HARVARD JOURNAL

on

LEGISLATION

VOLUME 15 DECEMBER 1977 NUMBER 1

CONGRESS ISSUE

ARTICLES

BOOK REVIEWS

Published four times during the academic year (December, February, April, and June) by the Harvard Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Mass. 02138. Second-class postage paid at Boston, Mass., and at additional mailing offices.

Subscriptions per year: United States, $7.50 (single copy, $2.50); foreign, $9.00 (single copy, $3.00). Subscriptions are automatically renewed unless a request for discontinuance is received.

Back issues prior to the current volume are available from Fred B. Rothman & Co., 10368 W. Centennial Road, Littleton, Colorado 80123, at $3.50, check with order. For prices of complete back volumes or of sets, please inquire of Fred B. Rothman & Co.

To Our Readers

The Board of Editors of the HARVARD JOURNAL ON LEGISLATION has voted to change the publication schedule of the JOURNAL from four to three times annually effective with Volume 16, Number 1. From that time, the JOURNAL will publish a Winter (January), Spring (April), and Summer (July) issue in each volume. This change in schedule will bring the JOURNAL's publication program into line with that of the HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW and the HARVARD INTERNATIONAL LAW JOURNAL and will alleviate production problems that may have been created by the change in Harvard Law School's academic calendar to a 4-1-4 semester format that took place in September 1978.

The JOURNAL anticipates that the number of pages in its volumes will not decrease from that of prior years, despite the reduction in annual issues from four to three. The subscription price for each volume will remain at $7.50 per volume for subscribers in the United States and $9.00 per volume for foreign subscribers. Subscribers are reminded that their subscriptions will be renewed automatically for Volume 16 if they do not send the JOURNAL notices of cancellation.

The JOURNAL reminds its subscribers that Fred B. Rothman & Co., from whom back issues, volumes, and complete sets of the JOURNAL may be obtained, has moved its offices to 10368 W. Centennial Road, Littleton, Colorado 80123. All inquiries concerning back issues should continue to be referred to Fred B. Rothman & Co. at its new address.

BEYOND THE NEW FEDERALISM—REVENUE SHARING IN PERSPECTIVE

GEORGE D. BROWN*

In 1972 Congress added General Revenue Sharing to the list of federal grant-in-aid programs for states and localities. President Nixon had recommended Revenue Sharing, as a part of his "New Federalism," because it would foster local autonomy by minimizing federal restrictions on the grants. When General Revenue Sharing was renewed in 1976, Congress made no changes in the formula, leading some commentators to minimize the significance of those changes which were made.

Professor Brown argues that the 1976 renewal amendments to the Revenue Sharing Act are an example of "interventionist federalism," a new form of federal influence over state and local governments. The federal government, while not specifying how Revenue Sharing funds must be spent, places on recipients strict conditions meant to promote such policies as non-discrimination and open access to state and local decision-making bodies. Thus the 1976 amendments, while enhancing local autonomy in spending decisions, enable the federal government to affect state administration in a potentially broader way than in the past.

Introduction

Prompted by decisions such as *National League of Cities v. Usery*[1] and *Younger v. Harris*,[2] lawyers are accustomed to viewing the courts as the forum in which the great controversies of federalism are settled. In fact, however, it is Congress—not the courts—which makes most major decisions

---

*Professor of Law, Boston College Law School; Harvard, A.B., 1961; LL.B., 1965.

1 426 U.S. 833 (1976). *Usery's* resurrection of the Tenth Amendment has generated numerous analyses of the decision itself, as well as a renewal of interest in federalism generally. *See, e.g.*, Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

2 401 U.S. 37 (1971).

concerning the allocation of power within the federal system; and, increasingly, Congress exercises this choice when it shapes the contours of federal grant-in-aid programs. Federal grants to units of state and local government now total approximately $85 billion annually.[3] At the heart of every grant-in-aid debate is the issue of which level of government will have the power to determine how the funds are spent.

Enactment of the State and Local Fiscal Assistance Act of 1972[4] (Revenue Sharing) marked a dramatic turning point in the American federal system.[5] By guaranteeing state and local governments $6 billion annually, the legislation constituted the largest domestic aid program ever enacted by Congress. At the same time this legislation contained few strings to control the recipient's expenditure of the funds. Former President Richard Nixon adopted Revenue Sharing as the cornerstone of his "New Federalism" policy. The objective of this policy was to return to state and local governments certain powers which had allegedly drifted away from these units over the years and accrued to the federal bureaucracy.[6]

But Revenue Sharing today is different from what it was in 1972. January 1, 1977, marked the effective date of a set of amendments to the original Act[7] which may be indicative of future grant-in-aid changes. Given the outpouring of studies on the 1972 Revenue Sharing Act, the lack of scholarly interest in the renewal amendments is surprising. The only major study to date—*Revenue Sharing: The Second Round,* by the Brookings Institution—describes the renewed Revenue Sharing program as reflecting predominantly the "Ford Administration's status quo position . . . ."[8] Brookings concludes that

---

3 U.S. Office of Management and Budget, Executive Office of the President, Special Analyses Budget of the United States Government Fiscal Year 1979 175 (1978).

4 State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972) [hereinafter cited as Revenue Sharing Act].

5 Nathan, *Federalism and the Shifting Nature of Fiscal Relations,* 419 ANNALS 120, 121 (1975) [hereinafter cited as Nathan].

6 *See* President's Message to the Congress Proposing a Program for the Sharing of Federal Revenues With the States, 5 WEEKLY COMP. OF PRES. DOC. 1143 (Aug. 13, 1969).

7 State and Local Fiscal Assistance Amendments of 1976, Pub. L. No. 94-488, 90 Stat. 2341 (1976) [hereinafter cited as Revenue Sharing Amendment].

8 R. NATHAN AND C. ADAMS, JR., REVENUE SHARING: THE SECOND ROUND 23 (1977 (Brookings Institution) [hereinafter cited as SECOND ROUND].

the amendments simply deal with "process issues . . . ."[9] In fact, however, the renewal amendments represent both a significant change in Revenue Sharing itself and the possible emergence of a new approach to federal-state power relationships.

This article analyzes the renewal amendments, and particularly their implementation by the Office of Revenue Sharing (ORS), as an example of what might be called "interventionist federalism." As used here, the term refers to the national government's use of grants to gain broad leverage over the organization and behavior of state and local governments, while allowing these units substantial discretion in the actual use of grant funds. This concept of federal-state relations differs both from Nixon's New Federalism and from the system of categorical grants which preceded it. It offers Congress the opportunity to institute changes far beyond those it can achieve through direct "regulation" of state and local governments. Thus, for example, new federal programs such as the proposed "National Urban Policy" are likely to involve interventionist uses of the grant system in order to further national goals for urban areas and preserve a degree of sub-national autonomy.[10]

The article also focuses on Congress' increased use of citizen recourse to federal administrative and judicial processes as a means of enforcing grantee compliance with program strings and of redistributing political power at sub-national levels. This congressional policy of opening up federal forums to those who may have been excluded from state and local decisionmaking comes, paradoxically, at the height of a judicial view of federalism which takes precisely the opposite approach.[11] In focusing on interventionist federalism and the use of federal forums to enforce Revenue Sharing strings, the article examines both the future of federal grant programs

---

9 *Id.* at 166.

10 The Carter Administration has studied one proposal for its national urban policy, which would increase allotments of Revenue Sharing funds to states that aid their depressed municipalities. These increases would be funded by cutting allotments to states which do not provide such aid. *See,* N.Y. Times, Feb. 12, 1978, at 1, col. 5.

11 *See* Note, Stone v. Powell *and the New Federalism: A Challenge to Congress,* 14 HARV. J. LEGIS. 152, 157-61 (1976).

and the broader issues concerning the role of federal institutions as overseers of state and local governments.

I. REVENUE SHARING IN THE CONTEXT OF THE GRANT-IN-AID SYSTEM

Despite the enactment of Revenue Sharing, other grant-in-aid programs have remained fixtures of the federal government's efforts to transfer funds to state and local governments. In order to understand fully the impact of Revenue Sharing and its 1976 amendments on federal-state relations, it is important first to consider grant-in-aid programs and their theoretical underpinnings.

A. *The Grant Programs–A System?*

A basic text on state and local finance describes grants as "an essential mechanism for federalism."[12] Although estimates of the number of grants have varied widely, it appears that there are between 400 and 500 different programs of financial assistance from the national government to state and local units.[13] In Fiscal Year 1979, federal grants will total approximately $85 billion, continuing a trend dating from the mid-1960's during which the increase in grant funds far outstripped the overall rate of growth of the federal budget.[14] Programs range in size from several billion dollars annually to the hundred thousand dollar level. Given the extraordinary variety of grant programs, it is questionable whether one can speak of a grant-in-aid "system" at all.[15]

---

12 J. MAXWELL & J. ARONSON, FINANCING STATE AND LOCAL GOVERNMENTS 63 (3d. ed. 1977) [hereinafter cited as MAXWELL & ARONSON].

13 Stanfield, *Will New Federalism Live On?* 9 NAT'L J. 1242 (Aug. 6, 1977); *Fiscal Relations in the American Federal System: Hearings Before the Subcomm. on Intergovernmental Relations and Human Resources of the House Comm. on Government Operations,* 94th Cong., 1st Sess. 74-75 (1975) (statement of David B. Walker) [hereinafter cited as Walker].

14 *See* U.S. Office of Management and Budget, Executive Office of the President, Special Analyses Budget of the United States Government Fiscal Year 1979 175 (1978). From FY 1967 to FY 1977 the average annual increase in grants was 16.2 percent, while total federal outlays grew by 9.8 percent annually.

15 *See* M. DERTHICK, THE INFLUENCE OF FEDERAL GRANTS 3-8 (1970) [hereinafter cited as DERTHICK].

An examination of the substantial body of academic literature on grant programs reveals that four distinct lines of analysis have developed which purport to serve as explanations of, and justifications for, grant programs.[16] It may well be that no single explanation offers convincing proof that the multiplicity of programs does constitute a system. However, the recurrence of certain interrelated themes, both in the academic literature and in the political debates, suggests that Congress' $85 million expenditure for the grants is based on more than a series of *ad hoc* decisions.

The first line of analysis might be called the "interest group approach." Professor Philip Monypenny describes grants as a mechanism through which interest groups seeking a particular good or service from state or local governments can influence national political processes to induce the lower levels to act in the desired way.[17] This line of analysis suggests that it is easier to forge coalitions at the national level than to do so in thousands of state and local jurisdictions. It also suggests that the national government may be more responsive to demands for additional governmental activity, particularly if "public interest" programs such as income transfers and social services are involved.[18]

A closely related line of analysis might be called the "centralist vs. decentralist" approach.[19] The grant-in-aid device has appealed to many who advocate a strong federal role in setting domestic priorities, but view the national government as limited in its authority, either by the Constitution or by tradition.[20] Spending grant funds in accordance with specific federal conditions contained in the grant statute or implementing regulations, the state and local governments act essentially as "agents" or "subdivisions" of the national govern-

---

16 *See* F. MICHELMAN & T. SANDALOW, GOVERNMENT IN URBAN AREAS 984-1002 (1970) [hereinafter cited as MICHELMAN & SANDALOW].

17 Monypenny, *Federal Grants-in-Aid to State Governments: A Political Analysis,* 13 NAT'L TAX J. 1, 13-16 (1960).

18 M. REAGAN, THE NEW FEDERALISM 84-86 (1972) [hereinafter cited as NEW FEDERALISM].

19 *See* MICHELMAN & SANDALOW, *supra* note 16, at 991-92.

20 *See* Susskind, *Revenue Sharing and the Lessons of the New Federalism,* 8 URB. L. ANN. 33, 64, 68-69 (1974) [hereinafter cited as Susskind].

ment.[21] At the same time, however, advocates of decentralization have focused on the grant device as a mechanism for enhancing the priority-setting and allocational role of state and local governments by increasing the fiscal resources available to them.[22] Not surprisingly, the decentralists would minimize the number of federal "strings" attached to any given program. The two views outlined under this category are not as diametrically opposed as might appear to be the case. Of course, the centralists would like to see the national government act without restraints, while the decentralists would like to see state and local governments left to their own devices. Yet each group regards the grant programs as being infinitely preferable to the policy most desired by the other.[23] Although the types and extent of "strings" attached to the grants are still in issue, the seeds of legislative compromise are present.

A third approach draws upon public finance theories to justify federal grants. Proponents of this view believe that if state and local governments are left to their own devices they might not provide the "correct" level of public goods and services.[24] Federal grants are viewed as a means of inducing the correct allocation of resources by compensating lower levels of government for benefits which "spill over" from their activities into the society at large.[25] This analysis is often used to justify fiscal assistance in specific program areas.[26]

A fourth, and more general, approach is the "fiscal federalism" or "fiscal mismatch" justification for grants. The federal government has preempted[27] the most productive revenue sources (personal and corporate income taxes), but service demands and responsibilities are concentrated at the lower

21 MAXWELL & ARONSON, *supra* note 12, at 65.

22 *See id.* at 74-75.

23 Grants also provide "centralists" a mechanism for achieving national minimum standards in the provision of basic services.

24 "Correct" in this context is defined from the perspective of the national marketplace for public goods and services. G. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES 71-77 (3d ed. 1967).

25 *Id.* at 71-77.

26 *Id.* at 77; MAXWELL & ARONSON, *supra* note 12, at 65.

27 Susskind, *supra* note 20, at 39 n.13.

levels of government. The financial resources of state and local governments thus are not equal to the tasks for which they are responsible. Federal grants can help alleviate this imbalance. A corollary of the fiscal federalism argument is the proposition that grants permit the national government to recognize differences in fiscal capacity *among* state and local units (as well as *between* those levels and the national level) and to "equalize," or reduce, those differences by providing proportionately more funds to the poorer jurisdictions.[28]

Revenue Sharing itself—defined, for the moment, as a program of general purpose federal aid to state and local government—furnishes a good example of how the above approaches can overlap. The "fiscal federalism" rationales for such a program are obvious and were a principal argument of the program's major academic proponent, Walter Heller.[29] The concept also had strong appeal for "decentralists," particularly the Republican architects of the "New Federalism."[30] Finally, the pressure for Revenue Sharing can be explained in political terms, although the configuration of forces represented a variant on Monypenny's model. It was the state and local governments themselves, through their elected officials, who asked the federal government for the increased fiscal resources which, presumably, the local political processes would not provide.

B. *How Much Federal Power?—the Question of Strings*

> This week, I am sending to Congress for its approval for Fiscal Year 1971, legislation asking that a set amount of Federal revenues be returned annually to the States to be used as the States and their local governments see fit—without Federal strings.—President Richard M. Nixon.[31]

---

28 *Id.* at 67-71. Much of the current debate between the so-called "Sunbelt" and "Frostbelt" states focuses on whether formulas which measure need by state per capita income levels or by uniform measures of poverty which fail to account for regional differentials in cost do, in fact, allocate federal resources on an equalizing basis. *See, e.g.*, 122 CONG. REC. H6996 (daily ed. June 29, 1976) (remarks of Rep. Harrington).

29 W. HELLER, NEW DIMENSIONS OF POLITICAL ECONOMY (1966) [hereinafter cited as HELLER].

30 R. NATHAN, A. MANVEL, & S. CALKINS, MONITORING REVENUE SHARING 351-55 (1975) (Brookings Institution) [hereinafter cited as MONITORING REVENUE SHARING].

31 President's Message, *supra* note 6, at 1144.

Discussions of federal grant programs are replete with references to terms such as federal "conditions," "strings," "controls," "sanctions," and "supervision."[32] These different terms are not always defined with great precision, yet they are frequently heard in debates over individual grant programs, as well as in debates over large-scale alterations of the system, such as President Nixon's ill-fated proposals for "Special Revenue Sharing."[33] This section will explain these terms as they are used in the context of grant programs.

As a starting point, one should recognize that Congress enacts a grant program in order to further a perceived national purpose through action by the grantee.[34] Since Congress in every case wants the grantee to do something—even if only to spend the money, in the hypothetical case of "pure" revenue sharing—the legislation, as well as any implementing regulations by the disbursing federal agency, will contain directions prescribing grantee activities with the funds. These directions constitute federally-imposed requirements on grantee governments, the observance of which is a condition to initial or continued receipt of the funds.

Federal strings may cover much more than the uses to which particular grant funds are put. Although many classifications of strings have been suggested,[35] this article

---

32 *E.g.*, BREAK, *supra* note 25, at 79; DERTHICK, *supra* note 15, at 7; MICHELMAN & SANDALOW, *supra* note 16, at 1199-1200; NEW FEDERALISM, *supra* note 18, at 12.

33 *See* Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development*, 7 URB. L. ANN. 189, 191-200 (1975).

34 Such action might take different forms, *e.g.*, distribution of the funds to individuals, regulatory programs, or planning.

35 For example, the National Science Foundation developed the following system of classifying program strings:

> fiduciary strings, which are intended to prevent any irresponsibility or misappropriation in the handling of funds; policy strings, which are intended to advance national objectives; and constitutional strings, which are intended to assure that essential commitments of the federal government are honored.

National Science Foundation, General Revenue Sharing Research Utilization Project 69-70 (Vol. 4, 1975). *See also* Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 603-05 (1972).

will refer to four categories which are particularly applicable to grant programs.[36]

The first category consists of "program expenditure strings." These govern the functional uses to which the particular grant funds may be put. For example, Title I of the Housing and Community Development Act of 1974 listed thirteen "eligible activities."[37]

The second category consists of "fiduciary-administrative strings." These include the administrative framework which the grantee must utilize, for example, a requirement that a single state agency administer the funds granted, requirements concerning accounting procedures and the observance of applicable state laws, and prohibitions on political activities by those administering grant funds.[38] The goal of such

---

36 These categories are based in part on the National Science Foundation's analysis of General Revenue Sharing.

37 The first four are as follows:

> (1) the acquisition of real property (including air rights, water rights, and other interests therein) which is (A) blighted, deteriorated, deteriorating, undeveloped, or inappropriately developed from the standpoint of sound community development and growth; (B) appropriate for rehabilitation or conservation activities; (C) appropriate for the preservation or restoration of historic sites, the beautification of urban land, the conservation of open spaces, natural resources, and scenic areas, the provision of recreational opportunities, or the guidance of urban development; (D) to be used for the provision of public works, facilities, and improvements eligible for assistance under this title; or (E) to be used for other public purposes;
>
> (2) the acquisition, construction, reconstruction, or installation of public works, facilities, and site or other improvements—including neighborhood facilities, senior centers, historic properties, utilities, streets, street lights, water and sewer facilities, foundations and platforms for air rights sites, pedestrian malls and walkways, and park, playgrounds, and recreation facilities, flood and drainage facilities in cases where assistance for such facilities under other Federal laws or programs is determined to be unavailable, and parking facilities, solid waste disposal facilities, and fire protection services and facilities which are located in or which serve designated community development areas;
>
> (3) code enforcement in deteriorated or deteriorating areas in which such enforcement, together with public improvements and services to be provided, may be expected to arrest the decline of the area; [and,]
>
> (4) clearance, demolition, removal, and rehabilitation of buildings and improvements (including interim assistance and financing rehabilitation of privately owned properties when incidental to other activities); . . .

42 U.S.C.A. § 5305 (West Supp. 1977).

38 *See, e.g.*, Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947).

strings might be summarized as more efficient administration, both within the particular programs and in general.

The third category consists of "political process-public participation strings." These include requirements of public hearings, citizen or expert advisory committees, and specified roles for the grantee's chief executive and legislative body.[39] These strings may be directly related to the program (*e.g.*, Judicial Advisory Committees to plan for court reform under the Omnibus Crime Control and Safe Streets Act) or may advance more general values such as "revitalizing" local government.

The fourth category consists of "general policy strings," applicable to a broad range of federal grant programs. Their source may be statutory or constitutional. Examples are prohibitions on racial, age or sex discrimination, and the requirements of the National Environmental Policy Act.[40] These strings embody generalized policies of the national government, although they may also be directly relevant to the policies of a particular grant program, such as nondiscrimination in federally-aided education.

C. *Enforcing Program Strings—The Concept of Controls*

Congress must provide enforcement mechanisms to ensure that the federal strings attached to each grant program are observed. This article will use the term "controls" to describe those mechanisms.[41]

1. Administrative Controls

The federal administrative process constitutes the principal set of controls which Congress utilizes to enforce federal strings.[42] Every grant program requires an administering

39 *E.g.*, 16 U.S.C. § 1455 (c)(3)-(5) (Supp. 1974). *See also* 24 C.F.R. § 570.303(e)(4) (1977).

40 *See, e.g.*, Carolina Action v. Simon, 389 F. Supp. 1244 (M.D.N.C.), *aff'd* 522 F. 2d 295 (4th Cir. 1975).

41 *See* DERTHICK, *supra* note 15, at 7-8, 68. This terminology differs from that of some analysts who use "control" to refer to direct federal power over grantees, as distinguished from indirect, limited federal "influence." *E.g., id.* at 68.

42 As Derthick's study of *The Influence of Federal Grants* stated, "the pursuit of federal objectives through the grant system is a task that falls to federal administrators." *Id.* at 11.

agency, even if only to disburse the funds. In fact, grantor agencies do much more, often fulfilling the traditional administrative law functions of rule-making and adjudication.

Detailed regulations to implement statutory mandates are a standard feature of grant administration,[43] just as they are in regulatory programs. The promulgation of regulations by administrative bodies facilitates law-making by allowing Congress to compromise on broad goals without becoming enmeshed in detailed regulation for which it has neither the resources nor the expertise.[44] The factors pushing for a strong administrative role in the regulatory context may be even more compelling in the case of grant-in-aid legislation. The very decision to enact a grant represents a compromise between performing a function through federal agencies and leaving the matter entirely in state and local hands. Too much legislative specificity would destroy the essential "halfway-house" quality which makes grant programs politically attractive. Thus it falls to the grantor agency to "fill in the gaps" through regulations and guidelines. Administrative elaboration of general legislative strings thus is an important form of federal control.

---

43 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, BLOCK GRANTS: A ROUNDTABLE DISCUSSION 17-19 (1976) [hereinafter cited as BLOCK GRANTS].

44 In the context of regulatory programs Professor Stewart offers the following analysis:

> . . . [T]here appear to be serious institutional constraints on Congress' ability to specify regulatory policy in meaningful detail. Legislative majorities typically represent coalitions of interests that must not only compromise among themselves but also with opponents. Individual politicians often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy. Detailed legislative specification of policy would require intensive and continuous investigation, decision, and revision of specialized and complex issues. Such a task would require resources that Congress has, in most instances, been unable or unwilling to muster. An across-the-board effort to legislate in detail would also require a degree of decentralized responsibility that might further erode an already weak political accountability for congressional decisions. These circumstances tend powerfully to promote broad delegations of authority to administrative agencies. Moreover, quite apart from these factors, one may question whether a legislature is likely in many instances to generate more responsible decisions or questions of policy than agencies.

Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695-96 (1975) [hereinafter cited as Stewart].

Apart from policy amplification, grantor agencies undertake a broad range of other activities in order to implement their programs and enforce the relevant strings. Most of these activities concern the disbursement of funds. The grantor agency has substantial leverage to ensure observance of federal strings because, with few exceptions, federal grant programs require some form of grantor approval prior to receipt of the funds.[45] Before receiving its share of the funds, a recipient must first submit, and obtain agency acceptance of, a "plan" showing how the funds will be used and specifying how federal strings will be observed. In her study of welfare administration, Professor Derthrick noted that a plan is "like a contract between the two governments: the state agrees to do what the plan says, and the federal government agrees to give grants as long as the state lives up to its plan, or more precisely, to those elements of its plan that come within the federal purview as defined by Congress."[46] Approval is required even in the case of programs, such as the Omnibus Crime Control and Safe Streets Act, which compute a recipient's "entitlement" through a formula.

The grantor agency has substantial discretion in reviewing plans, but in theory, it is limited to ascertaining adherence to the statutory strings. Judicial review of a plan's rejection is frequently available, but the grantee may not wish to pursue this avenue for fear of jeopardizing its on-going relationship with the grantor agency. Congress, of course, can relax this administrative control by establishing a presumption in favor of the grantee, and limiting the conditions under which the grantor agency can disapprove a plan. The leading example is Title I of the Housing and Community Development Act of

45 General Revenue Sharing and so-called "Counter-Cyclical Revenue Sharing" (42 U.S.C. § 6721) are the principal exceptions.

46 DERTHICK, *supra* note 15, at 22. The requirement of plan submission illustrates nicely the difficulty of drawing a clear distinction between "strings" and "controls." In which category does the submission requirement belong? On the one hand, it is a condition precedent to *receipt* of the funds. Thus it might be viewed as a "string." On the other hand the submission requirement is not a limitation on the actual *use* of the funds, although living up to the promises made in it is. On balance it seems more accurate to view the requirement of plan submission as part of the administrative control mechanism rather than as a string.

1974.[47] Even with such provisions, however, an activist grantor agency can exert significant leverage.[48]

The paradigmatic case of congressional use of the administrative process as a control on grantee activity is the so-called "project grant." These constitute more than two-thirds of all grant programs, but represent only 25 percent of all grant funds.[49] "Project grants . . . are not necessarily spread among the states on the basis of any formula. Discretion is conferred upon the responsible administrators to determine whether a particular proposal qualifies under the federal program and, if grant applications exceed available funds, to select from among competing applications."[50] It is in connection with project grant programs that charges of "grantsmanship" are most frequently heard, especially the accusation that grantor agencies develop, somewhat on their own, rigid notions of what the federal strings are, and award funds only to grantees who accept those notions.[51]

Use of the administrative process as a control on grantee observance of federal strings is not limited to initial funding or periodic re-funding decisions. Grantor agencies may conduct investigations to verify grantee compliance, as well as receive and determine third party complaints about non-

47 42 U.S.C.A. § 5304(c) (West Supp. 1977). The original Act provided that "the Secretary shall approve an application" from a community which is entitled to funds under the formula unless—

> (1) on the basis of significant facts and data, generally available and pertaining to community and housing needs and objectives, the Secretary determines that the applicant's description of such needs and objectives is plainly inconsistent with such facts or data; or
>
> (2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant pursuant to subsection (a) of this section; or
>
> (3) the Secretary determines that the application does not comply with the requirements of this [title] or other applicable law or proposes activities which are ineligible under this [title].

48 For example, the Carter Administration's policy at H.U.D. is to enforce the Act's Housing Assistance Plan requirement much more vigorously than in the past. *See, e.g.*, Boston Globe, Nov. 2, 1977, at 10, col 1. H.U.D.'s monitoring of grantee performance may also be a significant source of agency leverage.

49 Walker, *supra* note 13, at 75.

50 MICHELMAN & SANDALOW, *supra* note 16, at 1004.

51 MAXWELL & ARONSON, *supra* note 12, at 63.

observance of federal strings.[52] In sum, the management of intergovernmental relations through the exercise of controls over grantee uses of federal funds is a significant function of the federal administrative process which supplements the traditional role of regulation of private conduct.[53]

2. Legislative Controls

Congressional oversight of federal programs already on the books usually involves the regulatory activities of federal agencies.[54] Nonetheless, legislative oversight also plays an important role in implementing grant programs[55] and may serve as a control on grantee observance of program strings. For example, during its field monitoring of the early years of General Revenue Sharing, the Brookings Institution found that some local officials feared that Congress would not renew the program if it disapproved of recipients' uses of the funds.[56]

Most grant programs are enacted for a limited number of years. One significant legislative control device is the hearings which precede congressional reauthorization, which examine the performance of the grantor agency and the grantees. Committees delight in focusing the legislative spotlight on misuses or "frivolous" uses of grant funds, such as the construction of bike-paths and golf courses in wealthy neighborhoods.[57] Hearings provide an important opportunity for those who may be frozen out of the local political processes to raise issues of grantee non-observance of federal strings, especially

---

52 *See* text accompanying notes 193-208 *infra.*

53 W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 52-53 (6th ed. 1974) [hereinafter cited as GELLHORN & BYSE]. It is not yet clear whether traditional administrative law "doctrine" does or should recognize a sharp distinction between these two uses of the administrative process. The dissatisfaction with regulatory agencies which Professor Stewart has perceptively analyzed, *see* Stewart *supra* note 43, may have an intergovernmental counterpart in the frequent criticisms of grantor agencies both by "public interest" critics and by grantee governments.

54 *E.g.*, Stewart, *Constitutionality of the Legislative Veto,* 13 HARV. J. LEGIS. 593 (1976).

55 *See* MICHELMAN & SANDALOW, *supra* note 16, at 1122-33.

56 MONITORING REVENUE SHARING, *supra* note 30, at 219-20.

57 *E.g., Community Development Block Grant Program: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 2d Sess. (1976).

those pertaining to discrimination.[58] These hearings often serve as a catalyst for changes in the grant program. For example, Congress might revise the strings by making them more explicit, or it might alter the administrative enforcement mechanism.

Most grant programs are subject to the annual appropriations process which provides another opportunity for legislative review of grantee activities. Indeed, many congressional critics of General Revenue Sharing wanted the program subject to the appropriations process for precisely this reason.[59]

3. Judicial Controls

The role of the federal courts in the network of intergovernmental relationships[60] which the grant system creates is frequently minimized or ignored by analysts of that system.[61] Nonetheless, there is a substantial volume of federal grant litigation, and it appears to be increasing.[62] The federal judicial process represents a significant control mechanism to ensure grantee compliance with grant program strings.

The most frequent example of judicial control occurs in "third-party" suits attacking a grant award because the use of funds does not comply with applicable strings.[63] Plaintiffs often represent local grant opponents who believe that the proposed use will harm them, or that alternative uses are preferable.[64] In other cases, particularly those involving allega-

---

58 *Id.; Civil Rights Aspects of General Revenue Sharing: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975).

59 *See* text accompanying notes 293-297 *infra.*

60 *See, e.g.,* Rosado v. Wyman, 397 U.S. 397, 422-23 (1970).

61 *E.g.,* Wright, *Revenue Sharing and Structural Features of American Federalism,* 419 ANNALS 100 (1975).

62 *See generally* Kushner, *Litigation Strategies and Judicial Review Under Title I of the Housing and Community Development Act of 1974,* 11 URB. L. ANN. 37 (1976).

63 *E.g.,* Knoxville Progressive Christian Coalition v. Testerman, 404 F. Supp. 783 (E.D. Tenn. 1975); Mathews v. Massell, 356 F. Supp. 291 (N.D. Ga. 1973). Attacks by welfare recipients on the adequacy of state "plans" are a frequent example of third party suits. *E.g.,* Bourgeois v. Stevens, 532 F.2d 799, 807 (1st Cir. 1976).

64 *E.g.,* Western Addition Community Organization v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968).

tions of discrimination, plaintiffs may not dispute the functional area of the expenditure, but rather they object to conditions within the grantees' direct control. For example, when a police department receiving grant funds maintains discriminatory hiring practices, suits to cut off the funding would be aimed at eradicating discrimination.[65] Once the department stopped discriminating, plaintiffs probably would not object to federal assistance to local law enforcement agencies. Although the distinction is not always clear-cut, such suits might be termed "general leverage suits," as opposed to "particular project opposition suits." In every case, of course, violation of grant program strings is at issue.

Many third-party suits are brought against the federal officials charged with disbursing the funds. Whether Congress regards such litigation as a component of the grant condition enforcement process is far from clear. Plaintiffs frequently seek "non-statutory review" of the grant award, there being no specific review provision in the grant statute nor any applicable general statutory provision authorizing review of agency action.[66] Previous lower court holdings that section 702 of the Administrative Procedure Act constitutes a grant of general statutory review are now overruled by the Supreme Court's decision in *Califano v. Sanders*.[67] Third-party suits against grantor agencies based on non-discrimination strings may, however, fall under the heading of specific statutory review.[68] Non-statutory review—review based on the general jurisdictional provisions of Title 28—is greatly facilitated by the 1976 Amendments to the Judicial Code which removed the jurisdictional amount requirement in suits against federal officials "arising under" the laws of the United States.[69] Even before this liberalizing amendment, Professors Michelman and San-

65 *E.g.*, United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977).

66 On the differences among "specific statutory review," "general statutory review," and "non-statutory review" *see* GELLHORN & BYSE, *supra* note 53, at 145-67.

67 97 S.Ct. 980 (1977).

68 *See* 42 U.S.C.A. § 3766(c) (West Supp. 1977) (right to challenge discriminatory use of Safe Streets Act funds). It is not clear whether this statute permits an action to be brought against the grantor agency. The issues raised are similar to those concerning citizens suits under the Revenue Sharing statute.

69 Pub. L. No. 94-574, 90 Stat. 2721(1976).

dalow had detected a "veritable explosion" of third-party suits.[70] Despite questions whether courts are "likely to be able to make a useful contribution to issues of the type which arise before agencies dispensing grants,"[71] suits against federal officials seem to have posed few institutional problems for the courts. Judges apparently view them as not unusual examples of administrative law disputes.[72] Plaintiffs have won a number of victories, even though delay of the grant rather than outright invalidation may be the result.[73]

In a number of cases, third parties have brought suit in federal court directly against the grantee or its officials to enjoin expenditure of grant funds allegedly in violation of program strings, rather than against the grantor agency to review its disbursement of the funds.[74] Although some of these suits have been successful, they may present difficult "threshold" questions of jurisdiction, and the existence of an "implied right of action" based on the grant-in-aid statute.[75] Such direct suits also pose institutional questions concerning the proper role of the federal courts. To some extent the judicial process is being invoked as a substitute for the administrative process which normally plays the dominant role in grant program enforcement, rather than as a mechanism to review the administrative process.

A role for the federal courts in the grant system which is

---

70 MICHELMAN & SANDALOW, *supra* note 16, SUPPLEMENT 275 (1972); *see* Tomlinson & Mashaw, *supra* note 35, at 630.

71 MICHELMAN & SANDALOW, *supra* note 16, at 1111.

72 *E.g.*, City of Hartford v. Hills, 408 F. Supp. 889, 903 (D. Conn. 1976), *rev'd. sub nom.* City of Hartford v. Town of Glastonbury, 561 F.2d 1032 (2d Cir. 1977) (en banc), *cert. denied,* 98 S. Ct. 766 (1978).

73 *Id.*

74 Schreiber v. Lugar, 518 F.2d 1099 (7th Cir. 1975); Mathews v. Massell, 356 F. Supp. 291 (N.D. Ga. 1973).

75 *E.g.*, Schreiber v. Lugar, 518 F.2d 1099, 1101-1105 (7th Cir. 1975); *see generally* MICHELMAN & SANDALOW, *supra* note 16, SUPPLEMENT 276-78 (1972). *But see* Lau v. Nichols, 414 U.S. 563 (1974); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977). The jursidictional and right of action obstacles are encountered only in suits against grantees and their officials, and only in non-civil rights cases. Plaintiffs may be able to overcome these obstacles by suing federal defendants and joining state or local officials. *E.g.*, Knoxville Progressive Christian Coalition v. Testerman, 404 F. Supp. 783 (E.D. Tenn. 1975). The latter might be viewed as "pendent parties." *But see* Aldinger v. Howard 427 U.S. 1 (1976).

close to the judiciary's traditional reviewing function is conferred by a number of statutes which authorize the grantee to seek judicial review of grantor agency decisions denying or terminating assistance.[76] Here the courts act not as a control mechanism on grantee observance of program strings, but as a check on the administrative process. Such statutory provisions might be viewed either as typical provisions for judicial review of administrative action to ensure agency adherence to legislative directions, or as an attempt to increase grantee leverage against the grantor agency in order to enhance grantee power in the allocation decision.[77] In designing grant programs Congress has frequently shown an awareness of the tension between a desire for respect of the allocation decisions of elected state and local officials and the need for recourse to non-elected federal administrators to "police" those decisions when the funds being allocated come from the federal treasury. The National Land Use Planning Act, which passed the Senate in 1973, went so far as to provide that any decision by the Secretary of the Interior to deny funds to a state would be subject to review by an "arbitration panel" composed of one governor, a federal official from another cabinet department, and a private citizen.[78] The proposal was never enacted, and judicial review of negative agency decisions seems Congress' preferred institutional route for reconciling the tension.

It seems fairly clear that the federal judicial process can serve as an important control mechanism in the operation of federal grant programs. Whether it should may "depend upon the assumptions one makes concerning the character and intensity of the interests" present in a particular allocation of federal funds,[79] the proper allocation of roles among the legislative, administrative and judicial branches, and the results, including available remedies, of judicial intervention.[80]

---

76 *E.g.*, 42 U.S.C. § 3759 (1970).

77 *See* MICHELMAN & SANDALOW, *supra* note 16, at 1107-14.

78 S. 268, 93d Cong., 1st Sess. § 305(a) (1973).

79 MICHELMAN & SANDALOW, *supra* note 16, at 1110; *see* Tomlinson & Mashaw, *supra* note 35, at 634-37 (questioning utility of grant litigation).

80 One result, of course, may be delay. As for remedies, the sanctions available to

D. *The Grant-in-Aid Spectrum—From Categoricals to General Revenue Sharing*

1. The Spectrum

Over the years, scholars have developed several different approaches to classifying federal grants by program structure. The emergence in recent years of "block grants" and Revenue Sharing has led analysts to classify grant programs primarily according to the relative flexibility which the authorizing statute accords to grantees in their expenditure of the funds. An example is Reagan's distinction between categorical and block grants:

> categorical grants are by and large those for specifically and narrowly defined purposes, leaving very little discretionary room on the part of a recipient government as to how it uses the grant, while block grants are broader in scope and although tied to a clearly stated area (such as health, or elementary education, or community facilities development) they do not specify the exact objects of permitted expenditure and hence create much larger zones of discretion on the part of the receiving government or agency.[81]

This classification is helpful, as far as it goes. However, one can further hypothesize that a relaxation of grantor-imposed strings will be accompanied by a relaxation of grantor controls as well, since it is the strings which necessitate the recourse to controls. A classification based on the extent of strings and controls can be seen in David Walker's criteria for distinguishing block grants from categoricals:

> Conceptually, . . . a block grant is supposed to embody five basic differentiating traits. These are:
>
> —it authorizes Federal aid for a wide range of activities within a broad functional area;

---

the courts are generally similar to those available to grantor agencies. Thus a court may invalidate a particular use of grant funds, or suspend it until program strings are complied with. *See generally* United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977).

81 NEW FEDERALISM, *supra* note 18, at 59.

> —it gives recipient jurisdictions fairly wide discretion in identifying problems and designing programs to deal with them;
>
> —its administrative, fiscal reporting, and other federally-established program requirements are geared to keeping grantor instrusiveness to a minimum, while recognizing the need to ensure that broad national goals are accomplished;
>
> —it is distributed by formula, which narrows grantor administrative discretion and provides some sense of fiscal certainty for grantees; and
>
> —its eligibility provision is fairly specific, relatively restrictive, and tends to favor general purpose governments, elected policy officials, and administrative generalists.[82]

Using this approach, one can identify three relatively clear points on the grant-in-aid spectrum: categorical grants, block grants, and Revenue Sharing. Categorical grants are for relatively narrow program purposes, and grantee observance of strings is ensured by strict grantor (especially administrative) controls.[83] Block grants afford the grantee greater flexibility in fund allocation decisions and do not permit the grantor to retain much power over those decisions. Revenue Sharing represents a step beyond block grants. In its "pure" form, Revenue Sharing might consist of a guaranteed annual distribution to grantees based on a formula, but without strings and control mechanisms. However, Revenue Sharing as enacted by Congress never has conformed to the "pure" model.[84]

---

82 D. Walker, The Changing Pattern of Federal Assistance to State and Local Governments 10 (July 29, 1976) (on file with the author).

83 *Id.* at 8.

84 General Revenue Sharing is discussed more fully in subsection E, *infra*. At this point it may be helpful to distinguish that program from "Special Revenue Sharing," a concept which President Nixon advocated repeatedly, but without success. Special Revenue Sharing represents a point on the spectrum somewhere between block grants and General Revenue Sharing. Grantee expenditures would be limited to one relatively broad area such as "law enforcement," and there would be very few grantor level controls. Federal agency approval of a "plan" prior to distributing the funds would not be required. *See, e.g.*, Fishman, *supra* note 33, at 195-96. Some analysts have suggested that Special Revenue Sharing was little more than another name for block grants. BLOCK GRANTS, *supra* note 42, at 20. The Advisory Commission on

2. The "Changing Pattern" of Federal Grants[85]

Strings and controls present Congress with a number of structural options in designing a grant program. Yet, as recently as the mid-1960's, virtually all federal grants to units of state and local government took the form of categorical programs. With the development of block grants in the late 1960's, the pattern began to shift. The enactment of General Revenue Sharing intensified this shift. While in Fiscal Year 1972, categoricals still accounted for more than 97 percent of grant funds, by Fiscal Year 1976 the respective percentages were, approximately: categoricals, 75 percent; block grants, 12 percent; and, general support (primarily Revenue Sharing), 12 percent.[86]

There is every indication that this tripartite system will continue, and that Congress will continue to experiment with different combinations along the spectrum of federal strings and controls.[87] The non-categorical programs have demonstrated their staying power, although at least one observer has detected signs that the federal government is reducing the scope of state discretion in the renewal of block grants.[88] The Ford Administration advanced an unsuccessful proposal for consolidating a large number of categorical programs into block grants.[89] The Carter Administration reportedly has considered converting the Omnibus Crime Control and Safe Streets Act into a form of Special Revenue Sharing.[90] At the

---

Intergovernmental Relations felt that the absence of any matching requirement was an important factor differentiating "Special Revenue Sharing" from block grants. *Id.* at 19. In any event, Congress has not been receptive to the particular mix of strings and controls which the Special Revenue Sharing proposals represented.

85 *See generally* D. Walker, The Changing Pattern of Federal Assistance to State and Local Governments 10 (July 29, 1976) (on file with the author).

86 *See* Walker, *supra* note 13, at 75.

87 The "counter-cyclical" aid programs represent the latest variations on the traditional forms.

88 *E.g.*, NEW FEDERALISM, *supra* note 18, at 101.

89 *See* BLOCK GRANTS, *supra* note 43, at 19.

90 Department of Justice, Restructuring the Justice Department's Program of Assistance to State and Local Governments for Crime Control and Criminal Justice System Improvement 16-18 (June 23, 1977) (on file with the author). *See,* N.Y. Times, Dec. 13, 1977, at 17, col. 2. (Attorney General Bell proposes abolition of Law Enforcement Assistance Agency and changes in program to "increase the program

same time, the number of categorical programs has continued to grow, a trend which was unaffected by the Nixon Administration.[91] The exact future of the changing pattern of federal aid cannot be predicted, but one thing seems likely. General Revenue Sharing marks the outer boundary of congressional willingness to renounce federal strings and controls.

E. *The Revenue Sharing Controversy and the 1972 Act—New Federalism Triumphant*

1. The Debate

The concept of unrestricted federal aid to states and localities has generated intense controversy from the moment it initially surfaced in press accounts of the so-called Heller-Pechman plan. The plan, which was prepared for President Johnson during the 1964 election campaign, proposed sharing a fixed percentage of federal income tax revenues with the states. At the time, proponents of the plan envisioned it as a primary means of reducing fiscal drag.[92] However, because the proposal engendered immediate and heated opposition, the President decided to delay its release. When subsequent expenditures for the Vietnam War and Great Society categorical grants absorbed more and more federal revenues, "[r]evenue sharing did not surface again as a serious policy alternative under President Johnson."[93] Yet debate over the concept went on, culminating in enactment of the State and Local Fiscal Assistance Act of 1972. The controversy produced a plethora of arguments and counter-arguments.[94] The two

---

flexibility of state and local governments and strengthen their priority setting roles and responsibilities").

91 Walker, *supra* note 13, at 63.

92 "If the long run elasticity of tax yield with respect to GNP [Gross National Product] exceeds unity, federal revenues will increase over time more rapidly than GNP . . . [t]hus the budget imposes a restraint on desirable economic expansion, and this is the phenomenon . . . called 'fiscal drag.' [T]he drag of the budget [can] be converted into a 'fiscal dividend' which could take the form of new or enlarged government programs or of reduced tax burdens." T. DERNBURG D. MCDOUGALL, MACROECONOMICS 403-04 (4th ed. 1972).

93 MONITORING REVENUE SHARING, *supra* note 30, at 350.

94 *E.g.*, Stolz, *Revenue Sharing–New American Revolution or Trojan Horse?* 58 MINN. L. REV. 1, 5-12 (1973) [hereinafter cited as Stolz].

main areas of disagreement were the fiscal wisdom of revenue sharing and the impact of any such program on the federal system.

The fiscal debate centered on several issues, including whether a "fiscal crisis" existed at the state and local levels; the relative superiority of national over sub-national revenue raising capability; and the possibility of constructing an equitable distribution formula that could reflect the disparities in need among thousands of governmental units.

In the context of this article, however, the debate over the program's impact on the federal system was far more significant, for many participants recognized that what was at stake, at least in the short run, was a major shift in decision-making power from national to local hands.[95] This ideological debate matched proponents of Nixon's "New Federalism" against supporters of the existing pattern of "cooperative federalism" based on the categorical grants.[96] Defenders of cooperative federalism rested their case primarily on the superiority of national decision-making over state local decision-making, and, secondarily, on the greater degree of competence among federal administrative personnel. Both are recurrent themes in American federalism debates, especially the belief that Congress takes a broader view of the "public interest," particularly the rights of minorities, whether because of the national legislature's relative insulation from the vicissitudes of "faction," or because national officeholders are less likely than their sub-national counterparts to be dominated by the views of state and local elites.[97] Those who adhere to the

---

95 Reagan, *The Pro and Con Arguments,* 419 ANNALS 23, 27 (1975).

96 NEW FEDERALISM, *supra* note 18, at 89-132.

97 Cole, *Revenue Sharing: Citizen Participation and Social Service Aspects,* 419 ANNALS 69 (1975).

The following comment by Michael Reagan epitomizes both the substance and the rhetoric of this "centralist" view.

> Perhaps the most basic group of arguments in favor of specific grants-in-aid as the means the federal government uses to help states and localities financially—and equally the most basic set of arguments against general revenue sharing—revolves around the ideas that there are a number of identifiable national objectives to be obtained through domestic public policies; that the concept of national citizenship establishes an intellectual

Advocates of the "New Federalism" challenged the centralist premise of national superiority, and articulated the advantages of decentralizing decisions about the disposition of grant funds. The New Federalists maintained that state and local officials were also capable of making valid decisions about state and local matters, and might, in fact, make better decisions since they were "closer" to the problems and "to the people." Furthermore, the New Federalists argued, state and local governments could be "revitalized" if given more resources since the increased allocational power would call forth greater citizen interest and participation in how it was exercised.[99] Although many of the New Federalist arguments were conservative, both in their tone and their sources, at least one prominent liberal, Walter Heller, believed in revitalizing state and local units. Writing in 1966, he contended that the service functions of state and local governments are inherently redistributive and, therefore, consistent with the centralist view of the public interest.[100]

The New Federalists' faith in the virtue of decentralization and their de-emphasis of national priority-setting led to a vision of the grant system relatively free of federal strings and the controls to enforce them.[101] They opposed federal strings and controls not only on ideological grounds, but also because cooperative federalist stand favor a grant-in-aid system characterized by extensive strings of all four types described above,[98] and strict controls, especially administrative enforcement.

---

and ethical base for national criteria of equity in the provision of public services and a national minimum standard of living; that nationally raised funds should not be utilized without some accountability to national criteria; and that proven inefficiency of state and local governments and proven lack of concern of middle class political majorities for the needs of ethnic minorities and the poor require that the national government use financial leverage if equity is to be attained and national social responsibility is to be served. All of these reasons together constitute a very strong argument against simply handing out money with no strings attached.

Reagan, *supra* note 108, at 29.

98 *See* text accompanying notes 31-40 *supra*.

99 *See generally* Susskind, *supra* note 20, at 35-37, 42-44.

100 HELLER, *supra* note 29, at 132-44.

101 *See* Fishman, *supra* note 33, at 190.

experience had shown these mechanisms to be unworkable and counterproductive. Horror stories of red-tape and overlapping bureaucracies were buttressed by fiscal analyses which indicated that grantee budgetary decisions were "distorted" away from local priorities in order to "buy into" available categorical grants.[102] Lurking in the background was the academic criticism that some categorical grant programs had proven to be antidemocratic. These critics argued that alliances which developed between grantor and grantee agencies had usurped the power over spending priorities once exclusively wielded by elected public officials.[103]

Although the New Federalists vigorously challenged the categorical grants, they did not seek initially to scrap the existing system but to supplement it by the addition of General Revenue Sharing and block grants. After a protracted congressional battle, they won a major victory in 1972 with the enactment of General Revenue Sharing.[104]

2. The State and Local Fiscal Assistance Act of 1972

The original Revenue Sharing Act provided for distribution of approximately 30 billion dollars over a period of five years. The recipients of the money were the 50 state governments themselves and all "units of general government" within the states, including counties, municipalities and townships.[105] State governments were to receive one-third of the funds, and the remainder was allocated to local units. Funds were distributed to state areas in accordance with either of two formulas, the applicable formula being the one which yielded the greatest amount of aid to a given state. The Senate formula was based on population multiplied by tax effort and per capita income, while the House formula was based on population, per capita income, urbanized population, income tax effort and general tax effort.[106] The program was exempt from the annual congressional appropriations process. Thus reci-

102 Stolz, *supra* note 94, at 19-23.

103 *See* Wright, *supra* note 61, at 109-115.

104 *See generally* MONITORING REVENUE SHARING, *supra* note 30, at 355-72.

105 Revenue Sharing Act, *supra* note 4, § 108(d)(1).

106 *Id.* § 106. For discussion of the formula, *see* Stolz, *supra* note 94, at 33-59.

pients could count on a predictable amount of funds for a known period of time, just as they could estimate collections from their own revenue sources. This certainty was finite, however, since grantees could not count on renewal of the program upon its expiration in 1976. Although referred to as a "no strings" program, the General Revenue Sharing legislation contained numerous strings as well as a control mechanism to enforce them.

a. Program-Expenditure Strings

Congress imposed no functional limitations on expenditures by state governments. Local governments, however, could only expend Revenue Sharing funds within nine "priority expenditures" categories:

> (1) ordinary and necessary maintenance and operating expenses for
> (A) public safety (including law enforcement, fire protection, and building code enforcement),
> (B) environmental protection (including sewage disposal, sanitation, and pollution abatement),
> (C) public transportation (including transit systems and streets and roads),
> (D) health,
> (E) recreation,
> (F) libraries,
> (G) social services for the poor or aged, and
> (H) financial administration; and
> (2) ordinary and necessary capital expenditures authorized by law.[107]

In addition, no recipient could use directly or indirectly Revenue Sharing funds to satisfy the "matching" requirements of other federal grant programs.[108]

Whether these limitations were illusory, especially the "priority" categories, has been discussed frequently.[109] The Act contained no "maintenance of effort" provision requiring

107 Revenue Sharing Act, *supra* note 4, § 103(a).
108 *Id.* § 104(a).
109 *E.g.*, Stolz, *supra* note 94, at 59-71. Stolz believes the limitations were illusory.

expenditures within the categories to remain at previous levels, and thus raised the possibility of a problem referred to as "fungibility." This problem occurs when a local government applies its Revenue Sharing money to an eligible activity, *e.g.*, public safety, reduces its contribution of its own funds to that activity by an equivalent amount, and transfers the "freed-up" money to an ineligible category, such as education.[110] Nonetheless, these priority categories were part of the legislation and proved to be enforceable, at least in extreme cases.[111]

b. Fiduciary-Administrative Strings

The Act contained several strings designed to ensure that recipients actually spent the money, that they acted at least as honestly and efficiently as they would with their own funds, and that the federal government knew what they had done. From the grantee perspective, perhaps most significant was the requirement that a recipient expend Revenue Sharing funds "only in accordance with the laws and procedures applicable to the expenditure of its own revenues. . . ."[112] This provision prevents the grantee's executive branch from treating the funds as a "blank check" free from legislative authority, and it also triggers the considerable body of state controls over local finance.[113]

The reporting requirements of the former section 121 seem designed primarily to facilitate federal monitoring of grantee activities, although they may also enhance citizen participation in allocation decisions. This section required periodic submission to the Secretary of the Treasury (grantor agency) of reports outlining the "planned" use of Revenue Sharing funds, and reports "setting forth the amounts and purposes for which funds received . . . have been spent or obligated." Given

110 SECOND ROUND, *supra* note 8, at 75-80.

111 Mathews v. Massell, 356 F. Supp. 291 (N.D. Ga. 1973).

112 Revenue Sharing Act, *supra* note 4, § 123(a)(4). Technically this provision only required that a recipient make *assurances* that it would follow these "laws and procedures." However, the O.R.S. has always interpreted it as a requirement that the assurances be followed.

113 *See* text accompanying notes 223-224 *infra*.

the "fungibility" problem discussed above, the accuracy of these reports is open to debate.[114]

c. Political Process—Public Participation Strings

Proponents of Revenue Sharing had claimed that the program would increase citizen participation in state and local political processes. Yet the Act "differ[ed] from the major federally funded domestic programs of recent years in that, as approved by Congress in 1972, [it] require[d] absolutely no citizen input in the expenditure of funds."[115] One observer has stated that "the intent of the Congress" to encourage citizen participation "seems fairly clear;"[116] but such clarity is not evident from a careful reading of the text of the 1972 Act. Section 121(c) did require recipients to publish, in a newspaper of general circulation in their area, the Planned Use and Actual Use Reports described above. The Act also required recipients to "advise the news media" of the reports' publication. Since the Act thus ensured some public awareness of Revenue Sharing allocation decisions, one can infer that Congress did, indeed, favor public participation in those decisions. However, Congress left the form and extent of such participation, *if any,* in the hands of state and local officials. In this respect, the Act's requirement that recipients spend Revenue Sharing funds "only in accordance with the laws and procedures" applicable to the expenditure of their own revenues is important. Such "laws and procedures" might require citizen input through public hearings, advisory committees and other mechanisms. Moreover, state and local officials were free to provide special participation mechanisms for Revenue Sharing allocation decisions.[117]

d. General Policy Strings

The principal string of this nature was the prohibition against grantee discrimination "on the ground of race, color, national origin, or sex" in "any program or activity funded in

114 SECOND ROUND, *supra* note 8, at 78-80.

115 Cole, *supra* note 97, at 68.

116 Lief, *Revenue Sharing and Citizen Participation,* in GENERAL REVENUE SHARING AND DECENTRALIZATION 92 (N. Scheffer ed. 1975).

117 MONITORING REVENUE SHARING, *supra* note 30, at 266-67.

whole or in part . . ." with Revenue Sharing funds.[118] The extent to which the Revenue Sharing program is subject to other general policy strings, contained in statutes purportedly applying across the board to federal assistance programs, has been an area of uncertainty. One could argue that Revenue Sharing funds are *different* from other grant monies because the basic allocation decision is local, not federal. Moreover, the virtual absence of federal involvement justifies exemption from general congressional directives. In *Carolina Action v. Simon,* the Fourth Circuit adopted this view by holding that the requirements of the National Environmental Policy Act did not apply to projects funded by Revenue Sharing.[119]

e. Administrative Controls

Since the Revenue Sharing Act did contain strings, an enforcement mechanism (or mechanisms) was necessary. To some extent the Act resembled other grant programs in that a federal agency, the Department of the Treasury, was to play a substantial role in disbursing funds and ensuring compliance. Thus the Secretary of the Treasury delegated his authority to the Office of Revenue Sharing and was responsible for promulgating regulations, computing grantee entitlements under the formula, and monitoring grantee compliance.[120]

However, the principal administrative control which Congress utilizes in grant programs—federal agency approval of grantee uses and related activities *prior* to disbursing the funds—was not included in the Act.[121] Recipients must, it is true, make general *assurances* that they will comply with specified requirements, but this is a far cry from submission, subject to approval, of a plan. The absence of this key administrative control constitutes one of the major differences between Revenue Sharing and virtually all previous forms of federal domestic assistance. This difference reflected the desire of Congress and, especially, the Nixon Administration to reduce the influence of federal administrators over local allo-

118 Revenue Sharing Act, *supra* note 4, § 122(a).
119 522 F.2d 295 (4th Cir.), *aff'g* 389 F. Supp. 1244 (M.D.N.C. 1975).
120 Revenue Sharing Act, *supra* note 4, §§ 105, 123, 142.
121 *Id.* § 123(a).

cational decisions. The absence of this federal administrative control also increased the power of local elected officials by preventing the development of powerful "alliances" between grantor officials and their *administrative* counterparts at the state and local levels.[122]

f. Other Controls

The 1972 Act contained virtually no legislative controls, as that term is used in this article. Revenue Sharing was exempt from the annual appropriations process. There was no provision for periodic congressional review.[123] However, legislative control is never totally absent from a grant program, since Congress remains free to amend or terminate it, if only at the expiration date. In the case of Revenue Sharing, state and local officials were acutely aware of the specter of nonrenewal, and this awareness affected their spending decisions.[124] As for judicial controls, the 1972 Act was silent on the subject of "third-party" suits to enforce its provisions. But it did authorize grantees to seek judicial review of administrative sanctions.

II. New Federalism at Bay—the Renewal Debate and the 1976 Amendments

A. *The Monitoring-Research Efforts*

Federal grant programs, once enacted, usually achieve a permanent status. The beneficiaries (both recipient governments and particular constituencies) represent a vested interest in continuation, and the opponents go off to fight other battles. This was not the scenario with Revenue Sharing, however. "[P]ublic, academic and professional interest in the program exceeded that of almost any previous domestic policy . . .,"[125] and it soon became clear that this intense scrutiny was providing powerful ammunition for those who wanted to

122 Wright, *supra* note 61.

123 *See, e.g.*, 42 U.S.C.A. § 5306(*l*) (West Supp. 1977) (special report to Congress on operation of Community Development Block Grant formula).

124 Monitoring Revenue Sharing, *supra* note 30, at 219-20.

125 Caputo & Cole, Revenue Sharing 1X (1975).

terminate Revenue Sharing when the authorization ran out in 1976.[126] When the question of renewal did arise, of course, the terms of debate shifted away from issues of how Revenue Sharing would work to issues of how it had worked or had not worked.[127] In the debate those who had conducted "objective research" which demonstrated the program's "results" enjoyed considerable advantages.

Two separate but interrelated streams of monitoring and research began almost immediately after enactment. The first was what might be called the "public interest" monitoring. This effort consisted of research spearheaded by the League of Women Voters, the National Urban Coalition, the Center for National Policy Review and the Center for Community Change. The second set of monitoring research activities, can be conveniently labelled the "academic" efforts. This work was carried out by academic and research institutions (especially the Brookings Institution) with substantial support from the National Science Foundation.[128]

Beyond ascertaining which jurisdictions got how much money, most aspects of Revenue Sharing monitoring and research turned out to be unexpectedly complex and difficult. The academic literature contains extensive discussions of the methodological problems presented by efforts to determine *how* the money was spent, for example.[129] Moreover, many of the monitoring research efforts, especially those of the "public interest" groups, appeared to be "programs of research that reflected strongly held values."[130] One analyst found "a particularly disconcerting intermingling of value judgment and fact" in much of the research, and warned that "[t]here is nothing new about programs being misevaluated due to faulty data and undue speed with Congress . . . accepting the evaluations and stopping or changing programs before they have

126 *See* SECOND ROUND, *supra* note 8, at 1.

127 Reagan, *supra* note 95, at 24.

128 *See* SECOND ROUND, *supra* note 8, 7-10.

129 *E.g.*, Lovell, *General Revenue Sharing and Categorical Grants,* GENERAL REVENUE SHARING AND DECENTRALIZATION 115 (N. Scheffer ed. 1975).

130 Rosenthal, *Policy Analysis and Political Action: Advice to Princelings,* REVENUE SHARING 149 (Caputo and Cole eds. 1975).

been really tried."[131] Despite such strictures, however, it seems fairly clear that the output of both sets of research played an important role in congressional debates over renewal, and led to many of the changes in the program contained in the renewal amendments.

B. *Major Areas of Controversy in the Act's Operation*

1. Actual Uses of Revenue Sharing Funds

How recipients were actually using Revenue Sharing funds, and whether these uses were "desirable" constituted the principal area of controversy during the four years between enactment and renewal. Researchers disagreed among themselves over how to determine the actual uses. Approaches included working with the Actual Use Reports submitted to the Office of Revenue Sharing, sending observers into the field to conduct case analyses, and utilizing survey techniques to determine how grantee officials *thought* (or would say) they had spent the money.[132] The "fungibility" problem posed serious obstacles to any approach which asked "how was the money spent?" The Brookings Institution and other researchers directed considerable attention to net fiscal effects by posing this question: "how would expenditure and revenue policies be *different* in the absence of general revenue sharing funds?"[133]

Despite the methodological difficulties, a number of generally accepted conclusions about the first four years seem to emerge from the research literature. First, Revenue Sharing generated substantial new capital spending activities, especially by smaller and relatively wealthy units of government. The Brookings Institution's monitoring effort showed an eventual drop in the "new capital spending" percentage of local government decisions, but this category still represented by far the largest percentage of identifiable spending decisions.[134] A second general conclusion is that financially troubled units of government, especially central cities, used Revenue Sharing

131 Lovell, *supra* note 129, at 117, 121-22.
132 *See* Wright, *supra* note 61, at 107, 115.
133 SECOND ROUND, *supra* note 8, at 27, 28 (emphasis added). *See also id.* at 24-42.
134 *Id.* at 31 (Table 2-1).

funds "simply to hold the line fiscally."[135] Finally, to the extent that direct expenditures could be measured, a relatively small percentage of Revenue Sharing funds were allocated to social service programs.[136] For example, one analyst found "a miniscule response on the part of local governments to the needs of the poor and aged."[137]

All three of these conclusions figured prominently in the renewal debate, but the issue of Revenue Sharing's failure to help the disadvantaged was uppermost in the controversy over uses.[138] Some congressmen argued that the needs of the disadvantaged and elderly constituted a first order national priority, and that Revenue Sharing, in actual operation, had proved unresponsive to this priority.[139] Counter-arguments were not lacking. It may be, for example, that the elderly value increased police protection as much as direct expenditures on their behalf. Property tax stabilization may be beneficial to low income people.[140]

The spending "results" clearly put Revenue Sharing advocates on the defensive. It became apparent that the most likely remedies were either more congressional direction in the establishment of eligible activities, or efforts to utilize Revenue Sharing to alter the processes of local governments as a means of increasing the power of those who were not benefitting from the program.

2. The Extent of Citizen Participation in Revenue Sharing Decisions

Some supporters of the initial Revenue Sharing Act believed that "by providing greater discretion to generalist officials [it] would stimulate a more competitive environment within which state and local budgets are decided, at least for that portion of the budget affected by intergovernmental

---

135 *Id.* at 106.

136 *Id.* at 70-71.

137 Susskind, *supra* note 20, at 49 (commenting on an analysis of General Revenue Sharing allocations prepared by the Comptroller General).

138 SECOND ROUND, *supra* note 8, at 70.

139 *E.g.*, 121 CONG. REC. H6274 (daily ed. June 26, 1975) (remarks of Rep. Drinan).

140 Lovell, *supra* note 129, at 142.

grant revenues."[141] Thus monitors of Revenue Sharing closely analyzed the extent of citizen participation in fiscal decisions, and the extent to which the program could be associated with *increased* citizen influence on the budgetary process. Based on the program's first two years, the Director of the Office of the Revenue Sharing cited a "rekindling of citizen interest and participation in local government [which] gives new meaning to the concept of local accountability. . . ."[142] This panglossian view was not universal. A "public interest" spokesman concluded from the monitoring and research efforts that "by and large . . . citizen involvement is neither broad nor deep."[143] A major congressional critic went so far as to state that the record showed "that citizen participation in the expenditure of revenue sharing funds has been *virtually nil* to date."[144]

In fact, the research findings on this issue are somewhat mixed. There is some agreement that small governments exhibited less tendency to open up the appropriations process than large governments.[145] However, one of the leading analysts of the participation issue concluded that "the most surprising finding of the available research is that citizen interest in revenue sharing allocations is intense and that many cities have encouraged or allowed some degree of citizen input."[146]

Even a mixed record on this issue was enough to put Revenue Sharing advocates on the defensive, especially given the exaggerated preenactment claims of what the program would do. Substantial evidence of "the unwillingness of local officials to open up the budgetary process to the public or to urge citizen participation in the allocation of revenue sharing funds"[147] jeopardized the chances for renewal.

---

141 SECOND ROUND, *supra* note 8, at 108.

142 Watt, *Reaffirming the Federal Compact: General Revenue Sharing and the Federal System,* GENERAL REVENUE SHARING AND DECENTRALIZATION 81 (N. Scheffer ed. 1975).

143 Lief, *supra* note 116, at 101.

144 H.R. REP. No. 94-1165, Part I, 94th Cong., 2d Sess. 91, 92 (1976) (supplemental views of Rep. Drinan) (emphasis added) [hereinafter cited as 1976 H. REP.].

145 Sokolow, *Small Community Policy Making and the Revenue Sharing Program,* REVENUE SHARING 6 (Caputo & Cole eds. 1975).

146 Cole, *supra* note 97, at 68.

147 Susskind, *supra* note 20, at 47.

3. Discrimination in the Uses of Revenue Sharing Funds

One of the major domestic roles of the federal government has been the protection of minorities, especially racial minorities, against discrimination by state and local governments. That such a role is both proper and necessary is a fundamental tenet of American federalism. Therefore, the widespread assertion that Revenue Sharing, in fact, perpetuated and encouraged discriminatory practices by local governments posed a serious threat to the program's renewal. Critics were concerned not only with the practices of recipients, but also with the enforcement activities of the federal government.

"Discrimination" means different things to different people. Conduct which does not violate the Constitution may, nonetheless, run afoul of anti-discrimination statutes.[148] Whether the term refers solely to intentional deprivations or more broadly includes the failure to remedy past intentional deprivations is, of course, a major legal and political issue. Although section 122 of the Revenue Sharing Act authorized the Secretary of the Treasury to enforce its anti-discrimination provision, studies detected substantial discrimination by local governments in both senses. Critics focused on the employment practices of local governments and on the provision of services.[149] The employment discrimination accusations, both "active" and "passive," involved exclusion of racial minorities and women. The provision of services issue involved lower levels of service to "poor and minority areas."[150] According to one congressional critic, "the United States Civil Rights Commission, the National Urban League, and other organizations which have investigated . . . General Revenue Sharing have documented thousands upon thousands of cases in which local governments have used . . . funds in ways that discriminate against politically vulnerable groups. Employment discrimination has been the most prevalent form."[151]

148 *See* Washington v. Davis, 426 U.S. 229 (1976).

149 P. BLAIR, GENERAL REVENUE SHARING IN AMERICAN CITIES: FIRST IMPRESSIONS 13-14 (1974).

150 *Id.* at 14. The employment practices of local government contractors were also cited.

151 1976 H. REP., *supra* note 144, at 87 (supplemental views of Rep. Conyers).

The inclusion of the anti-discrimination provision in the Revenue Sharing Act did not guarantee its vigorous enforcement. Rarely has a federal agency charged with enforcing grant program strings come under such widespread condemnation. The Office of Revenue Sharing's (ORS) "laxity" was said to have "paralyzed civil rights enforcement under the act . . . ."[152] The ORS apparently was unsure of the extent of its authority to terminate funding and complained, somewhat justifiably, of a lack of manpower.[153] However, the ingrained habits of 38,000 jurisdictions—including a belief by many that they did not discriminate—and the ORS' view that its primary mission was to pay out money constituted the core of the problem. Both phenomena were, of course, closely linked to the program's underlying premises.

4. Formula Issues—Did the Act put the Money Where the Needs Were?

In 1975 Senator Edmund Muskie predicted "rough sledding" for the renewal of Revenue Sharing and emphasized the desirability of rewriting the distribution formula in order to channel funds to those jurisdictions with greatest needs.[154] Thirty-eight thousand jurisdictions were receiving funds. Congressmen and other policymakers learned the identity of the beneficiaries under the existing formula and developed ideas for possible changes.

The principal issue was whether the 1972 formula was successful in matching federal resources to state and local needs. A grant distribution formula may utilize measures of need for a particular aid program (*e.g.*, counting the number of poor children in distributing education funds), or may attempt to reflect differentials in recipients' fiscal capacity (*e.g.*, allocating distributions inversely with per capita income).[155] The latter approach is generally referred to as "equalization." The 1972 formula attempted to measure program need through

152 *Id.* at 90, 94, 95 (supplemental views of Rep. Drinan).

153 *See generally* SECOND ROUND, *supra* note 8, at 8-9.

154 Muskie, *Revenue Sharing and Counter-Cyclical Assistance,* REVENUE SHARING AND DECENTRALIZATION 68, 70 (N. Scheffer ed. 1975).

155 *See* MICHELMAN & SANDALOW, *supra* note 16, at 1005-21.

such factors as population and urbanized population, and also attempted to equalize for fiscal capacity differences through the use of income factors. The formula's attempt, through a "tax effort" factor to reward those jurisdictions which were actually using their capacity, seemed closely allied to equalization goals.

Analysis of the Revenue Sharing formula must consider both how it distributed funds *among* states, and how these funds were, in turn, distributed to local governments *within* states. The Brookings study concluded that, on an interstate level, the formula succeeded in targeting funds to "low-capacity, high-effort states," but did not succeed in helping the highly urbanized states.[156] As for the intra-state distribution to localities, Brookings concluded that "large metropolitan central cities" fared reasonably well, but that for other jurisdictions the conclusion depended on whether Revenue Sharing was evaluated in isolation, or in comparison with "the pre-existing financial scale of local government. . . ." Comparative analysis suggested that the formula tended to benefit "small towns and rural places."[157]

Any attempt to change the formula could have, of course, jeopardized the entire program by splitting the coalition of states and localities which initially had secured its enactment. Despite this risk (or perhaps, in some instances because of it) two principal methods for changing the formula emerged. The first one suggested that Revenue Sharing go much further in channeling funds to the large cities.[158] Since large cities have high proportions of service dependent persons, their need for general support funds (the expenditure of which is likely to assist these persons directly or indirectly) is greater than their population differential *vis à vis* other communities. This approach led to a search for new measures of "program need," especially the use of a formula factor which reflected the number of poor people in a jurisdiction.[159]

The Brookings Institution proposed a second method in

156 MONITORING REVENUE SHARING, *supra* note 30, at 92.

157 *Id.* at 132-34.

158 *E.g.*, Reagan, *supra* note 95, at 29.

159 1976 H. REP., *supra* note 144, at 83, 84 (supplemental views of Rep. Fascell).

light of general criticism that the formula's "equalizing impact is relatively limited."[160] Analyses suggested that per capita income was not an adequate measure of fiscal capacity. Jurisdictions with relatively low average incomes may have an abundance of other resources available for taxation. High per capita income jurisdictions frequently are also urbanized areas with a bi-modal income distribution—large numbers of well-off individuals along with large numbers of poor. Thus Brookings urged the development and utilization of alternative measures of fiscal capacity in the Revenue Sharing formula.[161]

5. Revenue Sharing as an Inducement to Structural Reform of Local Government

Some of the earliest Revenue Sharing proposals linked federal assistance to the "reform" or "modernization" of state and, especially, local governments.[162] These proposals included changes in internal structure to increase accountability, fiscal reforms to decrease reliance on "regressive" taxes, and the creation and strengthening of metropolitan area units. In both its structure and operation, however, the 1972 Act was generally unreflective of the "reformist" approach. The major "gain" appears to have been the increased citizen participation in some local budgeting processes.[163] Any movement towards "metropolitanism" was blunted in three ways: first, the Act served to "prop-up" smaller units, reducing incentives towards consolidation; second, the A-95 provisions for review of federally funded local projects by an areawide "clearing house" do not apply to Revenue Sharing expenditures; and third, regional planning commissions are not able to directly receive Revenue Sharing funds.[164]

Any federal intervention into the structures and policies of state and local governments runs counter to the traditional

160 SECOND ROUND, *supra* note 8, at 162.

161 MONITORING REVENUE SHARING, *supra* note 30, at 168.

162 *E.g.*, Humphrey, *Foreword* to H. REUSS, REVENUE SHARING at xi (1970).

163 *See* Stenberg, *Revenue Sharing and Governmental Reform*, 419 ANNALS 55 (1975) [hereinafter cited as Stenberg].

164 *Id.* at 59-60.

conception of Revenue Sharing which stresses freedom from all strings. However, the notion that the national government should only share revenue with units of government whose structure and powers corresponded to national standards, proved to have surprising vitality in 1976.[165]

C. *The Dynamics of the Renewal Amendments–The Emergence of Interventionist Federalism*

When the 1972 Revenue Sharing Act came up for renewal in 1976 it had the strong support of the Ford Administration, Republicans in Congress, and organizations of state and local government officials. At the same time the existing Revenue Sharing program was subject to mounting criticism from congressional liberals and civil rights organizations who argued that revenue sharing failed to aid minorities, the poor and the aged.[166] Only a few congressmen were irrevocably opposed to renewal in any form, largely on the grounds that Revenue Sharing constituted an abdication of congressional sovereignty over national tax revenues.[167] The Senate was fairly certain to favor renewal in more or less the 1972 form. The House Democratic liberals held the balance of power and faced a choice between attempting to terminate the program or attempting to restructure it. They chose the latter course, perhaps out of reluctance to hand the Republicans a major issue in a presidential election year, perhaps out of recognition that terminating Revenue Sharing funds would hurt the large cities most of all.[168]

Alternatively, these House members may have recognized the renewal debate as an unusual opportunity to achieve goals which had hitherto been regarded as impossible—an across the board change in the nature and activities of American local governmental units. While any federal grant constitutes intervention into the recipient's operations, if only through low-

---

165 *See* 1976 H. REP., *supra* note 144, at 17. *See* text at notes 290-292, *infra*.

166 SECOND ROUND, *supra* note 8, at 4-5.

167 *E.g.*, 1976 H. REP., *supra* note 144, at 80 (dissenting views of Reps. Brooks and Moss). These opponents also voiced the "Trojan Horse" view of Revenue Sharing; that localities would become unduly dependent on the funds.

168 *See, e.g.*, 1976 H. REP., *supra* note 8, at 87, 88 (supplemental views of Rep. Conyers).

ering the "price" to it of engaging in a particular activity, the renewal of Revenue Sharing presented the possibility of attaching strings in order to achieve goals which were only indirectly related to the programs for which the funds were spent. Such a strategy might be called "interventionist federalism"—that is, use of the leverage which the grant award carries with it to achieve a change in the recipient's organization or behavior which has substantial effects on matters *other* than the specific programs for which the grant funds are expended.[169] Such intervention might reflect a perceived national interest in state and local governments' political processes, their organization, structure and boundaries, and even their overall policies and programs.[170]

The change in the pattern of federal aid to the states from categorical grants to block grants and Revenue Sharing may have enhanced opportunities for interventionist federalism in two distinct ways: first, recipients may have become dependent upon the flow of funds from block grants and Revenue Sharing and thus stood in a relatively weak position to resist the imposition of additional strings;[171] second, the national government could contend that increased deference to the expenditure choices of state and local governments with respect to federal funds justified increased federal supervision of those levels of government.[172]

Those House members who favored restructuring the Act

---

169 This definition would cover effects both within the same overall functional area as the grant, *e.g.*, "education" and other areas. The concept of interventionist federalism rests on the possibility of drawing a distinction between strings primarily related to the purposes behind a particular grant and strings which, while related to those purposes, reflect other national purposes *and* attempt to achieve them broadly. To illustrate further, consider the differences between: 1) a prohibition on partisan political activity by state employees administering a particular grant; 2) a prohibition on partisan political activity by all state employees working in that grant's functional area; and 3) a prohibition on partisan political activity by all state employees as a condition of receiving the grant.

170 Both the concept of interventionist federalism and attempts to implement it are by no means new. *See* Nathan, *supra* note 5, at 127-28. The concept can be seen at work in the numerous federal efforts to encourage metropolitan planning and institutions. *See generally* Stenberg, *supra* note 163, at 51-52. *See also* NEW FEDERALISM, *supra* note 18, at 163-64 (concept of "permissive federalism").

171 NEW FEDERALISM, *supra* note 18, at 103-05.

172 *Cf.* Stolz, *supra* note 94, at 117-18.

had four main goals during consideration of the renewal amendments: strengthening the Act's anti-discrimination provisions and enforcement mechanism; mandating citizen participation in Revenue Sharing decisions; forcing greater expenditures on social services; and, changing the formula, primarily to aid large cities. They were successful only in the first two goals. Their successes and failures show the extent to which the Ninety-fourth Congress was willing to move beyond the New Federalism's fundamental tenet of taking state and local governments more or less as they are when entrusting them with substantial expenditure responsibilities. Congress accepted the legitimacy of intervention, through the grant device, to ensure that the rules of the allocation "game" at the sub-national level are fair and that no groups are excluded from playing, but de-emphasized direct national influence over the outcome of that game, except discriminatory outcomes.

D. *The Renewal Amendments*

Late in the 1976 session, after protracted legislative maneuvering, Congress enacted the State and Local Fiscal Assistance Amendments of 1976.[173] Revenue Sharing was renewed for three and three-quarters years at an annual funding level of $6.85 billion. Although one report states that the amendments reflected a "status quo position,"[174] the changes enacted could have a potentially sweeping effect on recipient governments.

1. The Anti-discrimination Provisions

There are three significant aspects of the new section 122. First, the grounds of prohibited discrimination are broadened to include age, handicapped status and religion.[175] The handicapped provision could be of particular significance, if the Department of Health, Education and Welfare attacks such forms of discrimination aggressively.[176]

---

173 Revenue Sharing Amendment, *supra* note 7.

174 SECOND ROUND, *supra* note 8, at 23.

175 31 U.S.C.A. § 1242(a)(1) (West Supp. 1977).

176 *See* Statement of Secretary Joseph A. Califano, Jr. (April 28, 1977) (on file with

The second significant change attempts to prevent fungible expenditure of Revenue Sharing funds from hiding discriminatory practices. Under the old Act, recipients who were engaging even in overt discriminatory practices would apparently suffer no loss of Revenue Sharing funds unless the discrimination emanated from a program or activity directly funded with Revenue Sharing money.[177] During the renewal debate, liberals led by Rep. Robert Drinan proposed a ban on *all* discriminatory practice by recipients, regardless of whether Revenue Sharing funds were involved.[178] The final version of section 122(a)(1) does, on its face, bar discrimination in "any program or activity of a [recipient] . . . ." But, section 122(a)(2) allows recipients to avoid the Act's sanctions if, in administrative proceedings, they can demonstrate "by clear and convincing evidence that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with [Revenue Sharing] funds. . . ."[179] While arguably this clause reintroduces the fungibility problem by exempting discriminatory activities financed with freed-up funds,[180] the amendments at least appear to alter the burden of proof with respect to use of Revenue Sharing funds in discriminatory practices, and suggest that the mere filing of a use report will not satisfy that burden.

The third change is a direct attack on ORS' alleged "laxity" in enforcement of anti-discrimination provisions. There was wide agreement on the need to "send the Office of Revenue Sharing a message" on enforcement practices.[181] The amendments mandate precise procedures and specific time limits within which the ORS (technically, the Secretary of the

---

the author). Even if the O.R.S. does not interpret this guarantee as broadly as H.E.W., O.R.S. could still find itself obliged to enforce H.E.W. "holdings" of discrimination based on handicapped status. *See* text accompanying notes 181-184 *infra*.

177 Revenue Sharing Act, *supra* note 4, § 122(a). *See* 1976 H. REP., *supra* note 144, at 12. *But see* SECOND ROUND, *supra* note 8, at 8 (revised enforcement policy under old Act in area of employment discrimination).

178 H.R. 8329, 94th Cong., 1st Sess. §§ 10, 122 (1975).

179 31 U.S.C.A. § 1242(a)(2)(A) (West Supp. 1977).

180 SECOND ROUND, *supra* note 8, at 167-68.

181 1976 H. REP., *supra* note 144, at 108, 111 (supplemental views of Rep. Horton).

Treasury who delegated his authority to the ORS) must carry those procedures out.[182] The key elements of the new enforcement provisions are two "trigger mechanisms" which are intended to *force* the ORS to begin the compliance proceedings outlined below. The triggers are either a "holding" by a federal or state court or a federal administrative law judge that a recipient government has engaged in discrimination as defined by the Act, or a "finding" by the ORS that "it is more likely than not" that a recipient is discriminating.[183] There are two important restrictions on the ORS' discretion. First, it *must* accept the "holding" that a discriminatory practice has occurred, unless that "holding" is reversed by an appellate tribunal, presumably in the process of appeal from the original proceeding which led to the "holding." Second, the Office is not free to delay its own "findings" through inaction on complaints. Section 125 is a new provision (discussed more fully below) which requires the ORS to establish time limits, not to exceed 90 days, for investigation and *initial resolution* of discrimination complaints.

Either trigger—a "holding" or a "finding"—sets off administrative proceedings which can lead to suspension or termination of Revenue Sharing payments. The ORS sends the recipient a "notice of noncompliance" within 10 days of the trigger, and the recipient has 30 days to respond. If the recipient contests the issue, it may "informally present evidence" to the ORS in support of its position. At this point the distinction between a "holding" and a "finding" is critical. A recipient may not collaterally attack a "holding" of discrimination, but can only attempt to prove that Revenue Sharing funds are not involved. However, an ORS "finding" of discrimination is subject to full re-examination in this informal proceeding. Within this 30-day period the Office must either (1) secure a "compliance agreement," (2) make a "determination" of compliance or (3) make a "determination" of non-compliance. Either of the first two results appears to end the matter, subject to judi-

182 As a matter of convenience, this Article will use "O.R.S." instead of the "Secretary of Treasury" when speaking of the administration of Revenue Sharing.

183 31 U.S.C.A. §§ 1242(b)(1), 1242(c)(1) & 1242(c)(4) (West Supp. 1977).

cial challenge by a third party.[184] "Determination" of non-compliance requires the office to suspend funding within 10 days. At this point the recipient may either enter into a compliance agreement or challenge the "determination."

Any such challenge, which blocks the suspension, takes the form of a "hearing" before an administrative law judge. Section 122 does not specifically invoke the adjudication provisions of the Administrative Procedure Act (APA). However, in view of that section's reference to a "record," and the provisions of section 143 for review on the record in a Court of Appeals, use of the adjudication provisions may be mandatory.[185] In any event, the Office of Revenue Sharing's new Regulations incorporate the key APA procedures.[186] The hearing can result either in exoneration, a compliance agreement, suspension, or termination. Suspension can be lifted more easily than termination, which requires reversal of the administrative law judge by an appellate tribunal.[187] Both suspension and termination are subject to judicial review at the circuit court level under section 143.[188]

Although it is not as stringent as some reformers wished, the new section 122 reflects interventionist goals. It has the potential to alter widespread local government practices, especially employment practices which may not violate *constitutional* standards of non-discrimination.[189] It could also have an effect on the provision of services.

---

184 Any such suit would be brought in accordance with the new § 124.

185 *But see* United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

186 31 C.F.R. §§ 51.50-51.62 (1977).

187 31 U.S.C.A. § 1242(e)-(f) (West Supp. 1977).

188 31 U.S.C.A. § 1263(a) (West Supp. 1977). It is interesting to note that a "holding" of discrimination, which triggers O.R.S. proceedings, cannot be attacked collaterally in those proceedings. § 122(c)(2). This provision could cause interagency difficulties if O.R.S. disagreed with H.E.W.'s interpretation of anti-discrimination statutes under its jurisdiction and incorporated into § 122(a). Section 122(h) authorizes cooperative agreements between the Secretary of Treasury and other federal and state agencies for joint investigations and notification to the Secretary of "any actions instituted by such agencies against a state government or a unit of local government alleging a violation of any federal civil rights statute or regulations issued thereunder." However, a decision by a state *agency* is not a holding as § 122 uses that term. Such a provision was deleted during the legislative process.

189 *See* 6 Revenue Sharing Bull., No. 3, at 1 (Jan. 1978) (increased volume of cases

Section 122's actual impact will depend, of course, on whether the Office of Revenue Sharing zealously enforces the new provisions. The interim regulations set forth broad prohibitions on employment discrimination, including conduct "perpetuating the results of past discriminatory practices."[190] Anti-discrimination enforcement appears to be much more vigorous than in the past. According to one analysis,

> state and local governments are realizing that merely eliminating any *intentional* discrimination against women and minorities is no longer sufficient to comply with the nondiscrimination provisions of the Revenue Sharing Act. Discrimination today is measured by 'effects' as well as 'intent,' and to simply prohibit discrimination is not enough to secure equal employment opportunities—a prerequisite for not losing revenue sharing funds.[191]

It is not clear whether a Revenue Sharing recipient could claim an exemption from the anti-discrimination provisions if the only department which utilized Revenue Sharing funds *was* in compliance with affirmative action standards while the recipient's overall employment pattern was not. The ORS appears to take the position that as long as Revenue Sharing funds go to pay any salary, the recipient's overall employment of personnel is a funded "program or activity" and thus must, as a whole, be in compliance with the anti-discrimination provisions.[192]

---

enforcing anti-discrimination provisions). Section 122 does not stand alone, of course. The same goals are furthered by Title VII of the Civil Rights Act of 1964. (42 U.S.C. § 2000e(a) (Supp. IV 1974). *See generally* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Title VII is within the regulatory power of Congress). Thus it might seem unnecessary to utilize the interventionist approach in order to achieve broad changes in state and local employment practices. However, the sanctions available under the Revenue Sharing Act may be more effective than those available under Title VII. *Cf.* MICHELMAN & SANDALOW, *supra* note 16, at 1083.

190 31 C.F.R. § 51.52(b)(2)(ii) (1977).

191 5 Revenue Sharing Bull., No. 11, at 3 (Sept. 1977); *see* 5 Revenue Sharing Bull., No. 8, at 1 (June 1977) ("Recipients in trouble over nondiscrimination provisions") 6 Revenue Sharing Bull., No. 8, at 1 (Dec. 1977) ("More recipients in violation of civil rights requirements").

192 *But cf.* Board of Pub. Instruction v. Finch, 414 F.2d 1068 (1968) (narrow interpretation of Title VI of Civil Rights Act of 1964). Even under Revenue Sharing

2. The Citizen Participation Provisions

As with the non-discrimination amendments, the question was not whether Congress would enact citizen participation requirements, but how extensive they would be. Liberal critics of the 1972 Act's operation felt that opening up the budgetary process was the key to changing local political systems. The question was what mechanism to use.

The most sweeping proposals for change were contained in Congressman Drinan's bill, H.R. 8329. At the local level, it mandated "a series of public hearings" prior to adoption of a planned use report, and appointment of a broadly based "citizens advisory committee" to oversee and recommend the expenditure of Revenue Sharing funds.[193] Large local governments—defined, essentially, as those that received more than one million dollars annually—would have to "provide for the selection and appointment of a local citizen's advocate . . ." with general supervisory authority over Revenue Sharing funds, and the ability to conduct "investigations, audits, and studies . . . ."[194] As for all other local governmental units, each state would have to establish "an office of citizen advocacy, which shall perform, to the extent possible and feasible, the function of citizen advocate. . . ."[195] The local "citizens' advocate" proposal, which seems a cross between an ombudsman-watchdog and a shadow government, may well mark the outer boundary of suggested federal intervention into local governmental structures through grant program strings.

The final legislation relies essentially on the public hearing as the mechanism for citizen participation. Two hearings are required. The first is held by the governmental authority responsible for preparing the budget and deals with "possible uses" of Revenue Sharing funds.[196] The second hearing is to be

there would remain the hypothetical possibility of a recipient which applied all its funds to uses, such as capital expenditures, which did not involve the payment of salaries, thus exempting its employment practices from § 122.

193 H.R. 8329, 94th Cong., 1st Sess. § 9 (1975).

194 *Id.*

195 *Id.*

196 31 U.S.C.A. § 1241(b)(1) (West Supp. 1977).

held by the governmental entity which enacts the budget. The "budget hearing" is not limited solely to consideration of Revenue Sharing funds but must include the opportunity "to ask questions concerning the *entire* budget *and* the relation thereto of [Revenue Sharing] funds. . . ."[197] Congress' concern with *who* participates in subnational political processes—in addition to the openness of those processes—was underscored by a provision requiring recipients to take steps to ensure participation in budget hearings by senior citizens.[198] Although the amendments do not compel state and local governments to follow suggestions made by citizens, the Brookings Institution concluded that "the hearing requirements could have an important effect on state and local political processes."[199] Such an impact would represent a victory for interventionist federalism.

However, the implementation activities of the ORS will again play a crucial role in determining just how significant this effect is. The Amendments authorize the ORS to promulgate regulations *waiving* both hearings. The proposed use hearing may be waived "if the cost of such a requirement would be unreasonably burdensome in relation to the [recipient's] entitlement. . . ."[200] The budget hearing may be waived if "the budget processes required under applicable state or local law or charter provisions assure the opportunity for public attendance and participation . . . and a portion of such process includes a hearing on the proposed use of [Revenue Sharing] funds in relation to its entire budget."[201]

On January 10, 1977, the ORS promulgated "Interim Regulations" which appeared to reflect a policy of "granting extensive waivers of the hearing requirements."[202] The regulations eliminated the proposed use hearing for four classes of reci-

197 *Id.* § 1241(b)(2).

198 *Id.* § 1241(g).

199 SECOND ROUND, *supra* note 8, at 168.

200 31 U.S.C.A. § 1241(b)(3) (West Supp. 1977).

201 *Id.*

202 42 Fed. Reg. 2196 (Jan. 10, 1977). The assessment of the policy is taken from SECOND ROUND, *supra* note 8, at 168, and refers to the initial "proposed regulations" issued in October of 1976.

pients: governments (such as the commission form) for which a budget is not presented by an executive authority to a legislative body; governments receiving less than $10,000 annually in Revenue Sharing funds; governments for which the unavoidable expense of holding the hearing would exceed 5 percent of their Revenue Sharing funds; and, governments which provide more feasible and less costly "alternative means of public participation."[203] The budget hearing was waived for those recipients who were not required under applicable law to enact a single budget or to adopt a formal budget, provided that alternative means of public participation in the budget process were available.[204]

In response to highly critical public comment, the ORS has backtracked substantially on waiving the hearing requirements.[205] New "proposed regulations" delete all exemptions from the proposed use hearing except exemption based on unavoidable expense. The ORS may grant a waiver if "unavoidable" hearing expenses exceed 15 percent of Revenue Sharing funds.[206] The exemption from the budget hearing is deleted, although the proposed regulations do contemplate permitting utilization of "an alternative budget hearing process."[207] These changes will have a substantial impact. For example, the Revenue Sharing Bulletin, which originally estimated that the first ORS proposals would exempt up to 75 percent of local governments below the county level from proposed use hearings, now reports that "virtually all governments will be required to hold proposed use hearings. . . ."[208]

3. The Citizen Complaint Provision[209]

The amendments concerning non-discrimination and citi-

203 Proposed 31 C.F.R. § 51.13, 42 Fed. Reg. 2197 (Jan. 10, 1977).

204 Proposed 31 C.F.R. § 51.14, 42 Fed. Reg. 2197-98 (Jan. 10, 1977).

205 *See* 42 Fed. Reg. 34336 (July 5, 1977).

206 Proposed 31 C.F.R. § 51.13, 42 Fed. Reg. 34236-37 (July 5, 1977).

207 Proposed 31 C.F.R. § 51.14(e), 42 Fed. Reg. 34337 (July 5, 1977). The provision permitting the budget hearing to be held before a committee of the enacting body is retained.

208 5 Revenue Sharing Bull. No. 9, at 1 (July 1977).

209 For a general discussion of the role of citizen complaints in grant enforcement, *see* Tomlinson & Mashaw, *supra* note 35, at 637-38.

zen participation add substantial strings to the original Revenue Sharing program. New strings, of course, raise the question of whether the existing control mechanisms are adequate. In the case of most grant programs, Congress would probably rely almost exclusively on enforcement by the grantor agency, through its periodic "plan" reviews and other oversight activities. However, Congress took a different approach with Revenue Sharing by relying on citizen impetus as a primary means of setting the administrative controls into motion.[210]

There are two reasons for this departure. First, Revenue Sharing is different from other grant programs in that it contains no plan approval mechanism. The legislative history of the renewal amendments shows a second reason for Congress' different approach: lack of confidence in the Office of Revenue Sharing's willingness to enforce strings against state and local governments. In a sense, the ORS found itself subject to the same criticism levelled against many *regulatory* agencies. Critics argued that since the agency was "too close" to, and in sympathy with, those it was supposed to regulate, the administrative process had to be opened up to "private attorneys general."[211] Most of the criticism focused on the Office of Revenue Sharing's handling of discrimination complaints; and the legislative history suggests that Congress regarded the new citizen complaint provision as part of the strengthened anti-discrimination mechanism.[212]

The new section 125 ("Investigations and Compliance Reviews") covers *any* "possible violation of the provisions of [the] Act." The key provision is a requirement that ORS promulgate regulations (by March 31, 1977) establishing "reasonable and specific time limits (in no event to exceed 90 days)" within which it shall conduct an investigation and "*make a finding*" after receiving a citizen complaint.[213] Although the Act retains requirements for notice and hearing prior to the

210 *E.g.*, §§ 121, 125.

211 *See generally* Stewart, *supra* note 44, at 1682-83.

212 *E.g.*, 1976 H. REP., *supra* note 144, at 14-15.

213 31 U.S.C.A. § 1245 (West Supp. 1977). The same time limits apply to receipt of other information concerning violations of the Act, including determinations by state and local agencies. Section 125 also contemplates that the Secretary of the Treasury

imposition of sanctions, the amendments do not specify whether sanctions are to be imposed if the investigation leads to a finding of violation.[214] But the regulations resolve this dilemma by guaranteeing a "finding" within 90 days of the filing of a formal administrative complaint of any violation of the Act, and by treating this finding as a trigger mechanism for adjudicatory procedures which *must* be followed prior to imposition of any sanction.[215] These procedures take the form of a complaint against the recipient, filed and prosecuted by the ORS before an administrative law judge, who conducts a "hearing . . . pursuant to section 7 of the Administrative Procedure Act (5 U.S.C. 556)."[216] Either party may appeal the administrative law judge's decision to the Secretary of the Treasury, and the Secretary's decision (or the administrative law judge's, if not appealed) is then subject to judicial review by the Circuit Court of Appeals.[217]

---

will conduct his own audits and compliance reviews, and requires him to establish time limits for these activities, without specifying a maximum period. Apparently, such reviews can be triggered by "allegations" of violation, which are less formal than the "complaints" which trigger 90-day investigations.

214 Section 123(b) presents an interesting ambiguity. Apart from the anti-discrimination provisions, it is now the only authority for the Secretary to withhold payments. Presumably the Secretary can withhold if recipients violate any assurances made of compliance with strings, as well as for failure to make them. Otherwise, the assurances requirement and the sanction to enforce it would be meaningless. However, the statutory grounds for withholding do not, apart from § 122, extend to all violations of the Act, but only the assurances requirement of § 123(b) and regulations "prescribed thereunder." Yet the regulations state that the sanctions process will be triggered "whenever the Director has reason to believe that a recipient government has failed to comply with *any* section of the Act. . . ." 31 C.F.R. § 51.02 (1977) (emphasis supplied). It appears that Congress failed to specify that funds could be withheld for violation of the citizen participation requirements. *See e.g.,* Revenue Sharing Act, *supra* note 4, § 104(b).

215 31 C.F.R. §§ 51.3(b), 51.200-23 (1977).

216 31 C.F.R. § 51.212 (1977).

217 31 C.F.R. §§ 221-22, 225 (1977). Although the administrative action would then be "final," the regulations track § 123(b) in providing for a 60-day grace period for the recipient to take "corrective action" before funds are withheld. 31 C.F.R. § 51.3(b). The sanctions provisions of the regulations appear to limit the administrative law judges to imposing penalties commensurate with the amount of Revenue Sharing funds expended in violation of the Act. 31 C.F.R. 51.218(a)-(c) is specific on this point. Subsection (d) refers to a reduction in entitlement, without specifying how it is to be computed. In the case of an across-the-board violation, such as failure to follow the citizen participation provisions, the proper penalty would presumably be the

The renewal amendments and implementing regulations will generate a substantial volume of enforcement activity.[218] Much of this activity will stem from citizen complaints alleging violations of the Act, including the anti-discrimination provisions. The Act is not clear on the role, if any, of the citizen complainant after a finding of violation has been made. Neither the Act nor the regulations provide for third party intervention in the adjudicatory proceedings before an administrative law judge, which must take place prior to imposition of any penalty to remedy a violation.

At the very least, the original complainant appears to have a right under section 555(b) of the Administrative Procedure Act to "appear" in the proceeding before the administrative law judge. Moreover, the complainant may well have a right to intervene under decisions such as *National Welfare Rights Organization v. Finch*[219] and *Office of Communication of United Church of Christ v. F.C.C.*[220] To the extent that the right of intervention in administrative proceedings is coextensive with standing to seek judicial review of those proceedings, the argument for intervention is bolstered by the Renewal Amendment's provision for judicial review in federal or state court by any "person aggrieved."[221] To the extent that the criterion should be "the contribution that a prospective intervener can make . . . ,"[222] local residents may have both greater knowledge and motivation than the enforcement agency. Certainly, allowing intervention furthers Congress' obvious intention to rely heavily on citizen enforcement of the Revenue Sharing Act's strings.

---

withholding of *all* payments. 31 C.F.R. § 51.3(b) so provides specifically, although it refers to the *Director* (of O.R.S.) imposing this sanction rather than to the judge or Secretary. It is important to note that the regulations permit the administrative law judge to order *repayment* of Revenue Sharing funds, even though the only explicit statutory provision contemplating repayment (the former § 123(a)(3)) was repealed. *Cf.* Susskind, *supra* note 20, at 95.

218 *See, e.g.*, 5 Revenue Sharing Bull. No. 10, at 1 (August 1977).

219 429 F.2d 725 (D.C. Cir. 1970).

220 359 F.2d 995 (D.C. Cir. 1966); *see* Shapiro, *Some Thoughts on Intervention before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 726, 766 (1968) (difference between "appearance" and intervention).

221 *See* GELLHORN & BYSE, *supra* note 53, at 723-26.

222 Shapiro, *supra* note 220, at 767.

The Act and its amendments also do not indicate to what extent the ORS in the complaint process is to get involved in overseeing state and local government activities. Complaints under section 125 can relate to *any* "possible violation of the provisions of [the Act]. . . ." Complaints can include alleged violations of "the laws and procedures applicable to the expenditure of [the recipient's] own revenues. . . ." Thus, the ORS may be forced to investigate and resolve essentially state law questions. There is a large volume of state court litigation involving issues such as the violation of competitive bidding[223] and conflict of interest statutes.[224] If the volume of complaints becomes too great, or if experience suggests that the ORS has little to contribute to such issues, it might be desirable for future amendments to limit the complaint mechanism to violation of provisions such as anti-discrimination and citizen participation sections in which there is a strong federal interest.

Imposing the requirement that federal administrative procedures be exhausted before state proceedings can be commenced is troublesome as well. Supported by the doctrine of *Testa v. Katt,*[225] Congress may have the power to compel state courts to hear Revenue Sharing claims and to require exhaustion of a federal administrative remedy beforehand.[226] Again, however, if the claim is based upon the state's own "laws and procedures," it is not clear that the administrative proceedings would be of much assistance to the state court. And if federal adjudicatory proceedings have led to a finding in the grantee's favor, it is difficult to predict how subsequent state judicial proceedings will weigh the finding.[227] Omitting questions of state "laws and procedures" from the complaint mechanism would also remove the exhaustion requirement

223 *E.g.,* McMichael v. Van Ho, 8 Ohio Misc. 281, 219 N.E.2d 831 (1966).

224 *E.g.,* Conley v. Town of Ipswich, 352 Mass. 201, 224 N.E.2d 411 (1967).

225 330 U.S. 386 (1947).

226 *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 567-71 (2d ed. 1973).

227 *Cf. id.* at 429-31. Since the Revenue Sharing statute has, in effect, "incorporated" state law, state decisions on "laws and procedures" would presumably be authoritative.

affecting such disputes. This is probably a desirable result.

4. The Citizen Suit Provision

Congress' intention to rely on citizen enforcement of the Revenue Sharing Act's strings is also clearly visible in the renewal legislation's provision for citizen suits. A new section 124 provides that "whenever a State government or a unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this chapter, upon exhaustion of administrative remedies, a civil action may be instituted by the person aggrieved in an appropriate United States district court or in a State court of general jurisdiction."[228]

This remarkable provision for a general "citizen suit" sparked little opposition, or even interest during the 1976 legislative debate. The original Act generated a substantial volume of litigation between its enactment and 1976. Many congressmen, including members of the House committee with jurisdiction over the bill, read the cases to support the proposition that courts would entertain suits to remedy violations of the Act's strings.[229] However, a closer analysis of the cases decided under the old Act reveals that this was not entirely true and that the availability of a judicial forum might depend on the violation asserted.

In one category of classes the situation was relatively clear: victims of discriminatory practices by recipients could bring suit in federal district court.[230] The jurisdictional and remedial statutes concerning civil rights actions facilitated suits against recipients,[231] while suits against the ORS could be brought in any circuit where section 702 of the Administrative Procedure Act was viewed as a general grant of jurisdiction.[232] Major procedural issues remained unresolved, including the extent to which a complainant had to exhaust any

228 31 U.S.C.A. § 1244(a) (West Supp. 1977).
229 1976 H. REP., *supra* note 144, at 30.
230 *E.g.*, Johnson v. City of Greenwood, Civ. No. GC-75-131-K (N.D. Miss. 1975).
231 *E.g.*, 42 U.S.C. §§ 1981, 1983 (1970).
232 Robinson v. Schulz, Civ. No. 74-248 (D.D.C. 1974).

available remedies with the ORS before suing,[233] and whether the grantee was an indispensable party in a suit against the ORS.[234] Standing was also a potential obstacle in non-discrimination suits.[235]

Litigants also had little difficulty initiating proceedings against recipients in *state* courts to restrain violations of the Act's program expenditure strings and fiduciary—administrative strings.[236] This result simply may have been an application of the principles of *Testa v. Katt* concerning state courts' obligations to enforce federal law.[237]

At the point of the renewal debate, the major unresolved question was whether the federal courts were open to plaintiffs alleging violations of the Act other than discriminatory practices. Such suits probably could have been brought against the ORS under general principles of third party challenges to administrative action.[238] In the case of third party suits against the grantee, the federal courts were split. The Seventh Circuit's decision in *Schreiber v. Lugar* raised two major obstacles for any third party plaintiffs.[239] First, the plaintiff must satisfy the $10,000 amount in controversy requirement of 28 U.S.C. section 1331. In *Schreiber, a challenge* to a $4.4 million expenditure for a sports facility, Judge (now Justice) Stevens held that the amount had to be computed from the point of view of an individual plaintiff's own damages, that claims could not be aggregated, and that based on those criteria no single plaintiff met the $10,000 requirement.[240] A second potential obstacle alluded to but not resolved was whether any cause of action in favor of third parties against grantees could be implied from the Revenue Sharing Act at all.[241]

---

233 Taylor, Sklar & Zehner, *Legal Issues in Revenue Sharing,* 7 NAT'L CL'H'SE FOR LEGAL SERV., CL'H'SE REV., 18, 19 (1974).

234 *See* United States v. City of Chicago, 395 F. Supp. 329 (N.D. Ill. 1975), *aff'd* 549 F.2d 415 (7th Cir. 1977).

235 *See* Committee for Full Employment v. Simon, Civ. No. 76-0467 (D.D.C. 1976).

236 *E.g.,* Mackey v. McDonald, 255 Ark. 978, 504 S.W.2d 726 (1974).

237 330 U.S. 386 (1947).

238 *See* text accompanying notes 61-75 *supra.*

239 518 F.2d 1099 (7th Cir. 1975).

240 *Id.* at 1101-04.

241 *Id.* at 1104-05, n. 16. *See,* Michigan Dist. Council No. 77 of A.F.S.C.M.E. v. City

If *Schreiber* represents the prevailing view under the old Act, the renewal amendments expand greatly the availability of judicial controls to ensure grantee observance of program strings. Section 124 appears to constitute both the establishment of a "right of action" and an exemption from the $10,000 jurisdictional amount.[242] The Senate and House were initially split over whether a citizen suit should be limited to violations of the non-discrimination provisions. The Senate's position was that the suits should be limited in this fashion.[243] The House bill originally reported by the Committee on Government Operations made *no* provision for citizen suits because the Committee assumed they were already authorized.[244] Those Committee members who recognized that *Schreiber* might be a problem dealt with it by "disapproving" the opinion in a footnote.[245] The House Committee did provide for attorneys' fees and intervention by the United States Attorney General in private civil actions. Section 124 became part of the House bill when the full House reversed the Committee and substituted for its reported bill the legislation first reported by the Subcommittee on Intergovernmental Relations.[246]

Apart from removing any jurisdictional and right of action obstacles to a citizen suit, section 124 is important in two respects. First, it clarifies the exhaustion issue by requiring "exhaustion of administrative remedies," and "deeming" them to be exhausted 90 days after filing a complaint with the ORS unless the matter is resolved, at least initially, in the complainant's favor.[247] Second, section 124(e) authorizes the court to award attorneys' fees.[248]

---

of Detroit, 436 F. Supp. 858 (E.D. Mich. 1977) (no implied cause of action under Public Works Employment Act).

242 At times, Congress has provided specifically for citizen suits "without regard to the amount in controversy." 42 U.S.C. § 1857(h) (2) (Supp. 1976) (Clean Air Act).

243 S. REP. No. 94-1207, 94th Cong., 2d Sess. 3 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5151, 5153.

244 1976 H. REP., *supra* note 144, at 14, 102.

245 *Id.* at 102 n.2 (additional views of Rep. Drinan).

246 122 CONG. REC. H5634 (daily ed. June 10, 1976).

247 31 U.S.C.A. § 1244(d) (West Supp. 1977).

248 *Id.* § 1244(e). *See* Civil Rights Attorneys Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. , 90 Stat. 2641 (1976). The Attorney General is also authorized to intervene in Revenue Sharing citizen suits.

Despite the apparent simplicity of section 124, the provision raises a number of potentially complex procedural and related issues which will be briefly reviewed here in the context of suits in federal court.

a. Standing

By limiting standing under section 124 to any "person aggrieved" by violations of the Act, Congress seems to have avoided any constitutional prohibitions against grantors' standing and spared courts the task of applying the "zone of interests" test.[249] Even so, courts will be confronted with some difficult standing issues.

The standing of *municipal* and *state* taxpayers to bring section 124 challenges against *federal* Revenue Sharing is particularly likely to pose problems. In an analogous context, at least one federal district court has held that municipal taxpayers do not have standing to challenge grant awards.[250] Since Revenue Sharing funds are not *local* tax revenue but federal receipts, a literal reading of *Frothingham v. Mellon* might suggest a denial of standing.[251] On the other hand, illegal use of Revenue Sharing funds can affect local taxes by diverting the funds away from other uses which might reduce those taxes, or be of greater benefit to taxpayers, and might lead to the loss of future Revenue Sharing funds.[252] Thus, the case for taxpayer standing to challenge Revenue Sharing expenditures seems fairly strong. But it is not clear whether local taxpayer standing, if allowed, would extend to violations of the Act other than expenditures, such as inadequate citizen participation. Such a suit might not be viewed as a "good faith" pocketbook action.[253] The taxpayer could frame a com-

249 *See,* Rhode Island Comm. v. General Serv. Admin. 561 F.2d 397 (1st Cir. 1977) (denying standing to plaintiffs not within the "zone of interests").

250 Knoxville Progressive Christian Coalition v. Testerman, 404 F. Supp. 783 (E.D. Tenn. 1975).

251 262 U.S. 447 (1923). However, the Court did state that "the interest of a taxpayer of a municipality in the application of *its moneys* is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Id.* at 486 (emphasis supplied).

252 *See* Mathews v. Massell, 356 F. Supp. 291, 296 (N.D. Ga. 1973) (emphasizing provision for repayment of 110% of certain illegal expenditures). Predicating standing on the danger of any administrative sanction may be somewhat tautological. No citizen

plaint about insufficient participation in adopting the budget as a challenge to *all* expenditures of Revenue Sharing funds. Additional standing problems might include whether *other* jurisdictions or their residents can challenge a recipient's use of funds.

b. Suits Against the ORS

Since section 124(a) only refers to illegal acts by recipients and their officials, one might infer that suit can only be brought against them, and not against the ORS. However, section 124(e) does provide that the United States shall be liable for fees and costs, indicating that suit can be brought against the ORS.[254] General "federal question" jurisdiction would presumably remain available to support a suit against the agency. Thus third parties now have the option in federal courts of suing either the grantee or the ORS. If they choose the latter course, the question arises whether the grantee is an "indispensable party." The question has a good deal of practical significance, since the answer may determine whether suit can be brought in the District of Columbia federal courts, or only in districts where the grantee can be joined. The grantee may be a person who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest. . . ."[255] The grantee certainly has a vital stake in the proceedings and it may be in a better position to argue about local facts and circumstances than is the ORS.

---

suit can be brought until administrative remedies within the O.R.S. have been exhausted. However, that agency would have vindicated the grantee—otherwise there would be no suit—thus, apparently, eliminating the risk of any sanction concerning the violation in question.

253 *See* Doremus v. Board of Education, 342 U.S. 429 (1952).

254 The matter is not clear. Attorney fees are only awarded in Section 122 suits, and the Attorney General may intervene in such cases. Congress may not have intended to have one branch of the federal government suing another. Furthermore, Section 124 allows attorney fees to a prevailing *party,* not just a prevailing plaintiff. *See* 42 U.S.C.A § 3766(c)(4)(A) & (B) (West Supp. 1977). Perhaps this language contemplates awarding fees to the grantee, and makes the United States liable if it intervenes. Whatever the ambiguities, it is doubtful that Congress intended to take away, by Section 124, the right of third parties to sue the O.R.S.

255 FED. R. CIV. P. 19(a).

The district court's opinion in *United States v. City of Chicago,* a decision which pre-dates section 124, accepts this analysis, even though it did not apply it in the complicated fact situation presented.[256] On the other hand, it would appear that the ORS is *not* an indispensable party in a section 124 suit against the grantee, since injunctive relief against the recipient would be effective in bringing its violations to an end.[257]

c. Suit in District Court as Review of Administrative Action or De Novo Proceeding?

Section 124 raises a basic insitutional question of whether a court should merely review the ORS' response to the complaint, or whether it should play an independent role in resolving disputes between citizens and their governments.[258] Section 124 can be interpreted to support both roles. It does not refer to a citizen suit as an "action to review" administrative proceedings, but it does require "exhaustion" of administrative remedies. A broadly interventionist view of that section would lead to the conclusion that Congress meant to give disgruntled citizens a maximum number of opportunities to challenge local decisions. On the other hand, reading sections 124 and 125 together suggests that Congress intended to give those who might be excluded at the state or local levels *one set* of federal remedies: guaranteed access to an administrative forum, with judicial review available as a check to ensure that the grantor agency was not "captured" by the grantees.

Under the 1976 amendments federal jurisdiction to review Revenue Sharing compliance disputes will be split between the district courts and courts of appeal depending on who initiates judicial action. If the outcome of administrative proceedings is adverse to the *grantee,* section 143 permits it to seek "on the record" review at the circuit court level. If, however, the grantee wins at the administrative level, the third party complainant who initiated the administrative proceed-

256 395 F. Supp. 329, 340 (N.D. Ill. 1975), *aff'd* 549 F.2d 415 (7th Cir. 1977).
257 *See* Rosado v. Wyman, 397 U.S. 397, 428 (1970) (Douglas, J., concurring).
258 *See* Stewart, *supra* note 44, at 1756 n. 412.

ings would have to sue in district court under section 124. Although this division of "review" may be an undesirable allocation of judicial resources,[259] it seems inevitable under the current statute.

For complaints brought in the district court, a question remains as to what effect is to be given to the agency's resolution of the complaint. The answer should not turn on the identity of the defendant. If the suit is brought against the ORS, the court may look to section 706 of the APA,[260] but that provision leaves open the question of when *de novo* review of facts is appropriate. Although stating that there is a presumption against *de novo* review, the Supreme Court in *Chandler v. Roudebush* held that federal employee sex discrimination claims should be tried *de novo*, after the exhaustion of administrative remedies.[261] *Chandler* may govern section 124 proceedings as well. The Court emphasized, for example, that the private suits in question were not labelled "actions to review."[262]

Another means of determining the proper scope of review in Revenue Sharing suits against grantees or the ORS would be to examine how the ORS has proceeded with a case. If the agency has simply conducted an investigation and made a "finding" of compliance, *de novo* review may be appropriate to ensure at least one full-scale hearing by an entity of the federal government of the grantee's observance of program strings. If, however, an initial "finding" of non-compliance has triggered adjudicatory proceedings which vindicate the grantee, there seems little reason to give the third party a broader scope of judicial review than the "on the record" review which would be available to the grantee in a circuit court if those proceedings had come out the other way.[263] This con-

---

259 *See generally,* Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals,* 88 HARV. L. REV. 980 (1975).

260 *See, e.g.,* City of Hartford v. Hills, 408 F. Supp. 889, 903 (D. Conn. 1976), *rev'd sub nom.* City of Hartford v. Town of Glastonbury, 561 F.2d 1032 (2d Cir. 1977), (en banc), *cert. denied, 98 S. Ct. 766 (1978).*

261 425 U.S. 840 (1976).

262 *Id.* at 862 n.37.

263 *But see id.* at 861 (rejection of varying standard in Title VII cases).

clusion would be strengthened if the third party had had the opportunity to intervene at the administrative level, since he would have participated in making the record.

d. State Law Questions in Federal Court

Challenges to local expenditures are frequent in state court systems. These challenges are based on constitutional requirements such as the "public purpose" doctrine, and the plethora of state statutes regulating local finance.[264] Such matters rarely arise in federal courts.[265] However, if a recipient fails to follow the "laws and procedures applicable to the expenditure of its own revenues," it arguably violates section 123(a)(4).[266] If section 123(a)(4) is violated a private civil action may be brought to remedy "any act or practice" prohibited by the Revenue Sharing Act.

Given the expertise and availability of state courts, it is questionable whether federal judicial or administrative resources should be expended to resolve such state law disputes.[267] On the other hand, federally created "procedures" affecting Revenue Sharing funds, such as the participation provisions, present a stronger case for the availability of a federal forum. Federal court jurisdiction under section 124 should be narrowed to allow federal review only where a federally created interest exists.[268] Such a dichotomy would be consistent with the interventionist interpretation of the amend-

264 *E.g.*, Barnes v. City of New Haven, 140 Conn. 8, 98 A.2d 523 (1953) (public purpose); Hilliard v. City of Seattle, 63 Wash. 2d 401, 387 P.2d 536 (1963) (statute regulating bidding).

265 *See* MICHELMAN & SANDALOW, *supra* note 16, at 110.

266 The argument would be that § 123(a)(4) requires Revenue Sharing recipients to honor as well as to give assurances that they will comply with the "laws and procedures applicable to the expenditure of its own revenue."

267 It is possible that federal courts would "abstain" from resolving such disputes until a state court had resolved any unclear state law questions. *See* C. WRIGHT, LAW OF FEDERAL COURTS 224-27 (3rd ed. 1976).

268 Whether Congress should narrow the scope of federal jurisdiction with respect to § 124 is a matter of policy rather than constitutional requirements. There seems to be no bar in Article III to a federal court deciding state law cases involving Revenue Sharing funds. The jurisdiction is not merely "protective," since Congress has created a federal right to have federal funds expended in accordance with state law. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS 77-79 (3rd ed. 1976).

ments, since the federal forum remains available to help bring about the changes which Congress wished to effectuate.

To summarize, section 124 constitutes a substantial departure from past congressional practice in the design of grant-in-aid programs. Potentially, it thrusts the federal courts into a major role in the enforcement of grant program strings. Moreover, the provision for a general citizen suit, as well as the administrative complaint section, strengthens the interventionist interpretation of the renewal amendments. Congress increased the leverage of those who may be excluded from the local political processes, by affording them an additional forum within which to challenge the conduct and the outcome of those processes. Thus sections 124 and 125 serve not only as control mechanisms to ensure grantee observance of program strings, but also as means of redistributing power at state and local levels.

5. Elimination of the "Priority Categories"

The renewal amendments' major "substantive" change in the Revenue Sharing program was the elimination of the "priority expenditure" categories for local governments. Congress incorporated these program expenditure strings into the original Act in an effort to limit recipient discretion. The inclusion of these strings reflected the underlying centralist distrust of decision-making by local governments. At one point during the renewal process, centralists sought to *strengthen* the priority categories by narrowing the eligible activities, requiring specific percentages of expenditure within these categories, and making the categories meaningful by requiring that the recipient maintain its own source funding at prior levels in addition to Revenue Sharing outlays.[269] However, the final amendments simply eliminated the priority expenditure categories. There are at least four reasons why Congress deleted these categories.

First, decentralists reasoned that imposition of any such program expenditure strings meant that the program was not true Revenue Sharing at all. To some extent, the renewal

269 H.R. 8329, 94th Cong., 1st Sess. § 7 (1975).

amendments' legislative history reflects acceptance of this position.[270]

A second, though often overlooked reason for eliminating the categories may have been their adverse effect on Revenue Sharing funds used for tax relief or tax stabilization. Such "substitutive" uses were *not* included as "priority expenditures." In *Mathews v. Massell,* the court held that Revenue Sharing funds could not be used to reduce city water rates.[271] This holding casts doubt on the legality of using such funds for tax relief or stabilization.[272] Yet urban spokesmen, such as Mayor Kenneth Gibson of Newark, insisted that such uses were the major reason for renewing the program.[273] The issue was not new, of course. Whether any Revenue Sharing program should permit the substitution of federal tax monies for state and local receipts had been a major controversy since the 1960's.[274] The renewal amendments resolve the issue squarely in favor of allowing Revenue Sharing funds to be used for tax relief.

Third, all sides could agree to eliminate the categories because evidence indicated that they were virtually meaningless. As the House Committee stated, "since revenue sharing funds are fungible with other State and local government revenues, it is impossible in many cases to determine for what purposes the funds are actually being used."[275] Studies by the Brookings Institution and others had demonstrated the extent to which the priority categories limitation could be satisfied by "accounting adjustments," leaving the freed-up funds for other uses.[276]

Finally, some legislators supported removal because they

---

270 *See, e.g., Hearings on General Revenue Sharing Before the Subcomm. on Revenue Sharing of the Senate Comm. on Finance,* 94th Cong., 1st Sess. 10 (1975) (statement of Sen. Brock).

271 356 F. Supp. 291 (N.D. Ga. 1973).

272 *See* Stolz, *supra* note 94, at 66-71.

273 *State and Local Fiscal Assistance Act: Hearings on H.R. 6558 Before the Subcomm. on Intergovernmental Relations and Human Resources of the House Comm. on Government Operations,* 94th Cong., 1st Sess. 376 (1975).

274 *See, e.g.,* HELLER, *supra* note 29, at 152.

275 1976 H. REP., *supra* note 144, at 9.

276 SECOND ROUND, *supra* note 8, at 170.

reasoned that such a move would maximize recipients' discretion over uses of the funds and thus increase their responsibility to account for those uses. According to this line of reasoning, the ultimate result is a truer picture of the effect of Revenue Sharing funds on a locality's budget.[277] Removal of the priority categories might also have been a step toward strengthening federal leverage over discrimination, since *all* local expenditures could then be treated as involving Revenue Sharing funds.[278] However, the final language of section 122 reduces this possibility by permitting a showing that "the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with [Revenue Sharing] funds. . . ."[279]

Whether the elimination of priority categories will have a significant effect on the operation of Revenue Sharing is difficult to predict. This change may increase grantee flexibility. While there is no doubt that the elimination of priority categories represents at least a symbolic reduction of federal intervention, this action may also be viewed as a trade off for the passage of amendments which were oriented toward interventionist goals.

6. Other Changes

The renewal amendments introduced four other changes in the program which are potentially significant.

a. Elimination of Anti-Matching Prohibition

The 1972 Act prohibited use of Revenue Sharing funds "as a contribution for the purpose of obtaining Federal funds under any law of the Untied States which requires . . . a contribution in order to receive Federal funds."[280] Decentralists opposed the provision with the same philosophical argument they expressed concerning the priority categories. They maintained that Revenue Sharing funds were just like local tax receipts, and therefore should be as freely allocable. The liberal critics

277 *Id.*

278 *Cf.* 1976 H. REP., *supra* note 144, at 94 (supplemental views of Rep. Drinan).

279 31 U.S.C.A § 1242(a)(2) (West Supp. 1977).

280 Revenue Sharing Act, *supra* note 4, § 104(a), 86 Stat. 920 (1972).

were troubled by evidence that recipient participation in federal social programs was the principal casualty of the anti-matching string. Thus the removal of this unpopular provision was welcomed by all sides.

b. Reporting Requirements

The renewal amendments continue the Act's requirement that recipients submit annual use reports to the ORS.[281] This provision may play a key role in the enforcement of the citizen participation guarantees by the ORS. Section 121(a) requires that any use report "identify differences between the actual use of funds received and the proposed use of such funds."[282] Since the recipient must make this report available for public inspection, the reporting mechanism may provide local citizens' groups with important information on the effect of their participation in the proposed use hearing and the budget hearing.[283]

c. Audit Requirements

The original act required the Secretary of the Treasury to "provide for such accounting and auditing procedures, evaluations and reviews as may be necessary. . . ." The renewal amendments go somewhat further in requiring each recipient to have "an independent audit" every three years, and the ORS has already issued regulations interpreting this requirement.[284] This "fiduciary-administrative string" represents a watered down version of the House Committee's bill which included a requirement that audits be made public.[285] Even in this form it appears that the new audit requirements are having a substantial impact on local fiscal practices. One expert on the operation of the new amendments has stated, "This provision is causing a major revolution in state-

281 31 U.S.C.A. § 1241(a) (West Supp. 1977).
282 *Id.*
283 See SECOND ROUND, *supra* note 8, at 170-71.
284 31 U.S.C.A. § 1243(c)(1) (West Supp. 1977).
285 1976 H. REP., *supra* note 144, at 16.

local finance. The key element is the requirement for an audit of all the recipient's funds, not just revenue sharing."[286]

d. Annual Report to Congress

As discussed above, one technique for legislative oversight of grantor agency enforcement of program strings is the requirement of specified reports on how a grant program is operating. The pendency of any such report may also constitute an indirect legislative control over grantees, since they will be concerned with how Congress perceives their performance. The 1972 Act required only an annual report on the "operation and status" of the Revenue Sharing Trust Fund during the preceding fiscal year.[287] The renewal amendments broadened this provision to require an annual report on recipients' observance of the nondiscrimination provisions, their fiscal practices, and their expenditure of Revenue Sharing funds.[288] One critic was explicit in describing this report as "an incentive to the Office of Revenue Sharing to enforce the provisions of the Act in a timely and forthright manner."[289] Since these reports must include recommendations for any necessary changes in the Act, they are likely to play a key role when Revenue Sharing is reconsidered by the Ninety-sixth Congress.

7. The Unsuccessful Amendments

The changes discussed above represent significant victories for the liberal critics of Revenue Sharing as enacted in 1972. They were successful in adding new strings on recipients as well as new federal controls to enforce those strings. However, the outcome of the renewal debate should not necessarily be interpreted as a total victory for the centralist approach to federal grant programs. The defeat of proposals designed to

---

286 Letter to author from Richard E. Thompson, Executive Director of Revenue Sharing Advisory Service (February 9, 1978) (on file with author). *See* 6 Revenue Sharing Bull. 1 (Nov. 1977) (reporting violations of the new requirements).

287 Revenue Sharing Act, *supra* note 4, § 105(a)(2).

288 31 U.S.C.A. § 1241(f) (West Supp. 1977).

289 1976 H. REP., *supra* note 144, at 94 (supplemental views of Rep. Drinan).

modernize state and local units and subject Revenue Sharing to the annual appropriations process shows the continuing vitality of decentralist values. Moreover, liberal reformers did not succeed in altering the distribution formula, one of their principal legislative goals.

a. Proposed "Modernization" of State and Local Government

A major surprise of the renewal debate was the House Government Operations Committee's adoption—by a one vote margin—of a proposal to tie Revenue Sharing funds to the "modernization" of state and local government.[290] The so-called Rosenthal amendment differed from earlier proposals which sought to achieve reform either by making recipients (usually states) draw up modernization plans in order to receive any Revenue Sharing funds or by offering additional funds to recipients who did. The proposed new section 120 would have required each state to submit an annual report to the ORS outlining any steps it had taken to "modernize" state and local governmental institutions and practices. Beyond filing the report, however, states were not required to do any modernizing at all. The amendment "establishes as a *goal*" the preparation and development of "master plans" and "timetables" for reform.[291] The items which these plans might contain amounted to a sweeping laundry list of proposals for state and local governmental change: for example, reduction of special districts; "adequate" home rule powers; revised state aid formulas; metropolitan zoning; and encouragement of metropolitan government. The Committee stressed, however, that this goal was "not mandatory." The Rosenthal amendment was eliminated when the full House restored the original subcommittee bill. The proposal had little broad-based support and was the target of violent opposition by Committee members of both parties. They charged it was "a death-dealing blow to the whole concept of a federal system of government . . .," which would convert "our States into provinces and our local governments into administrative precincts

290 *Id.* at 17, 54-56.

291 *Id.* at 17 (emphasis supplied).

molded and run by a powerful central government in Washington."[292]

Needless to say, state and local officials opposed the Rosenthal amendment strongly. Its defeat helps put the entire renewal debate in perspective. Many of the same legislators who opposed it were strong supporters of the new citizen participation provisions and other changes. The reason such congressmen refused to seize the opportunity to use Revenue Sharing as a lever for even broader changes in sub-national institutions seems to be that the concept of interventionist federalism has not yet been stretched to the limits of its logic. Through the renewal amendments, federal intervention into local political *processes* has been extended, but the *outcome* of those processes, except discriminatory outcomes, and the basic structure of sub-national institutions largely are left untouched.

b. Subjecting Revenue Sharing to the Annual Appropriations Process

During the early stages of the renewal debate, liberal critics lobbied to bring the program under the annual appropriations process.[293] Two distinct arguments could be made in favor of such a step. First, Revenue Sharing, like most other federal expenditure programs, should compete on an annual basis for available funds. Second, this step would provide an additional legislative control mechanism over grantee observance of program strings as well as enhancing legislative oversight of the grantor agency.[294] Such proposals garnered little support in the actual legislative debate.[295]

The explanation for the death of these proposals does not appear to be attributable to congressional hostility to increased federal controls *per se*. Congress balked at diminishing the predictibility of the Revenue Sharing funds, a result which would have followed from subjecting them to the ap-

292 *Id.* at 106, 107 (additional views of Rep. Levitas).

293 H.R. 8329, 94th Cong., 1st Sess. § 4 (1975).

294 *See, e.g.*, 1976 H. REP., *supra* note 144, at 95-96. (supplemental views of Rep. Drinan).

295 *See, e.g.*, 122 CONG. REC. S15,713 (daily ed. Sept. 13, 1976).

propriations process. Predictibility is essential if recipients, especially local governments, are to be able to anticipate and budget Revenue Sharing funds just as they would their own source revenues.[296] Maintaining this similarity probably maximizes local flexibility in allocation of Revenue Sharing funds since they can be allocated to on-going uses. Removing the element of predictibility might bias recipients toward "one-shot" allocations, especially capital projects.[297]

c. A Note on the Formula Battle

Although some battles in the continual formula controversy have centered on the differing values of centralists and decentralists, the principal formula issue in the renewal debate was *where* the money was going. The adequacy of funding to communities with large numbers or percentages of service dependent residents was of particular concern to Congress. In the House, for example, a concerted effort developed to change the formula by basing distribution of part of the funds on a factor which measured the severity of poverty within a jurisdiction.[298] But all efforts to change the formula failed. Some congressmen undoubtedly believed the existing formula was adequate, while others feared that any significant change would jeopardize ultimate passage of the bill. The inability to secure any change in the formula represents the biggest setback for the liberal critics of Revenue Sharing, who, by and large, emerged from the renewal debate with a significant record of achievement.

III. The Amendments in Perspective—Beyond the New Federalism

> As one who believes strongly in the need for local government to be as strong and independent as possible, I can only watch in sorrow and wonderment as officials of these communities struggle and strain to tug this Trojan Horse inside their city gates. — Congressman Jack Brooks on the renewal amendments.[299]

---

296 *See* 1975 *Senate Hearings*, *supra* note 270, at 9 (testimony of Sen. Brock).
297 *Cf.* Monitoring Revenue Sharing, *supra* note 30, at 204.
298 *See* 1976 H. Rep., *supra* note 144, at 7-8.
299 *Id.* at 80, 81 (dissenting views of Rep. Brooks).

A. *The Effect of the Amendments–Mere "Status Quo"?*

Given the interest in original Revenue Sharing legislation, the renewal amendments have attracted surprisingly little attention. The only major study to date is *Revenue Sharing: The Second Round,* by the Brookings Institution. It describes the renewed Revenue Sharing program as reflecting predominantly the "Ford administration's status quo position. . . ."[300] Brookings downplays the amendments as simply dealing with "process issues. . . ."[301] This analysis, however, may reflect an emphasis on the *fiscal* aspects of Revenue Sharing. Since Congress did not change the formula, it is only a short step to conclude that Congress did not change the program.[302]

But emphasis on what Congress failed (or chose not) to do should not obscure the significance of the changes which it did enact. Taken together, the renewal amendments constitute far more than incremental tinkering with an existing program. Congress seized upon the renewal of Revenue Sharing as an opportunity to exercise substantial leverage over the processes and programs of state and (primarily) local governments and placed entities of the federal government in a direct supervisory role over those processes and programs.

For the first time, the Act contains citizen participation strings; and these provisions cover not only Revenue Sharing funds, but the recipient's "entire budget" (section 121). Congress increased local flexibility, at least symbolically, through elimination of the priority categories. At the same time, however, Congress clarified and strengthened the federal prohibition against discrimination in the outcomes of state and local political processes (section 122). Through the complaint mechanism and citizen suit provision, Congress buttressed the federal enforcement apparatus in a way which not only ensures observance of federal strings, but helps redistribute power at sub-national levels by opening up federal forums to those who have been excluded from, or simply dissatisfied with, the state

300 SECOND ROUND, *supra* note 8, at 23.

301 *Id.* at 166.

302 The Brookings study does not go this far, but treats the renewal amendments as essentially status quo "on the principal issues. . . ." SECOND ROUND, *supra* note 8, at 23.

and local decision-making process (sections 124 and 125). In sum, the primary responsibility for choosing particular bundles of goods and services remains with state and local units. But the national government will intervene to ensure that these 38,000 sub-national units adhere to standards of fairness in distributing the funds and that the results do not run afoul of national values.

The dominant force in the renewal debate was the congressional centralists who have always been ambivalent about the desirability and wisdom of any Revenue Sharing program. On one hand, they have viewed the concept as ceding too much allocational authority to sub-national units. On the other hand, however, they have always recognized the enormous interventionist potential of any such program. The renewal amendments may prelude changes far beyond the reach of Congress' regulatory power over state and local governments.

Richard Nathan has stated that "despite the overall aim of New Federalism to avoid intervention by the federal government in the structure of state and local government, there is growing evidence that in the next decade the great issue of American domestic government will be precisely this question."[303] The renewal amendments stop short of the "new Structuralism" which Nathan describes, at least if one defines structure as pertaining to "organizational arrangements."[304] But the amendments do reach deeply into the practices and procedures of state and local governments. Since changes in the Revenue Sharing statute may be precursors of changes in *other* grant programs, perhaps one can redefine Nathan's "great issue" as follows: given the fact that state and local dependency on federal grants is liable to be greatest in the case of the growing volume of multi-purpose grants which become similar to own-source revenues, to what extent will the federal government utilize this relatively new form of leverage to secure broad changes in state and local processes, structures and allocational decisions?

---

303 Nathan, *supra* note 5, at 128.

304 *Id.*

B. *The Amendments as Precedent-Implications for the Future?*

One element which supports the conclusion that the Revenue Sharing amendments may be a model for future federal intervention into the affairs of state and local governments is the ever increasing dependence of these governments on federal aid. A recent New York Times survey of 20 cities reported that public officials, economists, and labor and business leaders "could not foresee a time when the economy in the aging cities would improve to such an extent that they would not have to depend on Federal subsidies to pay the salaries of municipal workers."[305] Detroit's budget director went so far as to say, "There is no way we could maintain our services without these Federal programs."[306] For *all* state and local units the magnitude of federal grants as a percent of own source revenues has increased steadily from 15.8 percent in Fiscal Year 1961 to over 35 percent in Fiscal Year 1977.[307]

The second element which will determine whether Congress will seek to exercise the leverage which this increasing dependency brings with it is how well the "new" Revenue Sharing program is operating. For example, whether citizen participation in budgetary decisions has increased and whether it has any real influence upon such decisions will be key issues not only in the next renewal debate, but also in the structuring of other grant programs.

Current public policy issues provide more specific illustrations. Consider the possible implementation of the "dispersal approach" to the urban problem in the administration of the Community Development Block Grant program. H.U.D., for example, may make awards of funds to suburban jurisdictions, contingent upon their willingness to use *other* funds, and their regulatory powers to assume a "fair share" of the metropolitan housing burden. As another example, Congress might enact a program of "Special Revenue Sharing" for education, which conditioned a state's receipt of funds upon its

305 N.Y. Times, Nov. 6, 1977, at 66, col. 1.

306 *Id.*

307 A Fiscal Note, 3 *Intergovernmental Perspective* No. 2, at 20 (1977).

adoption of an equalization program of aid to local school districts. In the case of Revenue Sharing itself, Congress could adopt the Brookings proposal to condition state eligibility on establishment of "some form of independent or quasi-independent state advisory commission on intergovernmental relations or commission on local government."[308] In each case, the federal intervention bears less directly on the expenditure of the particular grant funds than on the underlying practice and procedure of state and local government.

Interventionist federalism, as discussed in this article and found in the renewal amendments, is different from both the New Federalism and the categorical system advocated by some of the New Federalism's critics. The logic of the New Federalism dictates that the national government take the practices and procedures of state and local units more or less as it finds them. Interventionist federalism rests on the legitimacy of action by the national government to change those practices and procedures. A categorical grant system mandates the *outcomes* of those procedures, *e.g.*, "X" amount of spending for "Y" form of education. The interventionist approach leaves outcome choices in state and local hands, although it will forbid nationally undesirable outcomes. The renewal amendments illustrate this point nicely. Far from engaging in "hardening of the categories," Congress *removed* the priority categories and the anti-matching provision. At the same time, it strengthened the anti-discrimination provisions of the Revenue Sharing program.

National policymakers are not likely to preach "interventionist federalism" because it smacks too much of a powerful central government which would convert "our States into provinces and our local governments into administrative precincts . . . ."But they are very likely to practice it as they move beyond the New Federalism. Moreover, the Supreme Court seems likely to take a benign attitude towards interventionist uses of the grant device to secure changes in state and local

308 SECOND ROUND, *supra* note 8, at 176. Governor Michael S. Dukakis (D-Mass.) has proposed a "bonus payment on general revenue sharing funds" to induce states to draw up comprehensive urban economic development plans. Boston Globe, Nov. 30, 1977, at 32, col. 5.

governments which Congress could not mandate directly.[309] Where Congress draws the line will determine whether the New Federalism's successor is, in fact, federalism at all.

309 *See* National League of Cities v. Usery, 426 U.S. 833, 852 n.17 (1976).

CONGRESSIONAL ACCESS TO CONFIDENTIAL INFORMATION COLLECTED BY FEDERAL AGENCIES

PAUL C. ROSENTHAL*
ROBERT S. GROSSMAN**

With increasing frequency in recent years Congress has entrusted federal agencies with the responsibility for regulating many different sectors of the United States economy. In order to operate effectively, federal agencies often request the businesses in the industry they regulate to submit what had traditionally been regarded as confidential information. Similarly, Congress often needs such information to facilitate both the consideration of legislation involving regulated industries and the oversight of regulatory bodies. Since the necessary information is often already in the hands of a federal agency, congressional committees find it efficient to gather the information directly from the agency.

Such congressional requests for information have recently met with resistance primarily from information suppliers which argue that their right to privacy is breached by allowing Congress access to confidential information. Mr. Rosenthal and Mr. Grossman argue that the constitutional underpinnings upon which congressional requests for information rest should preclude information suppliers, executive officials, or the judiciary from blocking information requests on grounds of confidentiality. They also suggest procedures which Congress and federal agencies can implement to protect the legitimate privacy interests of information suppliers without interfering with Congress' legislative or investigative functions.

Introduction

As the federal government has extended the reach of its regulatory authority over many private activities, the gov-

*Counsel, Governmental Affairs Committee, United States Senate; A.B., University of California (Berkeley), 1972; J.D., University of California (Davis), 1975. The opinions in this Article are those of the authors and do not reflect the opinions of the Governmental Affairs Committee or its members.

**A.B., University of Wisconsin, 1974; M.A., University of Michigan, 1975; J.D., Georgetown University Law Center, 1978.

ernment's need for information about those activities has grown proportionately. In order to exercise the power delegated to them by Congress wisely, executive and independent agencies must have access to data once considered to be purely private and economic information traditionally reserved for internal use by business firms. Congress, too, needs to have access to this information, so that it may intelligently decide whether to extend, modify, or restrict the ambit of federal authority over a given area. Yet *how* Congress is to obtain access to such information has become a major question in which all three branches of the federal government have become involved.

Congressional committees charged with the oversight of regulatory activity could subpoena information directly from those who are regulated. Yet in many cases oversight bodies have found it more efficient to obtain from executive and independent agencies information submitted by third parties under statutes prohibiting the "public disclosure" of that information.[1] Some firms which have submitted "confi-

---

1 *E.g.*, Federal Trade Commission Act, § 6(f), 15 U.S.C. § 46(f) (1970).

The definition of the term "confidential information" is a matter of controversy. Of course, information is confidential if it is treated as such. But the fundamental question is what information should be treated as confidential. Congress has answered the question on a number of occasions by giving "trade secret" information confidential treatment, just as the common law protected trade secrets. Trade secrets, however, are just one kind of information normally granted confidential treatment.

The first Restatement of Torts provides a comprehensive definition of "trade secrets":

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757, comment b (1939). *See also* 18 U. S. C. § 1905 (1970); Richard Ehlke, Federal Protection of Trade Secrets and Proprietary, Commercial and Financial Information Obtained by Government Agencies in the Context of Energy-Related Data 2-8 (January 17, 1977, revised October 13, 1977) (CRS

dential" information to Federal agencies and some officials charged with the collection of that data have attempted to resist these congressional requests. One company, Ashland Oil, Inc., unsuccessfully sought to enjoin the Federal Trade Commission (FTC) from complying with a subpoena issued by a House committee, asserting that compliance was barred by a statute forbidding the public disclosure of information submitted subject to a promise of confidentiality.[2] And only a last-minute compromise forestalled contempt of Congress proceedings from being instituted against former Secretary of Commerce Rogers C. B. Morton when he asserted that it was he, not a House committee which subpoenaed confidential foreign trade information, who should determine whether the risk of public disclosure was so great that his agency would not honor the subpoena.[3]

The problem of whether congressional committees may successfully demand the transmission of otherwise confidentially submitted information from other governmental agencies centers on the balancing of two competing values. In order to intelligently exercise its constitutionally mandated legislative and oversight functions, Congress must have access to any information that may aid it in carrying out those functions. Yet, through the enactment of statutes prohibiting governmental agencies from making public information submitted on a confidential basis, Congress has recognized that individuals and businesses have a legitimate right to expect that some secrets will in fact remain secret. A conflict between those two interests exists if disclosure of

---

Memorandum 77-226A) [hereinafter cited as Ehlke Energy Memo]; *see* text accompanying notes 47-48 *infra*. The term confidential does not refer to classified information.

2 *See* Ashland Oil, Inc. v. FTC, 409 F. Supp. 297 (D.D.C.), *aff'd per curiam*, 548 F.2d 977 (D.C. Cir. 1976); SUBCOMM. ON OVERSIGHT AND INVESTIGATION, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95th CONG., 1st SESS., THE ASHLAND LITIGATION: A CASE STUDY IN JUDICIAL DELAY OF A CONGRESSIONAL INVESTIGATION (Comm. Print 1977) [hereinafter cited as ASHLAND REPORT].

3 *See Contempt Proceedings Against Secretary of Commerce Rogers C. B. Morton: Hearings and Related Documents Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Morton Contempt Proceedings*].

information by an agency to Congress amounts to public disclosure or will lead to public disclosure.

This Article will consider the key issue raised by such conflicts: whether Congress has the power to compel access to information needed to discharge its legislative function from administrative agencies, when that information has been provided to these bodies under a promise of confidentiality. It will be argued that this conflict can be reconciled if Congress is given broad access to confidentially supplied information, while at the same time Congress gives information suppliers an opportunity to make their privacy claims before such information is released to the public. Ultimately Congress, not the executive or the judiciary should be the branch to determine whether the risk of disclosure outweighs Congress' need for information in exercising its constitutional legislative power.

Section I of this Article will examine how the issues of congressional access and the rights of those supplying information were raised and resolved in the *Ashland* and Morton disputes. Section II will consider the issue of whether Congress should be allowed access to information supplied to federal agencies under a promise of confidentiality. First, it will discuss the constitutional underpinnings of Congress' need for access to information. Next, it will examine the arguments made by opponents of congressional access. Opponents claim that statutes barring public disclosure of information by agencies bar disclosure of information to Congress, or that the high risk of public disclosure can justify a court in enjoining an agency from transmitting information to Congress. The relationship of the holdings of cases on executive privilege to the problem of Congressional access to information will also be considered in Section II. While private firms cannot claim executive privilege for trade secrets and federal agencies have not specifically asserted the privilege in cases not turning on defense or security issues, the role of the judiciary in resolving questions of executive privilege provides a contrast to the role federal courts should play in resolving information disputes in which no executive interest exists.

Finally, Section II considers the problem of public disclosure once Congress is given access to confidential information. It first examines the lack of any statutory procedures to safeguard the privacy interests of information suppliers whose information has been given to Congress, and also the constitutional protection against civil or criminal liability which members of Congress and their staffs enjoy when they disclose information to the public. It then suggests procedures that federal agencies, congressional committees, and the judiciary can adopt in order to protect the privacy interests of information suppliers without interfering with Congress' investigative or legislative functions.

I. Recent Disputes Over Congressional Access to Information

The *Ashland* litigation and the threatened contempt proceedings against then-Commerce Secretary Rogers C. B. Morton for his refusal to transmit to a House Commerce Subcommittee documents submitted to his department on a confidential basis are recent examples of legal conflict over congressional access to information. The two disputes differed substantially. Ashland Oil brought suit to block the FTC from transmitting documents to Congress that the agency believed could be made available to oversight committees. The Morton dispute turned on the opinions of officials in possession of confidential data that disclosure to Congress was barred by statute. Yet both disputes focused on similar questions. At issue was whether statutes prohibiting the public disclosure of information provided under a promise of confidentiality barred disclosure to Congress in the absence of specific provisions for congressional access. Additional questions were whether the risk of eventual public disclosure should be a factor in deciding whether Congress could obtain access to the information, and who would evaluate those risks against Congress' "right to know": the congressional unit seeking access, the executive or agency officials in possession of the information sought, or the judiciary.

A. *The* Ashland *Case*

In October of 1975 the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce was conducting a study of the Interior Department's lease management practices on Federal lands, "for the purpose of exploring and producing natural gas for the interstate market."[4] As part of the study the Subcommittee subpoenaed[5] documents from the FTC concerning the continuing extensions of federal leases which did not produce oil or gas.[6] Although the Commission was willing to comply with the request, Ashland Oil, Inc., one of approximately 45 companies whose submissions to the FTC would have been made available to the Subcommittee, sought a temporary restraining order and permanent injunctive relief to prevent the Commission from making the Ashland documents available to Congress.[7]

Following Ashland's request for injunctive relief from the District Court for the District of Columbia, John Moss (D-Cal.), chairman of the Oversight Subcommittee, obtained permission from the House to intervene on behalf of the Interstate and Foreign Commerce Committee to argue for the protection of congressional interests.[8] The Subcommittee believed its participation in the litigation to be necessary because it was possible that:

> .... Ashland's arguments could be extended to block Congressional access to information under dozens of other Federal laws, and because of the Constitutional issues implicit in the judiciary's granting extraordinary injunctive relief with the effect of denying a Congressional Subcommittee information necessary for a current investigation.[9]

---

4 *See* ASHLAND REPORT, *supra* note 2, at 5.

5 The reports were originally requested from the FTC. They were later subpoenaed formally when the FTC refused to comply voluntarily. *See* Ashland Oil, Inc. v. FTC, 548 F.2d 977, 982 (D.C. Cir. 1976) (MacKinnon, J., dissenting) (subpoena invalid).

6 *See* ASHLAND REPORT, *supra* note 2, at 6.

7 *Id.* at 7.

8 *See* 121 CONG. REC. H12919 (daily ed. Dec. 18, 1975). *See also* FED. R. CIV. P. 24 (intervention).

9 ASHLAND REPORT, *supra* note 2, at 1.

The full House approved intervention on December 18, 1975.[10]

Ashland based its request for injunctive relief on section 6(f) of the Federal Trade Commission Act (FTCA) which provides,

> The Commission shall also have power—(f) to make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest.[11]

Ashland argued that the FTCA prohibited the Commission from disclosing confidential information to Congress, despite the lack of any specific reference to Congress in the statute. Ashland also argued that "experience shows that if the information is made available to Congress, it will inevitably be 'made public,'" in violation of section 6(f) of the FTCA protecting trade secrets.[12]

United States District Judge Corcoran dismissed Ashland's complaint on February 2, 1976,[13] but stayed the FTC from submitting the requested information to Congress pending appeal.[14] Judge Corcoran rejected Ashland's arguments on the grounds that "the courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties."[15] He concluded that Ashland could not overcome this presumption and therefore did not show the likelihood of irreparable injury warranting an injunction.[16]

Nearly eight months later the Court of Appeals affirmed Judge Corcoran's decision.[17] In its opinion, the Court of Ap-

---

10 H.R. Res. 899, 94th Cong., 1st Sess., 121 CONG. REC. H12919 (daily ed. Dec. 18, 1975).

11 15 U.S.C. § 46(f) (1970).

12 Ashland Oil, Inc. v. FTC, 548 F.2d 977, 979 (D.C. Cir. 1976). *See* 15 U.S.C. § 46(f) (1970).

13 Ashland Oil, Inc. v. FTC, 409 F. Supp. 297 (D.D.C.), *aff'd per curiam*, 548 F.2d 977 (D.C. Cir. 1976).

14 409 F. Supp. at 306.

15 *Id.* at 308.

16 *Id.*

17 548 F.2d 977 (D.C. Cir. 1976).

peals placed an enormous burden on a company attempting to prevent a government agency's submission to Congress of information gathered under a promise of confidentiality. The per curiam opinion noted:

> No substantial showing was made that the materials in the possession of the FTC will necessarily be "made public" if turned over to Congress. Therefore, we need not decide what application, if any, 15 U.S.C. § 46(f) might have if it were evident that Congress intended to "make public" trade secrets. At a minimum, we think it is clear that absent such a showing, 15 U.S.C. § 46(f) does not preclude the FTC from transmitting trade secrets to Congress pursuant either to subpoena or formal request.[18]

Thus, under the rule set forth in *Ashland*, only when a firm can show that information in the hands of a government agency will be publicly disclosed if submitted to Congress will a court consider acting under the trade secret provisions in the FTCA. The Court of Appeals, however, did not spell out how such a showing was to be made.[19]

Following its decision the Court of Appeals provided for a 15-day stay to allow Ashland to petition the Supreme Court for a writ of certiorari.[20] Instead, Ashland petitioned the Court of Appeals for a rehearing *en banc*, a request which was denied nearly five months later.[21] Ashland was granted 48 hours within which to seek review in the Supreme Court. It declined to do so. "Thus," in the words of the Moss Subcommittee, "14 months after issuing its subpoena in aid of a fully authorized investigation, the necessary documents were belatedly delivered to the Subcommittee."[22]

---

18 *Id.* at 979. *Cf. id.* at 983 (MacKinnon, J. dissenting) (accepting majority's opinion on this issue).

19 *But cf.* United States v. American Tel. and Tel. Co., 419 F. Supp. 454 (D.D.C. 1976), *vacated and remanded*, 551 F.2d 384 (D.C. Cir.), *modified* 567 F.2d 121 (D.C. Cir. 1977) (placing a burden on congressional committee to show no alternative to disclosure exists to obtain needed information where claim of executive privilege has been asserted).

20 548 F.2d at 982.

21 *Id.* at 977.

22 ASHLAND REPORT, *supra* note 2, at 2.

B. *The Morton Contempt Proceedings*

The issue of congressional access to information supplied by a private party to a government agency subject to a promise of confidentiality was raised again when the Moss Subcommittee voted to recommend that then-Secretary of Commerce Rogers C. B. Morton be held in contempt of Congress for repeatedly refusing to comply with a subpoena for Arab boycott reports submitted to his Department.[23] These reports were compiled pursuant to the Export Administration Act of 1969,[24] which requires that American firms report to the Commerce Department all requests to participate in the Arab trade boycott against Israel and firms doing business with Israel.[25] Section 7(c) of the Act provides:

> No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.[26]

Arguing that compliance with the congressional subpoena would violate section 7(c), Secretary Morton refused to convey the documents to the Subcommittee.

The thrust of the argument supporting the Secretary's defiance of the subpoena was that section 7(c) did not expressly exempt Congress from the confidentiality provision, and by implication Congress had included itself within this bar.[27] Secretary Morton based his defense on an opinion from the Department of Justice submitted to Morton on

---

23 *See generally Morton Contempt Proceedings, supra* note 3, at III (letter of transmittal).

24 50 U.S.C. app. §§ 2401-2413 (Supp. V 1975).

25 50 U.S.C. app. § 2423 (b) (1).

26 50 U.S.C. app. § 2406 (c).

27 *Morton Contempt Proceedings, supra* note 3, at III (letter of transmittal), 11 (testimony of Rogers C. B. Morton), 153-54 (letter from Rogers C. B. Morton to John Moss).

September 4, 1975. The Attorney General's position was that:

> (1) there is a presumption that the statutory restriction upon disclosure of "confidential" materials bars Congressional access; (2) the legislative history of the Export Act shows a purpose to create such a bar; (3) an administrative construction to that effect has been embedded in the statute by reenactment.[28]

In the face of Secretary Morton's refusal to turn over the subpoenaed documents, the Subcommittee voted 10 to 5 to recommend that the Secretary be held in contempt of Congress.[29] Secretary Morton persisted in his non-compliance with the Subcommittee subpoena until the day preceding the full Interstate and Foreign Commerce Committee's scheduled meeting to consider the matter.[30] On December 8, 1975, Morton agreed to surrender the subpoenaed documents to the Subcommittee.[31] His decision to comply with the subpoena followed Moss' statement that he would receive the documents in executive session and that the documents would not be made public.

The Secretary's action mooted the contempt proceedings, avoiding a potential constitutional clash. Yet, as in the *Ashland* litigation, the end of the controversy over congressional access to the Arab boycott information left many issues unresolved.

II. The Debate Over Congressional Access to Confidential Information Collected by Federal Agencies

On the surface, the *Ashland* and Morton disputes turned upon a relatively narrow legal issue. In both cases, inquiry

---

28 *Morton Contempt Proceedings, supra* note 3, at 173-75 (1975 opinion of Attorney General Levi). The latter two of the Attorney General's three arguments are not within the scope of this article. For a discussion of those arguments, *see Morton Contempt Proceedings, supra* note 3, at 105-07 (testimony of Philip B. Kurland).

29 Subcomm. on Oversight and Investigation, House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., The Arab Boycott and American Business 6 (Comm. Print 1977).

30 *Id.*

31 *Id.*

centered on whether disclosure to congressional committees was the equivalent of public disclosure barred by a statute which did not refer to congressional access to data collected under a promise of confidentiality. Yet, much broader and more basic issues are implicated in disputes of this type. The information in these disputes was sought by Congress under its power to investigate, a power which flows from the Constitution's grant of legislative power to the Congress. At the same time the information had originally been submitted by private parties who had been led to believe that the information would go no farther than the agencies to which it was submitted. This Section will examine the arguments both in favor of and against the right of congressional access to such information.

A. *Congress' Investigatory Power*

The primary argument in support of congressional access to information is that the Constitution places certain responsibilities on Congress, and Congress should have whatever information it needs to carry out those responsibilities. In *Eastland v. United States Servicemen's Fund*[32] the Supreme Court acknowledged that Congress possessed the right to obtain information because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."[33] The Constitution itself implies that Congress has broad power to obtain information. The Supreme Court has observed that Congress' investigatory power

> is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the adminis-

32 421 U.S. 491 (1975).

33 *Id.* at 504, *quoting from* McGrain v. Dougherty, 273 U.S. 135, 175 (1927). The Court in *McGrain* also noted: "In actual legislative practice, power to secure information . . . has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American Revolution, and a like view has prevailed and been carried into effect in both houses of Congress and most state legislatures." 273 U.S. at 161. In *Eastland,* the right of the Senate Internal Security Committee to obtain information on antiwar groups was upheld against a claim that the provision of such data would have a chilling effect on First Amendment rights.

> tration of existing laws as well as proposed or possibly needed statutes. It includes surveys or defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.[34]

Congress' oversight function has a long history. The power to investigate was first employed in 1792 when the House of Representatives initiated an inquiry into the defeat of General St. Clair and his army by the Indians of the Northwest.[35] The 1946 Legislative Reorganization Act, as amended in 1970, established a statutory basis for the oversight function.[36] Since passage of the Act, oversight has become an increasingly important function of Congress.[37]

The congressional oversight power is limited to some extent. Congress cannot ignore the Bill of Rights in the conduct of an investigation.[38] Congress may not inquire into purely private matters unrelated to the subject matter of current or future legislation,[39] and it may not interfere with an adjudication pending before an independent regulatory commission.[40]

Otherwise, the investigatory power of Congress is limited only to the extent that it serves no legislative purpose. Under the standard articulated by the Supreme Court in *Wilkinson v. United States,*[41] an investigation is proper so long as (1) it is authorized by Congress, (2) it is authorized pursuant to a valid legislative purpose, and (3) the specific inquiries are germane to the subject of the investigation.[42]

---

34 Watkins v. United States, 354 U.S. 178, 187 (1957).

35 *See* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 168 (1974).

36 2 U.S.C. § 190d (Supp. V 1975).

37 *See* 2 SEN. COMM. ON GOVERNMENT OPERATIONS, 95th CONG., 1st SESS., STUDY ON FEDERAL REGULATION (Comm. Print 1977).

38 Barenblatt v. United States, 360 U.S. 109, 111-12 (1959); Watkins v. United States, 354 U.S. 178 (1957). For an excellent discussion of congressional investigations and their limitations, *see generally* J. HAMILTON, THE POWER TO PROBE (1976).

39 Watkins v. United States, 354 U.S. 178, 198 (1957); Kilbourn v. Thompson, 103 U.S. 168 (1880).

40 The Pillsbury Co. v. FTC, 354 F.2d 952, 963 (5th Cir. 1966).

41 365 U.S. 399, 408-09 (1961).

42 *Id. See* Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 305 (1976).

Within these limits, then, Congress has exceptionally broad power to conduct investigations and obtain information.

B. *The Effect of Statutes Barring Public Disclosure On Congressional Access to Information*

Numerous statutes bar the public disclosure of confidential information submitted to regulatory agencies, without making any specific provision for the transfer of information to Congress.[43] Such legislation has been invoked by those resisting congressional access to agency-collected information as specific bars to such access.[44] Arguments based on these statutes can take two forms. First, it may be claimed that without language providing for congressional access, transfer of information to Congress is merely another form of the public disclosure forbidden by statute. Second, it has been argued that, under statutes barring public disclosure, courts may enjoin agencies from transmitting confidential data to Congress if they believe such disclosure could or would lead to public disclosure. Neither avenue of attack, however, can be reconciled with the language of the statutes or Congress' constitutional power to investigate.

1. Can Congress be Presumed to Have Denied Itself Access to Information?

The crux of Ashland's argument for nondisclosure of FTC materials was that "where Congress fails to explicitly exempt itself from a confidentiality provision [of a Federal Statute] it thereby meant to deny itself access to the information covered by the provision."[45] Secretary of Commerce Morton similarly argued that Congress had impliedly denied itself access to information covered by a statutory confidentiality provision.[46]

---

43 *E.g.*, Federal Trade Commission Act, 15 U.S.C. § 46(f) (1970); 15 U.S.C. § 79v(c) (SEC data on public utility holding companies). For a complete list of these statutes, *see* Ehlke Energy Memo, *supra* note 1, at 54-101.

44 Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 302 (1976).

45 ASHLAND REPORT, *supra* note 2, at 10 *citing* an opinion of the Congressional Research Service *reprinted in* H.R. REP. No. 94-756, 94th Cong., 1st Sess. 21-23 (1976).

46 *See* notes 27-28 *supra*.

The implications of this argument are enormous. Were it to be accepted, the power of Congress to gather information would be severely curtailed. According to a Congressional Research Service (CRS) compilation of confidentiality provisions, made at the request of Congressman Moss, nearly 100 statutory provisions "(1) prohibit disclosure of information in the possession of a government official, and (2) include no reference to the right of access of the Congress."[47] It was noted that if statutory provisions which refer to 18 U.S.C. section 1905[48]—a criminal prohibition of disclosure of confidential information by a federal officer or employee which has also been cited by executive agencies attempting to block compliance with congressional information requests[49]—were included in the statutory compilation, at least 50 statutes would be added to the list, thus raising the total to nearly 150.[50] Congressional inability to obtain information gathered under these statutes could impede Congress from carrying out its constitutionally mandated responsibilities. Presumably, of course, Congress could restore its access to information by passing a statute, or perhaps 150 statutes, explicitly providing for the transmission of data to itself.[51] But the need for such congressional action is questionable.

---

47 *Morton Contempt Proceedings, supra* note 3, at 211 (letter from Congressional Research Service).

48 "This section of the criminal code is a consolidation of three confidentiality provisions directed at three separate executive agencies which were, prior to 1940, the primary federal collectors of confidential business information. It now covers all executive branch officers and employees." Ehlke Energy Memo, *supra* note 1, at 10-11. *See also Morton Contempt Proceedings, supra* note 3, at 171.

49 "However, this prohibition against disclosure may not be invoked against a request of a standing committee of Congress or one of its subcommittees since it is inapplicable where disclosure is authorized by law." *Morton Contempt Proceedings, supra* note 3, at 211 (Congressional Research Service Memorandum). *See* Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970); Frankel v. S.E.C., 376 F. Supp. 675 (S.D.N.Y. 1971), *rev'd on other grounds*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); 15 U.S.C. § 78x(b) (1970) (making certain data submitted to SEC available to Congress).

50 *Morton Contempt Proceedings, supra* note 3, at 212 (Congressional Research Service Memorandum); ASHLAND REPORT, *supra* note 2, at 10.

51 *See, e.g.*, 15 U.S.C. § 78x (Supp. 1975) (stating a non-public disclosure statute pertaining to data supplied to the SEC does not authorize the withholding of data from Congress).

Congress cannot abdicate its constitutional powers,[52] including its investigatory powers. "A construction which suggests an abdication of power raises a constitutional doubt which should if possible be avoided."[53] Thus, while it is questionable whether Congress could explicitly waive or impede its power to investigate, it is clear that a waiver should not be presumed from statutory silence. As Professor Berger stated in the Morton contempt hearings, there is no presumption that Congress intended to withhold confidential information from itself,[54] and "[i]n fact, fundamental principles of our Constitution give rise to a presumption that runs the other way."[55]

The Supreme Court has similarly held that absent "clear and unmistakable evidence of the intent to part with it," a legislature cannot divest itself of certain powers:[56]

> An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions.[57]

Thus, given the constitutional importance of Congress' investigatory power,[58] the proposition that Congress precludes itself from obtaining information by enacting a confidentiality statute which contains no express congressional exemption is "contrary to widely accepted canons of constitutional

---

52 Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

53 United States v. Rumely, 345 U.S. 41, 47 (1953); Kovacs v. Cooper, 336 U.S. 77, 85 (1949).

54 *Morton Contempt Proceedings, supra* note 3, at 63; *accord id.* at 105 (testimony of Philip B. Kurland).

55 *Id.* at 63 (testimony of Raoul Berger).

56 Rochester Railway Company v. City of Rochester, 251 U.S. 236, 248 (1907).

57 Wheeling & B. Bridge Co. v. Wheeling Bridge Co., 138 U.S. 287, 292, 293 (1891); "Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the government of a power which has been confided to it to be used for the general good . . . unless plain and express words indicated that such was the intention of the legislature." Brown v. Duchesne, 19 How. (60 U.S.) 183, 195 (1856).

58 McGrain v. Daugherty, 273 U.S. 135, 174 (1927); Watkins v. United States, 354 U.S. 178 (1957); Barenblatt v. United States, 360 U.S. 109, 111 (1959); Eastland v. United States Serviceman's Fund, 421 U.S. 491 (1975).

construction, past congressional practice, and sound reason."[59]

This is not to say that Congress cannot prescribe certain procedures for receiving information. Indeed, the "necessary and proper" clause[60] affords Congress great latitude in determining how to carry out its responsibilities. In limited instances Congress may decide to channel access to information to particular committees. For example, only the Chairmen of the House Ways and Means Committee, the Senate Finance Committee, the Joint Committee on Taxation or a specially authorized select congressional committee or the Chief of Staff of the Joint Committee on Taxation may request disclosure of tax returns from the Internal Revenue Service.[61] The particular committee requesting the returns may then submit any "relevant or useful" information to either or both houses of Congress.[62]

Just as one cannot presume that Congress precludes itself from obtaining information by enacting confidentiality statutes which do not expressly include or exempt Congress, one cannot presume that the existence of statutes setting up procedures for transmission of information to Congress means that Congress meant to deny itself access to information in the absence of such statutes.[63] The tax return disclosure procedures were necessary and proper in Congress' view because the information transmitted is of a highly personal nature and the need to protect privacy rights justifies specific disclosure procedures. The existence of such procedural provisions for disclosure of information to Congress cannot by itself support the theory that absent such provisions, Congress has waived its right to information. Rather, it should be inferred that in the absence of specific procedures governing the receipt of information, Congress

---

59 *Morton Contempt Proceedings, supra* note 3, at 167 (Congressional Research Service Memorandum). *See e.g.*, In re Chapman, 166 U.S. 661, 671-72 (1897); Jurney v. MacCracken, 294 U.S. 125 (1935); Seymour v. United States, 77 F.2d 577, 579 (8th Cir. 1935).

60 U.S. CONST. art. I, § 8, cl. 8.

61 I.R.C. § 6103 (d) (1), (2).

62 I.R.C. § 6103 (d) (1) (c).

63 *See* notes 59 and 60 *supra*.

found it unnecessary to establish a protocol for transmittals by regulatory agencies.

2. Does the Risk of Public Disclosure Justify Denying Information to Congress?

A second argument made against allowing Congress to have access to information that has been given to an agency under a promise of confidentiality is that such access will lead to public disclosure in violation of the confidentiality statutes. Ashland raised such an issue in its action against the FTC, and Commerce Secretary Morton justified his refusal to transmit documents to the Congress on similar grounds. The issue was mooted in both disputes, for none of the information transmitted to the Congress became public. But the problems of public disclosure by Congress raised in the *Ashland* and Morton controversies persist.

The first response to the argument against congressional access based on an increased risk of public disclosure again is that Congress' ability to carry out its constitutional responsibilities is at stake, and as such it should not be limited unless absolutely necessary. It is particularly questionable whether the increased risk of public disclosure ought to prevent congressional access, since that risk is highly speculative. An agency holding information can never know for certain that the information it turns over to Congress would be made public. Congressional politics is notable for its lack of predictability. Whether a committee may vote to disclose certain information can depend on which committee members attend the meeting in which the vote is to be held or on some other unmeasurable variable. To deny Congress the information on speculative grounds would be improper.

This conclusion is supported by the decision of the United States District Court in *Ashland*. The court held that since Ashland had not sufficiently established that Congress would "make public" the data requested from the FTC, the Commission was not precluded from submitting such trade secrets to Congress.[64] Judge Corcoran reasoned that courts

64 Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 308-09 (1976).

must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties.[65]

Absent a "substantial" showing that the materials supplied to Congress would be made public, Ashland could not show the irreparable injury necessary for it to obtain an injunction. Yet the decision in *Ashland* did not make clear what would constitute a "sufficient showing" that the danger of disclosure was "imminent" rather than "prospective."[66] It is unlikely that many litigants would be able to show to a high degree of certainty that a committee intended to make information it received public. Congressional committees rarely, if ever, reveal in advance their plans for the specific use of requested materials. If any committee was inclined to announce, before receiving confidential information, that it intended to make that information public, it is unlikely to do so in the wake of *Ashland*.[67]

Even if a litigant could prove that Congress planned to make public information that it received from an agency, the confidentiality statutes would not require a court to issue an injunction. Confidentiality statutes, such as the ones involved in the Morton and *Ashland* disputes[68] pro-

65 *Id.*, citing Ansara v. Eastland, 442 F.2d 751, 754 (D. C. Cir. 1971). In *Ansara* the court said:

> This court cannot assume, as plaintiffs urge, that the members of the committee will fail to give consideration to constitutional claims they consider may have merit. On the contrary, we may rightly assume that the legislators are sensitive to, and will endeavor to act conformably to, the principle that the Bill of Rights applies to the legislature's investigations as well as to its enactments.

Id. at 753-54.

66 The District Court opinion in *Ashland* had concluded "isolated instances of breached confidentiality in the past" would not be "sufficient to overcome the continuing presumption of Congressional propriety." 409 F. Supp. at 308.

67 A litigant may be able to offer proof that a committee intends to disclose the requested information after receipt. Memoranda reflecting such an intention may become available to such litigants through the discovery process, *see* FED. R. CIV. P. 26, 34. If such documentation could be obtained over a claim of privilege for the internal deliberations of a congressional body parallel to executive privilege, *cf.* United States v. Nixon, 418 U.S. 683 (1974), it may not be dispositive proof of the intention of a committee that has every right to change its views.

68 Export Administration Act of 1969, 50 U. S. C. app. § 2406(c) (Supp. V 1975); Federal Trade Commission Act, 15 U.S.C. § 46(f) (1970).

hibit disclosure by the agency to the public. They do not prohibit disclosure by the agency to Congress, or even by Congress to the public. As long as the agency itself does not release the information to the public, it has complied with statutes prohibiting public disclosure.[69] This is not to say that Congress should not itself protect confidential information that it receives from administrative agencies. Congress in passing confidentiality statutes meant to prevent agencies from making confidential information public. While such existing statutes do not restrict either Congress' access to information held by congressionally created agencies nor Congress' ability to make information public, Congress can and should impose some public disclosure limitations on itself.[70]

C. *The Executive's Interest in Congressional Access to Information: The Executive Privilege Doctrine*

Disputes over access to information are not limited to arguments between private parties who have submitted confidential information to regulatory agencies and congressional committees. The executive branch has also sparred with Congress over what information is to be made available to judges, legislators, and the public in a recent series of cases outlining the doctrine of executive privilege. While no claim of executive privilege as such was made during the *Ashland* or Morton disputes,[71] executive privilege is included in this discussion of the problem of congressional access to information submitted to an agency under promise of confidentiality. This discussion of executive privilege is in-

---

69 By the same token, the agency official cannot be held criminally liable for disclosing the information under 18 U.S.C. § 1905.

70 *See* Section III.B. *infra*.

71 In the Morton dispute, where the Secretary of Commerce was refusing to transmit confidential information to a congressional subcommittee, Morton, relying on an opinion from Attorney General Levi, maintained that his noncompliance with a subpoena was not grounded in executive privilege. *Morton Contempt Proceedings, supra* note 3, at 173 (Opinion of Attorney General Levi). Not all of the witnesses at the Morton hearings agreed with this view, however. Professor Berger, for example, viewed Secretary Morton's position as a veiled executive privilege argument. *Morton Contempt Proceedings, supra* note 3, at 74.

cluded because the judicial role and the standard for resolving informational access disputes in cases where executive privilege is claimed provide illustrative contrasts to the judicial role and the standards which should be applied in cases where the only argument against congressional access is that of personal privacy or trade secrets.

1. Defining the Doctrine of Executive Privilege

In *United States v. Nixon*,[72] the Supreme Court considered two questions which are essential in defining the extent of executive privilege. First, it dealt with the question of whether the judiciary can review a claim by the executive branch that information held by the executive is privileged. The Court held that such claims are judicially cognizable:

> In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel . . . reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of [*Marbury v. Madison*] that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[73]

Second, the Court reached the substance of the President's claim that information held by the executive branch was privileged and beyond the reach of the Watergate Special Prosecutor who sought the production of President Nixon's tapes and memoranda for use in the criminal trial of indicted conspirators. The Court indicated three grounds on which a claim of executive privilege could be based. First, the Court acknowledged that a constitutional basis for the doctrine of executive privilege could be found in the generalized need for confidentiality to protect "communications between high government officials and those who ad-

72 418 U.S. 683 (1974).

73 *Id.* at 703 *quoting* Marbury v. Madison, 1 Cranch (5 U.S.) 137,177 (1803).

vise and assist them in the performance of their manifold duties."[74] Second, the Court indicated that the doctrine of separation of powers could justify, in some cases, the insulation of information held by the President from scrutiny by the judiciary. Third, the Court also recognized that a claim of executive privilege could be founded on the need to protect military, diplomatic, or sensitive national security secrets.

In *Nixon*, the President made a claim of executive privilege based on the first two grounds. The Court rejected the claim, however, holding "that neither [the need for confidentiality] nor the doctrine of separation of powers, without more, could sustain an absolute, unqualified Presidential privilege of immunity from judicial powers under all circumstances."[75] The President's generalized assertion of executive privilege, the Court said, must yield to the demonstrated, specific need for evidence in a criminal prosecution.[76] The Court while providing a definition of executive privilege which can be used in other contexts was careful to note that the constraints it put on the privilege in *Nixon* were limited to the facts of the case:

> We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, *nor with that between the confidentiality interest and congressional demands for information*, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.[77]

2. Executive Privilege and Congressional Investigations

The *Nixon* case does not provide direct guidance for resolving disputes which are a result of resistance based on

74 *Id.* at 705.
75 *Id.* at 706.
76 *Id.*
77 *Id.* at 712 n.19.

executive privilege to congressional demands for information.[78] However, the same two questions arise in such cases as were considered in *Nixon*. First, what branch of government should ultimately decide a dispute between an executive official claiming that information is privileged and a congressional committee claiming the information is pertinent to an investigation? In such an instance, when two coequal branches of government make conflicting constitutional claims, it is inevitable that the judiciary must intervene when the two branches cannot compromise by themselves. It is also not surprising that in answering the question of what the scope of executive privilege in such cases should be courts have created criteria with which to balance the claim of the executive branch against the congressional claim for information.

In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[79] decided prior to *United States v. Nixon*, the U.S. Court of Appeals for the District of Columbia refused to enforce a Senate committee's subpoena *duces tecum* for tape recordings and conversations between the President and former counsel John W. Dean III.[80] Citing *Nixon v. Sirica*,[81] the Court stated that whether the congressional committee could overcome the presumption in favor of confidentiality would depend on "the nature and appropriateness of the function in performance of which the material was sought and the degree to which the material was necessary to its fulfillment."[82] The court concluded that

> the need demonstrated by the Select Committee in the peculiar circumstances of this case, including the subsequent and ongoing investigation of the House Judiciary Committee, is too attenuated and too tangential to its

78 *See generally* Mary L. Ramsey, Executive Privilege: Withholding Information From the Congress—Selected Issues and Judicial Decisions 5 (April 3, 1975) (Congressional Research Service Memorandum JK 516 F).

79 498 F.2d 725 (D.C. Cir. 1974).

80 *Id.* at 726.

81 487 F.2d 700 (D.C. Cir. 1973) (granting, under specified conditions, power to the grand jury to subpoena the President to produce evidence relevant to the Watergate investigation).

82 498 F.2d at 731.

> function to permit a judicial judgment that the President is required to comply with the Committee's subpoena.[83]

The Watergate Committee did not seek review of the decision in the Supreme Court but commented in its final report "that the court's decision rested, as the court observed, on 'the peculiar circumstances of this case,' and should not necessarily prevent legislative committees in the future from obtaining materials relating to Presidential communications."[84]

Despite the Committee's statement it seems likely that courts will continue to balance the interest of the executive against that of Congress when executive privilege is claimed. In *Senate Select Committee* executive privilege based on the executive's general interest in confidentiality triggered judicial balancing. In *United States v. American Telephone & Telegraph Co. (AT&T)*,[85] where that privilege was claimed on the basis of national security, the D.C. Circuit again applied a balancing test. *AT&T* centered on attempts by the House Subcommittee on Oversight and Investigations to investigate the extent and nature of warrantless wiretapping within the United States conducted in the name of national security. The Subcommittee, through the full Committee on Interstate and Foreign Commerce had subpoenaed from AT&T all "request" letters from the FBI for wiretaps. Fearing that information turned over to the Subcommittee might interfere with ongoing investigations, the Ford Administration sought to reach an agreement with the Subcommittee on procedures whereby all relevant information might be transmitted to Congress without turning over the requested letters themselves.[86] When negotia-

---

83 *Id.* at 733.

84 SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT ON CAMPAIGN ACTIVITIES, S. REP. No. 93-981, 93d Cong., 2d Sess. 1083 (1974).

85 419 F. Supp. 454 (D.D.C.), *vacated and remanded,* 551 F.2d 384 (D.C. Cir. 1976), *modified,* 567 F.2d 121 (D.C. Cir. 1977) [hereinafter cited as *AT&T*].

86 The request letters contained information identifying the phone lines to be tapped. Fearing identification of the subjects of surveillance if the letters were turned over to the Subcommittee, the White House offered to make available to the committee

tions collapsed and AT&T indicated it would refuse to follow instructions from President Ford not to comply with the subpoena, the Justice Department commenced an action against AT&T to enjoin transmission of the letters to the Subcommittee.[87]

The District Court noted that it was confronted with a direct conflict between the investigatory power of Congress and the invocation of executive privilege by the President "concerning matters of national security, foreign affairs, or national defense."[88] To resolve this conflict, the court stated that "the extent and the relative importance of the power of one coordinate branch of government must be balanced against that of the other. Neither can be considered in a vacuum."[89] The court then weighed the competing interests of Congress and the executive by considering three significant factors explored in previous decisions: (1) "whether the information requested is essential to 'the responsible fulfillment of the Committee's functions,' "[90] (2) "whether there is 'an available alternative' which might provide the required information without forcing a showdown on the claim of privilege,"[91] and (3) "whether the circumstances surrounding and the basis for the Presidential assertion of privilege" warrant compliance.[92] The District Court held that in the particular circumstances of the case, the materials sought were not "absolutely essential to the legislative function," "alternative means" were open to the committee

---

the backup memoranda upon which the decisions to request the wiretapping were based. While the memoranda were arguably of greater value in the investigation because of information contained within them on the purpose and nature of the surveillance, they were to be edited to protect ongoing investigations and prevent identification of the targets of foreign intelligence surveillances. Negotiations broke down on the issue of whether executive officers or Subcommittee staff were to verify the information in the backup memoranda. *See AT&T*, 551 F.2d at 385-87; 567 F.2d at 124-25.

87 551 F.2d at 387 n.1 (letter from President Ford to Rep. Harley O. Staggers (D-W. Va.) informing the committee of his instructions to AT&T).

88 419 F. Supp. at 458-59.

89 *Id.* at 459.

90 *Id.* at 460, *citing Senate Select Committee,* 498 F.2d at 731.

91 *Id., citing* United States v. Reynolds, 345 U.S. 1, 11 (1953).

92 *Id., citing* United States v. Nixon, 418 U.S. at 710-11.

to gather the information and the President's judgment that the release of this material would create "an unacceptable risk of disclosure concerning national defense, foreign policy and national security outweighed the Subcommittee's need for the information."[93] The court also weighed the possibility that the subpoenaed letters might be made public if submitted to the Moss subcommittee.[94]

On appeal, Judge Leventhal, writing for the D.C. Circuit, noted that each branch of government alleged interests "put in absolute terms, to run without limit, and neither can be accepted as put."[95] As a result, the court imposed a settlement upon the parties, using a "gradual" approach rather than a "rigid arrangement."[96] The settlement permitted the Subcommittee staff to compare ten randomly selected, unedited leters with the corresponding edited ones to determine the accuracy of the edited letters. The staff was permitted to take notes on the unedited letters but was required to leave them under seal at the FBI. Judge Leventhal characterized the court's resolution of the case as being the result of a concerted search for accommodation between the two branches, one that might not absolutely ameliorate differences between the parties, but that would bring such differences "into even sharper focus."[97]

The *AT&T* case indicates that where executive privilege is asserted courts may continue to employ a subjective balancing test where judicial intervention cannot be skirted by an agreement between the executive and Congress. The approach used in *AT&T* places an enormous burden on

---

93 *Id.* at 460.

94 *Id.* at 460-61. A majority of the eight-member quorum of the subcommittee could have voted to make the letters public, subject to reversal by affirmative action of the House.

95 567 F.2d at 128.

96 *Id.* at 131. *See id.* at 131-33 for the terms of the court-imposed settlement, under which the Subcommittee staff will be permitted to randomly select ten unedited memoranda for review and compare them with the corresponding edited versions in order to determine the accuracy of the edited documents. The staff will be allowed to take notes on the unedited documents, but the documents and any notes taken will remain under seal at the offices of the FBI.

97 *Id.* at 131.

Congress. Nearly any informational request can be resisted by the argument that alternative means of obtaining the desired data is open to Congress. Those alternative means, however, may result in Congress' being denied the precise information it sought through reliance on alternative channels.[98] It is also far too easy for executive officers to assert a general interest in confidentiality or that a nexus exists between the information asserted and national security, laying the groundwork for a claim of executive privilege. Use of such a balancing test in these circumstances may tilt the scales against Congress before weighing of interests begins.

3. Executive Privilege and Confidentiality of Business Secrets: A Comparison

It is important to distinguish the arguments made in the *Ashland* and Morton disputes from those made in *Senate Select Committee* and *AT&T*. In the former the privacy of information suppliers was the interest asserted against congressional access to information. In the latter cases the executive branch's own interest was asserted against congressional access. Where the executive branch raises constitutional arguments against those made be a congressional committee fulfilling its constitutional function of investigation, it is inevitable that the judiciary will be needed to resolve the dispute, and will have to balance the constitutional interests involved to do so.

Where interests in privacy are raised against a congressional committee's constitutional arguments the standard used for resolution should be different.[99] The judicial role in

98 For example, under the AT&T settlement, *id.* at 131-33, Congress will receive mostly edited request letters containing less precise information than the Committee sought.

99 It is clear that neither independent agencies nor third parties can assert a claim of executive privilege.

> The formal prerequisites for assertion of executive privilege are specified in United States v. Reynolds as follows: 'The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.' 345 U.S. at 7-8. While *Reynolds* involved military secrets, subsequent decisions have

such a dispute should not be to balance interests but merely to ensure that the congressional committee is acting constitutionally. A court only need ask whether the investigation being undertaken is within Congress' constitutional powers and whether the information requested is relevant to that investigation. Admittedly this will be an easy standard for most information requests to meet. Therefore, if the interests of individuals or companies which have submitted documents to federal agencies under a promise of confidentiality are to be protected, Congress itself will have to provide protective mechanisms. The next section will discuss the mechanisms which currently exist to protect privacy interests and steps which Congress should take to further protect those interests.

III. Protecting the Privacy Interests of Information Suppliers

Congress' constitutional interest in access to information supports the conclusion that it has a legal right of access to information submitted under a promise of confidentiality to federal agencies. Yet such a conclusion does not mean that Congress should freely disclose such information to the public. A number of policy considerations support the idea that

---

uniformly applied the guidelines it expressed irrespective of the particular kind of executive claim advanced.

Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 326-27 n.32 (D.D.C. 1966).

Humphrey's Executor v. United States, 295 U.S. 602 (1934), refutes the idea that executive privilege may be asserted by independent regulatory agencies:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.... To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so ... as an agency of the legislative or judicial department of the government.

Id. at 628. *See* R. Berger, Executive Privilege; A Constitutional Myth 47 (1974).

public disclosure of confidential information should be limited. First, legitimate interests in privacy and trade secrets may be undermined by public disclosure. Second, if governmental agencies are to be able to have easy access to business information such agencies must be able to assure information suppliers that their submissions will not be made public. Third, fairness would seem to dictate that where a government agency promises to keep information confidential another arm of the government will not freely release such information.

This section will discuss how the privacy of information suppliers can be protected by Congress. First, the lack of existing laws to prevent public disclosure of confidential information by members of Congress will be discussed. This discussion will be followed by a set of proposals which suggest how federal agency and congressional procedures can be changed to protect privacy rights.

A. *Current Limits on Public Disclosure of Confidential Information by Members of Congress*

Public disclosure of confidential information would be greatly limited if such disclosure exposed members of Congress to civil or criminal liability. However, it is clear that neither civil nor criminal remedies are available to prevent such disclosure since existing privacy legislation does not apply to members of Congress, and even if it did, the Speech or Debate Clause of the Constitution[100] substantially insulates members of Congress and their staffs from any such liability.[101]

1. Current Statutory Protection of Privacy Rights

The existing statutory scheme in the privacy area deals

---

100 U. S. CONST. art. I. § 6, cl. 1:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.

101 *But see* United States v. Brewster, 408 U.S. 501, 515-25 (1972) (Speech or Debate Clause does not protect all conduct *relating* to the legislative process).

exclusively with the wrongful disclosure by the agencies to which information is submitted. Privacy provisions applying to particular agencies, such as in the Federal Trade Commission Act[102] or the Export Administration Act of 1969[103] prohibit the release of confidential information by agencies but make no mention of Congress. This statutory silence as has already been argued,[104] cannot be construed as placing limits on Congress' use or disclosure of the information.

Similarly, the general protection for privacy afforded by the Privacy Act of 1974[105] applies almost solely to agencies. The Privacy Act was designed "to promote governmental respect for the privacy of citizens by requiring all departments and agencies of the executive branch and their employees to observe certain constitutional rules in the computerization, collection, management, use and disclosure of personal information about individuals,"[106] and was intended to prevent the "wrongful disclosure and use ... of personal files held by Federal agencies."[107] However, the Act's language indicates that its prohibition against disclosure are limited to the Executive branch and do not apply specifically to the Congress.[108] In fact, the Act specifically permits disclosure of records without "a written request by, or with the prior consent of, the individual to whom the record pertains," if the disclosure would be "to another agency or to an instrumentality of any governmental jurisdiction ... for a civil or criminal law enforcement activity[109] ... [or] ... to either House of Congress, or, ... any committee or subcommittee thereof."[110]

Finally, no reference to members of Congress can be

102 15 U.S.C. § 46(f) (1970).

103 50 U.S.C. app. § 2406(c) (Supp. V 1975).

104 *See* Section II.B.1. *supra*.

105 5 U.S.C. § 552a (Supp. V 1975).

106 S. REP. 93-1183, 93d Cong., 2d Sess. 1 (1974).

107 *Id.* It should be noted that the Privacy Act only applies to information collected by an agency's independent investigation, not to information obtained from individuals or businesses under a promise of confidentiality. Hulett, *Privacy and the Freedom of Information Act*, 27 AD. L. REV. 275, 288 (1975).

108 5 U.S.C. § 552a(b) (9); Hulett, *supra* note 107, at 283.

109 5 U.S.C. § 552a(b) (7).

110 5 U.S.C. § 552a(b) (9).

found in 18 U. S. C. section 1905, which makes it a criminal offense for officers and employees of the federal government to disclose trade secrets.[111] In summary, under existing statutes neither civil nor criminal remedies would be available against members of Congress for disclosure of confidential information submitted to federal agencies.

2. Constitutional Limits on the Liability of Members of Congress for Public Disclosure of Confidential Information

In addition to being exempt from existing statutory prohibitions against public disclosure of confidential information, members of Congress and their staffs are substantially protected from civil or criminal liability by the Speech or Debate Clause of the Constitution. This conclusion may be drawn from two recent Supreme Court decisions, *Gravel v. United States*[112] and *Doe v. McMillan*.[113]

In *Gravel*, the Supreme Court held that Senator Mike Gravel's (D-Alas.) reading of classified material at a subcommittee hearing was absolutely protected by the Speech or Debate clause.[114] The protection afforded by the Clause was read to extend to committee reports, resolutions, the act of voting and those matters which "are an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[115] The protection granted by the Clause also extends to members' aides "insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."[116]

---

111 Ehlke Energy Memo, *supra* note 1, at 32-34.

112 408 U.S. 606 (1972).

113 412 U.S. 306 (1973).

114 The Court also held, however, that "Senator Gravel's alleged arrangement with Beacon Press to Publish the Pentagon Papers was not protected speech or debate within the meaning of art. I, § 6, cl. 1 of the Constitution." 408 U.S. at 662.

115 408 U.S. at 617, 624-25.

116 *Id.* at 618.

Doe v. McMillan was an action instituted by parents of District of Columbia school children for damages and an injunction to prevent the further publication of a congressional report on the local school system which included unflattering references to individually named students.[117] The defendants included the members of a House committee, committee staff, the Public Printer, officials and employees of the school system and the Superintendent of Documents. The Supreme Court held that the members of the committee and their staff were absolutely protected by the Speech or Debate Clause to the extent that publication of the report for the use of the other members of the House was in furtherance of a valid legislative function.[118] The Court construed the legislative function to encompass at least the introduction of material at committee hearings, referring the report with the material to the Speaker of the House, voting for publication, and the distribution of the published report to members, committees and House employees for legislative purposes.[119]

Moreover, the Court stated that "[m]embers of Congress are themselves immune for ordering or voting for a publication *going beyong the reasonable requirements of the legislative function*."[120] However, the legislative functionaries, such as the Public Printer and the Superintendent of Documents, are not protected by the Speech or Debate Clause in their execution of such nonlegislative directives.[121] The Court was unwilling to grant these functionaries protection "at least absent more substantial evidence that, in order to perform the legislative function, Congress must not only inform the public about fundamentals of its business, but also must distribute generally materials actionable under local law."[122]

The Court then considered the application of the doctrine

117 412 U.S. at 307-10.
118 *Id.* at 311-12.
119 *Id.* at 312.
120 *Id.* at 315 (emphasis added).
121 *Id.*
122 *Id.* at 317.

of official immunity, which confers immunity on government officials in order to allow them to exercise freely their official duties without fear of damage suits resulting from performance of those duties.[123] The Court stated that official immunity for congressional functionaries turned on the same factor as immunity under the Speech or Debate Clause: whether their actions went beyond the legislative function.[124] Thus, while the dismissal of the complaint as to defendant members of Congress and the committee staff was affirmed under Speech or Debate Clause immunity,[125] the dismissal in favor of the Public Printer and the Superintendent of Documents was reversed and remanded for a determination of whether their actions were pursuant to a valid legislative function.[126]

Under *Doe*, members of Congress and their staffs enjoy an absolute immunity from liability for the release of information, so long as that release is in furtherance of a legitimate legislative function. While some members of congressional staffs could be held liable under *Doe* for acts of disclosure ordered by Congress that are not related to the legislative function, disclosure of information on the floor of either house or in open committee meetings, where, one may presume, the press would be free to report on the details of the disclosure, would be immunized.[127] Thus, members of Con-

123 *Id.* at 319, *See also* Barr v. Matteo, 360 U.S. 564 (1957).

124 412 U.S. at 324.

125 *Id.* at 318.

126 *Id.* at 324-25. On remand the District Court held that the actions of the Public Printer as to the quantity and manner in which the reports were produced and distributed "remained within the limits of immunity of the Speech or Debate clause and the doctrine of official immunity." Doe v. McMillan, 374 F. Supp. 1313, 1316 (D. D. C. 1974), *aff'd,* 566 F.2d 713 (D. C. Cir. 1977), *cert. den.,* 98 S. Ct. 1607 (1978).

In a recently decided case, the Seventh Circuit Court of Appeals held that a press release and newsletter by Senator William Proxmire (D. Wisc.), explaining his conferral of the "Golden Fleece of the Month Award," were afforded Speech and Debate Clause immunity. Certain remarks by Senator Proxmire in television, radio and other interviews, as well as in phone calls to federal agencies, were not accorded absolute immunity. The Court held these remarks, however, to be protected by the qualified privilege of the first amendment right to free speech, finding that the subject of the defamatory statements to be a public figure under the doctrine of New York Times v. Sullivan, 376 U.S. 254 (1964). Hutchinson v. Proxmire, _____ F.2d _____ (7th Cir., June 30, 1978).

127 Doe v. McMillan, 412 U.S. at 313. In the Morton dispute, Congressman Moss

gress are free from statutory restrictions on their disclosure of information confidentially submitted to federal agencies and are protected from prosecution for such disclosure by the Speech or Debate Clause and the doctrine of official immunity. As a result, if the privacy of information suppliers is to be protected at all once information is given to Congress, Congress must implement its own internal procedures to recognize and protect such privacy interests.

B. *Suggested Procedures for Protecting the Privacy Interests of Information Suppliers*

While Congress has a constitutional interest in having broad access to information submitted to federal agencies, it must at the same time be recognized that a failure to respect information suppliers' expectations of non-disclosure may have an adverse effect on the ability of governmental bodies to collect data. Fortunately these two interests are not incompatible. Congress can recognize the legitimate privacy of interests of information suppliers without cutting itself off from information it needs to fulfill its own investigative functions. As Section III.A. has pointed out, however, the existing statutory pattern provides no protection against public disclosure once information gets into the hands of members of Congress. This Section discusses procedures which would provide protection for the privacy interests of information suppliers without hindering Congress from gaining access to necessary information.

1. The Role of Federal Agencies: Alerting Information Suppliers of Congressional Requests for Confidential Information

The Federal Trade Commission has established a standard procedure for the granting of advance notice to

---

promised the Secretary that his subcommittee would not disclose the requested information. Whether or not such a promise by a committee or subcommittee chairman is binding on either or both houses of Congress is doubtful, for the House could have voted to disclose that information despite Moss' promise. Congress would be wise to adhere to such promises of confidentiality, however, lest it jeopardize its ability to gather data in the future.

companies and individuals who have requested that documents submitted to the Commission be treated confidentially.[128] The Commission sends a letter to such parties stating that the Commission "will not disclose any of the above-described documents to any person outside the employ of the Federal Trade Commission, without first giving (company name) ten days' notice of its intention to do so."[129] The ten day notice period avails the company the opportunity to prevent FTC compliance with such requests by seeking judicial action.

However, the letter specifically exempts requests from Congress, a congressional committee or subcommittee or the compulsory process issued by a court from its minimum notice procedures:[130]

> In the event of such release, the Congressional committee or subcommittee or the court will be advised that the company considers the material to be confidential; and (company name) will be provided ten days' prior notice *where possible*, and in any event as much advance notice as can reasonably be given.[131]

The FTC's commitment to issue advance notice to an affected company continues for three years from the date of the letter, at which time a firm may request that confidentiality continue.[132] Notice will not be provided if: (1) allegedly confidential information is already in the public domain; (2) the data is made public by a non-FTC source; (3) the information was in the FTC's possession prior to submission of the documents by the company; or (4) the information is furnished to the FTC through a third party.[133]

---

128 Federal Trade Commission, Staff Bulletin 77-1 (1977); *see* 43 Fed. Reg. 3571 (1978) for the recently proposed FTC Rule, "Protection of Confidential Business Information," *to be codified* at 16 C. F. R. § 4.10(a), (b).

129 *Id.* at 1.

130 *Id.*

131 *Id.* (emphasis added). Also exempted from the Commission's advance notice procedures is the furnishing of documents to outside consultants retained by the FTC, but only to consultants who have agreed not to release the material. *Id.*

132 *Id.* at 2.

133 *Id.*

The procedures adopted by the FTC give information suppliers fair notice of that agency's plan to transmit information to outsiders without denying or delaying congressional access to data. It allows those who have sought confidentiality from the FTC sufficient time to press claims for continued confidentiality to the congressional body seeking the documents, and, if appropriate, in the courts.[134] The FTC procedures can and ought to serve as a model for the many executive and independent agencies that receive information on a confidential basis and may later be asked to transmit that data to Congress.

2. The Congressional Role: Respecting Legitimate Expectations of Confidentiality

There are at present few existing formal procedures which prevent Congress from disclosing confidential information or which even force congressional committees to consider privacy interests before disclosing confidential information.[135] Such procedures are necessary to prevent the disclosure of information which would cause substantial injury to an information supplier such as through the release of trade secrets. The procedures are also necessary to preserve the ability of federal agencies to collect information, and to prevent protracted disputes between agencies, congressional committees, and information suppliers over the question of congressional access to information.[136] Two proposals have been made in recent years in an effort to provide protection against public disclosure of confidential information by Congress.

---

134 This assumes, of course, that it is Congress which is requesting the information.

135 There are existing House and Senate Rules for receiving confidential information in executive session and prohibiting public disclosure. *See, e.g.,* House Rules XI(2)(g)(2), (2)(k)(5)(A) and (k)(7), *reprinted in H. R. Doc* 94-663, 94th Cong., 1st Sess. 430, 485-86 (1977).

136 *See* REFUSALS BY THE EXECUTIVE BRANCH TO PROVIDE INFORMATION TO THE CONGRESS, 1964-1973, A SURVEY CONDUCTED BY THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE SENATE COMMITTEE ON THE JUDICIARY, 93rd Cong., 2d Sess., 1974, at V (Foreword by Sen. Sam Ervin) [hereinafter cited as SEPARATION OF POWERS SURVEY].

a. The Collins-Lent Proposal: A Uniform Rule for Protection of Privacy

In the wake of the *Ashland* litigation, Representatives James M. Collins (R-Tex.) and Norman F. Lent (R-N.Y.) suggested a procedure which in their view would "deal effectively with the total issue of congressional access to trade secret or otherwise confidential business information in the possession of Federal agencies, those in the executive branch, and the Independent Regulatory Commissions."[137] In their view, the major obstacle to a solution to the access problem is the fear of businessmen that confidential information transmitted to Congress will be "leaked." To assuage these fears, the two congressmen set forth a multistep procedure to be followed on all informational requests.[138] Under the Collins-Lent plan, a committee or subcommittee chairman would request in writing the confidential business information from the appropriate agency.[139] The agency would then "be required to furnish this information forthwith to the committee or subcommittee sitting in executive session, or via some other appropriate mechanism for insuring the confidentiality of this business information."[140] The supplied information could be reviewed by members or designated staff of the committee or subcommittee.[141]

Under the Lent-Collins plan, any party interested in protecting the confidentiality of trade secrets or other sensitive business information would have the right to advise the committee chairman of its interest.[142] Agencies preparing to transmit to Congress data collected under a promise of confidentiality would be required to notify the supplier in advance of its intention to do so, "so that the supplier may have an opportunity to assert before that committee any

---

137 ASHLAND REPORT, *supra* note 2, at 43 (Supplemental Views of Representatives James M. Collins and Normal F. Lent).

138 *Id.* at 43-44.

139 *Id.* at 44.

140 *Id.*

141 *Id.*

142 *Id.*

substantial interest it may have in the confidentiality of the information."[143] Such an assertion by the supplier would in no way hamper congressional access to the data, nor would injunctive relief be available to any affected party at that time. If a request for confidentiality was made, the investigating congressional body would be given the first opportunity to review the request.[144] If the committee chairman determined that confidential treatment was not justified, any party with a substantial interest in the data could petition the Court of Appeals for District of Columbia within five days for *de novo* review of that determination.[145] The decision of the Court of Appeals could be appealed to the Supreme Court within five days.[146] Finally, the Collins-Lent proposal provided that the "confidentiality of such material shall continue to be maintained by the committee or subcommittee pending judicial resolution of their confidentiality, provided that such materials may be disclosed at any time upon a vote of the majority of the Members of both Houses of Congress."[147]

Some observers, including Rep. Moss, have argued that the highly structured Collins-Lent plan would be "a cure . . . worse than the alleged disease,"[148] particularly in light of the few instances of congressional "leaks" or improper disclosure[149] and the existing House rules providing mechanisms for receiving confidential information in executive session and blocking public disclosure.[150]

While it does appear that the Collins-Lent proposal would provide an additional measure of protection for the privacy of information suppliers, it does so at the cost of large amounts of congressional and judicial time and re-

---

143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.* at 45.
147 *Id.*
148 *Id.* at 46 (Additional Views of Hon. John E. Moss, Chairman).
149 *Id.*
150 *Id.* at 47; House Rules XI(2)(g)(2), (2)(k)(5) and (k)(7), *reprinted in* H.R. Doc. 94-663, 94th Cong., 1st Sess. 430, 485-86 (1977).

sources.[151] Requiring that each request for confidential business information be made in writing would place an enormous burden on the requesting committee. Determining in advance whether unexamined material is in fact confidential may be impossible and committing every such request to writing might fatally constrain a committee making hundreds of informational demands. The requirement that all confidential materials be submitted to committees sitting in executive session is also unduly burdensome when identical protection may be obtained where necessary under alternative procedures available under current rules. Allowing *de novo* judicial review of confidentiality requests is also questionable given the added burden on federal court dockets such extensive review would create and the lengthy delays in congressional processes that may result from such broad review. In sum, while legislation establishing procedures in Congress to protect the privacy of information suppliers is needed, the procedures created by the Collins-Lent proposal are overly cumbersome.

b. More Flexible Privacy Procedures: The Congressional Right to Information Act

An attempt to recognize both Congress' power to obtain information and the interest in confidentiality of information suppliers was made in the Ninety-third Congress through Senate passage of the Congressional Right to Information Act.[152] The proposed legislation would have established "a procedure assuring the full and prompt production of information requested from Federal officials and employees."[153] Yet it also would have required Congress and its committees to protect the confidentiality of sensitive information obtained from agencies if disclosure would jeopardize the privacy rights of individuals or the confidentiality of business secrets.[154]

---

151 ASHLAND REPORT, *supra* note 2, at 48.

152 S. 2432, 93d Cong., 1st Sess., 119 CONG. REC. 42101 (1973).

153 S. REP. NO. 93-612, 93d Cong., 1st Sess. 1 (1973).

154 *Id.* at 2. The confidentiality protection provisions of the Act were part of a

Specifically, section 345(a) of the Act would have obligated congressional committees to "take appropriate measures to insure the confidentiality of any information made available to it"[155] when such data, in the judgment of the transmitting agency or the congressional body requesting it, would endanger, "(1) personal privacy, (2) trade secrets or confidential commercial or financial information, or (3) the conduct of the national defense, foreign policy, or law enforcement activities."[156] Section 345(b) provided for an investigation by the Select Committee on Standards and Conduct of the Senate or the House Committee on Standards of Official Conduct of any breach of confidentiality by a Member or employee of their respective houses.[157] The investigating committees would be empowered to recommend that appropriate sanctions such as removal from office or censure be imposed.[158]

The Congressional Right to Information Act outlines an appropriate approach for Congress to follow in disputes

---

legislative package which sought to resolve claims of executive privilege. The proposed statute would have added a new section to the Legislative Reorganization Act of 1970 which would:

> (1) establish by statute the duty of Federal officials and employees to produce information requested by the Congress and the committees thereof;
> (2) require Federal officials and employees to produce the information requested unless they are instructed by the President in writing not to do so;
> (3) permit Congress and its committees to determine that the information is necessary to its legislative functions despite such a Presidential instruction;
> (4) authorize the committee chairmen to issue subpoenas to compel the production of the information despite such a Presidential instruction;
> (5) authorize the committee chairman, in the event of non-compliance with such subpoenas and subject to the approval of their respective houses of Congress, to bring civil actions in the Federal courts to enforce such subpoenas;
> (6) confer jurisdiction of such civil actions on the United States District Court for the District of Columbia; and
> (7) authorize the court to enforce the subpoenas by a mandatory injunction or other appropriate order, and to modify the subpoenas or set them aside entirely.

Id. at 1-2.

155 *See id.*

156 *See* S. 2432, 93d Cong., 1st Sess.; S. REP. 93-612 at 12.

157 *Id.* at 12-13.

158 *Id.*

about information. While the language of the Senate bill—"take appropriate measures"—was somewhat vague, requiring detailed procedures to be adopted by every congressional committee would overlook the fact that different committees have varying informational needs. Different kinds of data do not all require the same procedures for protection against public disclosure. A request for the number of employees working for a firm does not, for example, require the same extent of safeguards for confidentiality as a firm's formula for its best selling food product. Each congressional committee knows best its informational needs and should be responsible for establishing procedures adequate to protect those needs, as well as the interests of information suppliers.[159]

At present, some committees have specific procedures to protect information which government officials, through requests for closed hearings or other proceedings, identify as sensitive. Those committees which do not have specific procedures established to protect confidential information should do so.

Although no single procedure should govern all committees' handling of confidential information, certain minimum standards should be met. First, each committee should provide for the physical security of the confidential information it receives to prevent unauthorized or inadvertent disclosure of that information.[160] It is difficult to know how much of the concern expressed by business firms over congressional disclosure of confidential information is directed at so-called "leaks." Although congressional "leaks' have received much

159 However, the provision in § 345(a) of the Right to Information Act passed by the Senate permitting the agency transmitting data to the Congress to determine whether a document is to be treated as confidential and whether a committee's methods for protecting its secrecy are adequate may in practice deny the Congress important information. Such determinations should be made by Congress, not the agencies.

160 The procedures set up for protecting sensitive data established by the Senate committee studying intelligence activities are an example to be followed by other committees in this regard. *See* S. Res. 400, 94th Cong., 2d Sess., 122 CONG. REC. 7563 (daily ed. May 19, 1976); SEN. COMM. ON GOVERNMENT OPERATIONS, SENATE COMMITTEE ON INTELLIGENCE ACTIVITIES, S. REP. NO. 94-675, 94th Cong., 2d. Sess. (1976).

attention in the past few years, confidential business or trade secret information has rarely, if ever, been leaked.[161] Nevertheless, information suppliers are entitled to some assurances that their confidential information will remain so in the absence of a deliberate congressional decision to the contrary.

Suppliers of confidential information should also be given an opportunity to argue their case to the congressional committee against public disclosure of the information.[162] That opportunity need not be afforded each supplier on an individual basis. For example, Ashland Oil, Inc. was one of a number of firms with the same interest in keeping the disputed information confidential. Ashland could presumably argue the case for confidentiality for all firms similarly situated.

In addition, the opportunity to argue for confidentiality need not be granted in emergency situations requiring speedy public dissemination of the information. It is unlikely, though, that many emergencies would occur that would necessitate disclosure of confidential information without giving the affected parties an opportunity to present their views.

3. The Judicial Role: Preserving Congressional Access to Information

The Congressional Right to Information Act provides a procedure which recognizes both Congress' right to access to information and the need to protect the privacy of information suppliers. It is important that the essential balance struck by such procedures not be upset by an unnecessarily broad scope of judicial review.

When an information supplier challenges a request by Congress for information from a federal agency, the reviewing court has essentially a two-step task. First, it must de-

161 ASHLAND REPORT, *supra* note 2, at 46.

162 This would presumably be after information suppliers were notified that data was to be transmitted to Congress under procedures similar to those outlined in FTC Staff Bulletin 77-1, described in Section III.B.1. *supra*.

cide whether Congress has a right to access. Second, it must decide whether Congress has shown that it intends to make the information public. As has already been discussed in Section II of this Article, the judicial role in reviewing Congress' right to access is severely circumscribed. Only where constitutional harms will be inflicted upon information suppliers[163] may the courts consider blocking congressional information demands.

In reviewing a congressional committee's request for information in the possession of a government agency, the sole question a court should address is whether the investigation undertaken by Congress is within the scope of its constitutional investigatory powers and whether the information sought is relevant to that investigation. In most cases the answer to these questions will be yes, indicating that Congress would have the power to subpoena the information directly from the private party. It would make little sense to bar Congress from access to information it could receive directly, simply because of the intervening presence of a governmental agency. Only in the rare instances where a direct congressional subpoena is precluded should a private firm be allowed to resist successfully Congress' demand for information from a government agency.

As a result of the House Oversight Subcommittee's dispute with Ashland Oil, Rep. Moss introduced a bill in the Ninety-fifth Congress prescribing a limit on judicial review of congressional subpoenas and information requests to federal agencies.[164] Under the bill, courts would only be empowered to consider whether the request was a valid exercise of legislative power as defined by the District Court in *Ashland*[165] and whether the committee subpoena had been properly issued.[166] The elements of Moss' proposal are essential to any well functioning informational procedure, for if the role of the

163 Kilbourn v. Thompson, 103 U.S. 168 (1880).

164 H.R. 7475, 95th Cong., 1st Sess., *reprinted* in ASHLAND REPORT, *supra* note 2, at 50-51.

165 Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 305 (1976).

166 However, where a legitimate claim of executive privilege is raised, the scope of judicial review should be greater.

courts is not specifically limited to the standard expressed by Judge Corcoran in *Ashland*, the judicial process may delay a congressional investigation for as long as, if not longer than, the 14-month delay in the *Ashland* dispute.[167] Armed with such an accessible dilatory tactic businesses might have little trouble in befuddling congressional probes. The Collins-Lent proposal recognized this possibility as well by only allowing judicial review after the congressional committee has access to the information.

Once a congressional committee is provided with access to information a court may also have to review the committee's determination as to whether to make such information public. If the committee has procedures allowing interested parties to raise confidentiality claims, a reviewing court would have the power to determine whether such procedures have been followed. Where they have been followed and the committee has determined that the benefits of public disclosure outweigh the harms to the individual privacy of the information supplier, as in the case of the initial access question, there is no reason to substitute the judgment of a court for that of a congressional committee carrying out its constitutional function. In instances when such public disclosure falls outside of the committee's constitutional functions staff members and other functionaries who inevitably play a major role in committee activities might well be subject to liability. The threat of such liability along with the congressional privacy procedures should provide sufficient protection for the privacy interests of information suppliers. *De novo* review of a privacy claim by a court would add only a small increment of protection for privacy at a relatively large cost in terms of judicial resources and time, as well as possible delay in congressional proceedings.

Conclusion: Maintaining Congress' Right to Know

Resistance to congressional requests for information is becoming more pervasive as the scope of federal regulation in-

creases.[167] While individual instances of resistance to congressional requests for information, such as the *Ashland* and Morton cases, seem insignificant in isolation, their importance should not be underestimated. As Senator Ervin has written:

> The power of Congress, under our Constitution, to inquire never has been seriously in question. To the extent that Congress has acceeded to Executive branch denials or the withholding of information, it has failed to enforce its authority and has vacated its power to inquire. The diversity of a legislative body, which is its very nature, easily permits incidents to become obscured. When one subcommittee or another is frustrated in its efforts to obtain essential data, the facts surrounding the rebuff often escape attention or seem too insignificant in the single instance to warrant vociferous action. It is these individual instances in which Congress is denied information, when regarded collectively, that contribute to the deterioration of the constitutional authority of Congress.[168]

That constitutional authority of Congress must be zealously guarded to facilitate congressional investigations and prevent the demise of the legislative branch's ability to obtain essential information.

Congress, however, must take the necessary procedural steps to safeguard trade secret or confidential information gathered by Federal agencies under a promise of confidentiality, lest it jeopardize its future ability to collect such data from businesses. Protection of the legitimate privacy interests of firms and individuals can best be assured through adoption of appropriate procedures fitted to the particular type of information used by individual committees rather than a single procedure followed by every congressional body. The judgment of Congress, rather than the judiciary or executive branch, should resolve informational disputes except in those infrequent instances where there is

167 *See* SEPARATION OF POWERS SURVEY, *supra* note 136, which found over 283 reported instances of executive branch resistance to congressional requests for information from 1964 through the early months of 1973.

168 *Id.* at V.

a legitimate executive concern over the protection of interests such as national security. Where the courts are called upon to resolve an informational conflict a congressional committee should not be denied access to information which a government agency collected under a promise of confidentiality so long as the committee requests information relevant to a legitimate congressional function. Repeated denials of access in such cases would greatly accelerate the demise of congressional authority against which Senator Ervin so eloquently warned.

THE FOREIGN INTELLIGENCE SURVEILLANCE ACT: LEGISLATIVE BALANCING OF NATIONAL SECURITY AND THE FOURTH AMENDMENT

IRA S. SHAPIRO*

In the wake of revelations about abuses of electronic surveillance by the executive branch in the name of national security, Congress has been considering legislation to curb such abuses. The Foreign Intelligence Surveillance Act of 1978 requires that a judicial warrant be obtained by the executive branch before electronic surveillance can be used for foreign intelligence purposes. Passage of the Act has proven difficult as members of Congress, who agree on the need to curb executive discretion in the area, have divided over such issues as the showing which should be necessary to trigger a judicial warrant, the amount of protection which should be afforded to foreigners, and the proper role of the executive, judicial, and legislative branches in the area of electronic surveillance for foreign intelligence. Mr. Shapiro concludes that the Act, with some modifications, properly balances the interest of the government in national security against the fourth amendment rights of both Americans and foreigners.

Introduction

Sometime in 1978 both the Senate and the House will consider the Foreign Intelligence Surveillance Act.[1] This legisla-

*B.A. Brandeis University, 1969; M.A. University of California, 1970; J.D. University of Pennsylvania Law School, 1973. Currently counsel to the Senate Committee on Governmental Affairs, the author was actively involved in the drafting of legislation concerning foreign intelligence electronic surveillance when he served as legislative legal counsel to Senator Gaylord Nelson from October 1975-December 1977.

1 In the Senate, the legislation is S. 1566; in the House, H.R. 7308. Throughout this article, reference will be made to the Senate bill because the Senate has been the focal point of development on the issue, first during consideration of S. 3197 in the 94th Congress, and then during consideration of S. 1566 during this Congress. To date, only Senate committees have reported the legislation; therefore all references to committee hearings and reports will be to the Senate committees, unless otherwise noted. On April 20, 1978, the Senate passed S. 1566 by a vote of 95 to 1. 124 CONG. REC. S. 6014 (daily ed. April 20, 1978).

ED. NOTE: After this Article went to press, the Congress approved an amended version of S. 1566. For a discussion of the contents of the final version, *see Wiretaps Control Bill Sent to President,* 36 CONG. Q. WEEKLY REP. 2964 (1978).

tion would establish, for the first time, a judicial warrant procedure to be followed where electronic surveillance is to be used to obtain foreign intelligence information in the United States.

The impetus for such legislation is obvious. The fourth amendment requires that before the government invades a person's privacy, when that person's expectation of privacy is reasonable, a judicial warrant based on probable cause must be obtained.[2] However, the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities, better known as the Church Committee, found that every President since Franklin D. Roosevelt had claimed the "inherent" constitutional power to authorize warrantless electronic surveillance when he decided that the national security demanded it.[3] Although abuses of warrantless "national security" electronic surveillance first came to public attention during the Watergate investigations of the Nixon Administration,[4] the Church Committee concluded that such abuses long predated the presidency of Richard Nixon.[5]

Enactment of the Foreign Intelligence Surveillance Act by

---

2 *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Katz v. United States, 389 U.S. 347 (1967) and cases cited therein.

3 SENATE COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. No. 755, 94th Cong., 2d Sess. bk. II at 36-38, 60-61, 105-106, 121-22; bk. III at 277-93 (1976) [hereinafter cited as CHURCH COMMITTEE REPORT]. *See also* Testimony of Attorney General Levi before the Church Committee, November 6, 1975 [hereinafter referred to as Levi 1975 Testimony], *reprinted in Foreign Intelligence Surveillance Act of 1976: Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the Senate Select Comm. on Intelligence,* 94th Cong., 2d Sess. 24-29 (1976) [hereinafter cited as *1976 Intelligence Committee Hearings*].

4 The misuse of warrantless electronic surveillance was an important part of Article II of the Articles of Impeachment against Richard Nixon. *See* HOUSE COMM. ON THE JUDICIARY, REPORT ON THE IMPEACHMENT OF RICHARD NIXON, H.R. REP. No. 1305, 93rd Cong., 2d Sess. 3, 146-56 (1974).

5 The Committee had this to say:

> Since the early 1930's, intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of judicial warrant. . . . [P]ast subjects of these surveillances have included a United States Congressman, a Congressional staff member, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security. . . .

CHURCH COMMITTEE REPORT, *supra* note 3, bk. II at 12.

> The application of vague and elastic standards for wiretapping and bugging

the Ninety-fifth Congress would mark the completion of a five-year effort to respond to these abuses. In 1973 and 1974, the effort was adversarial and futile. In the wake of the revelations about Watergate, Senators Nelson (D-Wis.), Kennedy (D-Mass.), and Mathias (R-Md.), asserting that the President had no authority to disregard the fourth amendment in national security cases, introduced legislation to prohibit warrantless electronic surveillance.[6] The Nixon and Ford Administrations strongly opposed this legislation, asserting their constitutional prerogative to proceed without a warrant.[7] Both the chairman and the ranking minority member of the Senate Judiciary subcommittee to which the legislation was referred, John McClellan (D-Ark.) and Roman Hruska (R-Neb.), shared the President's view, which assured that the legislation did not escape from subcommittee.

By late 1975 it had become evident that warrantless electronic surveillance was not just an aberration of the Nixon years. Edward Levi, who had recently become Attorney General, was convinced that even if the Constitution did not require a judicial warrant in this area,[8] public confidence in intelligence operations could be restored only by establishing such a procedure.[9] The Administration and members of Con-

---

> has resulted in electronic surveillances which, by any objective measure, were improper and seriously infringed the fourth amendment rights of both the targets and those with whom the targets communicated.

Id. bk. III at 332. *See generally id.* at 273-351; CENTER FOR NATIONAL SECURITY STUDIES, THE ABUSES OF INTELLIGENCE AGENCIES 34-41 (1975) [hereinafter cited as CENTER FOR NATIONAL SECURITY STUDIES].

6 *See* S. 2820, 93rd Cong., 1st Sess. (1973) (introduced by Sen. Nelson); S. 4062, 93rd Cong., 2d Sess. (1974) (introduced by Sen. Kennedy); S. 1888, 94th Cong., 1st Sess. (1975) (introduced by Sen. Mathias); S. 743, 94th Cong., 1st Sess. (1975) (introduced by Sens. Nelson and Kennedy).

7 *See, e.g., Hearings on S. 2820, S. 3440, and S. 4062 Before the Subcomm. on Criminal Laws and Procedures and Constitutional Rights of the Senate Comm. on the Judiciary,* 93rd Cong., 2d Sess. 233-34 (1974) [hereinafter cited as *1974 Judiciary Hearings*] (testimony of Attorney General Saxbe).

8 The Supreme Court has never ruled on the issue, and the lower courts are divided. *Compare, e.g.,* Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), *cert. denied,* 425 U.S. 944 (1976) *with* United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974) and United States v. Butenko, 494 F.2d 593 (3d Cir.) (*en banc*), *cert. denied,* 419 U.S. 881 (1974). *See* notes 94-109 *infra* and accompanying text.

9 *See Foreign Intelligence Surveillance Act of 1976: Hearings on S. 743, S. 1888, and S. 3197 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 94th Cong., 2d. Sess. 8-9 (1976) [hereinafter cited as *1976 Judiciary Hearings*] (statement of Attorney General Levi).

gress began cooperative efforts to draft legislation, "agreeing to disagree" about the underlying constitutional issue. What mattered was that both agreed that legislation was needed, and that the Supreme Court's opinion in the *Steel Seizure Case*[10] recognized congressional power to legislate a warrant procedure which the President would have to follow, even if in the absence of such legislation the President might have the inherent power to proceed without a warrant.[11]

S. 3197, the Foreign Intelligence Surveillance Act, was introduced on March 23, 1976, with the bipartisan sponsorship

10 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

11 The Supreme Court rejected President Truman's argument that he had inherent constitutional authority as Commander-in-Chief to seize the nation's steel mills to insure continued production during strikes in times of war. The decision was shaped in large part by the fact that Congress had considered the possibility of seizing the steel mills and rejected it, instead passing the Taft-Hartley Act as an alternative approach to curbing labor unrest. In his concurring opinion, Justice Jackson wrote:

> When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.

343 U.S. at 637-38.

Attorney General Levi based his support for the legislation on the *Youngstown* precedent, noting:

> As you know, a difference of opinion may exist as to whether it is within the constitutional power of Congress to prescribe, by statute, the standards and procedures by which the President is to engage in foreign intelligence surveillance essential to the national security. I believe that the standards and procedures mandated by the bill are constitutional. The Supreme Court's decision in the Steel Seizure case seems to me to indicate that when a statute prescribes a method of domestic action adequate to the President's duty to protect the national security, the President is legally obliged to follow it.

Foreign Intelligence Surveillance Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 92 (1976) [hereinafter cited as *1976 House Hearings*].

Although Levi's commitment to legislation establishing a warrant procedure for foreign intelligence electronic surveillance was unprecedented for a high-ranking executive branch official, his recognition that Congress had the power to legislate curbs on the President in this area was not. In his concurring opinion in United States v. United States Dist. Court, 407 U.S. 297 (1972) (hereinafter cited as *Keith*), Justice White noted that "the United States does not claim that Congress is powerless to require warrants for surveillances that the President otherwise would not be barred by the Fourth Amendment from undertaking without a warrant." 407 U.S. at 338 n.2. Assistant Attorney General Mardian conceded that point during oral argument in an exchange with Justice White. 407 U.S. at 339 n.3.

The "inherent power" issue continues to linger. S. 3197 as introduced continued to

of congressional conservatives and liberals.[12] The bill provided for the designation by the Chief Justice of seven district court judges,[13] to whom the Attorney General, if authorized by the President, could make application for a warrant approving electronic surveillance within the United States for

---

reserve for the President "the constitutional power . . . to order electronic surveillance for the reasons stated in Section 2511(3) of Title 18, United States Code if the facts and circumstances giving rise to such order are beyond the scope of this chapter." By this provision, the Justice Department intended to reserve for the President whatever inherent power he might have in areas beyond the scope of the bill. Since the bill only applied to "electronic surveillance" as defined in the statute, in the United States, it did not reach the question of the President's power to conduct electronic surveillance against Americans or aliens abroad or the interception by the National Security Agency (NSA) of international communications. *See 1976 Judiciary Hearings, supra* note 9, at 12-13 (statement of Attorney General Levi).

Whatever the logic of the Justice Department's position, the attempt to explicitly retain some area where inherent presidential authority might still reign evoked a firestorm of protest. Most of the critics of warrantless electronic surveillance believed that there was no such inherent presidential power; the precise reason for enacting a statute was to replace the President's inherent power and discretion, which had been abused, with a statutory framework spelling out procedures to be followed before electronic surveillance in the United States could be conducted. *Id.* at 74 (statement by Senator Nelson).

Gradually, the Justice Department gave ground on this point. When S. 3197 was reported by the Judiciary Committee, it still contained a vague and troubling reservation of presidential power, but it repealed 2511(3) from existing law. The Intelligence Committee narrowed the reserved presidential power, but continued to frighten people by referring to any constitutional power the President may have to conduct electronic surveillance "if the facts and circumstances giving rise to the acquisition are so unprecedented and potentially harmful to the Nation that they cannot reasonably be said to have been within the contemplation of Congress." That apocalyptic formulation, plus the self-evident fact that it was impossible to produce examples of what the Department had in mind, remained unacceptable to many. On the eve of scheduled consideration of S. 3197 by the full Senate, Attorney General Levi informed Senators and staff involved with the bill that the Department would agree to delete that section. Benefitting from the predecessor administration's mishaps, the Carter Administration's legislation made no attempt to claim or reserve the possibility of an "inherent power" for the President to conduct warrantless electronic surveillance in the United States.

From the author's standpoint, the outcome of the debate over inherent power as the legislation developed was pre-ordained. Once a consensus emerged that legislation regulating electronic surveillance for foreign intelligence was necessary, it was anomalous and politically unacceptable to seek or retain some quantum of the unfettered executive discretion that prompted the legislation.

12 S.3197 94th Cong., 2d Sess., 122 CONG. REC. S3987 (daily ed. Mar. 23, 1976). Co-sponsors included Senators Kennedy, Nelson, Mathias, Hugh Scott, McClellan, Hruska and Robert C. Byrd.

13 *Id.* § 2523(a).

foreign intelligence purposes.[14] The judge could grant such an order only if he found that the target of the proposed surveillance was a foreign power or an "agent of a foreign power,"[15] and a Presidential appointee confirmed by the Senate certified that the information sought was foreign intelligence information which could not be obtained by less intrusive means.[16] If the judge found that the application met the standards required in the bill, surveillance could be approved for up to 90 days.[17]

Key provisions of the bill changed significantly in subsequent months,[18] but the basic framework of S. 3197 remained the same. The bill moved successfully through the Senate Judiciary[19] and Intelligence[20] Committees during the summer of 1976 but did not reach the full Senate before Congress adjourned. S. 1566, a collaborative effort by members of Congress and the new Carter Administration, was introduced on May 18, 1977. It carries forward, despite some specific, significant changes, the same basic legislative scheme.[21]

With members of Congress and the President no longer at sword's point over the "inherent power" question, rapid passage of legislation seemed possible. This has not been the case as the legislative effort has met strong resistance. This resistance is a result of a split among civil libertarians who, al-

---

14 *Id.* § 2524.

15 *Id.* § 2525(a)(i).

16 *Id.* § 2524(a)(6).

17 *Id.* § 2525(c). Extensions of orders approving electronic surveillance were also available on the same showings necessary for the original orders.

18 At all times the text will make it clear when referring to aspects of the legislation which remained constant during the legislative process. When dealing with provisions that underwent change, the various versions of the legislation as it developed will be referred to: (1) S. 3197 as introduced; (2) as reported by the Senate Judiciary Committee; (3) as reported by the Senate Intelligence Committee; (4) S. 1566, the successor legislation introduced by the Carter Administration and reported by the Judiciary Committee; or (5) S. 1566 as reported by the Intelligence Committee.

19 S. REP. No. 1035, 94th Cong., 2d Sess. (1976) [hereinafter cited as 1976 JUDICIARY REPORT].

20 S. REP. No. 1161, 94th Cong., 2d Sess. (1976) [hereinafter cited as 1976 INTELLIGENCE COMMITTEE REPORT].

21 S. 1566 was reported from the Senate Judiciary Committee on November 15, 1977. *See* S. REP. No. 604, 95th Cong., 1st Sess. (1977) [hereinafter cited as 1977 JUDICIARY REPORT].

though strongly advocating legislative controls on electronic surveillance, disagree sharply over whether the legislation being developed would provide adequate protection against the invasion of personal rights by electronic surveillance.[22]

Parallelling the approach taken by Congress and the Executive in the development of the legislation, this Article looks past the question of whether the President has inherent power to authorize warrantless electronic surveillance.[23] It attempts instead to analyze the major questions of law and policy posed by the fourth amendment which have divided Congress during the development of the legislation.

The Article has two parts. Part I establishes the framework for the current legislative efforts. First, it discusses the importance which every administration from Roosevelt to Carter has accorded to electronic surveillance as an investigative tool to gather foreign intelligence. Second, it examines the precise reach of current case law which limits the President's power to authorize warrantless electronic surveillance. This examination reveals what dangers to civil liberties are past and what threats remain under current case law.

Part II of the Article analyzes the following major fourth amendment questions presented in the legislation. First, the

---

22 In hearings before the Intelligence Committee, for example, Senators Kennedy and Mathias regarded the bill as the best possible bill and a major safeguard for civil liberties, while then Senators Mondale and Tunney condemned it in no uncertain terms. *1976 Intelligence Committee Hearings, supra* note 3, at 4-22, 52-73.

23 There has been no shortage of scholarly analysis on the "inherent power" issue. *See, e.g.*, H. SCHWARTZ, TAPS, BUGS AND FOOLING THE PEOPLE 35-42 (1977); Donner, *Electronic Surveillance: The National Security Game,* 2 CIV. LIB. REV. 15 (1975); Gasque, *Wiretapping: A History of Federal Legislation and Supreme Court Decisions,* 15 S.C.L. REV. 593 (1962); Nesson, *Aspects of the Executive's Power over National Security Matters: Secrecy Classifications and Foreign Intelligence Wiretaps,* 49 IND. L. REV. 399, 411-21 (1974); Theoharis & Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception,* 14 WAYNE L. REV. 749 (1968); Note, *Foreign Security Surveillance–Balancing Executive Power and the Fourth Amendment,* 45 FORDHAM L. REV. 1179 (1977); Note, *The Fourth Amendment and Judicial Review of Foreign Intelligence Wiretapping: Zweibon v. Mitchell,* 45 GEO. WASH. L. REV. 55 (1976); Note, *Foreign Security Surveillance and the Fourth Amendment,* 87 HARV L. REV. 976 (1974). The constitutional and policy questions which arise when legislating in this area have received much less attention. *See, e.g.*, Comment, *Present and Proposed Standards for Foreign Intelligence Electronic Surveillance,* 71 N.W.L. REV. 109 (1976).

fourth amendment requires that before a search takes place, absent exigent circumstances, a judicial warrant based on probable cause must be obtained. In framing the legislation, the question becomes, does that constitutional requirement mean probable cause of involvement in *criminal* activity? If not, should such a standard be used as a matter of policy?[24]

Second, it is now well established that the fourth amendment protects foreign visitors and nonresident aliens, as well as citizens and resident aliens.[25] But foreigners are more often likely to be fruitful sources of valuable foreign intelligence than Americans. Those drafting the legislation have had to decide to what degree it is constitutionally permissible to give foreigners less protection than citizens and resident aliens. And if permissible, to what degree is it advisable?[26]

Third, at the heart of the fourth amendment is the premise that there should be a prior judicial check on the discretion of the executive.[27] The legislation poses the problem of how broad the judge's inquiry should be. Clearly the judge bears the responsibility of insuring that the targets of electronic surveillance are proper, but should the judge be required to question executive assertions that the information sought is important foreign intelligence?[28]

Finally, the fourth amendment requires that before a judge issues a warrant, the places to be searched and objects to be seized must be "particularly" described. This particularity requirement has always co-existed uneasily with the sweeping, general nature of electronic surveillance, even in the criminal context. Electronic surveillance for intelligence purposes inevitably entails even more indiscriminate invasions of privacy. By what techniques can such electronic surveillance be conducted in accordance with the particularity requirement?[29]

The Article concludes that the Foreign Intelligence Surveil-

---

24 *See generally* text accompany notes 114-69 *infra*.
25 *See, e.g.*, Abel v. United States, 362 U.S. 217 (1960).
26 *See generally* text accompanying notes 170-208 *infra*.
27 United States v. United States Dist. Court, 407 U.S. 297, 317 (1972).
28 *See generally* text accompanying notes 209-44 *infra*.
29 *See generally* text accompanying notes 245-80 *infra*.

lance Act is a careful effort to safeguard civil liberties and national security and deserves enactment. The Article proposes several amendments that would strengthen the bill and might ease the fears of its critics.[30]

I. The History of National Security Wiretapping

A. *Prior to 1967: The Inapplicability of the Fourth Amendment to Electronic Surveillance*

The earliest documented electronic surveillance by the federal government was initiated by the Bureau of Prohibition, an investigative agency of the Department of Justice engaged in enforcing the Prohibition Era statutes.[31] Almost immediately, the practice of electronic eavesdropping was subjected to constitutional challenge, which reached the Supreme Court in 1928. In *Olmstead v. United States*,[32] over the dissents of Holmes and Brandeis, the Supreme Court held that the protections of the fourth amendment did not extend to electronic eavesdropping when it was accomplished without physical trespass on the premises of the target's home or business. By its 5-4 decision, the Supreme Court removed electronic surveillance, unaccompanied by physical trespass, from the purview of constitutional supervision for nearly forty years. The fourth amendment's requirement that invasions of privacy take place only after a warrant based on probable cause is obtained from a neutral magistrate was not applied in

30 The political dynamics of this legislation have been fascinating and important. The bills represented the first attempt to legislate curbs on the intelligence community in response to the disclosures of the Church Committee. As a matter of political reality it was necessary to write a bill which both civil libertarians and the intelligence community could accept; yet the gap between the two was formidable. Serious differences on virtually every major issue were aggravated by enormous mutual mistrust.

Yet it was felt that if a legislative solution for this issue could not be found, the outlook was similarly bleak for drafting badly needed charters for the intelligence agencies. Without these charters, it was questionable whether either public confidence or the morale of those in the intelligence agencies could be adequately restored.

While this analysis focuses on legal issues, the author will discuss the politics of the situation in the footnotes where illuminating.

31 *See* Thompson, *Power of the United States Attorney General to Authorize Wiretapping without Judicial Sanction*, 60 Ky. L.J. 245, 246 n.8 (1971).

32 277 U.S. 438 (1928).

this area, despite Brandeis' warning that "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping."[33]

In *Olmstead,* Chief Justice Taft noted that "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence."[34] Prompted possibly by the *Olmstead* opinion, Congress enacted the Federal Communications Act of 1934.[35] Section 605 of the Act provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purpose, effect or meaning of such intercepted communication to any person."[36] In *Nardone v. United States,*[37] the Supreme Court held that the statute applied to wiretapping by state and federal officials as well as by private persons; law enforcement officials could not escape "the plain mandate of the statute."[38] Accordingly, the Court held that the exclusionary rule against illegally seized evidence, used by the federal courts, applied to evidence obtained as the result of a wiretap in violation of section 605.[39]

Confronted with the clear holding of *Nardone,* the Justice Department under then Attorney General Jackson discontinued all wiretapping activity in March, 1940. This moratorium was short-lived.[40] The Justice Department soon adopted the view that since section 605 made it unlawful to "intercept" and "divulge" communications, the Act did not prohibit the wiretapping by agencies of the government if the material intercepted was disseminated only within the government for law enforcement purposes.[41] This ingenious in-

33 *Id.* at 476 (Brandeis, J., dissenting).

34 *Id.* at 465-66.

35 Communications Act of 1934, Pub.L.No. 73-416, 48 Stat. 1065 (1934) (codified in scattered sections of 47 U.S.C.).

36 47 U.S.C. § 605 (1977).

37 302 U.S. 379 (1937).

38 *Id.* at 383.

39 Two years later, in Nardone v. United States, 308 U.S. 338 (1939), generally known as *Nardone II,* the Court prohibited the introduction into evidence of the fruits of such wiretaps.

40 Levi 1975 Testimony, *supra* note 3, at 34.

41 *See* Donner, *supra* note 23, at 19.

terpretation of section 605 was strained at best.[42] When Jackson informed Congress of his interpretation, however, Congress considered amending section 605 but decided against it.[43] Consequently, the Justice Department's interpretation of section 605, tacitly accepted by Congress, became part of the justification for electronic surveillance for the next twenty-seven years.

At the same time, President Roosevelt in a memorandum to Jackson, spelled out the view that *Nardone* did not "apply to grave matters involving the defense of the Nation." The President authorized the Attorney General "in such cases as you may approve . . . to secure information by listening devices (directed at) the conversation or other communications of persons suspected of subversive activities against the government of the United States, including suspected spies." The directive also contained the admonition "to limit these investigations so conducted to a minimum and to limit them insofar as possible as to aliens."[44]

Shortly thereafter, the cautions suggested by President Roosevelt were thrown to the wind. In 1946, Attorney General (later Justice) Clark persuaded President Truman to expand wire-tapping authority in view of the "increase in subversive

---

42 In United States v. Butenko, 494 F.2d 593 (3rd Cir.), *cert. denied,* 419 U.S. 881 (1974), the Court set forth the Justice Department's rationale and rejected it:

> The legislative history relating to § 605 is bereft of any suggestion that Congress intended to fashion a rule of evidence. On the contrary, the language of the statute seems to reach any divulgence, by way of introduction into evidence or otherwise, of information obtained by way of wiretaps that would compromise the privacy of those whose conversations are overheard. Furthermore, the fact that the restrictions contained in § 605 have been enforced through the exclusion of evidence at criminal trial should not obscure the broader aim of the statute—the discouragement of the interception of communications.

494 F.2d at 599-600. *See also* CHURCH COMMITTEE REPORT, *supra* note 3, bk. II at 36.

43 *To Authorize Wiretapping: Hearings on H.R. 2266, 3099 Before Subcomm. No. 1 of the House Comm. on the Judiciary,* 77th Cong., 1st Sess. 112 (1941); CHURCH COMMITTEE REPORT, *supra* note 3, bk. II, at 37.

44 Memorandum from President Roosevelt to Attorney General Jackson, May 21, 1940, on file in the Truman Library, Independence, Mo., *quoted at length in* Theoharis & Meyer, *supra* note 23, at 759. While Roosevelt's memorandum made no reference to the use of microphones and other bugging devices, the Department construed the language to be broad enough to permit the use of that technique as well as conventional telephone wiretapping. Levi 1975 Testimony, *supra* note 3, at 24.

activities." In obtaining Truman's concurrence, Clark supplied the President with a copy of Roosevelt's directive with the limitations deleted.[45]

Roosevelt's memorandum is the first example of an executive determination that where electronic surveillance was concerned, national security demanded an exception to otherwise applicable rules. Clearly there was no national security exception in section 605, but Roosevelt and his Attorney General found it inconceivable that the constraints of a statute could bind the President where a serious threat to national security existed. In later years, when the provisions of the fourth amendment were held to apply to electronic surveillance, the same rationale was used to justify treating national security situations as an exception to the constitutional application as well.

Almost from the beginning of the use of electronic surveillance, attempts were made to place effective limits on the executive. In 1941, the House Judiciary Committee considered several bills which would have legalized wiretapping, but would also have required a judicial warrant. FBI Director Hoover strongly opposed this legislation, arguing that "certain Federal Judges . . . are not as close-mouthed as they should be."[46] Attorney General Jackson also opposed the legislation but from a different perspective. In his view, as noted above, stringent wiretap standards were not needed if the purpose of the surveillance "was to gather intelligence that would not be used as evidence in court." No bill was reported out of Committee.[47]

In 1953, the House Judiciary Committee held hearings on wiretapping for national security.[48] Debate centered on the question of whether to require court approval of wiretaps or to

45 Letter from Attorney General Clark to President Truman, July 17, 1946, on file in the Truman Library, Independence, Mo., *reprinted in* Theoharis & Meyer, *supra* note 23, at 760-61.

46 CHURCH COMMITTEE REPORT, *supra* note 3, bk. III, at 280-81.

47 *See* note 43 *supra* and accompanying text.

48 According to one commentator, increasing publicity concerning the "Orwellian" potential of new eavesdropping devices had set off this new round of debate; "the general response was a mixture of technological fascination and civic alarm." A. WESTIN, PRIVACY AND FREEDOM 180 (1967).

vest wiretap authority in the Attorney General. Ultimately, the House passed legislation requiring a court order by a vote of 221-166 but the Senate was unable to get a bill out of committee.[49]

Around this same time, Attorney General McGrath informed the FBI that he would not authorize trespassory microphone surveillance because he believed it violated the fourth amendment.[50] This decision controlled Department policy from February, 1952 to May, 1954, when it was reversed by Attorney General Brownell. In a memorandum to Director Hoover, Brownell instructed him that the Bureau was authorized to conduct trespassory microphone surveillances. The Attorney General stated that "considerations of internal security and the national safety are paramount and, therefore, may compel the unrestricted use of this technique in the national interest."[51]

During the Johnson Administration, a presidential memorandum to all federal agencies required that wiretapping be limited to national security cases and that the consent of the Attorney General be obtained in each case. The memorandum went on to state that the use of bugging devices to overhear conversations not communicated by wire raised substantial and unresolved questions of constitutional interpretation.[52] Public concern over invasions of privacy and the hearings chaired by Senator Edward Long prompted FBI Director Hoover to advise Attorney General Katzenbach that "we have discontinued completely the use of microphones."[53] The Attorney General evidently disapproved of Hoover's decision, responding:

> It is my understanding that such devices (wiretaps and microphones) will not be used without *my authorization* although in emergency circumstances they may be subject to my later ratification. At this time I believe it is de-

49 *See* Westin, *Wire-Tap: The House Approves,* NEW REPUBLIC, April 19, 1954, at 7; A. WESTIN, PRIVACY AND FREEDOM 180 (1967).

50 Levi 1975 Testimony, *supra* note 3, at 23.

51 *Id.*

52 *Id.* at 26.

53 *Id.*; CHURCH COMMITTEE REPORT, *supra* note 3, bk. III, at 307-10.

> sirable that such techniques be confined to the gathering of intelligence in national security matters, and I will continue to approve all such requests in the future as I have done in the past. *I see no need to curtail any such activities in the national security field.*[54]

Each attempt to limit electronic surveillance failed. In large measure, these efforts failed because every administration, whatever its feelings about the use of electronic surveillance in ordinary criminal cases, defended strongly the need for such techniques in national security cases. In principle, the proposition was probably unassailiable; few would favor renouncing an important intelligence technique in cases where the security of the nation was involved.[55] Unfortunately, while claiming the authority to conduct electronic surveillance without judicial approval, each administration showed its inability or unwillingness to distinguish true threats to the national security from situations where it just seemed advantageous to tap or bug.

As a result, the abuses uncovered by investigations of Watergate and the intelligence community occurred. Embassy taps to gather foreign intelligence were used as fruitful sources of political intelligence.[56] Prior to Richard Nixon's obsession with ferreting out news leaks, the Kennedy and Johnson Administrations tapped the phones of newsmen, in a futile effort to track down the source of leaks.[57] Extensive surveillance was directed at Dr. Martin Luther King from 1963 to 1968 in an effort to gather material which could be used to discredit him.[58] The FBI engaged in long-term elec-

54 *Id.*

55 As Professor Spritzer, a leading critic of electronic surveillance, wrote:

> Many Americans doubtless have serious reservations about wiretapping and bugging by police officers.... But when it comes to the protection of defense secrets, espionage, and counter-espionage there is apparently wide acceptance of the idea that the game is a special and dangerous one, and that ordinary rules and restraints go by the board.

Spritzer, *Electronic Surveillance By Leave of the Magistrate: The Case in Opposition*, 118 U.PA. L.REV. 169, 197 (1969).

56 CENTER FOR NATIONAL SECURITY STUDIES, *supra* note 5, at 35; CHURCH COMMITTEE REPORT, *supra* note 3, bk. II, at 229-32; bk. III, at 313-14.

57 CHURCH COMMITTEE REPORT, *supra* note 3, bk. II, at 201; bk. III, at 321-22.

58 *Id.* bk. II, at 199, 272-73; bk. III, at 131-54.

tronic surveillance of the Socialist Workers Party, whose only "crime" was a political ideology which the Bureau found repugnant.[59] In all these situations of abuse, "national security" was the justification claimed.[60]

B. Olmstead *Rejected: From* Berger *and* Katz *to* Keith

In 1967, the Supreme Court decided two cases, *Berger v. New York*[61] and *Katz v. United States*,[62] which reversed the Court's historic abdication in *Olmstead*. At issue in *Berger* was the constitutionality of a New York statute which authorized eavesdropping for periods of up to sixty days based on a sworn statement that there was "reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof. . . ."[63] A closely divided court struck down the New York statute, concluding that, among other things, it was incompatible with the fourth amendment's requirement of particularity. In the majority opinion written by Justice Clark, the Court stated,

> [t]he New York statute . . . lays down no requirement for particularity in the warrant as to what specific crime has been or is being committed, nor "the place to be searched," or "the persons or things to be seized" as specifically required by the Fourth Amendment. The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very na-

---

59 CENTER FOR NATIONAL SECURITY STUDIES, *supra* note 5, at 35; CHURCH COMMITTEE REPORT, *supra* note 3, bk. II, at 180.

60 As Professor Herman Schwartz noted after reciting the most troubling cases:

> All of this was done in the name of national security. In reality, it was aimed again and again at dissent and association. . . . As the Church Committee put it, 'the Bureau chose sides in the major social movements of the last 15 years and then attacked the other side with the unchecked power at its disposal.' . . .The number of people and conversations overheard is incalculable, but it must be enormous.

H. SCHWARTZ, TAPS, BUGS AND FOOLING THE PEOPLE 37-38 (1977).

61 388 U.S. 41 (1967).

62 389 U.S. 347 (1967).

63 N.Y. CODE CRIM. PROC. § 813-a (1958) (repealed 1968).

> ture eavesdropping involves an intrusion on privacy that is broad in scope.[64]

The Court found the statute infirm because of the continuous nature of the surveillance permitted. A sixty-day authorization period was unacceptable, because it was in effect a series of searches and seizures, pursuant to one finding of probable cause.[65] Additionally, during this long, continuous period, the conversations of any and all people coming into the area of surveillance would be intercepted, regardless of their connection to the crime under investigation.[66]

In *Katz v. United States*[67] petitioner challenged his conviction for a gambling offense on the ground that certain evidence that had been illegally seized by the FBI was used against him at trial. The FBI had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. Because no trespass had occurred, the government argued that, under *Olmstead,* the petitioner's fourth amendment rights were not

---

64 388 U.S. at 55-56.

65 *Id.* at 59.

66 In contrast, the Court compared the New York statute to much more easily justified electronic surveillance which had been approved by the Court in Osborn v. United States, 385 U.S. 323 (1966). In *Osborn,* the Court upheld the use of a recording device by a person serving as a federal agent involved in a conversation with a target because a judicial order had been obtained to investigate a "specific criminal offense directly and immediately affecting the administration of justice in the federal court." The eavesdropping was restricted to the "limited purposes outlined in" the order and the type of conversation was described with particularity so that "the officer could not search unauthorized areas." Most importantly, "the order authorized one limited intrusion rather than a series or continuous surveillance . . . a new order was issued when the officer sought to resume the search and probable cause was shown for the succeeding one." 388 U.S. at 57. *Osborn,* however, should be viewed as a plainly atypical case. Professor Schwartz noted that:

> Although *Osborn* involved the recording of a conversation by one who was participating in it, which was of course easy to describe with particularity in advance, the *Berger* Court seemed to attach no significance to this distinction. Rather, it implied that the procedures used in *Osborn* should be followed in all cases, even when none of the parties consented to the interception.

Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455, 459 (1969) [hereinafter cited as Schwartz, *Law and Order*].

67 389 U.S. 347 (1967).

implicated. Tracing its decisions since *Olmstead,* the Court concluded that the trespass doctrine had been "eroded" to the point where it had no continuing vitality as a principle of constitutional law.[68] Rather, what mattered was that the government's electronic surveillance had breached the privacy on which Katz reasonably relied while in the phone booth. Therefore, a search and seizure had occurred, triggering the protections of the fourth amendment.

The Government argued that even if the fourth amendment applied, the agents' behavior satisfied the amendment's requirement of reasonableness. Before beginning the surveillance, the agents had established a strong degree of probability that Katz was using that phone to transmit gambling information.[69] In addition, the surveillance had been limited in scope and duration, to insure that only petitioner's conversations were overheard. The Court acknowledged that under the precise circumstances, a magistrate could have authorized the "very limited search and seizure" which was apparently involved.[70] But while it was "apparent that the agents in this case acted with restraint . . . this restraint was imposed by the agents themselves, not by a judicial officer."[71] The Court stressed that the "procedure of antecedent justification . . . is central to the fourth amendment," and is "a constitutional precondition of the kind of electronic surveillance involved in this case."[72]

Taken together, *Berger* and *Katz* spelled out a standard for electronic surveillance that was extraordinarily difficult for law enforcement agencies to meet.[73] The Court had strongly indicated its view that electronic surveillance could be

68 *Id.* at 353.
69 *Id.* at 354.
70 *Id.*
71 *Id.* at 356.
72 *Id.* at 359.
73 In his dissenting opinion in *Berger,* Justice White wrote that:

> Today's majority does not, in so many words, hold that all wiretapping and eavesdropping are constitutionally impermissible. But by transparent indirection it achieves practically the same result by striking down the New York statute and imposing a series of requirements for legalized electronic surveillance that will be almost impossible to satisfy.

388 U.S. at 113.

squared with the fourth amendment only where the conversations to be overheard could be described specifically and the period of interception could be strictly limited.[74] But the *Katz* decision made no change in the status of national security wiretaps. The majority noted that it was not reaching the question of "whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment" in national security cases.[75]

In Title III of the Omnibus Crime Control and Safe Streets Act, Congress responded to *Berger* and *Katz,* by establishing a procedure for obtaining judicial authorization for electronic surveillance in cases of certain crimes.[76] However, Congress treaded carefully in the national security area. In 18 U.S.C. section 2511(3),[77] commonly referred to as the "national security disclaimer," Congress neither authorized national security electronic surveillance nor prohibited it. As the Supreme Court would subsequently hold, "nothing in § 2511(3) was intended to *expand* or to *contract* or to *define* whatever presidential surveillance powers existed in matters affecting the national security."[78] The question of whether the President

74 Dash, *Katz–Variations of a Theme by Berger,* 17 CATHOLIC L. REV. 296, 311 (1968).

75 389 U.S. at 358 n.23.

76 18 U.S.C. §§ 2510-2520 (1970).

77 18 U.S.C. § 2511(3) provides

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143, 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

78 United States v. United States Dist. Court, 407 U.S. 297, 308 (1972) (The *Keith* case) (emphasis in original). *See also* the reference to national security matters in emergency situations found in 18 U.S.C. § 2518(7).

had "inherent power" in national security situations, which would justify disregarding the warrant procedure otherwise required by the fourth amendment, remained open.

In *United States v. United States District Court,*[79] (better known as the *Keith* case) the Court provided a significant, if only partial, answer. The issue posed for the Court was whether the President had power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval.[80] The Court recognized that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court."[81] Nevertheless, the majority concluded that the requirements of the fourth amendment could not be ignored.

The Court began by noting that the basic premise of the fourth amendment was that those involved in investigating and prosecuting could not be trusted to judge the reasonableness of the searches and seizures they proposed. For this reason, the fourth amendment interposed the judgment of a neutral magistrate.[82] The protections afforded by the judicial warrant procedure were particularly important in this area because "[n]ational security cases . . . often reflect a convergence of first and fourth amendment values not present in cases of 'ordinary' crime. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' "[83]

Because the "Fourth Amendment is not absolute in its terms,"[84] the Court carefully considered the government's justification for dispensing with a warrant requirement. The government urged three principal grounds for finding that warrants were incompatible with the President's responsibilities to meet domestic threats to national security: the surveillance was intended to gather intelligence, rather than evidence for

79 407 U.S. 297 (1972).
80 *Id.* at 299.
81 *Id.*
82 *Id.* at 315-17.
83 *Id.* at 313-14.
84 *Id.*

specific prosecutions; the judiciary lacked the expertise to determine the extent of a threat to national security and the need for a surveillance; and requiring the government to present national security information to a court increased the possibility of a security leak.

The Supreme Court rejected these contentions as insufficient to outweigh the fundamental fourth amendment safeguard of prior review by a neutral magistrate. Responding *seriatim* to the government's arguments, the Court noted first that official surveillance posed a serious threat to constitutionally protected rights, whether undertaken for intelligence gathering or criminal investigation.[85] Second, there was no reason to believe that federal judges would be insensitive to the potential dangers involved in a domestic security case.[86] Third, federal judges had considerable experience in keeping matters confidential in sensitive law enforcement cases, and there was every reason to think they would be particularly conscious of security problems in national security cases.[87]

Even while finding that the fourth amendment demanded a warrant procedure in domestic security cases, the Court recognized that domestic security surveillance may involve different policy and practical considerations than the surveillance of "ordinary crime."[88] After noting several potential ways in which intelligence surveillance could differ from surveillance for criminal evidence, the Court stated,

> [g]iven these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of government for intelligence information and the protected rights of our citizens. For the warrant application may

85 *Id.* at 320.

86 *Id.* at 320-21.

87 If the involvement of clerical personnel posed a security threat, this problem could be met by having the government provide the necessary clerical assistance. *Id.*

88 *Id.* at 322.

> vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.[89]

Keith represented a vital rebuke to an exercise of presidential power which had been seriously abused. At the same time, while asserting the applicability of the fourth amendment, the Court made it clear that Congress had great latitude in legislating a warrant requirement for electronic surveillance for domestic security. In effect, the Court chose a middle course between the Justice Department's view that no warrant was required and the civil libertarians' view that the stringent requirements of *Berger* and *Katz* should apply equally in the intelligence area.[90] This approach would assume paramount importance in the debate over S. 3197 and S. 1566.

C. *Responding to* Keith: *From* Brown *and* Butenko *to* Zweibon

The *Keith* case dealt explicitly only with the domestic aspects of national security. It did not reach the question of whether a warrant was required "with respect to activities of foreign powers or their agents."[91] Nevertheless, the point-by-point consideration and dismissal of the government's claims in *Keith* did not suggest any reason why the same analysis would not require a warrant in the case of electronic surveillance for foreign intelligence.

Privately the Justice Department appeared to recognize the possibility that *Keith* would apply to electronic surveillance for foreign intelligence.[92] Nonetheless, because the executive

---

89 *Id.* at 322-23.

90 As one commentator noted, "the Court's invitation to Congress to dilute probable cause standards and to tailor warrant procedures to executive needs may dissatisfy Fourth Amendment purists, but in fact it is the strategic core of the opinion." Nesson, *Aspects of the Executive's Power over National Security Matters: Secrecy Classifications and Foreign Intelligence Wiretaps*, 49 IND. L. REV. 399, 412 (1974).

91 407 U.S. at 308, 309 n.8.

92 One year after the decision in *Keith*, Assistant Attorney General Dixon wrote the following:

> the reasoning in the *Keith* case itself suggests that the Court may not be readily persuaded of the Government's case. Although it is true that the

branch believed that warrantless national security surveillance was essential, the Department publicly took the position that such surveillance was constitutional except as explicitly covered by the *Keith* decision.[93]

The Department's view soon received judicial support. In the 1973 decision of *United States v. Brown,*[94] in an opinion by then-Judge Griffin Bell, the Court of Appeals for the Fifth Circuit concluded that the President had the constitutional power to authorize warrantless electronic surveillance for foreign intelligence flowing from his roles as commander-in-chief and head of foreign policy. The Fifth Circuit had reached the same result three years before,[95] but the *Keith* opinion had intervened. Judge Bell's opinion made reference to *Keith,* but the *Keith* analysis—the careful consideration of whether there was something about intelligence wiretapping which justified dispensing with a warrant—was completely ignored. Instead, the Court simply asserted that "[r]estrictions upon the President's power which are appropriate in cases of domestic security become artificial in the context of the international sphere."[96]

The next year, in *United States v. Butenko,*[97] the Third Cir-

---

> Court specifically reserved the foreign intelligence issue, at no point did it volunteer any reasons as to why, as a matter of constitutional law it might be willing to make this distinction when presented with a proper case. To the contrary, the reasoning in *Keith* seems to anticipate and reject arguments the Department is making at this time in the 'foreign intelligence' cases in the lower courts.

Memorandum of Robert Dixon to Attorney General Elliott Richardson, May 1973, quoted in testimony of Senator Gaylord Nelson, *1974 Judiciary Hearings, supra* note 7, at 55.

93 Attorney General Richardson expressed the Department's view:

> In general, before I approve any new application for surveillance without a warrant, I must be convinced that it is necessary (1) to protect the nation against actual or potential attack or other hostile acts of a foreign power; (2) to obtain foreign intelligence information deemed essential to the security of the United States; or (3) to protect national security information against foreign intelligence activities. 18 U.S. C. § 2511(3).

Department of Justice Press Release, Sept. 12, 1973, reproduced in 14 CRIM. L. REP. 2043 (BNA 1973).

94 484 F.2d 418 (5th Cir. 1973).

95 United States v. Clay, 430 F.2d 165, 170-72 (5th Cir. 1970), *rev'd on other grounds,* 403 U.S. 698 (1971).

96 484 F.2d at 426.

97 494 F.2d 593 (3d Cir. 1974).

cuit, which had not previously considered the question, reached the same result as the Fifth. The majority opinion acknowledged that requiring prior approval of electronic surveillance might serve some useful purposes, but concluded it was preferable "to rely, at least in the first instance, on the good faith of the Executive"[98] and the sanctions for illegal surveillance discovered after the fact.[99]

In 1975, however, those who favored a broad interpretation of the meaning of *Keith* won a major victory before the D.C. Court of Appeals in *Zweibon v. Mitchell.*[100] That case involved a challenge to the constitutionality of presidentially-approved warrantless electronic surveillance of the Jewish Defense League (JDL). In a campaign of concerted opposition to the Soviet Union's limits on Jewish emigration, the JDL was carrying out both peaceful demonstrations and more violent activities directed at Soviet installations in this country. The JDL members were Americans and there was no evidence that they were functioning as agents or at the behest of another country. Nevertheless, the Administration decided to wiretap the leaders of the organization.

In justifying these wiretaps, the Justice Department argued that the organization's activities threatened serious disruption of relations between the United States and the Soviet Union; that the President as commander-in-chief had the inherent power to authorize electronic surveillance to obtain information about the threat; and that the *Keith* decision did not question the President's authority where the "foreign aspects of our national security" were concerned. The District Court agreed, but the Court of Appeals for the District of Columbia, sitting *en banc,* reversed, holding that a warrantless wiretap

98 *Id.* at 605.

99 Critics of the result could take some solace in the penetrating opinion by Judge Gibbons, dissenting in part, in which he wrote the following:

> According to the Supreme Court (in *Keith*) a President in Lincoln's position, faced with an internal insurrection, remains subject to judicial review of his agents' compliance with the Fourth Amendment. But according to the majority, a peace-time President can decide, free of either congressional control or judicial review, what invasions of privacy are reasonable in the interest of his conduct of foreign affairs.

Id. at 629-30.

100 516 F.2d 594 (D.C. Cir. 1975).

against a domestic group which is neither the agent nor the collaborator of a foreign power violated the fourth amendment, even if it is authorized by a presidential directive.[101]

The *Zweibon* opinion carefully demonstrated the faulty analysis and lack of attention to *Keith* which characterized *Brown* and *Butenko.* The opinion concluded that the line of cases, exemplified by *United States v. Curtiss-Wright Export Corporation,*[102] generally cited as standing for the primacy of the President in foreign affairs, actually involved only the exercise of presidential power pursuant to congressional authorization. Moreover, despite their expansive dicta, even those cases noted that presidential power "like every other governmental power, must be exercised subordinate to the applicable provisions of the Constitution."[103] The Court then rejected the government's argument that the fourth amendment required "reasonableness," but not a judicial warrant. The fourth amendment decisions stood for the "presumption . . . that a warrant should be obtained whenever possible,"[104] and that the warrant could be dispensed with only in exigent circumstances.

Applying the *Keith* analysis point-by-point, the Court concluded that a warrant would not "unduly fetter" the legitimate functioning of the government and was constitutionally required in the circumstances at hand.[105] The plurality recognized that its analysis would suggest that in the absence of exigent circumstances, all foreign intelligence electronic surveillance must be conducted pursuant to a judicial warrant, "irrespective of the justification for the surveillance or the importance of the information sought."[106] Nevertheless, the Court's holding was limited to situations in which the targets

---

101 *Id.* at 614.

102 299 U.S. 304 (1936); *see also* Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948).

103 299 U.S. at 320, quoted in *Zweibon,* 516 F.2d at 621.

104 *Id.* at 631. *See also* Cady v. Dombrowski, 413 U.S. 433, 439 (1973), which, in effect, said that the requirement of "reasonableness" normally is not satisfied unless a search is authorized by a valid warrant.

105 516 F.2d at 651.

106 *Id.*

of surveillance were neither agents nor collaborators of a foreign power.

Zweibon was, of course, not a Supreme Court opinion. Furthermore, it did not resolve the ultimate question of whether the President has "inherent" constitutional power to authorize warrantless foreign intelligence electronic surveillance. Nonetheless, it was an extraordinarily important opinion. Prior to *Zweibon,* the government claimed the power to proceed without a warrant in all cases affecting foreign relations.[107] The Justice Department's claim co-existed uneasily with the reasoning of *Keith.*[108] However, given the importance that Presidents and the Justice Department had accorded warrantless electronic surveillance as an intelligence tool, it was inevitable that administrations would argue that everything not prohibited by *Keith* was permitted. *Zweibon* seriously challenged this premise.

Nevertheless, if *Zweibon* clarified this situation by reducing the range of executive discretion, the potential threat posed by warrantless electronic surveillance to first and fourth amendment freedoms still remained. *Zweibon* left the Justice Department room to argue that the President had the "inherent" power to authorize the warrantless electronic surveillance of those Americans assisting a foreign power or foreign-based political group. Under Edward Levi, this was the policy taken by the Department after *Zweibon.*[109]

Few people questioned Levi's commitment to personally re-

107 *See* the Justice Department's standard in such situations, at note 93 *supra.*

108 *See* notes 92-93 *supra* and accompanying text.

109 Attorney General Levi described the Justice Department's procedures for reviewing requests for electronic surveillance in this way:

> Under the standards and procedures established by the President, the personal approval of the Attorney General is required before any nonconsensual electronic surveillance may be instituted within the United States without a judicial warrant. All requests for surveillance must be made in writing by the Director of the Federal Bureau of Investigation and must set forth the relevant factual circumstances that justify the proposed surveillance. Both the agency and the Presidential appointee initiating the request must be identified. Requests from the Director are examined by a special review group which I have established within the office of the Attorney General. Authorization will not be granted unless the Attorney General has satisfied himself that the requested electronic surveillance is

view applications for warrantless electronic surveillance and require scrupulous evidence indicating probable collaboration.[110] Nevertheless, in assessing the need for legislative controls, the crucial point was that the executive branch could still proceed unilaterally to target Americans for electronic surveillance if it concluded that there was some link or collaboration with a foreign power. Levi was acting as a *de facto* judge, looking for probable cause to believe that collaboration was taking place. But there was no guarantee that other Attorneys General would be as careful, particularly as the memory of abuses faded. All too easily, the requirement of collaboration might degenerate to the point that electronic surveillance would be permitted on the showing that an American had a casual meeting or a social relationship with an "agent of a foreign power."

Recent events underscore these concerns. Although the Carter Administration has strongly advocated passage of S. 1566, in the interim it has promulgated an executive order which would permit the warrantless electronic surveillance of "agents of a foreign power." Unlike S. 1566, in which the definition of this crucial term has been painstakingly reworked again and again, the term is undefined in the executive or-

---

necessary for national security or foreign intelligence purposes important to national security.

In addition, the Attorney General must be satisfied that the subject of the surveillance is either assisting a foreign power or foreign-based political group, or plans unlawful activity directed against a foreign power or foreign-based political group. Finally, he must be satisfied that the minimum physical intrusion necessary to obtain the information will be used.

All authorizations are for a period of ninety days or less, and the specific approval of the Attorney General is again required for continuation of the surveillance beyond that period. The Attorney General has also been directed to review all electronic surveillance on a regular basis to ensure that the aforementioned criteria are satisfied. Pursuant to the mandate of *United States v. United States District Court,* electronic surveillance without a judicial warrant is not conducted where there is no foreign involvement.

Letter from Attorney General Levi to Senator Kennedy, June 29, 1975, *reprinted in* 1976 JUDICIARY REPORT, *supra* note 19, at 12, n.5.

110 Reports would subsequently emerge indicating that Levi's stringent standards drove the intelligence community to near distraction. *See Intelligence Aides Score Levi Curb on Wiretapping*, N.Y. Times, Dec. 9, 1976, at 1, col. 2; *Spooks v. Zilch*, N.Y. Times, Dec. 10, 1976, §A, at 27, col. 1.

der.[111] It has recently become clear that President Carter personally authorized, on the advice of the Attorney General, the warrantless television surveillance of Ronald Humphrey, a USIA employee suspected of conspiring to pass secrets to the North Vietnamese. Attorney General Bell acknowledged that under S. 1566, a warrant would have been required for the surveillance of Humphrey, but that, in the absence of a legislative enactment, the Carter Administration would claim and defend vigorously the inherent authority to proceed without a warrant.[112]

No one has yet seriously questioned whether the Administration could have obtained a warrant in the Humphrey case. Nonetheless, the readiness to proceed without a warrant and resurrect the spectre of "inherent power" is disquieting. Moreover, given the ill-defined nature of the executive order, it is by no means clear what showing the Attorney General will require before approving electronic surveillance. It is precisely this kind of concern which necessitates the enactment of a legislative standard and the interposition of a detached, judicial check on the executive branch.

Since *Zweibon,* many critics have perceived the need for an accommodation between the executive branch and congressional critics of warrantless electronic surveillance. *Zweibon* told a law-abiding President that he had significantly less leeway to proceed without a warrant than he could have claimed previously. While legislation on the subject would further tie a President's hands, the impact would be less dramatic than it would have been prior to *Zweibon.*[113]

Congressional liberals also have had reason to seize the day. The possibility of future mischief remained after *Zweibon.* While civil libertarians felt they knew what the ul-

---

111 For a cogent analysis of the Carter executive order reorganizing intelligence functions, *see Intelligence Needs Reform, Reforms Need Intelligence,* NEW REPUBLIC, Feb. 11, 1978, at 5.

112 *See Carter vs. The Constitution,* NEW REPUBLIC, March 4, 1978, at 9.

113 Additionally, the political benefits that the Administration could derive from actively cooperating to fashion legislation in this area were substantial. "Inherent" presidential power was widely considered to be one of the root evils of the Watergate scandal. Legislation renouncing the claim of inherent power in this area would be a dramatic break with the past.

timate decision on the constitutionality of warrantless electronic surveillance to gather foreign intelligence *should* be, they had no great confidence about how the Supreme Court *would* rule. *If* the Court would rule was a separate question. By early 1976, the Court had three times refused certiorari on the issue. Against this legal and political background the fourth amendment issues posed by national security wiretapping can be analyzed.

II. National Security Wiretap Legislation and the Fourth Amendment

During consideration of the Foreign Intelligence Surveillance Act Congress must strike a balance between the government's need for foreign intelligence information and the fourth amendment rights of both Americans and foreigners. The following section focuses on four major fourth amendment issues. These are concerned with the showing which should be required to trigger a judicial warrant, the amount of protection which ought to be afforded to foreigners, the scope of the judiciary's inquiry during a warrant process, and procedures to be followed to ensure that only foreign intelligence information is intercepted, retained, and disseminated.

A. *The Standard of Probable Cause*

Proponents of the Foreign Intelligence Surveillance Act hail it as a major step forward because it would entrust the final decision whether to permit electronic surveillance to the judicial branch, consistent with the demands of the fourth amendment. However, the involvement of the judiciary in the process becomes a meaningful protection for civil liberties only if the showing required of the executive branch before electronic surveillance can take place is strict enough to deny all but the most necessary invasions of a person's privacy. The major issue for Congress to resolve, and the issue which has proven most controversial, is what standard of probable cause must be met by the executive branch before electronic surveillance will be permitted.

The Supreme Court opinion in *Keith* makes it clear that Congress is not constitutionally obligated to incorporate a

criminal standard of probable cause in the legislation. In *Keith,* the Supreme Court sanctioned—indeed, seemed to invite—a warrant procedure for electronic surveillance to gather intelligence that departed from the criminal standard of probable cause. The Court noted that

> [t]he gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.
>
> . . . .
>
> . . . It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of [Title III] but should allege other circumstances more appropriate to domestic security cases. . . .[114]

Congress, then, has wide latitude to fashion a warrant procedure, assuming the procedure contemplates some meaningful judicial involvement. But everything that is constitutionally permissible is not necessarily desirable policy. Regardless of what the Court said in *Keith,* the only current statutory authority for electronic surveillance, Title III, incorporates a criminal standard of probable cause. Congress bears the responsibility for determining whether a departure from the criminal standard will be santioned for the first time in the area of electronic eavesdropping. Indeed, it can be argued that Congress assumes particular responsibility to consider the fourth amendment issue carefully, precisely because the Court has granted Congress such broad leeway.[115]

The American Civil Liberties Union and others who have

---

114 407 U.S. at 322-23.

115 Arguably, too, Congress bears an additional responsibility to safeguard fourth amendment rights. Since the Supreme Court's important opinion in *Keith,* which was

been critical of S. 3197 and S. 1566 have argued that traditional fourth amendment principles require that, before electronic surveillance is permitted, a court should have probable cause to believe that the proposed target is engaged in criminal activity.[116] In contrast, the legislation as written asks the court to determine whether there is probable cause to believe that the proposed target is a "foreign power" or the "agent of a foreign power." Until recently, an American citizen could have fit the bill's definition of an "agent of a foreign power" without being involved in criminal activity, although the American would have to have been committing certain "bad acts" harmful to the national security, while working for a foreign intelligence network. It has been this proposed departure from the "criminal standard" of probable cause, the so-called non-criminal standard, that has provoked most of the controversy over the legislation.

The non-criminal standard has undergone significant evolution during the legislative development of the bill. Under S. 3197 as introduced in March 1976, an American citizen, resident alien or foreign visitor would be "the agent of a foreign power," and hence the proper target of foreign intelligence electronic surveillance, if that person "pursuant to the direction of a foreign power, engages in clandestine intelligence activities, sabotage, or terrorist activities, or conspires with, assists or aids and abets such a person in engaging in such activities."[117]

---

protective of civil liberties, the Court has shown itself to be increasingly hostile to fourth amendment rights, narrowing the protection of the amendment in every case where the opportunity presented itself. *See* United States v. Ramsey, 97 S.Ct. 1972 (1977); Stone v. Powell, 428 U.S. 465 (1976); Andresen v. Maryland, 427 U.S. 463 (1976); South Dakota v. Opperman, 428 U.S. 909 (1976); United States v. Miller, 425 U.S. 435 (1976); United States v. Watson, 423 U.S. 411 (1976); Texas v. White, 423 U.S. 67 (1975).

116 Among the leading proponents of this view have been Senator Nelson, Professor Herman Schwartz, and Morton Halperin and John Shattuck representing the American Civil Liberties Union. *See, e.g., 1976 Judiciary Hearings, supra* note 9, at 29-30, 48-49; *Foreign Intelligence Surveillance Act of 1977: Hearings on S. 1566 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 95th Cong., 1st Sess. 80-81, 89-91 (1977) [hereinafter cited as *1977 Judiciary Committee Hearings*].

117 S.3197, *supra* note 12, at § 2521 (b)(1)(ii).

During the 1976 Judiciary hearings on S. 3197, this definition became the focus of grave concern. In response to the liberals' criticisms, the Senate Intelligence Committee tightened substantially the definition of "agent of a foreign power." In the version of the bill as passed by the Intelligence Committee in 1976, the definition contained an extremely narrow non-criminal standard. An "agent of a foreign power" was defined as a person engaged in *criminal* terrorist, sabotage or clandestine intelligence activities or

> a person who, acting pursuant to the direction of an intelligence service or intelligence network which engages in intelligence activities in the United States on behalf of a foreign power knowingly transmits information or material to such service or network in a manner intended to conceal the nature of such transmission under circumstances which would lead a reasonable man to believe that the information or material will be used to harm the security of the United States, or that lack of knowledge by the Government of the United States of such transmission will harm the security of the United States.[118]

With minor changes, this is the non-criminal standard which appeared in S. 1566 at the time of its introduction in May 1977 and when the Judiciary Committee reported it in November 1977. However, on March 13, 1978, the Intelligence Committee reported S. 1566 for the first time in a form that deleted the non-criminal standard for American citizens and resident aliens. In place of the non-criminal standard, an "agent of a foreign power" is defined to be any person "who knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities *involve or may involve a violation of the criminal statutes of the United States.*"[119]

The Intelligence Committee's action is unlikely to be the final word on the issue. Civil libertarians advocating a criminal standard have succeeded in first narrowing, and then

118 S. 3197, § 2521 (b)(2)(i), as reported by the Senate Intelligence Committee in 1976. 1976 INTELLIGENCE COMMITTEE REPORT, *supra* note 20.

119 S. 1566, 95th Cong., 2d Sess., § 2521 (b)(2)(b)(1) (1978) (emphasis added). *See also* S. REP. No. 95-701, 95th Cong., 2d Sess. (1978) [hereinafter cited as 1978 INTELLIGENCE COMMITTEE REPORT].

eliminating, the non-criminal standard. The Justice Department has given ground grudgingly, but steadily. There are some congressional conservatives, however, who have generally supported this bill, with misgivings, only because the Justice Department argued at length that the intelligence agencies needed a non-criminal standard, and the legislation had always contained such a standard. The Department's sudden acquiesence to a criminal standard may not satisfy the conservatives, who may seek to amend the legislation in committee in the House.

This section focuses on two questions. First, is a criminal or non-criminal standard preferable? A number of factors support the conclusion that a criminal standard is preferable. These include the dangers involved in using a standard which strays far from the criminal standard, the inapplicability of factors which have previously justified the issuance of warrants for non-criminal probable cause, and the weakness of the argument which justifies a departure from the criminal standard on the basis of the inadequacy of existing criminal laws. The second question is whether the legislation would be preferable to present procedures even if it contained a narrow non-criminal standard. Given the potential for harm inherent in the current situation where foreign intelligence electronic surveillance can occur without any legislative or judicial check, the question is not a close one. Even a narrowly-drawn non-criminal standard incorporated into a judicial warrant procedure would offer much greater protection to civil liberties than reliance on the whim of the executive branch, particularly as memory of the recent abuses fades.

1. The Potential Dangers of a Non-Criminal Standard

The principal danger stemming from the abuse of electronic surveillance is that the constitutionally protected rights of speech, association, and privacy may be unlawfully invaded. In *Keith* the Supreme Court emphasized the special dangers posed by national security wiretapping to first and fourth amendment rights.[120] The Church Committee cited numerous

120 *See* note 83 *supra* and accompanying text.

examples of cases in which wiretapping was used against political dissidents, newsmen, and others who clearly had violated no criminal laws.

The definition of criminal activity is, of course, limited by the scope of first amendment rights.[121] Confining wiretapping to instances in which there is probable cause of criminal activity gives greater assurance that first amendment rights will not be breached. Extending the right to wiretap beyond the criminal context increases the chance that first and fourth amendment rights will be violated.

The dangers inherent in using a non-criminal standard were reflected in the standard originally proposed in S. 3197. The drafters of S. 3197 tried to produce a standard which (1) would limit electronic surveillance only to those people who engaged in activities which, if not criminal, were universally regarded as illicit and (2) made it inescapably clear that such people could not be targeted for engaging in constitutionally protected activity. Nevertheless, the non-criminal standard contained in S. 3197 provoked troubling questions. If an American Jew met with a representative of the Israeli government and then sought to find out the position of a key Senator on the issue of the sale of F-15 fighters to Saudi Arabia by speaking on a confidential basis to the Senator's aide, was that person involved in "clandestine intelligence activities"?[122] If during the Vietnam war, an American went to Hanoi in an effort to find out information about American POW's, and then returned home and engaged in anti-war organizing, could the government claim these people were acting "pursuant to the direction of a foreign power"?[123] These questions reflect the fact that attempts to produce non-criminal standards for wiretapping, no matter how well intentioned, may pose threats to personal rights. Even if the standard would never be applied so as to infringe upon first amendment rights, its vagueness could exert a chilling effect on the exercise of such rights.[123a]

---

121 *See, e.g.,* Brandenburg v. Ohio, 395 U.S. 444 (1969); Cohen v. California, 403 U.S. 15 (1971); Edwards v. South Carolina, 372 U.S. 229 (1963).

122 S. 3197, *supra* note 12, § 2521 (b)(1)(ii).

123 *Id.*, §2521 (b)(1)(ii).

The use of a non-criminal standard of probable cause poses a second danger. Public confidence in the intelligence community remains low after the revelations of the Church Committee report. A crucial policy consideration is the need to reassure the public that intelligence operations will be carried out in strict conformity with the Constitution and that people's privacy will be scrupulously respected. The public mistrust of government surveillance is so intense, and in view of past abuses, so well justified, that an unequivocal statement of principle whould be extremely helpful to restore public confidence.[124]

In order to judge the desirability of deviating from the criminal standard the potential harm to personal liberties and public confidence in government which would result from such deviation must be weighed against the justifications offered in support of a non-criminal standard. An examination of these justifications leads to the conclusion that the balance must be struck in favor of the criminal standard.

2. Justifications for a Departure From the Criminal Standard: *Camara*

Most of the history of the fourth amendment supports the proponents of the criminal standard. In accordance with English common law, the framers of the Bill of Rights believed that search warrants could issue only for contraband, fruits, or instrumentalities of a crime. Those objects presuppose that a crime has been committed. The government could not obtain a

---

The 1976 Senate Judiciary Committee report dealt directly with concerns of critics about the non-criminal standard. The report stated the committee's belief that the language of the statute should not be construed to cover Americans who were meeting with foreign friends, or representatives of a foreign government, or peacefully demonstrating against their country's foreign policy. The need for such a clarifying statement in the legislative history is explained by the broad language of S. 3197. One would be hard-pressed to find a criminal statute in which a term like "clandestine intelligence activities," without further explication, occupied a central place in the statutory scheme.

123a *See, e.g.,* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

124 As Senator Nelson commented, criticizing the proposed departure from the criminal standard, "the legislation must not only be good; it must be perceived as good." 122 CONG. REC. S17,884 (daily ed. Oct. 1, 1976).

warrant for "mere evidence;" rather it could search for and seize, under the English tradition, only those items which the possessor could not lawfully possess.[125]

Only in 1967, in *Warden v. Hayden,*[126] did the Supreme Court abandon the prohibition against searching for "mere evidence," holding that a lawful search need not be limited to contraband, fruits, and instrumentalities. However, at the same time, the Court seemed to oppose any possible diminution of the criminal standard of probable cause.[127] The same point emerged, at least in dicta, in the Court's opinion the same year in *Berger* where the majority criticized the New York eavesdropping statute because under its overbroad provisions "[t]he purpose of the probable cause requirement of the fourth amendment, to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed, is thereby wholly aborted."[128]

The short answer to these "traditionalist" principles, of course, is *Keith,* which recognized that domestic security surveillance may, consistent with the fourth amendment, be subject to different probable cause standards than those applied to "ordinary crime," and implied that the scope of national security surveillance approved by a judicial warrant may be broader than that which is allowed in investigations of

---

125 This constitutional history, beginning with the historic British case of Entick v. Carrington, 19 How St. Tr. 1029, is summarized eloquently by Justice Douglas in his dissent in Warden v. Hayden, 387 U.S. 294 (1967), where he concludes "[t]he constitutional philosophy is . . . clear. The personal effects and possessions of the individual (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police." 387 U.S. at 323.

126 387 U.S. 294 (1967).

127 The Court noted that:

> There must of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus, in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.

Id. at 307.

128 388 U.S. at 59. The analysis presented in notes 125-29 and accompanying text closely parallels the arguments of the ACLU on this point. *See, e.g., 1977 Judiciary Committee Hearings, supra* note 116, at 78 (Testimony of John Shattuck).

normal criminal cases.[129] But since the question is what constitutes desirable, rather than permissible, policy, Congress should consider just how soundly reasoned *Keith* was on this point.

In sanctioning a departure from the criminal probable cause standard, the *Keith* case followed the precedent of *Camara v. Municipal Court.*[130] In *Camara,* the Supreme Court reversed its earlier decision in *Frank v. Maryland*[131] and held that a warrantless search by a building inspector violated the fourth amendment. However, the Court went on to hold that a constitutionally permissible building inspection need not be premised on information concerning any individual unit, but could be justified on the basis of an assessment of conditions in the neighborhood as a whole. A municipality could seek and obtain an administrative warrant from the magistrate by showing evidence of the age, nature, and occupancy of the housing units, the time elapsed since the last inspection, and the general condition of the area.[132]

In reaching its conclusion that a warrant authorizing an areawide search was permissible, the Court emphasized the "reasonableness" of such a search, based upon (1) the long history of judicial and public acceptance of similar searches; (2) the limited nature of the invasion of privacy involved; and (3) the necessity of locating and abating hazards to the public health, and the absence of any reasonable alternative ways of doing so.[133] However, one can accept the reasoning and result of *Camara* without finding anything in the case relevant to the problem of electronic surveillance. Applying the factors considered in *Camara* to the issue of electronic surveillance makes it clear that Congress should regard its precedential value for *Keith* as negligible.

In justifying the issuance of a warrant in the absence of criminal probable cause, *Camara* relied on the tradition of public acceptance of the need for governmental entry and in-

129 407 U.S. at 322-23; *See* notes 88-89 *supra* and accompanying text.
130 387 U.S. 523 (1967).
131 359 U.S. 360 (1959).
132 387 U.S. at 538.
133 *Id.* at 537.

spection of citizens' homes and business places in a variety of situations to insure public health and safety and to enforce certain economic regulations. It would be difficult to find evidence of similar public acceptance of electronic surveillance, in the absence of criminal activity. There was no mistaking the degree of public dismay at the revelations of the Church Committee that individuals and groups were targeted for warrantless electronic surveillance on the basis of their ideologies, without any evidence that they were involved in criminal activities. Even when a judicial warrant procedure was proposed, in S. 3197, the bill failed to pass because of widespread opposition from the press and citizen's groups. This opposition can be attributed in large measure to the proposed departure from the criminal probable cause standard.[134]

Another reason why *Camara* approved the use of an areawide search warrant was "because the inspections are neither personal in nature nor aimed at discovery of evidence of crime. . . . They involve a relatively limited invasion of the urban citizen's privacy."[135] *Camara* established that the degree of justification required for a search depends on the scope of the invasion, a principle which the Court has continued to utilize.[136] But the invasion of privacy involved in a walk-through inspection for housing code violations is com-

---

134 *See* note 116 *supra*.

135 387 U.S. at 537.

136 *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21 (1968); Davis v. Mississippi, 394 U.S. 721, 727 (1969). Neither of these cases is any more impressive than *Camara* as a precedent for departing from criminal probable cause where electronic surveillance is concerned. In *Terry*, the Court concluded that a police officer could conduct a "stop and frisk" for weapons based on suspicious circumstances, witnessed by the police officer, which were admittedly short of probable cause to believe a crime was taking place. The crucial point in the Court's opinion was that unlike an arrest or a search of a dwelling place, a protective search for weapons "constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person." Because the invasion of privacy was limited, it could occur despite the fact that the police officer did not have criminal probable cause. 392 U.S. at 21.

Similarly, in *Davis*, in the course of throwing out a conviction based on an illegal arrest, the Court suggested that detentions for the sole purpose of obtaining fingerprints might be found to "comply with the Fourth Amendment even though there is no probable cause in the traditional sense. . . . Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions." 394 U.S. at 727.

paratively minimal; the invasion involved when electronic surveillance is conducted is sweeping. Electronic surveillance inevitably entails a continuous surveillance lasting weeks or even months,[137] in which all conversations, innocent or inculpatory, relevent or irrelevant, can be overheard. If S. 1566 is enacted, it would permit electronic surveillance for an initial period of up to 90 days against targets who are "agents of a foreign power," and extensions could also be obtained. There is therefore no basis for departing from the traditional fourth amendment standard on the ground that the invasion of privacy involved is limited.[138]

Finally, *Camara* responded to the dictates of necessity: "[t]he public interest demands that all dangerous conditions be prevented or be abated. Yet it is doubtful that any other canvassing technique would achieve acceptable results."[139] Much of the analysis of the criminal standard issue will center on this question of necessity, so conclusions at this point would be premature. But it is clear that, in the context of *Camara,* "necessity" meant that a warrant for each dwelling unit based on probable cause was unworkable. It was "reasonable" to recognize that "the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building."[140] However, in the case of a foreign intelligence wiretap, there is no similar problem. There is general agreement that before a wiretap can take place, some showing should be made to a judge to convince him that a proposed target is appropriate. S. 3197 and S. 1566 have always recognized, with respect to American citizens and resident aliens, that some quantum of individualized suspicion was a prerequisite to a constitutional search and seizure.

137 Several years ago, the Justice Department advised Senator Edward Kennedy that during 1968-70, an FBI national security tap lasted on the average from 78 to 291 days. H. SCHWARTZ, TAPS, BUGS AND FOOLING THE PEOPLE 38 (1977).

138 *But cf.* United States v. Butenko, 494 F.2d 593, 636 (3rd Cir. 1974) (*en banc*) (dissenting opinion of Judge Gibbons) for the view that electronic surveillance might be regarded as a less serious invasion of privacy than an "ordinary" search of a person's home or business.

139 387 U.S. at 537.

140 *Id.* at 536.

The only question is what that showing should be, and there is nothing in the pragmatic *Camara* opinion which logically supports the use of a weaker standard than the traditional one. In addition, unlike the generally non-incriminating character of an area search for housing violations, intelligence wiretapping has repeatedly turned up evidence used in criminal prosecutions.[141]

Thus, in assessing the weight of *Keith,* which relied on *Camara,* Congress should remember that the factors which in *Camara* justified the issuance of warrants for less than probable cause are not applicable in the area of intelligence wiretapping.[142] Given the potential dangers, any deviation from the criminal standard must be based on other factors which render the criminal probable cause standard unworkable in the area of electronic surveillance for foreign intelligence.

3. Justifications for a Departure from the Criminal Standard: The Inadequacy of Existing Criminal Laws

Throughout consideration of S. 3197 and S. 1566, the Justice Department asserted that a departure from the criminal standard of probable cause is needed to safeguard national security.[143] The Department's position was based on the argu-

---

141 H. SCHWARTZ, TAPS, BUGS AND FOOLING THE PEOPLE 41 (1977).

142 Congress should remember that *Camara* was an anomaly, "at variance with traditional Fourth Amendment doctrine . . . [I]ts reasoning, if applied beyond the exceptional facts of that case, may lead to a general erosion of Fourth Amendment standards." Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara,* 84 YALE L.J. 355, 370 (1974), *See also* LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases,* 1967 SUP. CT. REV. 1.

143 At the time S. 3197 was introduced, the Justice Department took the position that the criminal law enforcement standard was simply irrelevant to the use of electronic surveillance for the purpose of obtaining foreign intelligence. In Attorney General Levi's words, any effort to use the criminal laws to reach all clandestine acts of foreign agents would be "based on a fundamental misconception." He went on to note:

> The purpose of criminalization, and of prosecutions for crime, is to deter certain activities deemed contrary to the public interest. The purpose of foreign intelligence surveillances is, of course, to gain information about the activities of foreign agents, not so much because those activities are dangerous in themselves—although they almost always are—but because they provide knowledge about the hostile actions and intentions and capabilities of foreign powers, knowledge vital to the safety of the Nation.

1976 Intelligence Committee Hearings, supra note 3, at 78-79. The Supreme Court, of

ment that the breadth of the federal criminal laws, particularly the espionage statutes, is inadequate. Certain acts that are potentially inimical to the security of the nation do not constitute espionage or another crime. Therefore, the argument goes, strict adherence to a criminal standard would deny the government the option of conducting electronic surveillance under certain circumstances, even after a clear showing of probable cause that dangerous activities by "agents of a foreign power" are taking place.

The espionage statutes make criminal the delivery of "information relating to the national defense" to "a foreign government" or "foreign faction or party."[144] The Justice Department's precise concern is that the phrase "information relating to the national defense," as interpreted by the courts, is not expansive enough to reach certain forms of espionage detrimental to the national security.[145]

Doubts arising from uncertainty about the meaning of the espionage laws[146] cannot be readily discounted. Recent commentaries analyzing these statutes have emphasized their extraordinary opaqueness.[147] In general, the statutes are mar-

---

course, had signalled its acceptance of this view in *Keith*. *See* note 89 *supra*, and accompanying text.

This analysis ignores the point that one of the major concerns in the defining of criminal conduct is the avoidance of chilling of constitutional rights. The same concern is obviously also implicated in the defining of a probable cause standard for electronic surveillance. Thus, the two are not as unrelated as Attorney General Levi suggested.

144 18 U.S.C. § 794 (1977).

145 *See 1976 Intelligence Committee Hearings, supra* note 3, at 78-79 (testimony of Attorney General Levi); *1977 Judiciary Committee Hearings, supra* note 116, at 8-19 (testimony of Attorney General Bell).

146 The principal espionage statutes are 18 U.S.C. §§ 793, 794, and 798.

147 *See generally* Edgar and Schmidt, *Espionage Statutes and the Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973) [hereinafter cited as Edgar and Schmidt]. In their comprehensive analysis of the espionage statute and its flaws, Edgar and Schmidt note that

> There is an additional fundamental problem: the legislation is in many respects incomprehensible. Legal practitioners must often overlook this and accept as irrebuttable the presumption that the draftsman was an artist with a complex vision, whose canvas is coherent if only brooded upon long enough. The proposition is false.

Id. at 934. *See also* Nimmer, *National Security Secrets and Free Speech: the Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974) [hereinafter cited as Nimmer].

red by inexplicable differences from subsection to subsection about the state of mind and culpability needed to commit espionage.[148] There are conflicts, far more serious than usual, between the plain language of the statutes and the plain intent of the drafters of the legislation.[149] Even when an authentic foreign agent is involved, the precise scope of the term "information relating to the national defense" is shrouded in uncertainty.[150]

During the development of S. 3197 and S. 1566, the Justice Department expressed fear that the term might be construed narrowly, prompting denial of a warrant for electronic surveillance sought in some critical case. The Department seems to have two particular areas of concern in this vein which cannot be dismissed out of hand.

Judge Learned Hand's opinion in *United States v. Heine*[151] accounts for the first. In that case, Heine, a native German living in the United States, compiled a comprehensive picture of the United States airline industry from technical journals, newspapers, communications with airline industry officials and other sources. He collected and transmitted the material in order to facilitate Germany's war effort in case the United States entered World War II. Judge Hand reversed Heine's espionage conviction on the ground that information lawfully accessible to everyone was not "information relating to the national defense," as defined in the Espionage Act. The fact that Heine compiled the information for the benefit of a foreign power, with the intention of harming the United States, was irrelevant. It was also irrele-

148 Edgar and Schmidt, *supra* note 147, at 986-98, 1038-46; Nimmer, *supra* note 147, at 324-25.

149 Edgar and Schmidt, *supra* note 147, at 937, 987-95. The serious possibility that key sections are facially unconstitutional and not susceptible to a saving judicial construction remains. The main theme of Nimmer's article is that completion of the Ellsberg case would have resulted in the striking down of §§ 793(d) and (e). Nimmer, *supra* note 147, at 324-27.

150 On this point, Professors Edgar and Schmidt have written the following:

> Our reading of the legislative history . . . offers no limits on the range of the term. . . . [Moreover] the meaning of the phrase "national defense," after some sixty years in the statute books, is not much clearer now than it was on the date of its passage.

Edgar and Schmidt, *supra* note 147, at 974, 986.

151 151 F.2d 813 (2d Cir. 1945).

vant that he misled some of those supplying him with information about the purpose of his inquiries. The decisive factor, Judge Hand concluded, was that it was lawful to collect and transmit any information about weapons or munitions of war which the armed services make public, or information which the services have never found it necessary to withhold.

The second area of Justice Department concern is illustrated by a hypothetical frequently invoked during debate over the legislation. Suppose that an American citizen, pursuant to the direction of a foreign intelligence service, has collected and transmitted sensitive economic information concerning IBM trade secrets and advanced technological research which ultimately could be useful in a sophisticated weapons system. The research has not been done pursuant to government contract and the information is not classified. The Department has argued that because the espionage laws have never resulted in the prosecution of a person for spying for purely private, proprietary information, there is strong doubt whether they would be violated by this hypothetical.[152]

These are the kinds of cases which the Justice Department used in support of a non-criminal standard. With respect to the first case, commentators generally agree with Judge Hand's interpretation of the espionage laws.[153] A latter day Heine could not be convicted of espionage. With respect to the second case, a crucial factor for courts in determining whether national defense information was involved has been whether the information was "secret," and whether the information was classified often appears to be a decisive factor in that determination.[154] For this reason, no one can confidently assert

---

152 The Department relied on Judge Hand's language, 151 F.2d at 815-16, as the basis of its fears of a narrow interpretation.

153 However, the author agrees with Professors Edgar and Schmidt who note that:

> If the problem is treated anew, however, we see no reason why Heine's systematic compilation of defense information for the benefit of foreigners ought not to be made criminal. It is not self-evident that foreigners can do the job of assembly as well or as cheaply at home, and we see little danger to first amendment interests in prohibiting such conduct.

Edgar and Schmidt, *supra* note 147, at 983 n.140.

154 *See e.g.*, United States v. Soblein, 301 F.2d 236 (2d Cir. 1962), *cert. denied*, 370

that information developed by a private company which may have ultimate military applicability would represent "information relating to the national defense" for the purpose of the espionage statutes. The issue might turn on how imminent the applicability to military use was or whether the information was stolen because of that military applicability. In both cases, however, the government could arguably meet the non-criminal standard of S. 1566, demonstrating to the court probable cause to believe that (1) the proposed target was acting pursuant to the direction of a foreign intelligence service; (2) knowingly collecting or transmitting material in a manner intended to conceal either the nature of the information or the fact that it was being collected or transmitted; and (3) under circumstances indicating that the transmission of the information, or lack of knowledge about it, would harm the national security.

However, the Justice Department's argument that the narrow reach of the espionage laws necessitates a non-criminal standard is unconvincing.[155] Contrary to the Department's assertion, the espionage laws have in general been broadly construed. Legislative history makes it evident that many of the members of Congress feared the breadth of the phrase "in-

U.S. 944 (1962); Dubin v. United States, 363 F.2d 938 (Ct. Cl. 1966), *cert. denied*, 386 U.S. 956 (1967).

155 While debate over the need for a non-criminal standard has focused primarily on the reach of the espionage laws, some critics have argued that two other statutes are also relevant. They assert that any acts which should trigger electronic surveillance but do not violate the espionage statutes would surely violate either the Foreign Agents' Registration Act, 22 U.S.C. §§ 611-18 (1977), or the Export Administration Act, 50 U.S.C. app. §§ 2401-13 (1977), both of which contain criminal sanctions. *See, e.g., 1976 Intelligence Committee Hearings, supra* note 3, at 53 (testimony of then-Senator Mondale).

However, reliance on either of these two statutes to cover all illicit activities not encompassed by the espionage laws is misplaced. The Foreign Agents' Registration Act requires detailed registration by a person, partnership, or corporation serving as the "agent of a foreign principal." Despite this requirement, it seems evident from the definition of "agent of a foreign principal," 22 U.S.C. § 611(c), that a person could be engaged in spying for a foreign government without having to register under the Act. Given the specific requirements of the Act, it is possible for a person to register as a foreign agent, provide a detailed description of his lawful work, omit any reference to his illicit activities, and still not violate any terms of the statute. The information to be disclosed in the registration must be provided only if the conduct was undertaken or the funds were expended in furtherance of or in connection with the activities which

formation relating to the national defense," but that their concerns did not carry the day.[156] At the time of enactment, the House attempted to limit the phrase, but the effort failed in conference, and as a result the conferees regarded the term as "extremely far-reaching."[157]

The only Supreme Court decision on point gave the term an equally far-reaching meaning. In *Gorin v. United States*[158] the Supreme Court observed that

> the use of the words "national defense" has given them, as here employed, a well understood connotation. . . . The traditional concept of war as a struggle between nations is not changed by the intensity of support or the extension of the combat area. National defense, the government

required the agent to register in the first place. *See, e.g.*, 22 U.S.C. § 612(a)(4), (6), (7), and (8).

In short, the Foreign Agents' Registration Act may provide the basis for criminal liability for Tongsun Park, but it would not touch a modern-day Rudolph Abel, or his American equivalent. *See* Attorney General v. Irish Northern Aid Committee, 346 F. Supp. 1384 (S.D.N.Y.), *aff'd*, 465 F.2d 1405 (2d Cir. 1972) (holding that the purpose of the Act as amended was to require complete public disclosure by persons, acting on behalf of foreign principals, *whose activities were political in nature*).

The Export Administration Act authorizes the government to police the exports of certain materials, information, and technology from the United States. The basic policy of the statute "is to restrict the export of goods and technology which would make a significant contribution to the military potential of any other nation or nations which would prove detrimental to the national security of the United States." 50 U.S.C. app. § 2402(1)(B). The statute pursues this policy by giving the President the authority to prohibit or curtail exports from the United States, and by permitting him in turn to delegate the authority of implementing the statute to the Secretary of Commerce, where ultimate responsibility falls to the Office of Export Control. The Office controls exports by permitting them to take place only after the exporter seeks and obtains a proper license. To carry out the objectives of the Act, the Office of Export Control has "created a veritable labyrinth of regulations concerning what may be exported to what countries under what conditions and by what procedures." Berman and Garson, *United States Export Controls–Past, Present, and Future*, 67 COLUM. L. REV. 791, 813 (1967).

Reliance on this Act instead of a non-criminal probable cause standard to trigger a warrant for electronic surveillance does not represent a great advance for civil liberties. Regulations promulgated pursuant to the Act are extremely complicated and were established by the executive branch with little substantive direction in the statute itself. *See* 15 C.F.R. § 399.1 (1977). Electronic surveillance triggered by violation of such executive enactments presents potential dangers to civil liberties at least as great as those presented by the non-criminal standard of S. 1566.

156 Edgar and Schmidt, *supra* note 147, at 971-74.

157 "The term, so central to the Espionage Act prohibition was without principled limitations in the mind of the Congress which adopted it." *Id.* at 974.

158 312 U.S. 19 (1941).

> maintains, is a generic concept of broad connotations, referring to the military and navel establishments and the related activities of national preparedness. We agree that the words "national defense" in the Espionage Act carry that meaning.[159]

Analyzing *Gorin* and subsequent cases interpreting the "information relating to the national defense" language, commentators have concluded that the words reach matters that lie at the very "periphery of military affairs."[160] There is no basis, then, for assuming that judges would generally interpret the phrase in a restrictive fashion.

Moreover, the Department's concerns fail to demonstrate a compelling need for a non-criminal standard because they do not adequately distinguish, as a legal or practical matter, between obtaining a judicial warrant and getting a criminal conviction. Proof beyond a reasonable doubt is required in order to obtain a criminal conviction. "[P]robable cause exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."[161] It is axiomatic that getting a warrant does not require the same showing as getting a conviction. It is established that only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause.[162] In determining whether probable cause exists, magistrates are not to be confined by the rigorous standards that govern the admissibility of evidence at trial,[163] or by technicalities which restrict the use of their common sense.[164]

What this means is that a judge is not going to be paralyzed by the vagaries of the espionage laws when a warrant to obtain foreign intelligence is sought. In an *ex parte* warrant pro-

---

159 *Id.* at 28.
160 Edgar and Schmidt, *supra* note 147, at 977.
161 Berger v. New York, 388 U.S. 41, 55 (1967).
162 Beck v. Ohio, 379 U.S. 89, 96 (1964).
163 McCray v. Illinois, 386 U.S. 300, 311 (1967).
164 United States v. Ventresca, 380 U.S. 102 (1965).

cedure, even a conscientious judge concerned with limiting the reach of executive power is likely to focus on the essentials: does the government have probable cause to believe that the proposed target is an agent of a foreign power, working at the behest of a foreign intelligence network? Can the government argue convincingly that the information involved is or may be related to the "national defense"? It is sheer fantasy to believe that a judge hearing an application for a warrant confronting a novel issue, such as theft of an IBM trade secret, is going to approach the problem as if reviewing a criminal conviction.

There is a second difference between obtaining a warrant and obtaining a criminal conviction. In a case like *Heine,* from the vantage point of an appellate court, with the trial record before it, the judge can deal in certainties. Judge Hand knew that, despite Heine's commitment to Germany, and his devious methods, the appellant had obtained only information accessible to the public. But at the time when the government seeks a warrant for electronic surveillance, neither the government nor the court will usually have the luxury of such certainty. At such a preliminary stage, in *Heine,* for example, the government might logically have concluded, and argued to the court, based on an informant's tip, that Heine was using publicly accessible materials to supplement classified information he was trying to steal or buy. In short, at the warrant stage the court will be dealing in probabilities, rather than certainties, making the warrant more readily obtainable.[165]

---

165 The Justice Department recognized that the government's uncertainty about certain elements in these situations could affect whether a warrant would be issued, but drew precisely the wrong conclusion from the insight. The Department argued, and convinced the Senate Intelligence Committee in 1976, that a non-criminal standard was

> necessary in order to permit the Government to adequately investigate cases such as those where federal agents have witnessed a series of "meets" or "drops" between a hostile foreign intelligence officer and a citizen who might have access to highly classified or other similarly sensitive information: information is being passed, but the federal agents have been unable to determine precisely what information is being transmitted. Such a lack of knowledge would of course disable the government from establishing what crime was being committed.

1976 INTELLIGENCE COMMITTEE REPORT, *supra* note 20, at 22.

To summarize, the argument based on the inadequacies of the espionage laws does not justify departing from a criminal standard of probable cause in this legislation. This argument is simply outweighed by competing concerns: fully safeguarding first and fourth amendment rights and restoring public confidence in the intelligence community.

4. A Non-Criminal Standard Versus the Status Quo

The conclusion drawn so far is that a criminal standard of probable cause is clearly preferable to a non-criminal standard. If the criminal standard presently included in S. 1566 remains in effect, Congressional liberals should have no difficulty supporting the legislation. However, it remains possible that at some point, in the House, the non-criminal standard which was previously in S. 1566 may reappear in the legislation. Should that occur, those liberals who have most strongly supported legislative curbs on foreign intelligence electronic surveillance may be forced to decide whether the bill should be defeated simply because it incorporates a narrow, non-criminal standard.

The dangers arising from a general departure from the criminal standard have been previously discussed.[166] Upon careful scrutiny it becomes apparent that the narrow non-criminal standard which was in S. 1566 does not pose the kind of threat to constitutionally protected rights that the S. 3197 standard did.

During the debate over S. 1566, there has been a general consensus that the government has a legitimate interest in conducting electronic surveillance against people engaged in the activities described in the non-criminal standard.[167] The

---

Of course, the Justice Department could not convict a person of espionage without proof beyond a reasonable doubt and could not meet that burden of proof without proving what information had been passed. But because getting a warrant does not require the same showing as getting a conviction, a judge hearing that information was being passed under the circumstances described in the Intelligence Committee report could surely issue a warrant based on probable cause to believe that espionage was occurring even without knowing the contents of the information. This argument was first made by Senator Nelson. *See* 122 CONG. REC. S17883-89 (daily ed. Oct. 1, 1976).

166. *See* text accompanying notes 121-24 *supra*.

requirements of the non-criminal standard in S. 1566 were spelled out with some precision. The judge had to make his probable cause determination based on several discrete findings of fact: (1) the target was acting pursuant to the direction of a foreign intelligence service or network in the United States; (2) knowingly collecting information for that service or transmitting information to that service; (3) in a manner intended to conceal the nature of the collection and/or transmission. The remainder of the section placed the judge in the position of the "reasonable man," trying to assess whether the circumstances suggest danger to the national security. Such a test would put the government in a persuasive position, particularly since the government would be seeking a warrant in an *ex parte* appearance. However, the specific findings which would be required would greatly reduce the chances of the government seeking a warrant without adequate factual basis.[168] The more specifically defined the court's inquiry, the less likely it is that the government would carry the court along solely on the basis of its own expressions of urgency.[169]

In considering the acceptability of S. 1566 with a non-

---

conduct described is already espionage under existing statutes, obviating the need for a non-criminal standard. Others, such as the Church Committee, have argued that the present espionage statutes might be defective but that they should be amended to cover the conduct described in the non-criminal standard so that electronic surveillance would occur only pursuant to a criminal statute. But no one has claimed that a person whose conduct fit the definition of the non-criminal standard was engaged in harmless or constitutionally protected activity which deserved immunity from electronic surveillance.

168 For example, in explaining the judge's role in assessing the attempt by the government to meet the non-criminal standard, the Senate Intelligence Committee wrote in its 1976 report:

> The judge is expected to take all the known circumstances into account, e.g., who the American is, where he is employed, whether he has access to classified or other sensitive information, the nature of the clandestine meetings (e.g., whether it is merely in an out-of-the-way restaurant, as opposed to a hidden location in a distant city), the method of transmission (e.g., handing over a sealed envelope in a public place as opposed to using a "drop") and whether there are any other reasonable explanations for the behavior. It is clear, moreover, that the circumstances must not merely be suspicious, but must be of such a nature as to lead a reasonable man to conclude that the information being transmitted will be used to harm the security of the United States.

1976 INTELLIGENCE COMMITTEE REPORT, *supra* note 20, at 23.

169 In fact, the narrow, non-criminal standard is almost indiscernible from a

criminal standard, liberals would have to balance the desirability of the legislation against the desirability of continuing the status quo. At present, of course, no judicial warrant is required to authorize a wiretap for foreign intelligence. The only check on the executive is self-imposed and depends largely on the respect a given administration accords to personal rights. In the absence of legislation, warrantless electronic surveillance for foreign intelligence may eventually be judicially challenged. At best the courts might follow *Keith* and *Zweibon* and impose a warrant requirement. However, given the language of *Keith,* such a requirement would almost surely contain a non-criminal standard at least as weak as the one originally proposed in S. 3197. At worst, the judiciary could interpret congressional inaction as a sign of Congress' acceptance of warrantless electronic surveillance for foreign intelligence. While a departure from the criminal standard does not appear to be justified, legislation containing a narrowly drawn non-criminal standard would be far preferable to the status quo, which still contains the potential for unbridled use of electronic surveillance by the executive branch.

B. *Foreigners and the Fourth Amendment*

The major impetus for S. 3197 and S. 1566 was the abuse of constitutional rights resulting from electronic surveillance of Americans who posed no threat to the national security. However, the legislation also set forth the requirements to be met before electronic surveillance could be conducted against foreigners in the United States.

S. 1566, as presently drafted, in effect separates the possible targets of surveillance into three categories and establishes

---

criminal standard. If a judge could make all the findings required by the non-criminal standard, he or she could surely also have sufficient grounds to issue a warrant based on probable cause to believe espionage was occurring. Any distinction between the narrow non-criminal standard and the criminal standard is further reduced by the Intelligence Committee's compromise formulation of the criminal standard. Electronic surveillance can be triggered by probable cause to believe that a United States person is engaged in clandestine intelligence gathering activities, which "*involve or may involve* a violation of the criminal statutes" (emphasis added). Ordinarily, a criminal standard would refer to probable cause to believe that a crime has been committed, is being committed or is about to be committed. *See, e.g.,* 18 U. S. C. § 2518(1)(b)(1970).

different standards of probable cause for each. The first category is that of "United States persons," consisting of American citizens and resident aliens. As the previous discussion on the standard of probable cause indicates, a United States person is considered the "agent of a foreign power," and thus a potential target for electronic surveillance, only if he or she participates in clandestine intelligence gathering for or on behalf of a foreign power which involves or may involve a criminal violation or other criminal sabotage, terrorism, or clandestine intelligence activities.[170]

The second category is that of "foreign visitors," including non-resident aliens. Under earlier versions of the legislation, foreign visitors were treated in all respects identically to American citizens and resident aliens.[171] Under the present language of S. 1566, the standard has been changed to give foreign visitors somewhat less protection than "United States persons." A "foreign visitor" meets the definition of "agent of a foreign power" and becomes potentially subject to electronic surveillance if he or she "acts for or on behalf of a foreign power which engages in clandestine intelligence activities contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States."[172]

The third category created by S. 1566 is that of "officers and employees" of a foreign power. These persons were by definition "agents of a foreign power" and thus proper targets for electronic surveillance on the basis of their status if certification for the warrant was otherwise in order.[173] "The definition [was] framed in this way because it [was] presumed that non-

170 S. 1566, § 2521(b)(2)(B)(i)-(iii), as reported by the Intelligence Committee on March 13, 1978; 1978 INTELLIGENCE COMMITTEE REPORT, *supra* note 119. A United States person would also be an "agent of a foreign power" if he or she knowingly aids or abets, or conspires with a person engaged in the activities in subsections (i)-(iii), knowing that the person is engaged in such activities.

171 S. 3197, § 2521(b)(1)(ii).

172 S. 1566, § 2521(b)(2)(A)(ii), as reported by the Intelligence Committee on March 13, 1978. 1978 INTELLIGENCE COMMITTEE REPORT, *supra* note 119. As with United States persons, a foreign visitor also becomes a target by knowingly aiding or abetting or conspiring with a person engaged in such activities, knowing that the person is engaged in such activities.

173 S. 3197, *supra* note 12, § 2521(b)(1)(i).

resident aliens who are officers or employees of a foreign power are likely sources of foreign intelligence information."[174] However, the Intelligence Committee has recently added an amendment which tightens the definition of "agent of a foreign power" to include only those who "act in the United States as an officer or employee of a foreign power."[175]

Treatment of foreigners has emerged as a major issue because current proposals afford foreign visitors less protection than that given to United States persons.[176] This approach is justified. The fourth amendment and due process tolerate some degree of distinction between United States persons and foreign visitors. The reduced standard of protection is carefully tailored to meet legitimate national security needs, and, equally important, the protection accorded foreign visitors remains substantial.

At the same time, the treatment of "officers and employees" of a foreign power throughout the development of the legislation has been disconcerting. These individuals have received no meaningful fourth amendment protection. While this treatment may be justified with respect to diplomatic personnel, nonetheless it sweeps too broadly in its application to other foreign officers and employees. The amendment re-

---

174 1976 INTELLIGENCE COMMITTEE REPORT, *supra* note 20, at 23.

175 S. 1566 § 2521(b)(2)(A)(i), as reported by the Intelligence Committee on March 13, 1978; 1978 INTELLIGENCE COMMITTEE REPORT, *supra* note 119.

176 Because the Carter Administration had improved the bill in significant respects with regard to American citizens, the new differentiation between Americans and foreigners stood out in sharp relief. The change regarding foreign visitors, in particular, dismayed many who had looked to the new Administration to resolve civil liberties problems identified in S. 3197, not raise what seemed to be new ones. A New York Times editorial typified these concerns:

> The principal problem remaining, now under vigorous debate within the executive branch, arises from the desire of the intelligence agencies to give less protection from surveillance to transient but legal visitors—professors, students and just plain friends and tourists—than to citizens and permanent residents. That position offends . . . the Fourth Amendment, which protects "persons" without distinction . . .
>
> It would be lamentable if the immensely complex effort to protect individual liberties and security needs should founder because the intelligence agencies burden the Carter Administration's bill with a regressive concept that the Ford Administration refused to embrace.

N.Y. Times, May 7, 1977 at 24, col. 2.

cently incorporated by the Intelligence Committee helps to cure these serious defects but does not go far enough.

1. Constitutional Principles

It is by now established beyond dispute that foreigners in the United States are entitled to the protections of the fourth amendment. In *United States v. Abel*,[177] the notorious spy Rudolph Abel challenged the search of his hotel room which produced evidence leading to his conviction for espionage. Although the Court concluded that the search did not violate the fourth amendment, because it was incident to a valid deportation arrest, all members assumed that Abel was entitled to the full protection of the fourth amendment. This was true even though he had entered the country illegally and was engaged in espionage.

The same principle was underscored in the recent case of *United States v. Toscanio*.[178] Petitioner, an Italian citizen, challenged his conviction because it was based on electronic surveillance conducted unlawfully against him by United States agents in Uruguay. The government argued that an alien could not invoke the protections of the fourth amendment against the actions of the United States government abroad. Reversing the conviction, the Court of Appeals wrote, "[l]ike the Fifth Amendment guarantee of due process, the Fourth Amendment refers to and protects 'people,' rather than areas . . . or citizens. . . .It is beyond dispute that an alien may invoke the Fourth Amendment's protection against an unreasonable search conducted in the United States."[179] The Court went on to conclude that the amendment also protected Toscanio's rights even while in Uruguay.

Since the basic right of foreigners to be under the protection cloak of the fourth amendment is clear, the issue becomes whether the legislation's differentiation in the level of protection between United States persons and foreigners comports with established principles of equal protection, made applica-

177 362 U.S. 217 (1960).
178 500 F.2d 267 (2d Cir. 1974).
179 500 F.2d at 267.

ble to the federal government, through the due process clause of the fifth amendment.[180] Equal protection analysis focuses on the justifications for disparate treatment and the strictness with which courts will scrutinize such justifications.

At the Judiciary Committee hearings on S. 1566, Attorney General Bell indicated the Justice Department's view that only a rational basis is needed to treat Americans and foreigners differently under the legislation. In response to questions by Senators Kennedy and Thurmond, Bell stated his view:

> I think there is something wrong if we are trying to extend the Fourth Amendment fully to people who come here and meet this definition [as agents of a foreign power].
>
> . . . [T]here are varying levels of Fourth Amendment protection.
>
> . . . .
>
> . . . I think that there is a rational basis for the distinction. You ought to have more strict standards where American citizens are involved.[181]

The courts, when dealing with federal legislation, appear to support this view, requiring only a rational basis for the distinction between foreigners and United States citizens.[182] In

180 Bolling v. Sharpe, 347 U.S. 497 (1954).

181 *1977 Judiciary Committee Hearings, supra* note 116, at 23, 27.

182 At one time, legislative distinctions based on alienage did not receive careful scrutiny from the courts. *See, e.g.*, Truax v. Reich, 239 U.S. 33 (1915); Heim v. McCall, 239 U.S. 175 (1915). The rights of aliens began to receive more careful attention in Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

Some recent decisions, however, represent an emphatic departure from that earlier view in cases of *state* legislation. For example, in Graham v. Richardson, 403 U.S. 365 (1971), the Supreme Court considered the claim of several states that they could condition welfare benefits on United States citizenship or long-term residence in the country. Rejecting this contention, the Court emphasized that, in usual equal protection parlance, the state has broad discretion to classify its citizens. However,

> classification based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny . . . Aliens as a class are a prime example of a "discrete and insular" minority for whom such heightened judicial solicitude is appropriate. Accordingly, it was said . . . that the power of a state to apply its law exclusively to its alien inhabitants as a class is confined within narrow limits.

403 U.S. at 371-72; *accord* Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffith, 413 U.S. 717 (1973).

Matthews v. Diaz,[183] for example, the Supreme Court unanimously upheld a federal statute denying aliens the right to enroll in the Medicare program unless they had been admitted for permanent residence and had also resided in the United States for at least five years. The Court noted,

> The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship. . . . [A] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other. . . . The fact that an Act of Congress treats aliens differently from citizens does not itself imply that such disparate treatment is "invidious."[184]

The Supreme Court has often reiterated the principle that the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the federal government. "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[185]

Thus, the responsibility for defining the rights of foreigners rests very much in the hands of Congress. Despite this constitutional leeway, Congress itself should require strong justifications before reducing the fourth amendment rights of foreigners. While some provisions of the Constitution, such as the "privilege and immunities" clause[186] protect only the rights of *citizens,* the fourth amendment explicitly protects the rights of *persons.* Too often in the past the rights of foreig-

---

Cases subsequent to *Graham* have made it clear, however, that the rights and privileges of aliens will be protected by strict judicial scrutiny only when threatened by legislative enactments of *state* governments. These cases underscore the fact that the federal government's power over immigration and naturalization is plenary. Congress can impose rules and make distinctions which would not be permissible if passed by a state. *See,* Matthews v. Diaz, *infra* note 183 and accompanying text.

183 426 U.S. 67 (1976).

184 426 U.S. at 78-80.

185 Harisiades v. Shaughessy, 342 U.S. 580, 589 (1952); *accord* Galvin v. Press, 347 U.S. 522 (1954); Kleindienst v. Mandel, 408 U.S. 753 (1972).

186 Art. IV, § 2, cl. 1; *see also* U.S. CONST. amend. XIV, § 1.

ners, or even Americans who seemed foreign, have been trampled on in the name of national security.[187] In the following two subsections the reasons for treating foreigners differently will be analyzed to determine whether reduced protection of fourth amendment rights is justified.

2. Treatment of Foreign Visitors

The foreign visitor category includes those foreigners who are not resident aliens or officers and employees of a foreign power. It encompasses such visitors as professors, lecturers, exchange students, performers, or athletes even if they are receiving remuneration or expenses from their home government in such capacity.[188]

The disparate treatment of foreign visitors as compared to United States persons[189] can be justified on at least four grounds. First, the protection of the fourth amendment rights of foreign visitors remains substantial. Those foreign visitors from a country which does not engage in clandestine intelligence gathering here cannot be placed under surveillance. For those from countries which do engage in clandestine intelligence activities, a judicial warrant based on probable cause is required before electronic surveillance can take place. The court will still be making the final judgment, based on facts produced by the executive, that the circumstances surrounding the person's presence in the United States indicate a likelihood that he or she will engage in clandestine intelligence activities. As the 1977 Judiciary Committee report notes, the concept of clandestine intelligence activities is "directed primarily toward those traditional activities associated with spy ing, that is, gathering information in a clandestine fashion."[190]

Second, both Attorney General Bell and former FBI Director Clarence Kelly have noted that a far higher percentage of foreign visitors than Americans engage in spying.[191] Certain

187 *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

188 1976 JUDICIARY REPORT, *supra* note 19, at 18.

189 *See* text accompanying notes 171-72 *supra*.

190 1977 JUDICIARY REPORT, *supra* note 21, at 22. In other words, S. 1566 contemplates that foreign visitors who could be targeted for electronic surveillance would ordinarily be involved in the clandestine collection of information

191 *1977 Judiciary Committee Hearings, supra* note 116, at 22-24.

governments, such as the Soviet Union, direct visitors of all types to serve as intelligence gatherers.[192] The Church Committee concluded that one-fourth of the Soviet exchange students, for instance, coming to the United States in a ten year period were intelligence agents.[193]

Third, the increasingly large number of foreign visitors[194] who are in the United States only a short time make any showing of probable cause more difficult.[195] The probable cause requirement for foreign visitors contained in S. 1566 responds directly to the exigency created by these factors. For example, under the probable cause requirement for foreign visitors of S. 1566, if the CIA informed the FBI of the whereabouts of a person whose identity as an agent of a hostile foreign power was established beyond dispute, the govern-

---

192 James Adams, assistant director of the FBI, explained the Bureau's concern about foreign visitors:

> As [the development of the legislation] progressed, we on the investigative side of the FBI became more aware of the potential problem of treating visitors as restrictively as U.S. citizens. Our experience in this regard develops from the fact that we see certain countries—in particular, the Soviet Union, directing individuals in this country in the student exchange program, foreign visitors of all types, and the Soviet seamen—each group penetrated by hostile intelligence officers. They serve as an extension, or an arm, of the Soviet government in this regard.
>
> . . . .
>
> These individuals, we have seen, penetrate every group. We have seen everyone utilized, either as a full-time intelligence officer or as a cooptee team for a one-time mission. This is why we felt, and went to the Department and raised concerns which we have from an investigative standpoint, that when the number of Soviet seamen in the United States jumped from 1,300 one year to 13,000 the next and 40,000 last year, our resources are limited in dealing with this type of group.
>
> . . . .
>
> They are not within the United States for a lengthy period of time. It does require some latitude and extraordinary coverage in order to attack these particular groups from an intelligence standpoint . . . .

1977 Judiciary Committee Hearings, supra note 116, at 30-31.

193 CHURCH COMMITTEE REPORT, *supra* note 3, bk. I, at 163-64.

194 For instance, the FBI estimated that the increase from 1961 to 1977 in Communist-bloc officials permanently assigned to the United States was 518 to 2298. Cultural and commercial visitors from the same countries increased from 5439 in 1972 to 10,337 in 1976. Soviet crewmen numbered 1300 in 1972, and 40,234 in 1976. Soviet tourists numbered 1128 in 1973 and 1747 in 1976.

1977 Judiciary Committee Hearings, supra note 116, at 23.

195 *See* note 192 *supra*.

ment could in all likelihood obtain a warrant for electronic surveillance immediately. If the background information were detailed enough, a reasonable judge could conclude that the person was likely to engage in clandestine intelligence activities, for or on behalf of the foreign power. However, if the standard applicable to United States persons were in effect, the court should refuse to grant the warrant request until the government could make some showing that the foreign agent was involved in specific acts which might be criminal. Given the fact that some foreign agents only remain in the country for a short time, this showing would often be impossible. Yet, electronic surveillance might be the investigative technique most needed in order to gather information and compensate for the short period of time available.[196] Because this kind of case does not seem far-fetched, the looser probable cause standard seems like a reasonable accommodation.

A fourth reason justifying the disparate treatment of foreign visitors stems from the desire to give the most stringent protections possible to American citizens and resident aliens. The abuse of electronic surveillance and other investigative techniques has probably had a significant "chilling effect" on the exercise of first amendment rights of Americans. It is necessary to give these rights breathing room by guaranteeing to United States persons that electronic surveillance will not be triggered by lawful activities.[197] At the same time, the need has been shown for more flexibility in the probable cause requirement when foreigners are involved. It stands to reason, then, that if no differentiation between Americans and foreigners is made, either Americans will have to forego some protection of their constitutional rights or

196 The Judiciary Committee accepted this argument. *See* 1977 JUDICIARY REPORT, *supra* note 21, at 21. *See also* note 192 *supra*.

197 To reassure Americans on this point, the Intelligence Committee has recently added a provision that "no United States person may be considered an agent of a foreign power solely upon the basis of activities protected by the first amendment of the United States." S. 1566, § 2521(b)(2)(B)(iv), as reported by the Intelligence Committee, March 13, 1978; 1978 INTELLIGENCE COMMITTEE REPORT, *supra* note 119.

This has always been the intention of the legislation, spelled out at length in the committee reports. The Intelligence Committee concluded that public confidence demanded that the guarantee be incorporated in the statute.

some protection of their national security. By making a differentiation, United States persons can be afforded full protection of the fourth amendment, while protecting the national security from the dangers of foreign visitors who are themselves still granted substantial protection from unwarranted surveillance. Balancing the government's concerns against the foreign visitors' rights, the formulation of S. 1566 seems reasonable.[198]

3. Officers and Employees of a Foreign Power

Although the treatment of foreign visitors in S. 1566 is acceptable, in part because the protections extended to them are substantial, the treatment of the "officers and employees" of foreign powers deserves more careful attention. Under S. 1566 these people are treated as the agents of a foreign power and potential targets for electronic surveillance whenever the executive branch certifies to the court that they could be sources of foreign intelligence information. By any criteria, this scheme places the privacy of foreign "officers and employees" in the almost unfettered discretion of the executive branch. The judicial checks on which other people can rely are simply non-existent.

Prominent among the "officers and employees" of a foreign power covered by the definition are diplomatic and support personnel attached to the embassies of foreign countries in the United States. It is generally recognized that the United States, like other nations of the world, conducts electronic surveillance on foreign embassies within our borders.[199] Most

198 Liberal senators who have worked on this legislation tended to criticize the Carter administration for its "retreat" on the issue of foreign visitors. *See, e.g., 1977 Judiciary Committee Hearings,* supra note 116, at 22-23. In fact, this "retreat" was part of a package of changes which added a degree of reassuring clarity to the legislation. The rights of Americans were enhanced as dangerous loopholes were filled. At the same time, the Department and the FBI clarified their view that the activities of foreign "foreign agents" were their paramount concern. Their priorities reflected, to some degree, the recognition that when stringent criteria based on actual collaboration with a foreign power were used, electronic surveillance of United States persons would be extremely rare.

199 *See* Nesson, *Aspects of the Executive's Power over National Security Matters: Secrecy Classifications and Foreign Intelligence Wiretaps,* 49 IND. L. REV. 399, 418-21 (1974), and cases cited therein.

observers would probably agree that taps on foreign missions—embassies and diplomats—present the strongest case for inherent executive power.[200]

Several factors justify the limited protection S. 1566 extends to members of the diplomatic community. The first is that such surveillance confronts judges with the kind of problem least conducive to their institutional competence. It would be difficult for a judge to dispute an assertion by the Secretary of State or the National Security Council that an embassy tap will produce useful foreign intelligence. There are no probable cause standards, criminal or otherwise, by which a judge or magistrate can readily measure such a claim.[201] Under the circumstances, one commentator has predicted that "judges could do little more than determine whether an appropriate person in the Executive branch had made the judgment that the tap would produce useful foreign information,"[202] Under S. 1566, where the proposed target is a diplomatic mission or an "officer or employee" of a foreign power, the judge's task is limited to precisely that: making sure the certification is in order.

Second, in a very real sense, members of the diplomatic community "assume the risk" that their conversations will be overheard. "Expectations of privacy are minimal in the diplomatic community. Notwithstanding reciprocal treaty agreements to respect the integrity and privacy of diplomats and embassies, diplomats apparently expect all manner of surveillance as a part of the law of the international jungle."[203] While it may be an exaggeration to say that diplomatic personnel "consent" to electronic surveillance, given the realities of international relations, it may be fair to conclude that such personnel lack the "reasonable expectation of privacy" warranting the protections of the fourth amendment.

Finally, the unique legal status of the diplomatic commu-

200 *Id.* at 418.

201 *Id.* This point is discussed further in assessing the role of the court in this legislation. See notes 222-33 *infra* and accompanying text.

202 *Id.*

203 *Id.*

nity may leave it with diminished standing to assert fourth amendment rights.[204] Members of diplomatic missions can be said to be in a different legal position under the Constitution and domestic law than other aliens and citizens. Diplomatic immunity can be seen as insulation from the operation of domestic law whereby most problems of diplomatic missions are considered matters for resolution between nations. Such a view of diplomatic immunity carries with it a diminished capacity to claim the protections of the domestic law, including the fourth amendment, even against the operations of the executive branch. Thus, "while a tap on an Embassy may give rise to a diplomatic complaint against the United States, it would not give rise to litigation in the domestic courts of either nation."[205] In short, diplomatic personnel fall into a special category for which there is a reasonable basis for being less concerned about their fourth amendment rights.[206]

The definition of "officers and employees" of a foreign power encompasses far more than just diplomatic personnel, however. It extends to anyone who has a "normal employer—employee relationship with a foreign government."[207] While the language does exclude some persons who are only receiv-

---

204 *Id.* Under the Vienna Convention on Diplomatic Relations, *opened for signature,* April 18, 1961, T.I.A.S. No. 7502, 500 U.N.T.S., which became effective in the United States on December 13, 1972, diplomatic agents, their residences, and their missions are "inviolable." *See* art. 30(1), and 22(1),(3).

Professor Nesson notes that "the provisions of the treaty do not explicitly prohibit wiretapping if the installation of the tap does not involve a physical trespass." Nesson, *supra* note 199, at 418, n. 61. Additionally, "the obligations of the Convention are reciprocal; when another nation has failed to maintain the inviolability of American diplomatic communications, this country is free under international law to act similarly toward representatives of that nation." 1976 JUDICIARY REPORT, *supra* note 19, at 21, n. 20. For these reasons, the view of the American Civil Liberties Union that the surveillance of foreigners permitted by S. 1566 could not be squared with the Vienna Convention is not convincing. *See 1977 Judiciary Committee Hearings, supra* note 116, at 80.

205 Nesson, *supra* note 199, at 418.

206 *Cf.* Matthews v. Diaz, 426 U.S. 67, 80 (1976) (dictum) where Justice Stevens wrote for a unanimous court:

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, [or] the resident diplomat . . . can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests.

207 1977 JUDICIARY REPORT, *supra* note 21, at 20.

ing limited remuneration or expenses from their government during their stay in the United States,[208] the definition seems to sweep in with equal ease French or British civil servants or the employees of government-owned airlines like El Al (Israel).

The absence of fourth amendment protection for all those who fit this definition offends constitutional principles. A worker at the Soviet embassy can fairly be regarded as a likely foreign intelligence agent and source of important information. However, there is no justification for regarding a French civil servant on a vacation as an "agent of a foreign power," without some showing that the person is involved in conduct detrimental to our national security. Unlike diplomatic personnel, such foreigners are entitled to the substantial protection of the fourth amendment's warrant and probable cause requirements. They should be extended the same protection offered to other foreign visitors not employed by their government. It is no answer to this line of reasoning that the government would not regard the French civil servant as a likely source of foreign intelligence information, and there would thus be no attempt to conduct electronic surveillance. The legislation seeks to interpose judicial safeguards between the government and prospective targets precisely because in the past executive determinations in this area have been erratic, whimsical, and indefensible.

A newly-added amendment by the Intelligence Committee dispels part of this concern. The definition of "agent of a foreign power" will include only those officers or employees of a foreign country who act in that capacity in the United States. Vacationing foreign civil servants would be treated identically to all other foreign visitors, with the same safeguards. However, the amendment does not solve the problem of overbreadth. Non-diplomatic officers and employees of a foreign country, such as those working for a government-owned tourist bureau, would still receive almost no protection. While it is reasonable to regard such a person working here on a continuing basis as a more likely source of foreign

208 *See* note 188 *supra* and accompanying text.

intelligence than a temporary visitor, such employees still occupy a different position than foreign diplomats and should receive greater fourth amendment protection.

C. *The Scope of the Judge's Inquiry*

Underlying S. 3197 and S. 1566 has been a broad consensus that the final decision to permit foreign intelligence electronic surveillance should be placed in the judicial branch, rather than in the executive branch where it has traditionally resided. This consensus stems directly from the *Keith* and *Zweibon* decisions which indicated that the fourth amendment probably demands a judicial warrant procedure, even where "national security" electronic surveillance is involved. Despite this agreement during the development of the legislation, the precise scope of the judge's role has been controversial. At issue is the division of labor contemplated in the bill between the executive and judicial branches.

In S. 3197, as originally written,[209] the executive branch was to certify to the court that the purpose of the proposed surveillance was to obtain "foreign intelligence information," as defined in the statute, and that this information could not be obtained by less intrusive means. This certification was to be signed by a high-ranking presidential appointee in the areas of state, defense, or national security. Although the certification was central to the application for a warrant, the court had no authority to look behind it and examine the underlying premises. Instead, the judiciary's responsibility was confined to determining whether the proposed target fit the definition of a "foreign power" or an "agent of a foreign power."

Critics viewed the division of labor in S. 3197 as a corruption of the fourth amendment. They argued that the amendment requires the judiciary to pass on all elements needed to determine probable cause.[210] The task for the court, under their view, is to decide whether there is probable cause

209 *See* notes 12-17 *supra* and accompanying text.

210 *See, e.g., 1976 Judiciary Hearings, supra* note 9, at 48-49 (testimony of Herman Schwartz); *1977 Judiciary Committee Hearings, supra* note 116, at 103-04 (testimony of Esther Herst).

to believe the surveillance would produce the information sought, *i.e.*, foreign intelligence information.

S. 1566 reflects a compromise over the proper scope of the court's responsibility. In addition to the certification required by S. 3197, S. 1566 also requires that the executive branch provide the court with "a detailed description of the nature of the information sought" (except where the proposed target is the installation of a "foreign power"). It also requires the court in approving the application to find, if the target is a United States person, "that the certification or certifications are not clearly erroneous."[211]

This compromise is effective. It avoids both the extreme positions—on the one hand, that the court must decide for itself whether information the executive is seeking is important foreign intelligence; or on the other, that foreign policy is solely the province of the executive and that a court must not get involved at all. Instead, the approach of S. 1566 supplies the substantial protection of a tough standard of probable cause, avoids the huge cost and minimal benefits of an overly intrusive judicial role, and adds an element of executive accountability which will be effective in preventing abuse. Each of these aspects of the compromise will be addressed below.

1. The Position of Maximum Judicial Involvement

Some critics of S. 1566 have argued that the courts should decide all questions of probable cause and should independently review the substance of the executive's claim that the particular information sought rises to the level of important foreign intelligence information. Those holding this view base their arguments in the first instance on the *Keith* case.[212] In *Keith,* the government had argued that courts, as a practical matter, have neither the knowledge nor the techniques necessary to determine whether there is probable cause to believe that the surveillance is necessary to protect national security. These problems, the government contended, involved a large

211 S. 1566, 95th Cong. 2d Sess. § 2525(a)(5)(1978).

212 United States v. United States Dist. Court, 407 U.S. 297 (1972). *See* notes 79-90 *supra* and accompanying text.

number of "complex and subtle factors" beyond the competence of courts to evaluate. The Supreme Court rejected that argument:

> We cannot accept the government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of "ordinary crime." If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a Court, one may question whether there is probable cause for surveillance.[213]

While the Supreme Court's statement in *Keith* is relevant, it hardly resolves the question of judicial competence raised by the certification issue involved here. In *Keith,* the Court was saying that the particular nature of domestic security problems does not justify *complete exemption* of domestic security surveillance from prior judicial scrutiny. However, the Court did not pass on the validity or wisdom of a scheme like S. 1566 under which the courts would focus chiefly on the propriety of the proposed target while deferring to executive judgment on the question of the importance of the foreign intelligence information sought. The precise claim being made by the critics of the certification arrangement goes considerably beyond *Keith.* They are arguing not only that the courts should play a significant role in passing on foreign intelligence electronic surveillance, but that the courts should review the substance of the certification regarding the importance of the foreign intelligence information.

In support of their position these critics advance a second argument—that Congress has made the judgment at least once before that the judiciary can and should evaluate the substance of executive claims concerning national security.[214]

---

213 407 U.S. at 320.

214 *1976 Judiciary Hearings, supra* note 9, at 49 (testimony of Herman Schwartz).

They base this argument on the 1974 amendments to the Freedom of Information Act (FOIA).[215] As originally passed in 1966, FOIA included an exemption from the forced disclosure mandate of the Act for those matters "specifically required by executive order to be kept secret in the interest of national defense foreign policy." In *Environmental Protection Agency v. Mink*,[216] the Supreme Court decided that this exemption barred an *in camera* investigation by the courts into the propriety of the classification of such documents. In Justice Stewart's memorable phrase, Congress had written into the FOIA "an exemption that provides no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been."[217]

To rectify the result in *Mink*, Congress amended section 552(b)(1) of the FOIA in 1974,[218] making clear that the courts should make a substantive evaluation of whether materials were properly classified. Under the controlling definitions of the executive orders, such an evaluation would inevitably entail determining whether exposing certain documentary materials would pose a threat to national security. Those who believe that the courts should decide all the issues relating to probable cause argue that the 1974 FOIA amendments reflect Congress' judgment that "judges are competent to analyze the substance of matters allegedly pertaining to the national security."[219]

It is true that the legislative history of the FOIA amendments indicates that the *Mink* decision was overruled legislatively and that the propriety of a document's classification is to be judicially determined with respect to both procedural and substantive criteria contained in the executive order under which it was classified. Nonetheless, Congress did not grant the courts *carte blanche* to second guess executive assessments of what may jeopardize national security.

---

215 5 U.S.C. § 552 (1977).
216 410 U.S. 73 (1973).
217 *Id.* at 95 (concurring opinion).
218 5 U.S.C. § 552(b)(1) (1977).
219 Zweibon v. Mitchell, 516 F.2d 594, 642-43 (D.C. Cir. 1975).

In *Weissman v. Central Intelligence Agency*,[220] the United States Court of Appeals for the District of Columbia discussed the limited nature of the judiciary's inquiry under the FOIA amendments. The CIA had refused under the national security exemption of section 552(b)(1) to turn over certain requested documents. The District Court rejected Weissman's claim under the FOIA on the strength of affidavits submitted by the CIA. The court reached its decision without doing an *in camera* investigation of the documents. The Court of Appeals affirmed the District Court noting that

> [i]f exemption is claimed on the basis of national security, the District Court must, of course, be satisfied that proper procedures have been followed, that the claim is not pretextual or unreasonable, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. It need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.[221]

Thus, the role assigned to the courts under the 1974 FOIA amendments is still modest. While they are responsible for determining whether the documents in question were properly classified according to the relevant executive order, the presumption of good faith and regularity remains strong. In most instances, the courts need not even examine the documents in dispute. In relation to the division of labor in the area of electronic surveillance, the FOIA analogy does not suggest that courts are to substitute their judgment for that of the intelligence community as to whether particular pieces of information are important to national security.

---

220 565 F.2d 692 (D.C. Cir. 1977).

221 *Id.* at 697. In seeking the congressional intent in the amendment, the Court quoted from the Senate report:

> This standard of review does not allow the court to substitute its judgment for that of the agency—as under a *de novo* review—but neither does it require the court to defer to the discretion of the agency, even if it finds the determination not arbitrary or capricious. Only if the court finds the withholding to be without a reasonable basis under the applicable Executive order or statute may it order the documents released.

Id.

2. The Position of Minimal Judicial Involvement

Some critics of legislative control of electronic surveillance for foreign intelligence have argued that the area should be left exclusively to the executive with minimal or no interference from the judiciary or Congress.[222] These critics have taken their lead from Justice Harlan's dissent in the Pentagon Papers case.[223] In concluding that the *New York Times* and the *Washington Post* could be enjoined from publishing documents due to the executive's belief that their publication would cause great harm to the conduct of United States foreign policy, Justice Harlan argued that "the scope of the judicial function in passing upon the activities of the Executive branch . . . in the field of foreign affairs is very narrowly restricted."[224] The judiciary's role was limited to "review[ing] the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power."[225] The courts could also "properly insist" that representations about the irreparable harm to national security must be made by the head of the executive department involved. Beyond that, the courts had no substantive role to play.

Harlan's view did not prevail in the Pentagon Papers case, but the logic of his position and his reading of the precedents were quite persuasive to the courts which produced *Butenko* and *Brown*[226] It was the basis for concluding that the President has "inherent power" to use electronic surveillance for foreign intelligence purposes without regard for the customary requirements imposed by the fourth amendment.

Support for such a view is extremely weak. The Supreme Court, in *Baker v. Carr*,[227] commented directly on the judicial function in foreign relations cases:

---

222 *See, e.g., 1974 Judiciary Hearings, supra* note 7, at 3-4 (testimony of Senator John L. McClellan); Bork, *'Reforming' Foreign Intelligence*, Wall St. J., Mar. 9, 1978, at 24, col. 4.

223 New York Times Co. v. United States, 403 U.S. 713 (1971).

224 *Id.* at 756 (dissenting opinion).

225 *Id.* at 757 (dissenting opinion).

226 *See* notes 94-99 *supra*, and accompanying text.

227 369 U.S. 186 (1962).

> There are sweeping statements to the effect that all questions touching on foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and the possible consequences of judicial action.[228]

There are cases in which it would appear that the judiciary has an unavoidable obligation to assess the substance of an executive claim of "national security." The Court of Appeals for the District of Columbia in *Zweibon v. Mitchell*[229] convincingly demonstrated that no Supreme Court case ever held "that any issue that touches foreign affairs is to be immunized from judicial review, *particularly when there are strong countervailing constitutional interests that merit judicial protection.*"[230] *New York Times Co. v. United States*[231] is a classic example of a case where fundamental constitutional rights were implicated, and the courts had to get involved in national security questions in order to protect those rights. In that case, the government argued that the revelations contained in the Pentagon Papers could jeopardize the national security by impairing the conduct of our foreign policy. The District Court concluded that the government carried a heavy burden of proof because it sought to impose an unprecedented prior restraint on the press. It concluded that the government had not met its burden, because it had not demonstrated any specific threat to national security, seeking relief instead on the basis of a generalized claim that national security would be imperiled. The Supreme Court affirmed the lower court, permitting the newspapers to publish. In reaching their conclusions, both courts substituted their judgment for that of the executive branch, in order to protect first amendment rights.

228 *Id.* at 211-12.

229 516 F.2d 594 (D. C. Cir. 1975). *See* notes 100-06 *supra* and accompanying text.

230 516 F.2d at 623 (emphasis added).

231 403 U.S. 713 (1971).

It is this independence of judgment that critics of the certification process seek for the judiciary, especially where fundamental constitutional rights are at stake.[232]

The notion that the judiciary should take no action where foreign affairs or national security are involved is also refuted by the role courts play even when constitutional rights are not directly implicated. Sometimes a problem of executive abuse may seem acute, and no better solution than creating a judicial check comes to mind. In the area of classification of documents, for example, Congress was not ready to establish a new system to supplant the executive's. But at the same time, Congress faced substantial evidence that thousands of government employees wielded the classification stamp indiscriminately; that a high percentage of the materials classified should not have been; and that the secrecy resulting from this classification system was a touchstone of the "imperial presidency."[233] Under the circumstances, judicial review of the decision to classify, under appropriate limits, appealed to Congress, and the 1974 FOIA amendments were passed.

To summarize, there is no basis for the claim that the courts have no role to play in the area of foreign affairs and national

---

232 It must be noted that there are distinctions between the government's position in the Pentagon Papers case, where courts substituted their judgment for the executive's, and the government's position when it applies for a national security wiretap or bug. In the Pentagon Papers case, the government was taking the extraordinary step of seeking a prior restraint on the publication of newspapers. As Justice Brennan wrote, "never before has the United States sought to enjoin a newspaper from publishing information in its possession." 403 U.S. at 725 (concurring opinion). A consistent body of law spelled out just how high the barriers against prior restraint were, and the obligation of the courts to scrutinize such restraints with great care. *See, e.g.,* Near v. Minnesota, 283 U.S. 691 (1931); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963). Moreover, legislation creating a judicial warrant procedure for foreign intelligence electronic surveillance permits the court to safeguard fourth amendment rights without having to second-guess the executive's claim that foreign intelligence information is sought. The prior restraint case offered no such safeguard for first amendment rights without the evaluation of the substance of the government's claim that the publication of the papers posed a serious danger to the national security.

233 *See* Nesson, *supra* note 199, at 402-08. *See generally, Hearings on U.S. Government Information Policies and Practices Before a Subcommittee of House Committee on Government Operations,* 92d Cong., 1st and 2d Sess. (1972); *Hearings on Classification Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations,* 93rd Cong. 2d Sess. (1974). A. SCHLESINGER, THE IMPERIAL PRESIDENCY 331-76 (1973).

security. *Keith, Zweibon,* and *New York Times* establish clearly the propriety of judicial involvement. If anything, the courts should be on even firmer ground in the sphere of foreign relations where the Congress outlines the scope of their role, as it does in S. 1566.

3. S. 1566: A Compromise on the Role of the Judiciary

S. 1566 reaches an effective compromise on the respective roles of the executive and the judiciary in the warrant procedure for national security electronic surveillance. It avoids the mistake of those who argue for minimal judicial involvement by requiring judicial scrutiny necessary to protect individual constitutional rights and to prevent abuses of executive discretion. S. 1566 requires the judge to consider all the facts and circumstances to determine whether the proposed target is an "agent of a foreign power." Based on these facts, the court must determine whether the target is engaged in criminal sabotage, terrorism or clandestine intelligence activities, for or on behalf of a foreign power. As the Intelligence Committee noted, "it is this finding that constitutes a fundamental safeguard for the individual."[234]

In addition, individual rights are judicially protected and executive discretion checked by the requirement that the executive's designation of information as foreign intelligence not be "clearly erroneous." While it is unlikely that a court will often find a certification to be clearly erroneous, there is no basis for saying that the court should not have the power to reject the executive's claim if a flagrant case should arise. If the judicial checks of S. 1566 had been in effect ten years ago the electronic surveillance of Martin Luther King, Joseph Kraft or Morton Halperin would not have been approved, and likely would not even have been proposed.

S. 1566 also protects individual rights and limits executive discretion by requirements to assure accountability within the executive branch for surveillances proposed and undertaken. S. 1566 requires that a certification of the importance of the foreign intelligence information sought must come from

234 1976 INTELLIGENCE COMMITTEE REPORT, *supra* note 20, at 36.

an official of the executive branch who is appointed by the President with the advice and consent of the Senate.[235] Each application for a warrant also requires the final approval of the Attorney General, based upon his finding that all the requirements of the statute are met.[236]

The explicit requirements that two high-ranking executive branch officials personally assert the need for the electronic surveillance is a complete break with the practices of the past. Intelligence abuses have often been characterized by their "deniability;" surveillances were undertaken in such a way as to assure that no high-ranking official assumed responsibility. The Attorney General's participation in the process has also been extremely haphazard. The Church Committee noted that "while the prior written approval of the Attorney General has been required for all warrantless wiretaps since 1940, the record is replete with instances where the requirement was ignored and the Attorney General gave only after-the-fact authorization."[237] Additionally, "until the mid-1960's, there was no requirement of periodic reapproval [of wiretaps] by the Attorney General. In the absence of any instruction to terminate them, some wiretaps remained in effect for years."[238]

S. 1566 should put an end to that pattern of negligence and omission. It is reasonable to believe that the specially-appointed executive official and the Attorney General would give serious thought to proposed surveillances before signing off on them, both because of the need to satisfy the courts and because a written record would be created which would be available to the newly-created oversight committees of Congress.[239]

While S. 1566 creates mechanisms for the protection of in-

235 S. 1566, 95th Cong., 2d Sess., § 2524(1)(7)(1978).

236 Id. § 2524(a).

237 CHURCH COMMITTEE REPORT, *supra* note 3, bk. II at 12.

238 CHURCH COMMITTEE REPORT, *supra* note 3, bk. II at 187-88.

239 The Church Committee noted that "[t]he root cause of the excesses . . . [of the intelligence community] has been failure to apply the wisdom of the constitutional system of checks and balances to intelligence activities." CHURCH COMMITTEE REPORT, *supra* note 3, bk. II, at 111. Congress had failed to offset excesses of Executive power in two major respects: first, by never spelling out through legislation what the

dividual rights and the checking of executive discretion, it does so without requiring courts to assess whether information sought is important foreign intelligence. Leaving this decision to the executive with the courts merely checking for clearly erroneous decisions is sound policy. A more extensive judicial role in making such a decision would provide only a small increment of additional protection to constitutional rights, and would do so at a great cost.

Once the finding of agency is made under the strict probable cause requirements of the statute applicable to American citizens and resident aliens, it is hard to believe that the courts would contradict the executive's claim that information sought was important "foreign intelligence information." Critics have cited statistics compiled under the criminal surveillance provisions of Title III which indicate that the courts have virtually rubberstamped prosecutors' requests for criminal wiretaps.[240] From 1969 to 1976, out of 5563 federal and state applications for a wiretap, only 15 were denied.[241] Where national security was involved, critics claim, judicial

intelligence agencies could do and what they could not; and second, by failing to exercise vigorous oversight, particularly in the domestic security area. *Id.* at 339.

S. 1566 represents the first piece of legislation setting forth curbs on the President and the intelligence community in response to the Church Committee Report. However, both Houses have already created permanent select committees on intelligence in an effort to strengthen oversight.

Both legislation and oversight are necessary, and they are complementary. The Intelligence Committee has added stringent oversight provisions to S. 1566. The Attorney General is required to "fully inform" both intelligence committees on a semi-annual basis about all electronic surveillance under this chapter. Section 2528 (a). Moreover, within one year of the effective date of the statute, and annually on the same day thereafter, the Senate Intelligence Committee must report to the Senate concerning the implementation of the statute, including, but not limited to, recommendations as to whether the statute should be amended, repealed or continued without change. Section 2528(b). In case the committee should recommend amendment or repeal, the statute contains provisions to insure consideration of the proposed changes, modelled after the War Powers Act, to avoid a possible filibuster.

This oversight plan may actually be excessive. It would probably be adequate for the Attorney General to report annually, and for the committee to report to the Senate biannually. Additionally, the mechanism of the War Powers Act should not be included in very many other statutes simply to insure consideration of amendments. But this section demonstrates that the committee is reacting to the complete failure of oversight in the past, and that it takes this particular statute very seriously.

240 *See, e.g.*, N.Y. Times, June 15, 1976, at 36, col. 2; H. SCHWARTZ, TAPS, BUGS AND FOOLING THE PEOPLE 23 (1977).

deference would be even more complete. But the fact is that if a court is inclined to accept blithely executive assertions about the proposed target, the additional requirement of a finding that the information sought is important "foreign intelligence information" will be equally meaningless. It is unrealistic to think that a requirement of additional findings would change the ultimate decision reached by a court or provide a greater protection against abuse.

Against this minimal increase in protection which might result from an extension of the judiciary's role must be balanced the costs and dangers of such an extension. There is considerable reason to worry about the court's lack of experience and skill in weighing the importance of intelligence information.[242] There is no existing justiciable standard by which a court could determine whether a certain piece of information sought by the executive branch is essential to the foreign policy or the national security. Obviously, if the courts were exposed to a detailed argument, some intelligent judgments about the importance of certain information within the mosaic of foreign intelligence would be possible. One might even assume that if a brief were detailed enough, a court might have before it every piece of information relevant to the decision made by a high-ranking executive official. But this possibility poses a number of problems. The time and judicial resources required to obtain and digest enough information about the foreign intelligence field would be substantial. Such a cumbersome procedure would be incompatible with the necessity of a relatively quick decision on many warrant applications.

To summarize, one must question whether such a judgment is the most efficient means of protecting individual rights and checking executive discretion. Logic and precedent suggest that the political branches of government should not be sus-

---

241 H. SCHWARTZ, *supra* note 240, at 23.

242 The majority in the *Weissman* case, *supra* note 220, at 697, expressed just such a worry in the context of the national security exemption of the FOIA. The rationale of the observation there would apply with equal force if the courts were asked to assess whether certain information sought by the Executive branch was really important foreign intelligence information.

ceptible to judicial second-guessing.[243] As one commentator has written, "the nation may rest a measure of trust in the Judiciary's moral leadership, but none in the ability of judges to second guess the President and his generals on military and diplomatic matters where the nation's safety is concerned."[244] S. 1566 successfully balances the need for the judiciary to protect individual rights and check abuses of executive discretion against the need for the executive to control foreign policy.

D. *Particularity and Minimization*

Each of the major issues addressed so far—the criminal standard, the treatment of foreigners, and the scope of the judge's inquiry—relates to the legislative effort to develop effective standards by which permissible targets of electronic surveillance could be distinguished from those who are not.

---

243 *See* Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), where the Supreme Court concluded that the judicial review procedures of the Civil Aeronautics Act did not authorize review of those orders which are subject to the approval of the President, concerning applications by citizen carriers to engage in overseas and foreign air transportation. Writing for the majority, Justice Jackson stated:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that Courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can Courts sit *in camera* in order to be taken into Executive confidence. *But even if Courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.* Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. *They are delicate, complex, and involve large elements of prophecy.* They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.*

333 U.S. at 111 (emphasis added).

Justice Jackson's opinion has been substantially misused, becoming the major precedent for Justice Harlan in the *New York Times* case. Significantly, the opinion dealt with an exercise of presidential power pursuant to Congressional authorization, rather than a far more dangerous claim of "inherent" presidential power; *Waterman* also involved no significant countervailing claim that constitutional rights were involved. Nonetheless, what Justice Jackson wrote about the nature of a certain category of foreign policy judgments stands unchallenged to this date.

244 Nesson, *supra* note 199, at 400.

Because of past abuses in which Americans were targeted for electronic surveillance without being a threat to national security or collaborating with foreign powers, the importance of such standards is evident.

There is another dimension to the problem. Any investigative technique can be abused by being directed at the wrong people. But only electronic surveillance raises the spectre of an investigative technique which defies control even when the targets are proper. Whenever a bug is used, persons who are not the targets of the investigation may be overheard if they converse in the room being bugged. When wiretaps are used, both untargeted individuals using the tapped telephone and innocent parties on the other end of conversations will be overheard. Even when the target is using the room or the phone, it is not always possible to limit the interception to conversations relevant to the purposes of the surveillance.[245] In some cases, such as when a phone is being used almost exclusively for a gambling operation, a wiretap can produce a high percentage of conversations relevant to the crime being committed. But in most cases, even where there is probable cause to believe a crime is in progress and the phone will be used in part of the criminal enterprise, the percentage of relevant conversations could be much lower. When a "bug" is used instead of a wiretap, even larger quantities of innocent conversations may be overheard.[246]

Like Title III, S. 1566 seeks to meet this formidable problem through "minimization." The essence of minimization is the effort to avoid intercepting conversations which are not pertinent to the purpose for which electronic surveillance was approved. Minimization contemplates the use of procedures which are directed toward determining patterns of callers and calls as a method of refining the monitor's ability to predict early in a conversation whether it should be intercepted.[247] In

245 CHURCH COMMITTEE REPORT, *supra* note 3, bk. II, at 198-202.

246 As one commentator has put it, "no warrant procedure can confine an electronic surveillance to the predictable and the relevant. Such a search is as errant as shifting winds." Spritzer, *supra* note 55, at 201.

247 REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 93 (1976).

the simplest kind of case, if X's phone is being tapped because of his probable involvement in a narcotics ring, once the monitor established that X's 10 year old daughter is making a phone call, the interception of that conversation should cease. In practice, however, nothing has been simple about minimization,[248] and the lessons of Title III are significant for assessing the minimization problems which S. 1566 must meet.

1. The Experience With Minimization Under Title III

To critics, the unique danger posed by electronic surveillance flows from its basic constitutional defect: almost inevitably it becomes a "general search" of the sort which the fourth amendment was enacted to prohibit. This concern is well founded. As noted earlier,[249] the Supreme Court signaled general acceptance of this view in *Berger v. New York*. The Court implied that, at least in the criminal context, electronic surveillance not limited to the extraordinary circumstances of *Osborn v. United States*[250] could not co-exist with the fourth amendment's "particularity" requirement, which obligated the government to describe with particularity the things, *i.e.*, conversations, to be seized and to confine its seizures to those conversations described in the warrant.

Whether the *Berger* majority meant what it said or not, neither Congress nor the lower courts have been prepared to accept it. In enacting Title III of the Omnibus Crime Control and Safe Streets Act, Congress established a judicial warrant procedure for electronic surveillance to be used against assorted crimes. Despite the fact that certain features of Title III posed "a rather clear conflict with the Supreme Court's holding in *Berger*,"[251] the constitutionality of Title III has been upheld repeatedly by the lower courts,[252] and the Supreme

248 The National Wiretap Commission observed that "[f]ew aspects of Title III have engendered as much controversy and uncertainty as the minimization requirement." *Id.* at 92.

249 *See* notes 61-66 *supra* and accompanying text.

250 *See* note 66 *supra*.

251 Schwartz, *Law and Order*, *supra* note 66, at 461.

252 *See, e.g.*, United States v. Kirk, 534 F.2d 1262 (8th Cir. 1976); United States v. Ramsey, 503 F.2d 524 (7th Cir. 1974), *cert. denied*, 420 U.S. 932 (1975); United States v. Martinez, 498 F.2d 464 (6th Cir. 1974), *cert. denied*, 419 U. S. 1056 (1974); United States v. Fino, 478 F.2d 35 (2d Cir. 1973), *cert. denied*, 417 U. S. 918 (1974).

Court has declined numerous opportunities to say otherwise. In Title III, the fourth amendment's particularity requirement translated into the statutory requirement that electronic surveillance "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception."[253] In large measure, courts upholding the constitutionality of Title III have done so because of this minimization requirement. In effect, they have accepted the view that "all searches are general; only seizures are definite."[254] The minimization requirement presumably bridges the gap between the overbroad, general search and the specific, "particularized" seizure by permitting the interception of only pertinent conversations.

The attempts at minimization under Title III, however, have been largely unsuccessful. Part of the problem stems from the fact that minimization is inherently an imprecise art.[255] For example, after a reliable pattern is seemingly established, monitors may have to intercept conversations to determine whether new callers are part of a conspiracy. The fact that some nonpertinent conversations are intercepted does not signify that the officers have failed to follow the minimization directive. Given this imprecision, courts have been generally tolerant in supervising the minimization procedure. The general standard has been whether, in light of all facts and circumstances of the case, "the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion."[256]

Another factor contributing to the failure of minimization under Title III is that the courts have carried their tolerance too far, and in the view of some commentators have drasti-

253 18 U.S.C. § 2518(5) (1976).

254 *Hearings on S. Res. 190 Before the Subcomm. on Administrative Practices and Procedures of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. 434 (1967) (testimony of Prof. G. Robert Blakey).

255 One frequently-quoted decision notes that "it is . . . obvious that no electronic surveillance can be conducted so that innocent conversations can be totally eliminated." United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973), *cert. denied,* 423 U.S. 952 (1975).

256 United States v. Tortorello, 480 F.2d 764, 784 (2d. Cir. 1973), *cert. denied,* 414 U. S. 866 (1973); United States v. Armocida, 515 F.2d 29 (3rd Cir. 1975).

cally circumscribed the statutory requirement to minimize.[257] A number of courts have concluded that the statute prohibits only the interception of the most patently non-criminal conversations.[258] The interceptions of apparently personal calls have been permitted on the ground that they may later become pertinent.[259] In the rare cases in which violations of the minimization order have been found, the courts have tended to suppress only those non-pertinent conversations which should not have been intercepted.[260] Clearly, where judicial scrutiny is so limited, there is simply no incentive to minimize. Prosecutors have capitalized on the reluctance of the courts to impose tough standards on this imprecise practice. Some prosecutors apparently believe that "anything goes" once they have satisfied the judge initially with a showing of probable cause. Overall, the record has been discouraging.[261]

257 Comment, *Minimization of Wire Interception: Pre-search Guidelines and Post-search Remedies,* 26 STAN. L. REV. 1411, 1438 (1974).

258 *See, e.g.,* United States v. Bynum, 485 F.2d 490 (2d Cir. 1973), *cert. denied,* 423 U.S. 952 (1975).

259 *See, e.g.,* United States v. Sklaroff, 323 F. Supp. 296, 317 (S. D. Fla. 1971).

260 NATIONAL WIRETAP COMMISSION REPORT, *supra* note 247, at 94. *See, e.g.,* United States v. King, 335 F.Supp. 523, 545 (S.D.Cal. 1971), *modified,* 478 F.2d 494 (9th Cir. 1973).

261 Professor Schwartz expressed this discouragement:

> This so-called protection has turned out to be almost worthless. Wiretapping opponents have consistently charged that innocent people and conversations will be overheard one way or another. Experience under the Act confirms this. Judges, prosecutors, policemen and defense lawyers all agree that "minimization" is often impossible and that the statutory mandate is not working.

H. SCHWARTZ, TAPS, BUGS AND FOOLING THE PEOPLE 20 (1977). Title III requires prosecutors to report the number of conversations in each interception and the percentage they consider incriminating. Analyzing these figures, Schwartz derived additional evidence that the minimization requirement is virtually meaningless:

> Even by the prosecutors' subjective standards, a very high percentage of the calls intercepted are not incriminating. In 1976, for example, almost 60% of the conversations intercepted on the average tap or bug were so characterized by the prosecutors themselves, even though 55% of the cases were for gambling, where the percentage of "incriminating" interceptions should be almost 100% since the taps are generally on a phone used almost solely for gambling. In non-gambling contexts, the percentage of crime-related conversations is much lower. For example, in 1970, there were 21 non-drug and non-gambling investigations, in which fewer than 20% of the conversations were allegedly incriminating. In many investigations,

2. Minimization in the Foreign Intelligence Area

The Title III experience carries disturbing implications for the foreign intelligence area. At least under Title III evidence of a specified crime is being sought, and this may serve as some constraint on the prosecutors and police.[262] In the foreign intelligence sphere, no similar moorings are available. Under the "vacuum cleaner"[263] approach which the intelligence community takes toward gathering foreign intelligence, it is essential to collect every piece of information possible. Even the most mundane fact could have great significance to the intelligence experts in the overall mosaic of information collected.[264] The validity of that approach is not

---

none of the conversations overheard were considered incriminating. *Id.* at 21.

262 Even this point is open to question. One apparent reason that Title III has been abused is that while the statute requires that only conversations relating to a specific crime will be intercepted, the value of electronic surveillance to law enforcement authorities cannot be confined in this manner. Professor Spritzer has written:

> [O]ne of the principal "practical" justifications . . . for electronic surveillance is that it provides police with an unrivaled opportunity to keep an eye on . . . organized crime . . . and to gain "strategic intelligence . . . . Since surveillance for the avowed purpose of conducting a general watch would never pass muster, the pursuit of strategic intelligence, under a system such as that devised by Congress, also requires a bit of tactical make-believe: one must designate an ostensible objective (evidence relating to a particular offense) in order to obtain an unadvertised by-product (the wealth of information yielded by protected electronic surveillance).
>
> . . . .
>
> . . . The description of subject matter in a warrant no matter how specific has no effect on the scope of an electronic search . . . .

Spritzer, *supra* note 55, at 187, 191.

263 CHURCH COMMITTEE REPORT, *supra* note 3, bk. II, at 178.

264 Former FBI director Clarence Kelley has described the essence of foreign intelligence collection in this way:

> In investigating crimes such as bank robbery or extortion, logical avenues of inquiry are established by the elements of the crime. The evidence sought is clearly prescribed by these elements.
>
> But there are no such guidelines in the field of foreign intelligence collection. No single act or event dictates with precision what thrust an investigation should take; nor does it provide a reliable scale by which we can measure the significance of an item of information.
>
> The value and significance of information derived from a foreign intelligence electronic surveillance often is not known until it has been correlated with other items of information, items sometimes seemingly unrelated.

being questioned here. It is obvious however, that the philosophy is on its face completely incompatible with the constraints of minimization. If minimization has worked disappointingly in the criminal area, there is every reason to believe that it might be completely worthless in the foreign intelligence sphere.

Awareness of these difficulties has led the authors of the Foreign Intelligence Surveillance Act to spell out a detailed definition of minimization which deals not only with the acquisition of conversations which are not properly subject to interception but with retention and dissemination of such conversations as well.[265] In S. 1566 "minimization procedures" are defined as procedures which are reasonably designed to minimize the acquisition and retention, and to prohibit the dissemination of, any information concerning United States persons without their consent that does not relate to the ability of the United States to protect itself against actual or potential attack or other grave hostile acts of a foreign power, terrorism, sabotage or clandestine activities, or provide for national defense or the security of the nation or the conduct of foreign affairs of the United States.[266] A subsequent section

---

> Also, difficulty in determining the potential value of information derivable from such an installation makes it hard to predict the required duration of the surveillance.

1974 Judiciary Hearings, supra note 7, at 255.

265 *But see 1977 Judiciary Committee Hearings, supra* note 116, at 112-21 (testimony of David L. Watters). Watters argues that stringent minimization procedures to prevent acquisition of conversations which should not be obtained can be designed legislatively, and that in fact, "acquisition minimization at the front end is easier to control and is more effective than is the expungement kind." *Id.* at 114.

266 S. 1566, 95th Cong., 2d Sess., § 2521(b)(8)(1978). Throughout the development of the legislation, the drafters have been concerned about the potential overbreadth of a definition of foreign intelligence information which refers to the "conduct of foreign affairs." The Church Committee had reported that from 1966 to 1968, the FBI provided President Johnson with a bi-weekly summary of conversations involving anti-war Senators or Congressmen that had been collected by FBI agents conducting electronic surveillance of foreign embassies. *See* note 56 *supra* and accompanying text. Johnson regarded the information as the political byproduct of the national security taps. There was no pretense made that it was actually national security information. However, the drafters have worried that even had legislation like S. 1566 been in effect at that time, Johnson could have obtained the information on the grounds that the conversations of Congressional opponents of the war, particularly their contacts with representatives of foreign governments, were relevant to his

also authorizes "the retention and disclosure, for law enforcement purposes, of any information which constitutes evidence of a crime."[267]

This definition parallels the definition of "foreign intelligence information" and says that acquisition, retention and dissemination of information other than "foreign intelligence information" must be minimized. Despite the number of words involved, with respect to acquisition, the result is not greatly different from the directive of Title III "to minimize the interception of communications not otherwise subject to interception."[268] Given the disappointing results under Title III there is little chance that acquisition of irrelevant information during foreign intelligence surveillance will be prevented.[269]

Since, under these circumstances, the *acquisition* of nonpertinent conversations can probably not be adequately minimized, the further prohibitions against improper *retention* and *dissemination* assume great importance. In a significant innovation, S. 1566 mandates that information acquired which does not relate to the approved purpose of the warrant must be destroyed.[270] Under Title III, all interceptions must be recorded, if possible, and the tapes cannot be edited or destroyed for ten years.[271] In the context of possible

---

"conduct of foreign affairs." Consequently the drafters added a qualifier to the definition of foreign intelligence information; foreign intelligence information is information "*with respect to a foreign power or foreign territory* which relates to and if concerning a United States person is necessary to 'the successful conduct of the foreign affairs of the United States.' " S. 1566, § 2521(b)(5)(B). With this language, the Judiciary Committee was able to note, "This definition would not include information about the views or planned statements or activities of members of Congress, Executive Branch officials or private citizens concerning the foreign affairs of the United States," or, judging from the statutory language, the national defense or security of the United States as well. 1977 JUDICIARY REPORT, *supra* note 21, at 30-31.

267 S. 1566, 95th Cong., 2d Sess., § 2526(b) (1978).

268 18 U.S.C. § 2518(5)(1976). The legislative history of S. 1566 expresses the drafters' intention that "the minimization requirement of this paragraph is meant generally to parallel the minimization provision in existing laws." 1977 JUDICIARY REPORT, *supra* note 21, at 37.

269 The Judiciary Committee report notes that in some cases, "primarily for sophisticated technological reasons, it may not be possible to avoid acquiring all conversations." 1977 JUDICIARY REPORT, *supra* note 21, at 38.

270 *Id.*

271 18 U.S.C. § 2518(8)(a) (1976).

criminal prosecution this insures that the tapes used as evidence are intact and have not been tampered with. The committees handling S. 1566, however, concluded that destroying information which is not foreign intelligence information or evidence of criminal activity is the best safeguard for the privacy of individuals in this area.

On balance, destruction of tapes (or the equivalent) containing conversations which are neither foreign intelligence information nor evidence of criminal prosecution is a valuable step. There are costs to such an approach; in all likelihood, it reduces further the incentive to minimize interceptions initially. Realistically, however, conversations which should not have been intercepted will be acquired under any circumstances. The need to minimize retention thus becomes paramount.

A more challenging problem arises when a United States person is overheard in a conversation which clearly involves "foreign intelligence information" which the government should be able to retain. Suppose, for example, an ambassador from a neutral nation advises a senator that he has secretly been approached by another country about a possible attack on the United States.[272] Given the importance of the information, there would be general agreement that the conversation falls within the definition of "foreign intelligence information" and its substance should be available to the government. At the same time, the first amendment rights of the senator are implicated. The Church Committee report documents the tendency of the intelligence community to start dossiers on incidentally overheard Americans whose only "crime" was being involved in conversations that have been intercepted. Moreover, the dissemination of such conversations throughout the federal government without regard to the rights of privacy of the incidentally overheard persons has occurred "with distressing frequency in the past."[273]

To deal with these problems, S. 1566, as reported by the In-

272 1976 JUDICIARY REPORT, *supra* note 19, at 42-43.

273 S. REP. No. 701, 95th Cong., 2d Sess. 42 (1978).

telligence Committee, seeks to strike a delicate balance. The legislation now provides that

> Information which relates solely to the ability of the United States to provide for the national defense or security of the nation and to provide for the conduct of the foreign affairs of the United States . . . shall not be disseminated in a manner which identifies any United States person without such person's consent unless such person's identity is necessary to understand or assess the importance of information with respect to a foreign power or foreign territory or such information is otherwise publicly available.[274]

The thrust of this provision is important. If a United States person is overheard in a lawful electronic surveillance and the conversation contains important foreign intelligence information, one can accept the need of the government to retain the conversation. But ordinarily, it is the substance of the conversation that is important, not the identity of the American participant. Accordingly, this provision establishes the general rule that the identity of the United States person will not be disseminated unless the government can meet the burden of showing that the person's identity is needed to understand the foreign intelligence information or to assess its importance.

This rule should not unduly inhibit the government's need to disseminate information in important cases. The executive branch will make the determination in the first place as to when the exigencies of the situation demand that the identity of the incidentally overheard person be disseminated. As the Intelligence Committee notes, "there will inevitably be close judgment calls,"[275] and realistically, the executive will decide the close calls in favor of dissemination. Neither the courts nor the committees are likely to challenge those decisions. However, this provision does establish a presumption against disseminating the identity of incidentally overheard Americans. Executive officials will have to be able to justify their

274 S. 1566, 95th Cong., 2d Sess., § 2521(b)(8)(F)(1975).

275 S. REP. No. 701, 95th Cong., 2nd Sess. 42 (1978).

decisions to disseminate the information and will risk being held accountable for actions which are unreasonable. Overall, the provision represents a sensitive balancing of the conflicting demands of national security and civil liberties.[276]

Minimization procedures—and their failings—go to the very heart of our fears about electronic surveillance. The main thrust of S. 1566 is to insure that only those whose conduct or status makes them proper targets for electronic surveillance are so targeted, but the initial invasion of privacy which accompanies electronic surveillance can be compounded at every stage if innocent conversations are intercepted, retained and then disseminated. Given the abuses of the past, both from electronic surveillance and the creation of dossiers by the intelligence community, Congress should consider the possibility of establishing criminal sanctions for violations of the minimization rules in this area. Admittedly, minimization at the time of interception is an imprecise art; criminal sanctions should be applied with great caution, if at all, at that point. But no similar qualms should block imposition of criminal penalties for improper retention or dissemination of information which is clearly not foreign intelligence information. Enactment of criminal sanctions would be a strong response to the revelations of the Church Committee. It would also allay public concern about the scope of the electronic surveillance permitted under this statute.

Conclusion: Risks Worth Taking

The drafters of the Foreign Intelligence Surveillance Act believed that the abuses uncovered by the Watergate investigations and the Church Committee demonstrated the

276 From the standpoint of United States persons, the rule applies to those parts of the definition of foreign intelligence information where controls on dissemination are most needed. Given the importance that past administrations have accorded to electronic surveillance of foreign embassies as a source of foreign intelligence information, it is likely that United States persons will again be incidentally overheard in conversations relating to the national defense or foreign affairs of the nation. It is far less likely that a United States person would be incidentally overheard in a conversation relating to terrorism or sabotage. Extending the rules against dissemination to other aspects of the definition of foreign intelligence information would, therefore, provide little additional meaningful protection.

necessity of legislating controls over the use of electronic surveillance. They did not believe, however, that the abuses should lead to the total prohibition of it. The underlying premise of the legislation is that, in certain situations, the use of electronic surveillance to gather foreign intelligence is justified and should be permitted. Although the usefulness of electronic national security surveillance has been debated, and total bans on all electronic surveillance have been suggested,[277] the Church Committee report removed any possibility that a ban would be seriously discussed when it noted that "electronic surveillance has proven to be a valuable technique for the collection of foreign intelligence and counter-intelligence within the legitimate mandate of the FBI."[278] Futile pursuit of a ban on electronic surveillance would have made cooperation between the executive and Congress to regulate the practice impossible. Congressional liberals opted for the more modest strategy of trying to enact a warrant procedure to govern electronic surveillance for foreign intelligence purposes.

Given the revelations of the past few years, it is fair to say that critics of the bill were motivated by an intense fear of executive power, its potential for misuse, and the possibility that the legislation would somehow become a license for future abuses. But in assessing the implications of the past excesses, critics sometimes failed to put them into their historical context. Until 1967, the fourth amendment had been interpreted as not providing protection from unreasonable electronic surveillance, unless trespass was involved. Since 1940, Congress had generally averted its eyes from the activities of the intelligence agencies, acquiescing completely in warrantless elec-

277 Professor Schwartz has pointed out that some who have worked with national security surveillance have disparaged its value. *See* H. SCHWARTZ, TAPS, BUGS AND FOOLING THE PEOPLE 39-40 (1977). Some of those cited include Richard Nixon, Ramsey Clark, Morton Halperin, and William Sullivan, former Assistant for Intelligence to J. Edgar Hoover. Halperin and Clark held major positions in the executive branch and were well located to observe the effectiveness of national security electronic surveillance. The views of Sullivan, who once advocated a ban on all electronic surveillance for a trail period of three years, also merit careful attention.

278 CHURCH COMMITTEE REPORT, *supra* note 3, bk. III, 351.

tronic surveillance. In short, the system of checks and balances on which we rely to curb executive power had failed completely. But the fact that presidential power was abused in that context does not mean that similar abuses will occur after judicial decisions have established the constitutional responsibility of the courts in this area, and Congress enacts statutory parameters.

In place of the lawlessness of the past, S. 1566 offers a system of internal executive accountability, a meaningful, antecedent role for the courts, consistent with the fourth amendment, and reliance on legislative oversight by the new intelligence committees to insure that the system works. Every major provision of the bill has been written and reworked painstakingly, with careful attention to the concerns of both civil libertarians and the intelligence community. The legislation still entails some risk, but major legislative efforts always do. In its present form, S.1566 deserves prompt enactment by Congress.

BOOK REVIEW

LAW, LEGISLATION AND LIBERTY—THE MIRAGE OF SOCIAL JUSTICE, By *F. A. Hayek*. University of Chicago Press, 1976. Pp. 195, $10.00.

*Review by Robert F. Drinan**

Nobel Prize-winner F.A. Hayek subtitles his three-volume treatise, *Law, Legislation & Liberty* as "a new statement of the liberal principles of justice and the political economy." The sweeping assumptions and jolting conclusions which Professor Hayek sets forth in the second volume of his trilogy, *The Mirage of Social Justice,* [1] virtually compel the reader to become familiar with Hayek's first volume entitled *Rules and Order.*[2] In that work, Hayek depicts the evolution of the concept of order and law in society and the resulting origin of legislation and lawmakers. Hayek's forthcoming third volume, *The Political Order of a Free Society,* will outline a reform structure of democratic government which is free of the built-in trend toward totalitarianism present in existing democracies. Clearly the three volumes of Hayek should have been published together because without the last part it is very difficult to assess the frequently opaque prose of Dr. Hayek, whose presentation is further complicated by his background in European economics and the civil law of Germany, where he was a professor until his retirement in 1967.

I. THE MIRAGE OF SOCIAL JUSTICE

In volume two of the trilogy, *The Mirage of Social Justice,* Hayek argues that both policymakers and theorists have misapplied vaguely defined "principles" of social justice in their

---

*Member of the United States House of Representatives from the Fourth District of Massachusetts. A.B., 1942, M.A., 1947, Boston College; LL.B., 1949, LL.M., 1950, Georgetown University Law Center; Doctor of Theology, 1957, Gregorian University (Rome).

1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY—THE MIRAGE OF SOCIAL JUSTICE (1976) [hereinafter cited as *The Mirage of Social Justice*].

2 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY—RULES AND ORDER (1973).

attempts to regulate society. He asserts that these attempts pose a grave threat to individual liberty.

Among Hayek's startling premises is the conviction that the liberal constitutionalism established by the founding fathers of America has failed to secure that individual liberty which was its objective. Hayek asserts that government in the modern world is "omnipotent." This situation occurred, Hayek argues, because the safeguards developed 200 years ago by the founders of liberal democracies were inadequate to prevent a situation where legislation is utilized to authorize coercion for the benefit of specific persons or groups who control society.

From one point of view, Hayek, a leading advocate of classical free-market economic theory,[3] could be seen in this volume to reject virtually every political development in the history of the Western World since the eighteenth century. In a deeper sense, however, he probes the underlying and seldom articulated presuppositions of those who assume that the demands of justice and the working of the free enterprise system are compatible. Hayek's notion of the way these two goals should be reconciled is probably best articulated in a Walter Lippmann quotation, cited by Hayek. Lippman stated: "In a free society the state does not administer the affairs of men. It administers justice among men who conduct their own affairs."[4]

For Hayek then it is critical that the government not impose itself in the name of justice on a society that does not share a common ideal of justice. Hayek devotes an extraordinary amount of effort in his book to a denunciation of the concept of "social justice." He concedes that the appeal to social justice has "become the most widely used and most effective argument in political discussion," a standard that guides and measures the worth of political activity. He elaborates that:

---

3 *See, e.g.*, F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960) and THE ROAD TO SERFDOM (1944). A more recent statement of his views applied in a particular context can be found in F.A. HAYEK, RENT CONTROL—A POPULAR PARADOX: EVIDENCE ON THE ECONOMIC EFFECTS OF RENT CONTROL (1975).

4 W. LIPPMANN, AN INQUIRY INTO THE PRINCIPLES OF THE GOOD SOCIETY 267 (1937).

"The commitment to 'social justice' has in fact become the chief outlet for moral emotion, the distinguishing attribute of the good man, and the recognized sign of the possession of a moral conscience."[5]

But Hayek nonetheless states that "the prevailing belief in social justice is at present probably the gravest threat to most other values of a free civilization." For the concept of social justice is neither definitive nor well-understood, despite universal belief in its "ideal." Thus, the "Mirage of Social Justice" looms as a potential pretext for coercion by those who can manipulate it for their special interests. Hayek further states that the quest for this "social justice" will "lead to the destruction of the indispensable environment in which the traditional moral values alone can flourish, namely personal freedom."[6]

Hayek's vehement rejection of the concept of social justice derives ultimately from his adamant contention that the only ties which unite the Western nations are economic relations. He recognizes that this suggestion arouses "great emotional resistance,"[7] but he asserts repeatedly that contemporary mankind should not perpetuate the illusion of any tribal unity. Rather, in Hayek's judgment, modern man should rejoice that "the possibility of men living together in peace and to their mutual advantage without having to agree on common concrete aims . . . was perhaps the greatest discovery mankind ever made."[8] It led to the realization that an order definable by abstract tenets would be necessary for the pursuit of a multiplicity of goals. Thus, members of society with diverse aims could and did agree to basically fair and impartial rules and instruments to maintain order in society. Such agreement became possible only because the particular results such rules produced could not be predicted.[9]

Hayek does concede that at least one moral value should be common to modern society when he writes that "there is no

5 *The Mirage of Social Justice, supra* note 1, at 66.
6 *Id.* at 67.
7 *Id.* at 112.
8 *Id.* at 136.
9 *Id.* at 4.

reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income. . . ." In order to prevent disruption of the social order, however, this income should be "provided outside the market to all those who, for any reason, are unable to earn in the market an adequate maintenance. . . ."[10]

Having sought to establish that only economic relations unite modern men and contemporary nations, Hayek must somehow explain away the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948.[11] He asserts that this document is an attempted fusion of the "rights of the Western liberal tradition with the altogether different conception deriving from the Marxist Russian Revolution."[12] With uncharacteristic bluntness, Hayek scorns the twenty-one articles of the Universal Declaration that seek to guarantee classical civil rights and expresses particular disdain for the seven additional articles of the Declaration which guarantee social and economic rights. He objects to these latter seven guarantees on two grounds. First, positive benefits are ordained for every member of society without a correlative burden placed on someone to provide these benefits. Second, the rights are too indefinite for any tribunal to succeed in applying them to a particular case. Sardonically, Hayek writes:

> Even the slightest amount of ordinary common sense ought to have told the authors of the document that what they decreed as universal rights were for the present and for any foreseeable future utterly impossible of achivement, and that solemnly to proclaim them as rights was to play an irresponsible game with the concept of 'right' which could result only in destroying the respect for it.[13]

Hayek concludes his rejection of anything in the Universal

---

10 *Id.* at 87.

11 Universal Declaration of Human Rights, G.A. Res. 217 A(III) U.N.Doc. A/810 (1948), *reprinted in* L. SOHN, BASIC DOCUMENTS OF THE UNITED NATIONS 168-72 (1968) [hereinafter cited as *Universal Declaration of Human Rights*].

12 *The Mirage of Social Justice, supra* note 1, at 103.

13 *Id.* at 105.

Declaration as a true right with this reaffirmation of his passionate belief in free enterprise:

> To speak of rights where what are in question are merely aspirations which only a voluntary system can fulfill, not only misdirects attention from what are the effective determinants of the wealth which we wish for all, but also debases the word 'right', the strict meaning of which it is very important to preserve if we are to maintain a free society.[14]

II. RIGHTS, THE CONGRESS AND THE THIRD WORLD

Professor Hayek has written in a disconcerting and to some extent disjointed way about the absence of any clearly accepted moral values shared by the industrialized nations and the Third World. Hayek would be easier to understand and accept if he were philosophizing from a strictly utilitarian base[15] or from a viewpoint of judicial or legal positivism.[16] He expressly rejects these philosophies,[17] however, while he does not associate himself with any identifiable natural law juris-

---

14 *Id.* at 106.

15 Hayek notes that although, in general, the constructivist interpretation of rules is known as "utilitarianism," a narrower concept has been used since the late eighteenth century—conduct based on an explicit balance of the relative pleasure and pain of a certain course of action. *See The Mirage of Social Justice, supra* note 1, at 17-18. *See also* J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 17 (Dolphin ed. 1961) (the work was first published in 1789). J. S. MILL, UTILITARIANISM (12th ed. 1891).

16 H.L.A. Hart, in his book *The Concept of Law,* notes the different forms which the theory of "legal positivism" can take:

> Legal Positivism. The expression 'positivism' is used in contemporary Anglo-American literature to designate one or more of the following contentions: (1) that laws are commands of human beings; (2) that there is no necessary connexion between law and morals, or law as it is and law as it ought to be; (3) that the analysis or study or meanings of legal concepts is an important study to be distinguished from (though in no way hostile to) historical inquiries, sociological inquiries, and the critical appraisal of law in terms of morals, social aims, and functions; (4) that a legal system is 'closed logical system' in which correct decisions can be deduced from predetermined legal rules by logical means alone; (5) that moral judgments cannot be established, as statements of fact can, by rational argument, evidence of proof ('non cognitivism in ethics').

H. L. A. HART, THE CONCEPT OF LAW 253 (1961).

17 *The Mirage of Social Justice, supra* note 1, at 17-30.

prudence. He stands outside of any group of writers about the law, although he concedes some agreement with the approach of Professor John Rawls in his classic book *A Theory of Justice.*[18]

Almost any reader of this volume—and particularly a legislator—will have intense interest in the application of Hayek's principles in the political order—to be discussed in his third volume. Some of the political conclusions of Hayek are predictable. He certainly will rebel against most if not all governmental regulations which affect the operation of the free market. He will criticize in this area as in others what he describes as "the futile medieval search for the just price and just wage."[19]

While Hayek easily can denounce the imposition of principles of justice where they interfere with the free market, his own principles do not indicate how to choose between the political and economic rights mentioned in the Universal Declaration. What does his theory of justice suggest as the proper policy when the United States Congress and international development agencies come to the question of whether they should deny access to food and to energy to millions of people in the Third World because their unelected rulers deny to these people internationally guaranteed human rights?[20] The Declaration makes no distinction between the basic political

---

18 Hayek states that Rawls' theory is that one cannot define specific systems or hierarchical distributions as just. Rather, "justice" defines constraints on the institutions whose operations create such distributions, and if such constraints are satisfied, the distributions are 'not unjust.' *The Mirage of Social Justice, supra* note 1, at 100. *See* J. RAWLS, A THEORY OF JUSTICE 13 (1971). Note that Hayek does voice disagreement, however, with the fact that Rawls uses the term "Social Justice." *The Mirage of Social Justice, supra* note 1, at 183 n. 44.

19 *Id.* at 75.

20 This concern was expressed by Secretary of State Cyrus Vance in Congressional Hearings last March before the Senate Foreign Relations Committee. Secretary Vance stated:

> 'New directions' [in bilateral foreign assistance] call for greater emphasis on delivering aid to the poor people of the world. Similarly we are called upon to concern ourselves with the status of human rights in the countries we aid.... How, for instance, are we to proceed in a case where our commitment to development and economic human rights may come into conflict with our commitment to principles of individual justice? No pat formula can resolve such a dilemma. We believe we can best deal with these

rights which it vindicates and the relatively sophisticated claim that everyone should have "just and favorable remuneration, including reasonable limitations of working hours and periodic holidays with pay."[21]

In a halting and uncertain way the Congress has denied economic assistance to some nations where a dictator has usurped the political rights of the citizens of that country.[22] Yet Congress has not taken corresponding action against South Korea or the Philippines. Military assistance should logically be withdrawn from both nations since they each have abominable records with regard to the protection of internationally guaranteed human rights. Some unrefined claim that these nations are military allies of the United States has inhibited Congress from withdrawing assistance which clearly would be withheld from other nations with comparable records on human rights.[23]

The Congress has sought to be consistent in extending this principle to United States participation in the work of international agencies designed to help the Third World. The Congress has given some unspecified discretion to State Department officials to grant or to withhold United States aid for Third World countries after a judgment is made concerning

---

questions on a case-by-case, country-by-country basis, always applying the same set of general criteria.

The International Development Assistance Act of 1977, Hearings Before the Subcomm. on Foreign Assistance of the Senate Foreign Relations Comm., 95th Cong., 1st Sess. 9 (1977).

21 *Universal Declaration of Human Rights, supra* note 11, at XXIV.

22 The Senate Committee on Foreign Relations recently recommended the prohibition of military assistance and training, FMS credits and sales and deliveries of military equipment financed by the US government to Ethiopia because "by all available sources of information (the Ethiopian government) is consistently engaging in gross violations of human rights. . . ." SENATE COMMITTEE ON FOREIGN RELATIONS, THE INTERNATIONAL SECURITY ASSISTANCE AND ARMS EXPORT CONTROL ACT OF 1977, S. REP. No. 195, 95th Cong., 1st Sess. 29-30 (1977).

23 For example, in 1976 the House International Relations Committee drafted an amendment to limit the amount allocated to Korea under the Foreign Military Assistance Arms Sales bill (H.R. 13680). This ceiling was placed because of concern with violations of basic human rights by the Park government. Opponents argued that the reduction would severly hamper South Korean efforts to become militarily self-sufficient. The amendment was defeated, and the original allotment granted. 122 Cong. Rec. H5167 (daily ed. June 2, 1976).

the quality of good faith efforts made by a nation in the area of human rights.[24] But clearly both the Congress and international lending agencies have a long way to go before anyone can claim that a clear and coherent policy has been established.

It may well be that the fundamental difficulty in this matter derives ultimately from Professor Hayek's contention that there really is no significant moral consensus in modern society. Clearly there is no accepted moral conviction as to the hierarchy of political and economic rights.

Despite the forcefulness of Hayek's presentation, one continues to wonder whether or not there cannot be some acceptance of a moral vision among men everywhere that goes beyond the economic and financial alliances which bring men together. In a certain narrow and technical sense, Hayek is correct when he asserts that there are no internationally recognized or guaranteed human rights in the strict, juridical sense of a right as something for which there is a correlative duty. But surely there are quasi-rights among men or at least inchoate rights which are in the process of becoming fully acceptable juridical rights. Apparently members of Congress think so in passing social welfare and employment legislation.[25] And so do those persons who desire to be the architects of a world order in which those fundamental guarantees

---

24 For example, a 1966 amendment to the statute authorizing use of funds for The Alliance for Progress states, "In furnishing assistance under this subpart the President shall take into account . . . (5) the degree to which the recipient country is making progress toward respect for rule of law, freedom of expression and of the press, and recognition of the importance of individual freedom, initiative & private enterprise. . . ." 22 U.S.C. § 2211(b) (1970). And legislation enacted in October directed the United States Executive Directors of International financial institutions to advance the cause of human rights with "their voice and vote and by seeking to have the institutions direct assistance toward countries which are not engaging in a consistent pattern of gross violations of human rights." International Bank for Reconstruction and Development Act of 1977, Pub. L. No. 95-118, § 701, 91 Stat. 106 (1977).

25 For example, the stated purpose of the Humphrey-Hawkins Full-Employment Bill is "to establish and translate into reality *the right* of all adult Americans able, willing, and seeking to work the full opportunity for useful paid employment at fair rates of compensation. . . ." S. 50, 123 CONG. REC. S124 (daily ed. Jan. 10, 1977) and H. R. 50, 123 CONG. REC. H79 (daily ed. Jan. 4, 1977) (emphasis added).

which are enforceable by citizens in Europe and America will also be accepted in nations where at this time neither political nor economic rights are clear or enforceable.

Hayek's hard-driving logic and his relentless pursuit of his confining but challenging thesis will force jurists to curb their rhetoric and chisel their prose more concisely. At the same time, *The Mirage of Social Justice* should stimulate non-jurists to recognize that their dreams of fairness and justice for all men are by no means a reality.

RECENT PUBLICATIONS

CONGRESSIONAL STAFFS: THE INVISIBLE FORCE IN AMERICAN LAWMAKING. By *Harrison W. Fox & Susan Webb Hammond.* New York: The Free Press, 1977. Pp. 227, index. $12.95.

Two former Congressional staff members have written an "insider's view" of a power elite largely hidden from the American public—the staff members who serve American Congressmen. Harrison Fox has served on House and Senate personal staffs as well as on the Senate Government Operations and Finance Committees, and on the Committee to study the Senate Committee System. Susan Hammond was on the personal staff of Congressman William H. Meyer, and has worked with the Commission on the Operation of the Senate and House Commission on Administrative Review. This personal experience, as well as the use of questionnaires circulated among Congressional staffs, and a meticulous collection of data, provide the reader with a better view of this unknown "subculture."

The book resembles an anthropological study. After a detailed examination of the growth of Congressional staffs, inundated with the record of every change in pay raises and staff allowances, the authors launch an analysis of the attributes of staff members. Their conclusions are not surprising—that staff members tend to be young, that males predominate the professional sphere, that members often hail from the home state of their Congressmen and have strong party preferences.

Of greater interest is the chapter on hiring and tenure policies, where the authors leave the security of data and attempt to identify specific patterns and attitudes of Congressmen and their staffs. The authors also discuss the developing trend of persons making a career, rather than a starting point, of service on Congressional staffs. Other chapters focus on organization, job assignment, and communications among the staffs.

The authors close with a discussion of future trends. They postulate that the increasing complexity of issues facing Congressmen augments the power of the specialized staff member and gives him or her an increasingly important role in the political milieu.

Although the book provides worthwhile reading and interesting fact patterns, it is disappointing to find so little commentary on the merits of the system itself and the dangers or advantages of the increasing power of the Congressional staffs. It merely provides fuel for serious consideration of how this important "subculture" should operate to provide a more effective Congress.

SPECIAL INTERESTS & POLICYMAKING: AGRICULTURAL POLICIES AND POLITICS IN BRITAIN AND THE UNITED STATES OF AMERICA 1956-70. By *Graham K. Wilson.* New York: John Wiley & Sons, 1977. Pp. 205, Index. $17.95.

Congressmen today face a myriad of special interest groups whose concerns must be evaluated and considered. Some groups are successful; others less so. *Special Interests and Policymaking* examines the role of a well-known interest group, the agricultural lobby, to illustrate the effect of minority pressure groups on the economic policies in two nations—the United States and Great Britain.

In both Great Britain and the U.S., notes Graham, "[f]armers are . . . both a small minority and immensely successful in attracting government help." Graham attempts to resolve this so-called paradox by examining the history and structure of these interest groups—both as they actually exist and as they are perceived by decision makers in both nations.

Graham implies that in Great Britain the Conservative Party, the traditional representatives of the rural constituency, overestimates the power of the farm vote and reacts accordingly. The Labour Party competes for the farm vote, in the hope of swinging a close election or in building up a constituency less closely allied with Conservatives than in former

times. Since the farm bloc is small and, until Britain's entry into the European Economic Community, concessions to it went unnoticed, the farm vote could be courted without the loss of the consumer votes. Graham also discusses the power of the National Farmer's Union (NFU), depicting it as well-organized and integrated—80 percent of all farmers in England and Wales are members.

U.S. agricultural lobbyists enjoy less unity and common purposes, resulting in a greater disparity in the distribution of subsidies. The lack of unity is evident in the large number of farm lobbies. Although the members of U.S. lobbies are indistinguishable from one another in terms of income or type of farm operated, farm interest groups in the United States focus on issues other than farming—from the conservative American Farm Bureau Federation to the liberal National Farmers' Union. The farm bloc splits not on agricultural issues, but on different views on the role of government in the economy. The Secretary of Agriculture, maintains Graham, is also hampered in devising a rational farm policy due to influence of a vote-conscious Congress.

The book in general provides interesting reading on the development, strengths and weaknesses of the farm bloc, but it is uncertain whether the bulk of this information and conclusions can be applied to interest groups less aged in development and more subject to internicine quarrels about policies and goals.

RULING CONGRESS: HOW THE HOUSE AND SENATE RULES GOVERN THE LEGISLATIVE PROCESS. By *Ted Siff & Alan Weil*. New York: Penguin Books, 1977. $2.95.

Ruling Congress, originally published in hardcover in 1975, is the result of a study of the Ralph Nader Congress Project. "In the inner world of the Congress, strategic use of *rules, precedents, customs,* and *courtesies* spells power. . . ." Although consideration of the rules of parliamentary procedure may be insufferably dull in the abstract, this book succeeds in illustrating their impact on Congressional activity.

Certainly procedures are necessary to ensure orderliness in the administration of a body of 535 lawmakers. But as the authors of the study note, the complexity and disorganization of the Congressional Rules results in the concentration of power among those who know how to use them. Those experts in the use of rules are generally ranking senior members. Of course, freshmen Congressmen can gain power by mastering the Rules, but this is a difficult procedure. There are no single manuals codifying the Rules and precedents, and rulings from the chair have not been codified since 1936.

The book explores the assignment and organization of congressional committees. The assigning of members to committees, called a "mystic process" by one legislator, is done by Republican and Democratic "Committees on Committees." Seniority plays an important role in the allocation of committee assignments, and the chairman of a committee (again usually determined by seniority) controls the activity of that committee by his power to set the agenda and to parcel and distribute debate and hearing times. Another type of committee, the conference committee, is explored. Since a bill must pass both houses with the same wording, representatives from the House and Senate meet in these committees to negotiate compromise wording acceptable in both houses. Precedent has demanded that these conferences be held behind closed doors, yet the resulting manipulations of statutory wording and the preparation of the conference report have a major impact on the interpretation of legislation. The study examines Wilbur Mills' mastery of the conference procedure in his role as former Chairman of the House Ways and Means Committee. One tactic was to have Senators introduce amendments on the floor that he wanted discussed at conference, thus bypassing his own committee and full consideration of the House in the matter.

The study also examines the use of parliamentary procedures on the floor of the House and Senate, and, in a most interesting chapter, examines the personalities, powers and roles of the two Congressional Parliamentarians—Lewis Deschler in the House and Floyd Riddick in the Senate. Both of these men play powerful roles in advising members how to manipulate bills through the congressional mechanism, and in telling them when such tactics will not succeed.

BOOKS RECEIVED

THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES. By *G. Edward White.* New York: Oxford Univ. Press, 1978. Pp. 441, index. $4.95, paper.

CHILD ADVOCACY WITHIN THE SYSTEM. By *James L. Paul, G. Ronald Neufeld, and John W. Pelosi,* eds. Syracuse: Syracuse Univ. Press, 1977. Pp. 162. $9.95.

CHILD MALTREATMENT IN THE UNITED STATES: CHALLENGE TO SOCIAL INSTITUTIONS. By *Saad Z. Nagi.* N.Y.: Columbia Univ. Press, 1977. Pp. 162, index. $8.00.

CHINA AND THE MAJOR POWERS IN EAST ASIA. By *A. Doak Barnett.* Washington, D.C.: Brookings Institution, 1977. Pp. 416, index. $12.95 cloth, $5.95 paper.

A CITY IN TERROR: THE 1919 BOSTON POLICE STRIKE. By *Francis Russell.* New York: Penguin Books, 1977. Pp. 256, index. $3.95 paper.

CRIME PREVENTION THROUGH ENVIRONMENTAL DESIGN. By *C. Ray Jeffery.* Beverly Hills, Calif.: Sage Publication, 1977. Pp. 351, indices. $17.95 cloth, $7.95 paper.

DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION. By *Suzanne Weaver.* Cambridge, Ma.: MIT Press, 1977. Pp. 196, index. $14.95.

DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL. By *Edward Ross Aranow, Herbert A. Einhorn, and George Berlstein.* N.Y.: Columbia Univ. Press, 1977. Pp. 411, index. $57.50.

THE GENTLEMEN'S CLUB: INTERNATIONAL CONTROL OF DRUGS AND ALCOHOL. By *Kettil Brunn, Lynn Pan and Ingemar Rexed.* Chicago: Univ. of Chicago Press, 1975. $12.50.

GUIDEBOOK TO OCCUPATIONAL SAFETY AND HEALTH, 1977 EDITION. Chicago: Commerce Clearing House, 1977. $8.50 paper.

IN NECESSITY AND SORROW: LIFE AND DEATH IN AN ABORTION HOSPITAL. By *Magda Denes.* N.Y.: Penguin Books, 1977. Pp. 247. $2.95 paper.

THE INHERITANCE OF ECONOMIC STATUS. By *John A. Brittain.* Washington, D.C.: Brookings Institution, 1977. Pp. 185, index. $9.95 cloth, $3.05 paper.

KNOWLEDGE AND IGNORANCE IN ECONOMICS. By *T.W. Hutchinson.* Chicago: Univ. of Chicago Press, 1977. Pp. 186, index. $12.50.

THE LAW OF HABEAS CORPUS. By *R.J. Sharpe.* N.Y.: Oxford Univ. Press, 1976. Pp. 254, index. $22.00.

THE LAWLESS STATE: THE CRIMES OF THE U.S. INTELLIGENCE AGENCIES. By *Morton H. Halperin, Jerry J. Berman, Robert L. Barosage and Christine M. Marwick.* New York: Penguin Books, 1977. Pp. 328, index. $2.05 paper.

LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS. By *William H. Harbaugh.* N.Y.: Oxford Univ. Press, 1978. Pp. 648, index. $6.95 paper.

THE LEGAL PROCESS: MODELING THE SYSTEM. By *Stuart S. Nagel and Marian Neef.* Beverly Hills: Sage Publications, 1977. Pp. 214, indices. $14.00 cloth, $6.95 paper.

NUCLEAR POWER. By *Walter C. Patterson.* N.Y.: Penguin Books, 1974. Pp. 304, index and appendices. $3.50 paper.

POLITICS AND THE ADMINISTRATION OF JUSTICE. By *George F. Cole.* Beverly Hills: Sage Publications, 1977. Pp. 234, indices. $10.95 cloth, $6.95 paper.

POWER PLANT PERFORMANCE: NUCLEAR AND COAL CAPACITY FACTORS AND ECONOMICS. By *Charles Komanoff.* N.Y.: Council on Economic Priorities, 1976.

PUBLIC REGULATION OF SITE SELECTION FOR NUCLEAR POWER PLANTS. By *Ernest D. Klema* and *Robert L. West.* Washington, D.C.: Resources for the Future, 1977. Pp. 129. $5.75 paper.

RADIOACTIVE WASTE: MANAGEMENT AND REGULATION. By *Mason Willrich and Richard K. Lester.* N.Y.: The Free Press, 1977. Pp. 138, index. $13.95.

THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848. By

William M. Wiecek. Ithaca, N.Y.: Cornell Univ. Press, 1977. Pp. 306, index. $12.50.

THE SOVIET MILITARY BUILDUP AND U.S. DEFENSE SPENDING. By *B. Blechnam, R. Bernam, M. Benkin, W. Johnson, R. Weinland and F. Young.* Washington, D.C.: Brookings Institution. Pp. 61. $2.95 paper.

STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM: CASES AND MATERIALS. By *Daniel L. Mandelker and Dawn Clark Netsch.* N.Y.: Bobbs-Merrill Co., 1977.

THE WHORES OF WAR: MERCENARIES TODAY. By *Wilfred Burchett & Derek Roebuck.* N.Y.: Penguin Books, 1977. Pp. 240. $2.95 paper.

ZONING AND PROPERTY RIGHTS. By *Robert H. Nelson.* Cambridge: MIT Press, 1977. Pp. 259, index. $16.95.