contends that as specialists, rather than generalists, the members would be less able to evaluate broad ranges of information. Moreover, as congressional operations are streamlined, there are fewer points of access for information. "If this should happen," he persuasively argues, "the basic sources of information available to the Congress would be controlled by a few efficient gatekeepers operating as loyal junior members of an oligarchy dominated by Macro-Business, the Super-Rich and Chief Executive-National network."[83]

In an earlier article in the same vein, Lewis A. Dexter explains that specialization in Congress can undermine checks and balances by leading to the development of a common mindset about problems. Congressional specialists do come to see the world from the same perspective as executive branch specialists, especially in the case of staff specialists who often owe their first loyalty to a "profession." Dexter proposes, among other remedies, that congressmen develop a skeptical attitude towards bureaucratic experts, and that staffs acquire a common-sense wisdom about solutions to problems by having increased "contact with the public."[84]

Marcus Raskin would have the Congress increase its contact with the public in even more radical ways, by creating congressional grand juries — citizens' groups in each congressional district, which "would point out and debate the major institutional crises in forums of investigation which would stimulate the consciousness of the people."[85] Raskin examines the way in which the Executive has come to dominate the Congress by control of information and by intimidation through its controls of the means of world destruction. Through years of acquiescence, he argues, the Congress became a "passive branch" in which the denial of personal responsibility was the dominant motif. To regain power to check the Executive, Congress must

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83 Gross, *Toward a House of Worse Repute, or How to Be a Rubber Stamp with Honor*, in *Committee Organization in the House*, *supra* note 50, at 767, 768.

84 Dexter, *"Check and Balance" Today: What Does It Mean for Congress and Congressmen?*, in CONGRESS: THE FIRST BRANCH OF GOVERNMENT 83, 101 (A. de Grazia ed. 1966).

85 M. RASKIN, NOTES ON THE OLD SYSTEM: TO TRANSFORM AMERICAN POLITICS 152 (1974).

first regain legitimacy in the public mind, which it can only do by returning to the citizenry and allying itself more closely with interests that could be represented in the congressional grand juries.[86]

While the tendency to centralization might be thus seen in terms of checks and balances, it is also important to recognize that the Congress might reflect a different set of interests than the Executive. Samuel Huntington has described the congressional interests as "local needs," which are articulated by "local businessmen, local bankers, [and] local trade union leaders" among others.[87] Such material forces may be quite real, even in the face of the tendency for culture to become national instead of local. Typically, local needs are juxtaposed, in the words of James M. Burns, with "the overriding interests of the nation" which are represented in the executive branch.[88]

James O'Connor provides a powerful analytical framework for considering how these two sets of interests might differ. He outlines the way in which local interests tend to be labor-intensive and highly competitive, and so somewhat unstable, and tend to leave markets which are confined to limited geographic areas. National interests are seen as companies which control their markets and are thus able to "administer" their prices, which are capital intensive and so have major investments in technology, and which have national and international markets.[89] He describes conflicts between the President and Congress as "increasing executive resistance to programs tailored by Congress to local and regional interests — the interests of small-scale capital. In the long run these interests must give way to those of 'society as a whole' — a euphemism for the needs of monopoly capital."[90]

This approach offers the beginning of a systemic perspective

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86 *Id.* at 147-49. Raskin's argument is more intricate than described here, and his critique of Congress and proposal for grand juries are rooted in a sophisticated discussion of the development of federal law in the twentieth century.

87 Huntington, *Congressional Responses to the Twentieth Century*, in THE CONGRESS AND AMERICA'S FUTURE 15 (D. Truman ed. 1965). For a similar statement, *see* S. BAILEY, CONGRESS IN THE SEVENTIES 2-3 (1970).

88 J. BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE 136 (1966).

89 *See* J. O'CONNOR, THE FISCAL CRISIS OF THE STATE 13-17 (1973).

90 *Id.* at 81.

on congressional reform. While many of the studies described in this essay provide useful details and compelling explanations about the immediate causes of congressional reform, and others appear to provide imaginative proposals to address immediate "problems," most of the studies do not probe or even consider the origins of these problems. They tend to be ahistorical because they lack a systemic approach.

For example, reformers who propose to make congressional operations more "efficient" appear to assume that such a change "is a supreme value of and in itself," as Professor Gross critically observes. "No historical experience is mentioned."[91] Yet a similar reform in 1946 came at a critical historical juncture,[92] as the federal government was entering a new period where it would have become clearly responsible for the maintenance of the stability and expansion of markets and access to resources for private investors.

The Executive responded to these profound new burdens with the Employment Act of 1946 — whereby the federal government accepted a major role in planning the economy — and the National Security Act of 1947, through which the Executive could shape the economy through military budgets and plan a foreign policy without congressional participation.[93] Still, a Congress fragmented into more than eighty committees in each house could impede the "rational" exercise of this new responsibility, and the 1946 reorganization act thus promoted rationality by drastically altering the committee structure.

Similarly, the contemporary emphasis on rationalizing the budget process might be seen as a response to "runaway" budgets that have generated a "fiscal crisis of the state."[94] Until the 1974 budget act, the budget process in Congress was uncoordinated, with each appropriations subcommittee acting

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91 Gross, *supra* note 83, at 777.

92 On the 1946 Reorganization Act, *see* G. GALLOWAY, HISTORY OF THE HOUSE OF REPRESENTATIVES 57-61 (1968).

93 On the Employment Act, *see* S. BAILEY, CONGRESS MAKES A LAW (1950).

On the National Security Act, *see* Borosage, *The Making of the National Security State*, in THE PENTAGON WATCHERS 5 (L. Rodberg & D. Shearer eds. 1970). *See also* D. CARALEY, THE POLITICS OF MILITARY UNIFICATION (1966).

On the use of military budgeting as a planning tool, *see* S. MELMAN, THE PERMANENT WAR ECONOMY (1974); R. BARNET, THE ROOTS OF WAR (1972).

94 *See* J. O'CONNOR, THE FISCAL CRISIS OF THE STATE 79 (1973).

somewhat independently, and with last year's budget being "the largest determining factor of the size and content of this year's budget."[95] Analysts have explained the development of the Act in terms of the growing fiscal crisis, and in terms of President Nixon's impoundments. But the fiscal crisis and the impoundments were not random phenomena that somehow happened to occur in the 1970s; they can and should be seen in systemic terms.

Richard Nathan, assistant director of the Office of Management and Budgeting from 1969-71, explains that the Nixon Administration was attempting to respond to fundamental instabilities in the economy when it reorganized the executive branch and began to impound funds. Demands for social services had grown so large that the viability of the government was perceived to be at stake, he argues.[96] Indeed, O'Connor views the growth of demand for social services as a consequence of fundamental dynamics in the economy. He explains that as the monopoly sector grows, it carries with it an ever-smaller percentage of the workforce. Workers then must find employment in the "competitive" sector of the economy where wages are lower, which means that they cannot afford to purchase social services from private suppliers. Moreover, the high-technology industries cannot afford individually to invest in research and development and turn to the government. Having assisted these industries, the government also feels compelled to provide services to workers so that it retains an appearance of neutrality and in this way maintains its legitimacy. Thus in an effort to reconcile the needs of a private economy with its own need for legitimacy, the federal government's resources become drained at an ever-accelerating rate.[97] This diminishes the ability of the government to plan the economy.

In a corresponding way, though for different reasons, the 1921 Budgeting and Accounting Act required the Executive to coordinate the segmented budgets of the different depart-

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95 *See* note 62 *supra.*.

96 R. NATHAN, THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY 2-11 (1975).

97 *See* J. O'CONNOR, THE FISCAL CRISIS OF THE STATE 25-63 (1973). O'Connor refines his analysis as he begins to examine the reasons for stagnation in the monopoly sector. O'Connor, *Productive and Unproductive Labor,* 5 POL. & SOC'Y 297 (1975).

ments in one unified budget. This came at the end of a period of great growth and turmoil in the economy. The federal government had been involved through some efforts at planning and regulation, but as its own budget grew in size, planning had to become more systematic.[98] Compare the statements by reformers reported above calling for a coordinated congressional budget process with the following comments in 1919 on the need for a budget act:

> The estimates of expenditure needs now submitted to Congress represent only the desires of the individual departments . . . without making them, as a whole, conform to the needs of the Nation as represented by the Treasury and prospective revenues.[99]

Reforms, then, do not occur merely by happenstance. To be sure, political scientists who analyze reform do try to discern some underlying patterns, and do consider structural factors that might contribute to reforms. For example, Norman Ornstein explains the adoption of the "subcommittee bill of rights" in terms of the increased number of "liberals" in the House who had gained middle-level seniority.[100] Gary Orfield has usefully argued that change in Congress should be considered not only in a formal sense, with regard to intentional reforms, but in terms of policies. He notes the following irony:

> While reformers were losing battle after battle, as the years passed Congress was somehow becoming less conservative. Although the structure was the same, political and social change altered the membership of each house, thus changing the policy impact of various rules and customs.[101]

These scholars thus recognize that while congressmen may make their own history, they do not make it under circumstances they choose themselves. Political scientists are well aware that the institution has a history which the legislators inherit, and which can limit and shape reforms. They also consider the fact that elections can affect the Congress, and

98 *See* J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 57-68 (1965).

99 H.R. REP. No. 362, 66th Cong., 1st Sess. 4 (1919), *quoted in* J. HARRIS, *supra* note 98, at 66.

100 *Causes and Consequences, supra* note 24, at 89-90.

101 G. ORFIELD, CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE 29 (1975).

elections may turn on political and social change. But here they stop. They do not examine whether there are *systemic* changes that might lead voters to act in systematic ways. To suggest that change in Congress is related to isolated voters obscures an analysis of the links between large social forces — such as the changing composition of the workforce and conflict between local and national capital — and reform in Congress.

From a systemic perspective, the turnover of membership in Congress might be seen as a reflection of struggles in which workers are demanding services to which they feel entitled. And congressional reform might be seen as a response to these struggles. In this light, the centralizing tendency of the reforms could be interpreted as an effort on the part of the Congress to isolate itself from the struggles. As bureaucratic organization tends to diminish individual responsibility, so the centralizing of Congress might lessen the personal accountability of its members. Simultaneously, the Congress might be attempting to maintain its legitimacy in the face of growing voter distrust in government, a distrust borne in part out of the government's contribution to fundamental dislocations in the economy. This suggests that Congress did not adopt many of the reforms which have been described here simply on the basis of the logic and force with which they were presented. Rather, only those reform proposals which addressed perceived problems of legitimacy and corrected an inability to plan the national economy, while protecting members of Congress from the voters, gained ascendancy.

III. Conclusion

The studies of congressional reform which have been reviewed here — both the prescriptive ones which advocate particular changes and the analytic ones which explain change — indicate two characteristics about the way in which the Congress is examined. The studies (1) focus on the personnel of Congress and on congressional operations, and (2) serve ideological purposes.

1. It is perhaps to be expected that studies about congressional reform would focus on the Congress. This might be explained in part from the extensive field research and

participant-observation out of which most of the recent literature has developed.[102] This vantage point has led scholars to emphasize the internal workings of the Congress and to consider external factors only insofar as they might directly affect the Congress. Explanations for behavior take on the logic that the members themselves provide, in part because close contact leads congressional scholars to view the world from the same perspective as the congressmen. The larger social system which serves as a backdrop for the Congress is implicitly assumed to be so stable that it does not require discussion. While there are short-term dislocations, the larger patterns persist, which allows the scholars to focus only on the internal adjustments that Congress makes.

To say this is not to suggest that internal reforms are without significance. They might indeed enable the Congress to challenge the Executive more effectively, as some reformers would hope. Or, as the Congress makes greater use of legal forms such as that "legislative veto" — by which the Congress retains authority to shape the implementation of a program or plan for which it has given the Executive authorization[103] — it might control efforts to plan the economy for the benefit of national corporations. Yet to the extent that its reforms permit access only by large and national interest groups, the Congress is more likely to follow the lead of the Executive and to take a "national" view with respect to the needs of the economy.

2. By focusing on the internal operations of the Congress, and by removing congressional reform from a systemic context, most studies of Congress tend to foreclose an examination of the class bias with which the Congress may operate. Though this is probably unintended by congressional scholars, such obfuscation has an ideological function: it serves to reinforce a belief that the government is neutral, and that when it undergoes reform it does so for technical efficiency reasons and not

102 *See* Peabody, *Research on Congress: A Coming of Age,* in CONGRESS: TWO DECADES OF ANALYSIS 3, 10-12 (R. Huitt & R. Peabody eds. 1969).

103 *See* J. HARRIS, *supra* note 98, at 204-48. *See also* Note, *Constitutionality of the Legislative Veto,* 13 HARV. J. LEGIS. 593 (1976); *Congressional 'Veto' Over Federal Regulations: Support for Idea Grows as Constituents Complain,* 33 CONG. Q. WEEKLY REP. 2322 (1975). The congressional veto was recently upheld by the U.S. Court of Appeals for the District of Columbia in Clark v. Valeo, No. 76-1825 (D.C. Cir. Jan. 21, 1977).

with reference to struggles that go on between workers and corporations. The emphasis on technique affirms a Weberian vision of the world where facts and values can be isolated, where politics becomes a science that can serve any master. This is not the place to review the arguments which form the basis of a major debate in the social sciences about the weaknesses and strengths of the Weberian view, or about whether there is an "end of ideology." But it is appropriate to observe that a debate does exist and that the literature on Congress tends to rely on only one side of the debate. Inasmuch as that view assumes the government is neutral, the studies rarely attempt to raise the question as to whether the assumption is correct, and thereby reinforce the view.

Studies of Congress themselves must be seen in a social context. They are not simply scholarship for its own sake; they often have significant political effects. As has been suggested here, several of the reforms proposed by political scientists have been adopted by the Congress. Moreover, the view of Congress they present is transmitted to thousands of students in universities and more generally by the news media. Thus when the studies isolate the Congress from a larger, class context, they can have profound consequences for the way in which citizens understand and relate to the Congress.

To be sure, the study of congressional reform requires a close analysis of the personal and organizational aspects of reform. Such foci may, in the short run, explain the genesis of change in the legislature. That is, members might have personal reasons, such as frustration for adopting reforms. Or there may be institutional imperatives, such as the need for legitimacy in the face of scandal, which encourage change. But to appreciate fully the implications of proposals for reform, and to analyze the adoption of reforms, there must be systemic analysis which situates the Congress within a framework whose boundaries extend beyond Capitol Hill.