IMPACT OF THE TAX REFORM ACT OF 1969 ON STATE SUPERVISION OF CHARITIES

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Introduction

The primary responsibility for supervising the activities of charitable organizations in each of the fifty states is vested in its attorney general or other similar state official, acting under the power of parens patriae. While in theory state law defines the powers and duties of the trustees and directors of these organizations, in practice the Internal Revenue Code and the Internal Revenue Service have determined the scope and extent of their activities, particularly since the early nineteen-fifties. This is especially true for that group of tax-exempt charitable organizations that do not depend on contributions from the public for their support. For tax years after 1950 these organizations have been subject to loss of tax-exemption if they engage in certain self-dealing transactions,[1] or had accumulations of income that were unreasonable in amount or duration.[2]

Prior to the Tax Reform Act of 1969, the indentures of charitable trusts and the charters of charitable corporations had generally followed the language of the Internal Revenue Code in stating the purposes of the organization and the restrictions on operation. Moreover, trustees and directors had inevitably assumed that their powers and duties were those set forth in the Code. Thus, even though a trustee's duty of loyalty under state law precluded any self-dealing regardless of reasonableness,[3] many

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1 INT. REV. CODE of 1954, § 503(h) *as amended*, 83 Stat. 527 (1970).

2 *Id.* § 504, 68A Stat. 168 (repealed, 1970).

3 RESTATEMENT (SECOND) OF TRUSTS § 170 (1959); 2 A. SCOTT, TRUSTS § 170 (3d ed. 1967); See *Duties of Charitable Trustees and Directors*, 2 REAL PROPERTY, PROBATE AND TRUST L.J. 545 (1967).

fiduciaries felt governed by the more lenient standards of the Code.

Conversely the Code was often more restrictive than state law. Under the laws of a majority of the states it is entirely permissible to accumulate income for charitable purposes for an indefinite period.[4] However, after 1950 the Internal Revenue Service would not grant exemption to any organization whose charter or indenture of trust required or permitted the accumulation of income beyond a specified period. This was particularly true if the stated purpose for the accumulation was merely to increase the amount of funds passing ultimately to charity.

There was a similar preemptive federal influence in regard to public disclosure of the activities of tax-exempt organizations. Those not primarily dependent upon public support were required to file information returns with the Internal Revenue Service.[5] Twelve of the 50 states[6] required certain charitable organizations to file periodic financial reports with the attorney general. However, only one of these state statutes[7] was sufficiently broad to affect the entire range of organizations required to file with the Service. Furthermore, in only seven of the states[8] was there an adequate staff for investigation and follow through on the reports that were received.

I. Tax Reform Act of 1969

The Tax Reform Act of 1969 has now classified organizations that do not depend upon public support as "private foundations"[9] and subjected them to an annual tax of four percent of their net income. It has also created a series of substantive rules

4 Restatement of Property § 442 (1944).

5 Int. Rev. Code of 1954 § 6033(a).

6 Cal. Gov't Code § 1258 (West 1963); Ill. Ann. Stat. ch. 14, §§ 51-64 (Smith-Hurd, 1963); ch. 364, §§ 1-12, [1959] Iowa Acts 487-89 (repealed 1965); Mass. Gen. Laws Ann. ch. 12, § 8 (1966); Mich. Comp. Laws, §§ 14.251-.266 (1967); N.H. Rev. Stat. Ann. §§ 7:19-32 (1955); N.Y. Est. Powers &Trusts Law § 8-1.4 (McKinney 1967); Ohio Rev. Code Ann. §§ 109.23-.31,.99 (Anderson 1953); Ore. Rev. Stat. §§ 128.610-.750, 61.972 (1969); R.I. Gen. Laws Ann. §§ 18-9-1 to -15 (1970); S.C. Code Ann. §§ 67-81 to -85 (1962); Wash. Rev. Code Ann. §§ 19:10.010-.900 (1971).

7 Mass. Gen. Laws Ann. ch. 12, § 8 (1966).

8 California, Illinois, Massachusetts, Michigan, New York, Oregon, Washington.

9 Int. Rev. Code of 1954 § 509.

concerning their method of operation. There are new disclosure requirements for all tax-exempt charitable organizations (churches and certain small entities excepted) and expanded reporting procedures for private foundations.

For private foundations, the new prohibitions against self-dealing are more stringent than under state law.[10] In addition to prohibitions on accumulation, these organizations must invade and expend principal in any year that their investment income is less than a federally defined minimum investment return.[11] State laws defining permissible investments have now been superseded by a rule that prevents private foundations, together with their "disqualified persons" from holding more than 20 percent of the voting stock of a single corporation or of the financial interest in a business entity.[12] A new federal "prudent man" rule has been enacted to determine when a manager has acted so as to jeopardize the fulfillment of the trust's exempt purposes.[13] Congress has also prohibited certain types of charitable activities heretofore considered proper (and still not subject to circumscription under state law). This section prohibits expenditures for lobbying, influencing elections, and making certain grants to individuals and other foundations.[14] Violation of any of these substantive provisions can lead to imposition of excise taxes on the foundation and, in some instances, its fiduciaries, principal donors, the families of both groups, and business and financial interests they control. Loss of tax-exempt status will now result in taxation at individual or corporate rates[15] and perhaps imposition of what is, in effect, a confiscatory tax on the foundation's net assets.[16] Severe penalties will also be imposed on the foundation and its managers for failure to make proper and timely reports.[17]

In order to provide a basis for enforcement of these rules in equity proceedings, Internal Revenue Code section 508(e) now

10 *Id.* § 4941.
11 *Id.* § 4942.
12 *Id.* § 4943.
13 *Id.* § 4944.
14 *Id.* § 4945.
15 *Id.* § 4940. It should be noted that § 642(c)(6) prevents taxable private foundations from taking a deduction for charitable contributions.
16 *Id.* § 507.
17 *Id.* §§ 6652(d), 6685, 7207.

states that a private foundation will not be exempt from taxation if its governing instrument does not contain provisions requiring the trustees to act in accordance with the new federal rules.

Finally, a private foundation can no longer merely decide to terminate and thereby avoid application of the new rules. A new section of the Internal Revenue Code, section 507, contains detailed procedures whereby, unless the foundation's funds are distributed to publicly-supported organizations or the foundation itself becomes publicly-supported, the Internal Revenue Service may impose an excise tax on the terminating foundation equal to the lower amount of (1) all tax benefits previously accorded to the foundation and its donors, or (2) the value of the net assets of the foundation.

It should not be assumed that these new provisions apply only to organizations that have already received a ruling that they are exempt under section 501(c) (3). Section 4947(a) extends all of the substantive rules, the termination procedures, and the requirements for inclusion of certain provisions in governing instruments to any trust that has exclusively charitable interests, regardless of whether it would have been able to receive tax-exemption under prior law. In addition, under section 4947(b) certain of the new rules are also made applicable to trusts with both charitable and private interests.

II. The Developing State Legislation

In one sense, the passage of the "private foundation" provisions of the Tax Reform Act of 1969 represents complete federal preemption of the manner in which charitable organizations not dependent upon public support will henceforth be operated. However, in addition to the substantive and procedural rules, there are other provisions in the Tax Reform Act relating primarily to enforcement procedures that reflect a desire on the part of Congress to encourage and increase participation of the states in the supervision of charities. These provisions reflect a new approach to the administration of the Internal Revenue Code and, as such, are likely to have far-reaching consequences at both the

state and the federal level. They have already led to the passage of five state statutes, the introduction of legislation in the current sessions of some eight states and the drafting of two proposed "uniform acts." It is far too soon to assess, or even predict, the ultimate impact of these state actions. However, an examination of these proposed statutes and the relevant Internal Revenue Code provisions should provide some assistance in formulating an orderly course for the transformation at the state level.

A. *The Impact of Section 508(e)*

The starting point for such an analysis is section 508(e) of the Internal Revenue Code. As noted, this section was designed to assure federal control of the ground rules under which private foundations shall henceforth operate. It states that a foundation shall not be exempt from taxation unless its governing instrument includes provisions (1) to require distribution of income in conformity with the new requirements of section 4942 and (2) to prohibit the foundation from engaging in any of the other activities or making any of the expenditures now prohibited under sections 4941 and 4943 through 4945.

Application of section 508(e) to organizations in existence before January 1, 1970, was postponed until tax years beginning after December 31, 1971. This section also contains special delay provisions to give foundations an opportunity to seek reform of their governing instruments. Organizations which institute judicial proceedings before that date to reform their governing instruments or to excuse fiduciaries from compliance in order to meet the federal requirement are exempted during the pendency of judicial action and thereafter, if the court action is not successful.[18]

Although these savings provisions seem to be lenient on their face, this appearance is somewhat deceiving. If the governing instrument of a private foundation contains a prohibition against distribution of capital or corpus or a mandatory direction for accumulation of income that would not have been grounds for refusal of an exemption ruling under section 501(c) (3) prior to the repeal of section 504, the savings provisions will be of no avail if a court refuses to permit deviation or amendment. The provision

18 *Id.* § 508(e)(2).

requiring distribution of an amount equal to the minimum investment return under section 4942 becomes effective for these organizations on January 1, 1972, regardless of whether a court has refused to permit deviation or amendment.[19] Thus, in these cases, the savings provision will be of no value.

In addition to assuring uniformity of administration, section 508(e) has also established the groundwork for enforcement of the new federal requirements at the state level. As explained in the report of the House Committee on Ways and Means, the requirements of section 508(e) were specifically designed to encourage and facilitate effective state involvement in the supervision of private foundations:

> Your committee intends and expects that this requirement will add to the enforcement tools available to State officials charged with supervision of charitable organizations.[20]

The first step by the Treasury to implement section 508(e) came with publication of Revenue Ruling 70-270, which contained language suggested for inclusion in trust instruments and corporate charters.[21] Then, on May 9, 1970, the Secretary issued temporary regulation 13.8 which provides that the requirements of section 508(e) will be considered satisfied if valid provisions of state law have been enacted that either (1) impose upon foundations the restrictions required by section 508(e) to be included in their governing instruments; or (2) treat these restrictions as contained in their governing instruments.[22]

B. *Proposed State Legislation*

Several versions of state statutes designed to take advantage of the treasury regulation have been introduced in various jurisdictions. Others are still in various stages of preparation. The drafts available illustrate the problems that state legislators face in altering the governing instruments of charitable organizations to meet the federal requirements. As a preliminary matter, it is helpful to examine the approaches taken in these proposed statutes.

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19 *Id.* § 4942(e)(4); Tax Reform Act of 1969, Pub. L. No. 91-172 § 101(l)(3).
20 H.R. REP. No. 91-413, 91st Cong., 1st Sess., pt. 1, at 40 (1969).
21 Rev. Rul. 70-270, 1970 INT. REV. BULL. No. 22, at 8.
22 Proposed Treas. Reg. § 13.8, 35 Fed. Reg. 7300 (1970).

In attempting to assess these differing approaches, one must realize that idiosyncrasies in various jurisdictions prevent complete uniformity.

The Virginia legislature had already enacted a statute in April, 1970,[23] with an approach similar to the first alternative in temporary regulation 13.8. Basically the act establishes an express prohibition on actions that would subject a foundation to excise taxes and an affirmative requirement that income be distributed in amounts sufficient to avoid taxation. This statute has been recently amended, however, to conform to the second alternative. On March 2, 1971, bills were introduced in Delaware which would expressly prohibit private foundations and trusts from acting in any manner which would subject them to the taxes of sections 4941 through 4945.[24] These bills also follow the first alternative of temporary regulation 13.8.

A draft bill prepared by the Committee on Charities of the Tax section of the State Bar of Texas[25] follows the second alternative of temporary regulation 13.8. It states that the governing instrument of every trust and the articles of incorporation of every private foundation shall be "deemed to contain" the required provisions.[26] This draft is of particular interest since on January 4, 1971, the Internal Revenue Service issued an advisory opinion letter indicating that, if enacted, the statute would be effective to meet the requirements of section 508(e).[27] The Virginia act, as amended,[28] follows this version, as do bills introduced in Georgia[29] and North Carolina.[30]

Drafts prepared for introduction in Illinois,[31] Minnesota,[32]

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23 1970 Va. Acts chs. 549, 714, as amended, H. 114, 115, 116, Va. Gen. Assembly, 1971 Sess. (enacted March 16, 1971, effective May 1, 1971).

24 *State Legislation Since TRA 1969*, 4 NON-PROFIT REPORT 8 (1971).

25 S. 174 (Trusts); S. 176 (Non-Profit Corp.), Tex. Legislature, 1971 Sess.

26 S. 174, § 1; S. 176, § 1, Tex. Legislature, 1971 Sess.

27 Brorby, *Using State Law to Amend Foundations' Governing Instruments Under 508(e)*, 34 J. TAXATION 170, 172 (1971) (copy of approval letter enclosed).

28 H. 114, § 1; H. 115, § 1; H. 116, § 1, Va. Gen. Assembly, 1971 Sess. (enacted March 16, 1971, effective May 1, 1971).

29 1971 Ga. Stat. ch. 577 (eff. Jan. 1, 1972). The final version as adopted, however, only deals with INT. REV. CODE of 1954, § 4942.

30 S. 119 § 1, Gen. Assembly of N.C., 1971 Sess.

31 Letter from Morton John Barnard, Vice President, Ill. State Bar, to author, August 13, 1970. (Proposed Ill. Draft, Trusts § 1; Not-for-Profit Corp. § 1).

32 H.F. 957, § 1; H.F. 958, § 1, Minn. Legislature, 1971 Sess.

North Carolina,[33] and Pennsylvania[34] also use the "deemed to contain" language and are made applicable to private foundations and split interest trusts notwithstanding any provision in the laws of the state or the governing instrument to the contrary.

The Virginia act, as amended, applies the "deemed to contain" language unless the governing instrument expressly includes specific provisions to the contrary. Both the Virginia act and the Texas draft permit the trustees, with the consent of the settlor (if living and competent), to amend the trust instrument to conform with section 508(e) without judicial proceeding.[35] The Texas bill requires filing of a duplicate original of the amendment with the attorney general.[36] The Virginia act requires the consent of the attorney general and recording the amendment.[37]

The amended Virginia act[38] and the drafts proposed for Texas,[39] Georgia[40] and North Carolina[41] also contain provisions permitting trustees or directors, without judicial proceeding, to expressly *exclude* their organization from application of the act by executing a written amendment to that effect and filing the same with the attorney general. Again, the Texas version requires consent of a living settlor of a trust to such an amendment.

In contrast, the Pennsylvania draft states that the incorporated provisions shall apply except to the extent that a court of competent jurisdiction in a proceeding instituted before January 1, 1972 should explicitly decide that their application would substantially impair the accomplishment of the purposes of the charitable organization involved.[42] The Minnesota act is rendered inapplicable if a court of competent jurisdiction determines at

33 S. 119 § 1, Gen. Assembly of N.C., 1971 Sess.

34 Letter from Charles A. Woods, Jr., Dep. Att'y Gen. of Pa., to author, March 4, 1971. (Proposed Pa. Draft §§ 1, 2). A similar version has been introduced in Iowa. S. 347, Iowa Gen. Assembly, 1971 Sess.

35 *Id.*

36 S. 174, § 3, Tex. Legislature, 1971 Sess.

37 H. 114, § 1; H. 115, § 1; H. 116, § 1, Va. Gen. Assembly, 1971 Sess. (enacted March 16, 1971, effective May 1, 1971).

38 H. 114, § 1; H. 115, § 1; H. 116, § 1, Va. Gen. Assembly, 1971 Sess. (enacted March 16, 1971, effective May 1, 1971).

39 S. 174, § 2; S. 175, § 1, Tex. Legislature, 1971 Sess.

40 H.F. 957, § 2, H.F. 958, § 2, Gen. Assembly of Ga., 1971 Sess. See note 29, *supra.*

41 S. 119, § 2, Gen. Assembly of N.C., 1971 Sess.

42 Letter from Charles A. Woods, Jr., *supra* note 33 (Proposed Pa. draft § 4).

any time that its application would be contrary to the terms of the governing instrument and that the same may not be changed.[43]

The drafts prepared for introduction in Illinois state that its provisions shall prevail over any other in the governing instrument.[44] The trust section permits amendment of the trust, with the consent of the attorney general, to the extent necessary to bring it into conformity with the tax exemption requirements imposed by sections 4941 through 4947 and to exclude the trust from private foundation status. Such an amendment may include the reduction of any power and the reduction or limitation of the organizations or classes of potential beneficiaries of the organization and the appointment of new or additional trustees.[45]

A committee of twenty New York attorneys, including the director of the charitable trust division of the New York attorney general's office, prepared a draft bill submitted to the legislature of that state in March, 1971.[46] This bill has received informal approval by the Internal Revenue Service.[47] The required provisions are "included" in the certificate of incorporation of every domestic corporation which is a private foundation unless they conflict with a mandatory direction in any instrument which transferred assets to the corporation prior to the effective date of the act.[48] Any conflict with such a direction may be removed as impractical by a competent court. The absence of a specific provision for current use of principal is expressly held not to be a conflicting mandatory direction.[49]

The trust provision of the New York draft act requires a private foundation trust or a split interest trust to distribute income in accordance with section 4942 and prohibits actions which would

43 H.F. 957, § 2; H.F. 958, § 2, Minn. Legislature, 1971 Sess.

44 Letter from Morton John Barnard, *supra* note 30, (Proposed Ill. draft, Trusts § 1; Not-for-Profit Corp. § 1).

45 *Id.*

46 S. 5546, A. 6719, N.Y. Legislature, 1971 Sess.

47 Telephone conversation of author with Julius Greenfield, Dep. Att'y Gen. of N.Y., March 29, 1971.

48 S. 5546, A. 6719, N.Y. Legislature, 1971 Sess. (Not-for-Profit Corp. § 1; Trusts § 1). It should be noted that any conflicting direction may be removed by a court proceeding.

49 *Id.*

subject the trust to chapter 42 taxes.[50] These provisions are applicable "notwithstanding any provision in the governing instrument of the trust," but are subject to an exception similar to the one in the corporate section in case of a conflicting mandatory direction in the instrument. The trust section, however, adds that a provision limited to holding, investing and reinvesting the principal is not to be construed as a conflicting direction.[51]

A draft prepared by the attorney general's office in California reflects a more conservative approach.[52] This bill would affect all corporations but would apply only to trusts created after the effective date of the act.[53] For existing trusts, application to a court of competent jurisdiction for authority to amend the governing instrument to gain exemption would be permitted.[54] With respect to any trust which by express provisions in the governing instrument is not amendable, the draft contains a legislative declaration that it is the policy of the state to maximize the funds available for charitable purposes by minimizing as far as possible the imposition of federal income and excise taxes upon trust assets otherwise available for charitable purposes. The proposal declares further that it is in the best interests of the state to construe a provision declaring a trust non-amendable as binding only upon the creator and not upon the trustee acting pursuant to that section of the act.[55]

A committee of the American Bankers Association has prepared a draft for use in all states that follows the first alternative in temporary regulation 13.8.[56] Its provisions are applicable to all charitable trusts that are private foundations unless the trustees determine that the governing instrument contains provisions inconsistent with the new requirements. If such provisions are present the trustees must notify the attorney general within six months following the effective date of the act (or the date it be-

50 Id. (Not-for-Profit Corp. § 1; Trusts § 1).
51 *Id.*
52 A.B. 1985, Cal. Legislature, 1970 Reg. Sess.
53 *Id.* § 1.
54 *Id.* § 1.
55 *Id.* § 2.
56 Trust Division Study Committee of the American Bankers Assoc., Proposed Charitable Trust Act. 4th draft, May 22, 1970 (unpublished draft in possession of author). See note 177 *infra.*

comes applicable to the trust) and thereafter the requirements will not be applicable until the trust is amended.[57] It also contains a power to amend without court action, but requiring permission of the attorney general, to permit compliance with the minimum distribution provisions.[58] If the trust's terms require payments to other charitable organizations, consent of the charitable beneficiaries is required.[59] The draftsman of this act expressed the view that, in the case of other prohibitions, court-approved reformation was preferable to the short form procedure.[60] This draft act also contained provisions, similar to those in the Illinois draft,[61] allowing release of powers to permit a private foundation to terminate by becoming a satellite of a publicly-supported charitable organization.[62] Versions of this act have been introduced in Oregon[63] and Michigan.[64] In addition, the Michigan draft contains a provision permitting termination or dissolution of a private foundation without court proceeding if the termination is made pursuant to section 507(b) (1) (A) of the Internal Revenue Code and the attorney general consents.[65]

A sub-committee of the Charitable Trusts Committee of the Section of Real Property, Probate and Trust Law of the American Bar Association also undertook to prepare a model act to meet the requirements of section 508(e). Due to lack of time, neither the section nor the association was able to consider or recommend its adoption, but it was circularized by the section chairman to the bar associations, the governors, and the attorneys general of all the states.[66] Versions of these drafts were introduced in the Massachusetts,[67] Missouri[68] and New Hampshire[69] legislatures early

57 *Id.* §§ 3, 6.
58 *Id.* § 7(b).
59 *Id.* § 7(a).
60 *Id.* § 7, Note.
61 Letter from Morton John Barnard, *supra* note 31, (Proposed Ill. draft, Not-for-Profit Corp. § 1).
62 Trust Division Study Committee, *supra*, note 56, § 9.
63 S. 377, S. 379, Ore. Legislature, 1971 Sess.
64 Letter from the Att'y Gen. of Mich., to author, March 29, 1971. (Proposed Mich. draft enclosed).
65 *Id.* (Proposed draft § 12).
66 Reprinted in 5 REAL PROPERTY, PROBATE, AND TRUST L.J. 310E (1970). See note 177 *infra*.
67 H. 1554, Mass. Gen. Court, 1971 Sess. Passed in May, 1971; now awaiting action by the governor.

in 1971 and a draft prepared for use in Ohio[70] has adopted it in part. North Dakota has very recently adopted a statute quite similar to the ABA draft.[71] These proposed acts, one for corporations and one for trusts, also take the affirmative approach of requiring minimum distributions and expressly prohibiting the transactions described in sections 4941 and 4943 through 4945.[72] The savings provision reads as follows:

> The provisions of §§ 1 and 2 shall not apply to any corporation to the extent that a court of competent jurisdiction shall determine that such application would be contrary to the terms of the articles of organization or other instrument governing such corporation and that the same may not properly be changed to conform to such sections.[73]

This language thereby places an affirmative burden on trustees and directors of private foundations to obtain a judicial determination that the provisions are inapplicable. It was not anticipated that the acts would apply to instruments which affirmatively require accumulation of income, but that otherwise they would be all-encompassing. These acts also contain provisions similar to those in bills already discussed to the effect that nothing in them shall be deemed to impair the powers of state courts or of the attorneys general to supervise charitable organizations.[74]

The Ohio version does not use the savings provision of the model act. Rather, for corporations in existence on the effective date it permits a form of election out by an amendment adopted

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68 Letter from B.J. Jones, Ass't Att'y Gen. of Mo., to author, March 9, 1971. The bill, S. 47, S. 48, S. 49, Mo. Legislature, 1971 Sess., passed both houses in May, 1971, and is now awaiting action by the governor.

69 Letter from G. Wells Anderson, Director, Register of Charitable Trusts, to author, March 2, 1971 (proposed N.H. drafts enclosed).

70 Letter from Norman A. Sugarman to Edward G. Thomson, March 25, 1971 (copy on file with author; Ohio draft statute enclosed).

71 H. 1392, N.D. Legislature, 1971 Sess. (enacted March, 1971, effective July 1, 1971).

72 H. 1554, § 1, Mass. Gen. Court, 1971 Sess.; Letter from B.J. Jones, *supra* note 68; letter from G. Wells Anderson, *supra* note 69 (Corp. draft § 1, Trusts draft § 1); letter from Norman A. Sugarman, *supra* note 70 (proposed Ohio draft §§ 1, 2).

73 H. 1554, § 3, Mass. Gen. Court, 1971 Sess.; letter from B.J. Jones, *supra* note 68; letter from G. Wells Anderson, *supra* note 69 (Corp. draft § 3, Trusts draft § 3).

74 H. 1554, § 7, Mass. Gen. Court, 1971 Sess.; letter from B.J. Jones, *supra* note 68; letter from G. Wells Anderson, *supra* note 69 (Corp. draft § 7, Trusts draft § 7).

after the effective date.[75] The trust section states that the substantive provisions express the continuing policy of the state with respect to charitable trust interests, that they are enacted to assist such trusts in maintaining tax benefits, and that they shall apply to all trusts whether or not contrary to provisions of governing instruments. A proviso, however, permits the attorney general, the settlor or any beneficiary to file written objection to the application of any of the substantive provisions with the trustee on or before November 30, 1971. Thereupon the trustee must, before December 31, 1971, commence a court action to reform or excuse the trust from compliance with its governing instrument in order to meet the requirements of the law. Once the action is commenced, the trustee is excused from compliance until the court determines that it is in the best interests of all parties.[76]

The most innovative features of this legislation are provisions, applicable both to trustees and corporate directors, exonerating them from surcharge or other liability for violation of any prohibition or requirement under the acts. The only exception occurs if they "participated in such violation knowing that it was a violation." Even then the violation must be willful and not due to reasonable cause.[77] The corporate section also states that violation of its provisions shall not be cause for cancellation of a corporation's articles.[78]

A comprehensive survey of all fifty states was conducted by *Non-Profit Report* from December, 1970, to February, 1971.[79] Several states reported that they had no plans for legislation in light of the 1969 Act.[80] In addition to the states discussed in this article, three others indicated some legislation "may" be considered.[81] Eight reported that their tax code incorporated the

75 Letter from Norman A. Sugarman, *supra* note 70 (proposed Ohio draft § 1).
76 *Id.* § 2.
77 *Id.* §§ 1, 2.
78 *Id.* § 1.
79 *State Legislation Since TRA 1969, supra* note 24, at 8-12.
80 *Id.* Those states reporting no plans were: Alabama, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, New Jersey, New Mexico, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming.
81 *Id.* Those states which indicated such legislation may be introduced are: Arizona, North Carolina, and Nevada.

Internal Revenue Code.[82] It should be noted that incorporation of the Internal Revenue Code will not really solve the problems dealt with in this article.

C. *Problems Raised by the Proposed Statutes*

1. Constitutional Problems

The major problem faced by legislative draftsmen who deal with the federally imposed necessity for amendment of charitable trusts and corporations is a constitutional one — the prohibition against impairment of contracts set forth in article I, Section 10 and the fourteenth amendment of the Constitution. By these provisions a state is prevented from altering any charter or trust provision so as to fundamentally change or defeat the original charitable purpose or to change any methods of administration that are a necessary adjunct to the accomplishment of those purposes. The classic case applying the rule against impairment of contract rights to a charitable corporation was *Trustees of Dartmouth College* v. *Woodward*[83] where an attempt to shift control of charitable funds was held improper. It is noteworthy that in each of the cases decided since the *Dartmouth* case where the court has found an unconstitutional abridgement of contract rights, the proscribed action involved an attempt to shift control of the corporation from one body to another.[84] None involved attempts to change enforcement powers or duties of trustees and directors. In the area of private trusts, retroactive legislation that does not alter charitable purposes has uniformly been held constitutional. Thus it has been held proper to limit or enlarge investment power,[85] the amount of compensation of trustees,[86] and their accounting and reporting duties.[87] So long as the federal

82 *Id.* Those states which replied that the Internal Revenue Code was incorporated in state law were: Alaska, Idaho, Kentucky, Montana, Nebraska, and Oregon. Utah indicated that the 1969 act has not yet been incorporated into state law but is expected to be in the near future.

83 17 U.S. (4 Wheat. 1) 518 (1819).

84 *See, e.g.*, Board of Regents v. Trustees of Endowment Fund, 206 Md. 559, 112 A.2d 678 (1955), *cert. denied*, 350 U.S. 836 (1956); Adams v. Plunkett, 274 Mass. 453, 175 N.E. 60 (1931); Crawford v. Nies, 224 Mass. 474, 113 N.E. 408 (1916); Goldstein v. Trustees of the Sailor's Snug Harbor, 277 App. Div. 269, 98 N.Y.S.2d 544 (App. Div. 1950).

85 Fidelity Union Trust Co. v. Price, 11 N.J. 90, 93 A.2d 321 (1952). *See generally* Annot., 35 A.L.R.2d 991 (1954).

86 Aydelott v. Breeding, 11 Ky. 847, 64 S.W. 916 (1901).

87 Mechanicks Nat'l Bank v. Brady, 100 N.H. 469, 129 A.2d 857 (1957).

rules now applicable to private foundations are held not to alter the original charitable purposes of the trusts or methods of administration necessary to achieve those purposes, the proposed statutes should be valid.[88]

There may, of course, be precedent in certain jurisdictions which does not follow the general rule and, in those instances, greater caution is warranted. This was clearly the belief of the draftsmen of the proposed California act which was prospective only.[89] The American Bar Association sub-committee, on the other hand, felt that a provision making the legislation inapplicable only if a court so ruled would assure the widest coverage. It also reasoned that placing the burden on the courts would not put fiduciaries in the anomalous position of being able to elect to have their organization taxed.[90]

The draftsmen of the New York statute felt that the reserved power in their general incorporation statute was so broad as to obviate the need for even a savings clause of this nature. There is, however, more explicit precedent in New York on this subject than in most other states.[91]

The proposed solution to the constitutional problem adopted in Virginia and used in some other drafts permitting an "election out"[92] appears to ignore the fact that the overriding duty of charitable fiduciaries is to assure the fulfillment of the purposes for which the funds were donated.[93] If trustees or directors should elect out and thereby subject an organization to income taxation (and possibly confiscatory excise taxes) they could well be held to be in breach of their fiduciary duties. To the extent that the grant of this option by the state legislature is considered an implicit approval of actions that might lead to taxation, it would seriously undermine the duty of loyalty. If it were not so interpreted, it could well be argued that the provision is meaningless as a solution to the constitutional question. Added weight is given

88 See C. BOGERT & G. BOGERT, TRUSTS AND TRUSTEES § 395 (2d ed. 1964); Fremont-Smith, *Duties and Powers of Charitable Fiduciaries,* 13 U.C.L.A.L. REV. 1041, 1054-56 (1966); Scott, *Education and the Dead Hand,* 34 HARV. L. REV. 1 (1920).

89 A.B. 1985, § 2, Cal. Legislature, 1970 Reg. Sess.

90 Trust Division Study Committee, *supra* note 56, § 6.

91 *In re* Mt. Sinai Hospital, 250 N.Y. 103, 164 N.E. 871 (1929); See 4 A. SCOTT, TRUSTS § 399.5 (3d ed. 1967).

92 H. 114, § 1; H. 115, § 1; H. 116, § 1, Va. Gen. Assembly, 1971 Sess.

93 RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

to this latter proposition by virtue of the fact that the election out does not require the consent of the attorney general. One of the draftsmen of this act stated that this consent was expressly rejected on the grounds that an attorney general's duty to preserve charitable funds precluded him from allowing an election which would result in taxation.[94] This argument, however, seems equally applicable to the fiduciaries themselves.

There are also grounds for doubt as to whether the requirements of section 508(e) are met by an option unlimited in time. Versions setting a time limit for amendment which conforms with the section 508(e) savings provisions will afford greater security to fiduciaries. Of the proposed drafts, the Ohio approach most nearly follows the federal rule.[95]

2. Further Problems

There are additional problems raised by these acts. One concerns the respective powers of the courts and the legislature. It is generally accepted that the legislature has no prerogative power over charitable funds, although it may establish rules for their administration.[96] Alteration of trusts and use of the doctrine of *cy pres* are generally reserved for the equity courts. Acts which permit amendment without court approval could, therefore, be construed as unconstitutional limitations on the power of the equity courts and, therefore, as being without effect. A second problem is whether a state may delegate its authority to the federal government by incorporating prospective changes in federal law into state law. This question arises in those drafts which state that references in the acts to sections of the Internal Revenue Code shall include future amendments thereto. There is precedent in Washington to the effect that an act of this nature is unconstitutional.[97] The act prepared for introduction in the Washington legislature,[98] therefore, omitted this language, but to date it does not appear that any other states have followed suit.

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94 Brorby, *supra* note 27, at 172.
95 Letter from Norman A. Sugarman, *supra* note 70, § 1.
96 4 A. Scott, Trusts § 399 (3d ed. 1967).
97 State *ex rel.* Kirschner v. Urquhart, 50 Wash. 2d 131, 310 P.2d 261 (1957).
98 Letter from Robert F. Hauth, Ass't Att'y Gen. of Wash., to author, Oct. 20, 1970.

A final question arises from the nature of charitable trusts and the respective rights of trustees, donors, the state, and specific charitable organizations named as beneficiaries. Draft acts that require consent of donors to amendments appear to be particularly inappropriate. Under common law a donor has no right to revoke or amend the purposes for which a charitable gift was made. In some jurisdictions he may have standing to enforce the applications of property and the carrying out of the stated charitable purposes. In a *cy pres* proceeding, if no general charitable intent is found, there may be a right of reversion.[99] It may be appropriate to require donor consent in those instances where there is an express right of reversion, but otherwise, unless there is explicit precedent in a particular state conferring rights on donors greater than those under common law, a provision requiring consent of donors to amend is based on a premise inappropriate to the law of charity.

In those cases where a foundation is required to make payments to named charitable organizations, consent of these beneficiaries should be required. The fact of their inclusion is not, however, a proper ground for excluding the attorney general, who represents the general public as the ultimate beneficiary of all charitable funds. To the extent that any of these acts undermine the authority of the attorney general, they will seriously impair future state enforcement of charitable funds.

The foregoing discussion may, in a sense, be moot because of the time limit of January 1, 1972 for amendment of governing instruments of private foundations in existence prior to January 1, 1970. However, to the extent that consideration of state legislation of this nature has focused attention on the law of charities in the several states and, in particular, the anomalies and uncertainties in this area of the law, it will not have been a wasted effort.

III. Reporting Requirements and State Supervision

The 1969 Tax Reform Act will draw the states into enforcement of the new private foundation rules whether they desire it or not. Section 6104(c), entitled "Publication to State Officials," provides as follows:

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99 Scott, *supra* note 88, at 11.

> (1) GENERAL RULE — In the case of any organization which is described in section 501(c)(3), and exempt from taxation under section 501(a), or has applied under section 508(a) for recognition as an organization described in section 501(c)(3), the Secretary or his delegate at such times and in such manner as he may by regulations prescribe shall —
>
> (A) notify the appropriate State officer of a refusal to recognize such organization as an organization described in section 501(c)(3), or of the operation of such organization in a manner which does not meet, or no longer meets, the requirements of its exemption,
>
> (B) notify the appropriate State officer of the mailing of a notice of deficiency of tax imposed under section 507 or chapter 42, and
>
> (C) at the request of such appropriate State officer, make available for inspection and copying such returns, filed statements, records, reports, and other information, relating to a determination under sub-paragraph (A) or (B) as are relevant to any determination under State Law.
>
> (2) APPROPRIATE STATE OFFICER. — For purposes of this subsection, the term "appropriate State officer" means the State attorney general, State tax officer, or any State official charged with overseeing organizations of the type described in section 501(c)(3).

The effect of subsection (A) will be to provide the attorney general with notice of all charitable organizations (not merely private foundations) that have applied for a tax-exemption ruling and have been refused, as well as all organizations whose outstanding tax-exemption is being revoked. Subsection (C), the need for which has long been recognized, permits state authorities to inspect previously classified information relating to charitable organizations. These two subsections are of particular importance for state enforcement and remedy one of the greatest problems under prior law. Formerly, in a state without its own registration and reporting provisions, an organization losing tax-exemption would often merely continue to operate with the same fiduciaries, affording the same benefits to individuals that have led to revocation of its tax-exempt status, but with no need to account to the federal government beyond filing and paying taxes. Even in states with active enforcement programs, state officials were often unaware of federal action until it was far too late to take effective

measures to preserve charitable assets. If, as many believe, there are abuses by publicly-supported corporations equally as flagrant as some of those attributed to private foundations, the reporting provisions for public corporations will be especially important in future regulation. It is to be noted that these publicly-supported organizations have not in the past been under a duty to file any federal information returns.

In contrast with the subsections just described, subsection (B) of section 6104(c)(1) relates only to private foundations. Its effect is to tie the notification provisions to the new private foundation excise taxes and the termination rules under section 507. In order to understand its impact, however, it is necessary to describe briefly the nature of these excise taxes under sections 4941 through 4945. In each instance there is a first level tax, automatically imposed on the foundation, equal to a stated percentage of the amount involved in the transaction giving rise to the tax. If the matter is not corrected within an appropriate period, then a second level of tax is imposed, in amounts varying from 100 to 200 percent of the amount initially involved. A third level of tax is set forth in section 507. This tax arises if there have been willful repeated or flagrant acts or failures to act, giving rise to liability for the first and second levels of tax and if the Internal Revenue Service has notified the organization that it is subject to tax under this section. The section 507 tax is equal to the lesser of the aggregate income, estate and gift tax benefits, plus interest, which have accrued to the foundation and its substantial contributors as a result of the organization's tax-exempt status since 1912 or the value of the net assets of the foundation.

This same tax is applicable to a private foundation which voluntarily desires to terminate if it does not follow certain specific procedures also set out in section 507. However, with either voluntary or involuntary termination, the tax may be abated if one of the following procedures is followed: Either (1) the foundation must distribute all of its net assets to one or more organizations described in section 170(b)(1)(A) (other than in clauses (vii) and (viii)) each of which has been in existence continually for the last five years,[100] or (2)

100 INT. REV. CODE of 1954, § 507(g)(1).

> following the notification prescribed in section 6104(c) to the appropriate State officer, such State officer within one year notifies the Secretary or his delegate, in such manner as the Secretary or his delegate may by regulations prescribe, that corrective action has been initiated pursuant to State law to insure that the assets of such private foundation are preserved for such charitable or other purposes specified in section 501(c)(3) as may be ordered or approved by a court of competent jurisdiction, and upon completion of the corrective action, the Secretary or his delegate receives certification from the appropriate State officer that such action has resulted in such preservation of assets.[101]

The explanations of the Tax Reform Act published by both the House Ways and Means Committee and the Senate Finance Committee contain the following identical language:

> The exercise of discretion with respect to abatement of the tax will depend upon the extent to which effective assurance can be given that the assets and organizational structure dedicated to charity will in fact be used for charity. It is expected that effective assurances are most apt to be available in those States where there is vigorous enforcement of strong State laws by the State attorney general or other appropriate official.[102]

This is one of the most innovative parts of the Tax Reform Act from the federal point of view. For the first time, there has been a clear indication of a congressional preference for preservation of assets donated for charitable purposes rather than their confiscation through taxation. The challenge to the states is clear, for the burden to act is placed upon them. The new disclosure requirements, combined with the ability to receive classified information could provide the necessary groundwork for effective enforcement by the states.

However, proposed regulations issued on October 12, 1970[103] would appear to place serious procedural restrictions on the ability of state officials to receive information readily. In addition, by making such previously classified information available only after

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101 *Id.* § 507(g)(2).

102 H.R. REP. No. 91-413, 91st Cong., 1st Sess., pt. 1, at 40 (1969); S. REP. No. 91-552, 91st Cong., 1st Sess. 56 (1969).

103 Proposed Treas. Reg. § 301.6104-3, 35 Fed. Reg. 16049 (1970).

the service has completed all administrative review, the regulations may nullify the ability of the state to preserve assets. The rules appear to be far stricter than those relating to the exchange of other types of information between state tax officials and the service. It will be regrettable if the regulations subvert the intent of section 6104 by unduly hampering the flow of information to the states.

Reference was made to the fact that prior to passage of the Tax Reform Act of 1969, only those organizations that were not primarily dependent upon the general public for their support were required to file information returns with the Internal Revenue Service. The Tax Reform Act now requires that organizations described in section 501(c)(3), with certain limited exceptions, file annually a return stating the following information:[104]

(1) Its gross income for the year,
(2) Its expenses attributable to such income and incurred within the year,
(3) Its disbursements within the year for the purpose for which it is exempt,
(4) A balance sheet showing its assets, liabilities, and net worth as of the beginning of such year,
(5) The total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors,
(6) The names and addresses of its foundation managers within the meaning of section 4946(b)(1)) and highly compensated employees, and
(7) The compensation and other payments made during the year to each individual described in paragraph (6).

Mandatory exemption is provided for churches and religious activities of religious orders and for organizations other than private foundations with gross receipts not normally in excess of $5,000 per year. In addition, the Secretary is given discretion to relieve other organizations from filing if he determines that filing would not be necessary to the efficient administration of the Internal Revenue laws.[105] Form 990 is to be used for compliance with section 6033.

104 INT. REV. CODE of 1954, § 6033(b).
105 *Id.* § 6033(a).

Not only did the Tax Reform Act increase the number of organizations required to file reports and the amount of information to be supplied, for the first time it established meaningful penalties for non-compliance. Under prior law, there was a criminal sanction with a maximum penalty of one year's imprisonment and/or a $10,000 fine for failure to file an information return.[100] Because of its severity the service had been reluctant to invoke it. In Revenue Ruling 59-095,[107] however, the service took the position that failure to file might constitute a ground for withdrawal of exempt status on the basis that the organization was failing to comply with a continued course of conduct implied under section 501(c)(3). The authority for this position has been seriously questioned, and it is thought that the statement was "intended more to intimidate than to be legally authenticated."[108]

In 1965, the *Treasury Department Report on Private Foundations* recognized the inappropriateness of the penalty provisions and recommended a fine of $10 per day for each day of delay with a $5,000 maximum, unless the failure to file was due to reasonable cause.[109] This recommendation has been adopted by new section 6652. Furthermore, a similar penalty has also been imposed on "any officer, director, trustee, employee, member or other individual who is under a duty to perform the act in respect of which the violation occurs."[110] While the penality imposed on the organization is automatic, this personal penalty may be invoked only after written demand by the Secretary or his delegate. It should also be noted that, under section 7202, willful filing of a fradulent or false return will subject an individual to a $1,000 fine or one year imprisonment or both.

Private foundations are subject to the above rules. In addition, however, they must file with both the Internal Revenue Service and "appropriate state officials" a private foundation annual report which contains the following information:[111]

106 *Id.* § 7203.

107 Rev. Rul. 59-95, 1959-1 CUM. BULL. 627.

108 Eliasberg, *Section 501(c)(3) — The Private Foundation: New Procedural Requirements and Non-Compliance Penalties*, 49 TAXES 87, 90 (1971).

109 STAFF OF SENATE COMM. ON FINANCE, 89TH CONG., 1ST. SESS., TREASURY DEP'T REPORT ON PRIVATE FOUNDATIONS 64 (Comm. Print 1965).

110 INT. REV. CODE of 1954, § 6652(d)(3).

111 *Id.* § 6656(b).

(1) Its gross income for the year,
(2) Its expenses attributable to such income and incurred within the year,
(3) Its disbursements (including administrative expenses) within the year,
(4) A balance sheet showing its assets, liabilities, and net worth as of the beginning of the year,
(5) An itemized statement of its securities and all other assets at the close of the year, showing both book and market value,
(6) The total of the contributions and gifts received by it during the year,
(7) An itemized list of all grants and contributions made or approved for future payment during the year, showing the amount of each such grant or contribution, the name and address of the recipient, any relationship between any individual recipient and the foundation's managers or substantial contributors, and a concise statement of the purpose of each such grant or contribution,
(8) The address of the principal office of the foundation and (if different) of the place where its books and records are maintained,
(9) The names and addresses of its foundation managers (within the meaning of section 4946(b)), and
(10) A list of all persons described in paragraph (9) that are substantial contributors (within the meaning of section 507(d)(2)) or that own 10 percent or more of the stock of any corporation of which the foundation owns 10 percent or more of the stock, or corresponding interests in partnerships or other entities, in which the foundation has a 10 percent or greater interest.

This private foundation report must be made available to the general public at the foundation's offices during regular business hours and prior to the date of filing the foundation must advertise in a paper of public circulation in the county of its principal offices, stating the name and address of its principal manager, and announcing that its books and records are available for inspection during regular business hours on the request of any citizen made within 180 days thereafter.[112]

The penalties for non-compliance with each of these requirements are the same as those for failure to file the information

112 *Id.* § 6104.

returns required of other tax-exempt organizations under sections 6033, 6034, or 6034(b).[113] In addition, however, willful failure to file the annual report with either the Internal Revenue Service or the required state officials will subject the person "required" to do so to a single penalty of $1,000 with respect to each such report.[114]

The Treasury Department issued proposed regulations on October 21, 1970 dealing with both the reporting requirements and the publication to state officials sections.[115] On January 4, 1971 a portion of these were withdrawn and a revised version published.[116] The effect of the proposed regulations, as amended, is to permit private foundations to satisfy the annual report requirement either by using Internal Revenue Service form 990AR, or any printed, typewritten or other form that "readily and legibly discloses the information required by section 6056." The proposed regulations also stated that the commissioner may designate appropriate libraries or depositories to which the foundation managers will be required to send copies of their annual reports, in addition to, and not in lieu of, filing them with the Internal Revenue Service and making them available for public inspection. It also permitted satisfaction of the public availability requirement by the furnishing of a free copy to persons requesting inspection.[117]

These same proposed regulations state that the foundation must furnish to the attorney general of each state which has jurisdiction over the foundation or its assets or activities a copy of the annual report on or before the date it is due to be filed with the Internal Revenue Service. It then adds:

> In addition, the foundation managers shall provide upon request a copy of the annual report to the Attorney General or other appropriate State officer of any State. For purposes of this paragraph and § 301.6104-3, the States which have jurisdiction over a private foundation include but are not limited to all those to which the foundation is required by provisions

113 *Id.* §§ 6652(d)(3), 7207.
114 *Id.* § 6685.
115 Proposed Treas. Reg. §§ 1.6033, 1.6056, 301.6104, 35 Fed. Reg. 16049 (1970).
116 Revised Proposed Treas. Reg. § 1.6056-1, 36 Fed. Reg. 106-07 (1971).
117 *Id.* § 1.6056-1(b)(3).

> of State law to report in any manner on its activities or assets, and all those with which the foundation is required by State law to register in any manner.[118]

The first version of this proposed regulation had contained a requirement that the annual report list the states to which the foundation was required in any fashion to report and similar language appears in the first draft of instructions for form 990.[119] This paragraph was deleted in the amended version of the proposed regulations, and in the final instructions. Proposed regulation 301.6104-3(c)(2), referred to in the quoted paragraph above, defines "jurisdiction" for purposes of determining which states will receive notice and may inspect Internal Revenue Service information under section 6104. The list of states appearing in regulation 301.6104-3 is as follows:

> (1) the state which the organization lists as its address on Form 990 or Form 1023,
> (2) the state of incorporation or creation,
> (3) for private foundations, the states listed by it on its annual information return as those to which it must report,
> (4) any other state which has jurisdiction over the organization, its assets or activities and which has requested that its appropriate officers be notified of determinations in respect to particular organizations, and
> (5) any other state which the Internal Revenue Service believes has jurisdiction over the organization, its assets or activities.

The question of state jurisdiction over charitable organizations has always been difficult, with very few clear precedents other than regulations promulgated by attorneys general as part of the administration of supervisory programs in their states. The situs of trusts varies depending upon whether the trust is testamentary or inter vivos and whether the question involved relates to interpretation and construction or administration.[120] Foundations, whether trusts or corporations, making grants or hiring consultants in several states could be in a particularly difficult position unless

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118 *Id.*

119 Proposed Treas. Reg. § 1.6056-1(6)(ii), 35 Fed. Reg. 16052 (1970).

120 See 5 A. Scott, Trusts ch. 14 (3d ed. 1967).

the service deals more realistically with foundation operations than suggested to date.

IV. The Problems with Increased State Supervision

As with the governing instrument provision, there is a two-fold purpose behind the reporting requirements. The emphasis on disclosure was designed to limit opportunities for abuse. There is also an evident attempt by Congress to force the states to share the expanded administrative burden caused by the imposition of the new substantive limitations on foundation operations and management. It may well be asked, however, what the fifty attorneys general plan to do with this new responsibility. This final section will attempt to describe briefly the situation as it existed in the states prior to passage of the Tax Reform Act and to give some indication of the possible effect of the new provisions.

A. *Extent of Prior State Supervision*

State interest in the administration of charitable funds existed long before tax-exemption was a matter of concern. The common law assigned to the attorney general the exclusive role of representing the general public, which was considered to be the ultimate beneficiary of these funds. State courts are empowered to take action in suits brought by the attorney general. If the existence of a misapplication of funds is proven, the relief available to the courts in each state includes a broad range of equitable remedies to compel accountings, enjoin actions, remove fiduciaries, require restitution of misappropriated funds, surcharge trustees and directors for diversion of assets to non-charitable purposes, force transfers of title from them, and apply the *cy pres* doctrine when the original purposes for which funds have been donated become impracticable. In many states there is also an interest arising from a grant of exemption from state tax, but the primary emphasis has traditionally been on assuring proper administration and preserving assets donated for charitable purposes.[121]

New Hampshire was first of twelve states that had a program

121 See M. Fremont-Smith, Foundations and Government: State and Federal Law and Supervision (1965).

for supervision of charitable organizations in operation in the offices of their attorneys general prior to passage of the Tax Reform Act of 1969.[122] In 1943, legislation was enacted there creating a separate division for supervision and enforcement of testamentary trusts for charitable purposes and inter vivos trust at such time after the death of the donor that the chariable interest was vested. Trustees of these trusts were required to register and submit annual information returns with the attorney general who was given power to conduct investigations and issue rules and regulations regarding the operation of the act.[123] The attorney general was also required to receive notice from the courts of proceedings involving charitable trusts and be given an opportunity to be heard before the termination of any charitable trust by court decree.[124]

Rhode Island adopted a similar statute in 1950 shortly after a congressional investigation of the activities of a Rhode Island foundation.[125] In 1951 the National Association of Attorneys General requested the National Conference of Commissioners on Uniform State Laws to draft a Uniform Act for Supervision of Trustees for Charitable Purposes[126] suitable for introduction in all of the states. The act was approved by the commissioners in 1951. In the meantime Ohio, [127] South Carolina[128] and Massachusetts[129] had enacted statutes modeled on the original New Hampshire act. The uniform act itself has been adopted with modifications, in California,[130] Michigan,[131] Illinois,[132] Oregon,[133] Washington[134] and New York.[135] In 1959 Iowa[136] enacted a version similar to that in effect in Rhode Island.

122 N.H. REV. STAT. ANN. §§ 7:19-32 (1955).
123 *Id.* § 7:28.
124 *Id.* § 7:29.
125 R.I. GEN. LAWS ANN. §§ 18-9-1 to -15 (1970).
126 9C UNIFORM LAWS ANN. 208-15 (1957).
127 OHIO REV. CODE ANN. §§ 109.23-.31, 109.99 (Anderson 1953).
128 S.C. CODE ANN. §§ 67-81 to -85 (1962).
129 MASS. GEN. LAWS ANN. ch. 12, § 8 (1966).
130 CAL. GOV'T CODE §§ 12580-96 (West 1963).
131 MICH. COMP. LAWS §§ 14.251-.266 (1967).
132 ILL. ANN. STAT. ch. 14, §§ 51-64 (Smith-Hurd 1963).
133 ORE. REV. STAT. §§ 128.610-.750, 61.972 (1969).
134 WASH. REV. CODE ANN. §§ 19:10.010-.900 (Supp. 1971).
135 N.Y. EST., POWERS AND TRUSTS LAW § 8-1.4 (McKinney 1967).
136 Ch. 364 § 1-12, [1959] IOWA ACTS 487-489 (repealed 1965).

The purpose of these statutes is to provide the attorneys general with the necessary information to fulfill their common law duties of supervision and enforcement. Without the establishment of a registry it was virtually impossible for them to know what funds actually existed in their jurisdictions, quite apart from knowing whether they were being properly administered. The periodic financial reports were designed to provide information on the operation of charitable organizations. Furthermore, it was also believed that the creation of a source of easily available public information on the activities of charities would in itself serve to deter abuse and also increase the effectiveness of charitable activity by providing potential beneficiaries with knowledge of available funds. There is ample evidence that the majority of the state programs now in existence have realized the potential originally envisioned.[137]

The uniform act, as originally adopted by the commissioners, has a serious drawback in that it is applicable only to trusts, corporations formed to administer charitable trusts, and "corporations which have accepted property to be used for a particular charitable corporate purpose as distinguished from the general purpose of the corporation."[138] That phrase originated in the New Hampshire legislation.[139] Its inherent ambiguity has caused problems in that state as well as in Rhode Island[140] and Ohio[141] where similar language was adopted. The versions enacted in California,[142] Michigan,[143] Illinois,[144] Oregon,[145] New York[146] and Washington[147] now contain modifications designed to indicate clearly that the act applies to corporations as well as trusts. Each

137 M. FREMONT-SMITH, *supra* note 121, contains detailed description of the statutes and the programs operated under their authority. See also Greenfield, *Government Supervision; Two Years of the New York Experience,* 9 N.Y.U. CONF. ON CHARITABLE FOUNDATIONS 97 (1969); Howland, *The History of the Supervision of Charitable Trusts and Corporations in California,* 13 U.C.L.A.L. REV. 1029 (1966).

138 UNIFORM ACT FOR SUPERVISION OF TRUSTEES FOR CHARITABLE PURPOSES § 2.

139 N.H. REV. STAT. ANN. § 7:21 (1955).

140 R.I. GEN. LAWS ANN. § 18-9-15 (1970).

141 OHIO REV. CODE ANN. § 109.23 (Anderson 1953).

142 CAL. GOV'T CODE § 12582.1 (West 1963).

143 MICH. COMP. LAWS § 14.253 (Supp. 1971).

144 ILL. ANN. STAT. ch. 14, § 53 (Smith-Hurd 1963).

145 ORE. REV. STAT. § 128.620(1) (1969).

146 N.Y. EST., POWERS AND TRUSTS LAW § 8-1.4 (a)(2)(3) (McKinney 1967).

147 WASH. REV. CODE ANN. § 19:10.020(2) (Supp. 1971).

of these state laws does exempt religious organizations from the registration and reporting requirements, as well as schools, hospitals and certain other operating institutions.[148] The New York act, in addition, exempts corporate trustees of trusts created by non-resident testators and settlors.[149] The California[150] and Washington[151] acts exempt banks and trust companies acting as trustees, if they are subject to examination by state or federal tax authorities. Washington also excludes tax-exempt community foundations that publish annual reports.[152] The Michigan act has been amended several times to exempt certain operating charities.[153] Each of these special exemptions was added during the enactment stage of the legislation and reflects the lobbying ability of the groups involved rather than a reasoned argument for exemption. In contrast, the Massachusetts act requires reports from all "public charities" within the commonwealth other than religious organizations and trusts for religious purposes.[154]

B. *The Effect of the Tax Reform Act of 1969 on Prior State Supervisory Programs*

Even from the brief preceding summary it is clear that the scope of the state reporting requirements is not identical to that of the Tax Reform Act. In states such as New Hampshire and Ohio, the number of organizations that will file annual private foundation reports with the attorney general will greatly enlarge the registry files. All resident corporate trustees of private foundations will now be reporting in California, Washington, and New York, but in these states there will also be numerous organizations that must meet the state requirements but not the federal. Some revision of the report forms in all of these states will undoubtedly now be necessary. Those jurisdictions that in the past have attempted

148 CAL. GOV'T CODE § 12583 (West 1963); ILL. ANN. STAT. ch. 14, § 54 (Smith-Hurd 1963); MICH. COMP. LAWS § 14253 (1967); ORE. REV. STAT. § 128.640 (1969); N.Y. EST., POWERS AND TRUSTS LAW § 8-1.4(b) (McKinney 1967); WASH. REV. CODE ANN. § 19:10.020 (Supp. 1971).

149 N.Y. EST., POWERS AND TRUST LAW § 8-1.4(b)(7) (McKinney 1967).

150 CAL. GOV'T CODE § 12586(a) (West 1963).

151 WASH. REV. CODE ANN. § 19:10.020(3)(d) (Supp. 1971).

152 *Id.* § 19:10.020(3)(e).

153 MICH. COMP. LAWS § 14.253 (1967).

154 MASS. GEN. LAWS ANN. ch. 12, § 8F (1962).

to achieve uniformity in reporting may now find it difficult to do so. Cooperation by the states and the service in the development of forms will be extremely desirable, particularly in view of the fact that the Code requires that only the Private Foundation Annual Report be submitted to the state. Much information that has in the past been submitted in certain jurisdictions appears on federal form 990 which the code does not require to be submitted to the state authorities.

In the past it was assumed that the number of states adopting the uniform act would not expand appreciably unless some form of incentive was given to them by the federal government. Various schemes for accomplishing this have been suggested.[155] The provisions in the Tax Reform Act contain the weakest form of incentive. Thus it is not anticipated that any great number of states will now move to establish new programs. However, as of April 1, 1971, versions of the uniform act had been introduced in Arizona[156] and Georgia,[157] and amendments to the New Hampshire[158] and Oregon[159] legislation designed to increase their coverage and improve administration had also been filed. In addition, the draft act to meet the requirements of section 508(e) proposed for Michigan contains a section enlarging the attorney general's powers to obtain injunctions and bring court actions to force termination.[160]

To date, adoption of a modified Uniform Act for Supervision of Trustees for Charitable Purposes has been considered the preferred means for establishing a state enforcement program, but it is not a necessary prerequisite. In Pennsylvania, Texas and Hawaii, for example, the offices of the attorneys general have for some years been active in litigation involving charitable organizations. In Pennsylvania, the supreme court adopted a rule requiring notice to the attorney general of all proceedings involving charitable interests and representatives of his office have been

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155 *See, e.g.*, COMMITTEE ON FOUNDATIONS AND PRIVATE PHILANTHROPY, PRIVATE GIVING AND PUBLIC POLICY 171 (1970). *Panel Discussion on State Regulation of Tax Exempt Foundations*, 20 BULL. A.B.A. SECTION OF TAXATION 17 (1967).

156 Letter from James D. Winter to author, March 5, 1971.

157 Letter from Larry D. Ruskaup, Ass't Att'y Gen. of Ga., to author, March 4, 1971.

158 Letter from G. Wells Anderson, *supra* note 69.

159 S. 506, Ore. Legislature, 1971 Sess.

160 Letter from Mich. Att'y Gen., *supra* note 62.

active participants in litigation.[161] They plan now to review all reports which will be received pursuant to the Internal Revenue Code, with a staff already familiar with the law of charity and state enforcement remedies. In Hawaii and Texas the power of parens patriae has been invoked to obtain information[162] on the operation of charitable organizations in those jurisdictions. The new code requirements will be of great assistance in expanding these efforts. Developments in these states that attempt to inaugurate vigorous enforcement programs without the aid of special state legislation will be of particular interest in the future.

The most serious drawback encountered in each of the states that has adopted the uniform act or a similar statute has been a lack of funds to support adequate staff for processing and review of reports, conducting audits and making investigations. New York attempted to solve this problem by imposing filing fees in amounts proportionate to the assets of the reporting organizations that range from $10 to $250.[163] Even these fees, however, have not provided adequate funds for a completely effective enforcement program. Massachusetts requires a filing fee of $3;[164] legislation recently introduced in Oregon would impose a $10 fee.[165] No other states have such a requirement.

Now that all private foundations must pay to the federal government an annual excise tax equal to four percent of their net investment income, the state legislatures may be more willing to impose a state tax or filing fee. Previously it was argued that such a practice would reduce the amount available for charity. This would no longer be the case if a state fee were held to be a proper deduction in computing the tax. Some state officials have recently indicated that they were considering requesting Congress to share the federal excise taxes with the states. It is unlikely that such an action will be immediately forthcoming. However, given the difficulties experienced for some 20 years by the states that have attempted to provide effective enforcement of charitable funds, it

161 *Standards for Supervision of Charitable Trusts*, 3 REAL PROPERTY, PROBATE AND TRUST L.J. 154 (1968).
162 *Id.*
163 N.Y. EST., POWERS AND TRUSTS LAW § 8-1.4(p) (McKinney 1967).
164 MASS. GEN. LAWS ANN. ch. 12, § 8F (1966).
165 S. 506, § 7(8), Ore. Legislature, 1971 Sess.

is unrealistic to expect that new programs can be developed without recognition of the necessity of adequate funding. It is also possible that those state legislatures that in the past have been reluctant to appropriate funds for supervision will still be reluctant to do so now. The fact that the Internal Revenue Service has greatly expanded its own exempt organization branch may also increase this reluctance.[166]

It has not been possible as of this date to obtain detailed information on the programs and projected plans for supervision of private foundations in all of the states. In addition to those just described Alabama,[167] Delaware,[168] Maryland[169] and Minnesota[170] have indicated that private foundation reports will be referred to the state tax departments for review. It is questionable whether this will achieve what Congress intended, particularly in regard to the preservation of charitable funds. It is to be hoped that the remedies available to the attorneys general in those states will be used to correct abuses instead of relying on the more limited ones available to the tax authorities.

In the more sparsely populated states such as Idaho,[171] Maine,[172] the Dakotas,[173] Utah[174] and Wyoming,[175] the attorneys general have not considered administrative or legislative changes, primarily because they do not anticipate receipt of any large volume of reports. As in the past, the predelection of individual attorneys general will be as important a factor as any in determining whether there will be active supervision. It is not the number of organizations but the quality of their operation that is of concern.

166 Eliasberg, *supra* note 108 at 94-98; Lehrfeld, *I.R.S.'s New Large Foundation Audit Program: How to Prepare for It*, 33 J. TAXATION 16 (1970).

167 Letter from Willard W. Livingston, Ala. Dep't of Revenue, to author, March 3, 1971.

168 Letter from Edward J. Wilson, Dep. Att'y Gen. of Del., to author, March 4, 1971.

169 Letter from Jon F. Oster, Ass't Att'y Gen. of Md., to author, March 12, 1971.

170 Letter from John R. Kenefick, Dep. Att'y Gen. of Minn., to author, March 10, 1971.

171 Letter from W. Anthony Park, Att'y Gen. of Idaho, to author, March 4, 1971.

172 Letter from George C. West, Dep. Att'y Gen. of Me., to author, March 1, 1971.

173 Letter from Joseph R. Maichel, Spec. Att'y Gen. of N.D., to author, March 4, 1971; letter from John Dewell, Ass't Att'y Gen., of S.D., to author, March 5, 1971.

174 Letter from G. Blaine Davis, Ass't Att'y Gen. of Utah, to author, March 4, 1971.

175 Letter from Robert J. Oberst, Spec. Ass't Att'y Gen. of Wyo., to author, March 10, 1971.

V. Conclusion

Proponents of full federal preemption of the supervision of charitable organizations have been primarily concerned about the ambulatory foundation and afraid that a "Delaware for foundations" would develop.[176] The section 508(e) requirements were designed in part to overcome this possibility by setting forth uniform rules under which private foundations would be administered. In its procedural aspects, however, the Tax Reform Act does not go far enough to assure uniform enforcement. The Treasury has indicated that it is interested in using the procedural approach found in the private foundation provisions in its recommendations for reform of the code provisions dealing with other tax-exempt organizations. It is, therefore, an appropriate time for consideration of methods by which state action in the charitable area can be improved and expanded. The basic requirements for a state program are well-established. What is primarily lacking is a solution to the problem of funding, but it is unrealistic to assume that this can be solved by the states alone. One, therefore, returns to the Congress. If Congress truly wants to encourage and expand state enforcement, it will have to provide greater incentives, both substantive and financial, than those set forth in the Tax Reform Act of 1969.[177]

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176 Committee on Foundations and Private Philanthropy, *supra* note 155; Stone, *Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy*, Proceedings, U. So. Cal. 1968 Tax Inst. 27.

177 After this Article was written, Utah adopted the American Bankers Association draft, note 56 *supra*, S. 114, Utah Legislature, 1971 Sess. (eff. May 10, 1971). The draft of the Charitable Trusts Committee, note 66 *supra*, has recently been introduced in Maine. S.P. 279, S.P. 280, Me. Gen. Ct., 1971 Sess.

THE SUMMARY COURT-MARTIAL: A PROPOSAL

EUGENE R. FIDELL*

Introduction

One quarter of all courts-martial recently tried in the armed forces of the United States have been summary courts-martial,[1] but despite this fact, there is virtually no legal literature analyzing this type of one-officer tribunal.[2] As we approach the third decade of practice under the Uniform Code of Military Justice, the time may be ripe to take stock of some developments and concerns in this area. This article will analyze the place of the summary court-martial within the system of military justice, em-

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Opinions and assertions contained in this article are those of the author alone, and are not to be construed as official or reflecting the views of the Coast Guard. The author is indebted to Michael H. Chanin of the Georgia Bar for his counsel in the preparation of this article.

1 Article 20 of the Uniform Code of Military Justice, 10 U.S.C. § 820 (Supp. V, 1970) [hereinafter cited as UCMJ], provides:

> Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try person subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

2 Such literature as there is is largely of the "trial guide" variety. *See generally* U.S. Naval Justice School, *Summary and Special Courts-Martial,* JAG J., Feb. 1952, 3, 4-9; Douglass, *One-Man Court,* JAG J., Jan. 1954, 7; Nesmith, *Summary Court-Martial Procedure,* JAG J., Oct. 1957, 12; Berry, *A Pathway for the Summary Court-Martial,* JAG J., Nov.-Dec. 1959, 3; U.S. NAVY, JUDGE ADVOCATE GENERAL, SUMMARY COURT-MARTIAL TRIAL GUIDE (NAVPERS 10091) (1967); DEP'T OF THE ARMY, MILITARY JUSTICE HANDBOOK: GUIDE FOR SUMMARY COURT-MARTIAL PROCEDURE (DA Pam. 27-7) (1964); U.S. COAST GUARD, SUPP. MCM 1951, App. A, 14-31.

phasizing the objections to this form of tribunal and suggesting methods for challenging it in various judicial forums. It will be argued that the summary court is unessential to the administration of military justice, that it does not meet existing constitutional standards, and that it has effects far beyond those generally known or considered by those charged with administering military justice.

A. *A Matter of Necessity*

As may be seen from Table 1, the summary court-martial has accounted for a decreasing percentage of the total military caseload in the years 1962-1969. The chief explanation for this phenomenon lies in the expansion of nonjudicial punishment powers accomplished in 1963.[3] Many cases which would have been referred to summary courts prior to the effective date of the amended Article 15 have, in subsequent years, been handled at mast. It is to be expected that this trend will continue, as commanders will continue to prefer to administer prompt justice personally, rather than relying on the referral of charges to a summary court officer, who may be more inclined to dismiss offenses which would be unhesitantly punished at captain's mast. To the extent that the expanded Article 15 directly reinforces the position of command, it enjoys a preferred position over the summary court.

Nevertheless, it is often argued that the summary court is a necessary complement to nonjudicial punishment on the one hand and the special court on the other. For instance, no change has occurred making the summary court-martial less significant for purposes of the escalator clauses in the table of maximum punishments in the Manual for Courts-Martial[4] and to this degree a commander may have an interest in referring a matter to summary court, especially where recidivism is expected or feared. However, on the related question of the admissibility of the conviction as matter in aggravation at a subsequent court-martial, the summary court-martial and nonjudicial punishment now stand on even

3 10 U.S.C. § 815 (Supp. V, 1970).

4 MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 127c, § B (rev. ed. 1969) [hereinafter cited as 1969 MANUAL]. Under this provision, prior convictions may empower a court-martial to adjudge a bad conduct or dishonorable discharge where one would ordinarily not be an authorized penalty for the offense.

TABLE 1
Distribution of Courts-Martial, All Services, 1962-68

Year	Summary Courts-Martial	Total Courts-Martial	Summary Courts As Percentage of Total
1962	85,166	133,818	64%
1963	65,069	113,079	58
1964	32,389	75,957	43
1965	30,501	73,169	42
1966	27,394	69,274	40
1967	27,819	84,764	33
1968	24,842	89,956	28
1969	28,281	109,656	26

Source: 1962-69 USCMA ANN. REPS.

ground, since the 1969 Manual for Courts-Martial changed the prior rule[5] that mast records were inadmissible.

Summary courts are also said to be necessary because they provide another step in the progression of punitive measures, permitting a command to invoke a more serious sanction without convening a special court-martial. The plain answer to this argument is that the summary court is no more powerful than the command himself would have been at mast, provided the commander is at least the grade of major or lieutenant commander. Indeed under his nonjudicial punishment powers a commander may impose a total forfeiture equivalent to one month's pay, while the summary court may only adjudge a maximum forfeiture of two-thirds of one month's pay.[6] If a commander imposes less

5 1969 MANUAL para. 75*d*; *compare* United States v. Johnson, 19 U.S.C.M.A. 464, 42 C.M.R. 66 (1970) *with* United States v. McDowell, 13 U.S.C.M.A. 129, 32 C.M.R. 129 (1962).

6 *Compare* UCMJ art. 20, 10 U.S.C. § 820 (Supp. V, 1970) and 1969 MANUAL para. 16b *with* UCMJ art. 15b(2)(H), 10 U.S.C. § 815(b)(2)(H) (Supp. V, 1970) and 1969 MANUAL para. 131(b)(2)(B). Indeed, maximum non-judicial punishment powers never exceed a total forfeiture of one month's pay, while the summary court may only adjudge a maximum forfeiture of ⅔ of one month's pay. The statement in the text also assumes that a meaningful correctional custody program is in effect and available to a command. If, as has already seemingly occurred in some parts of the country, such facilities are unavailable, then a trend back to the use of summary court would be foreseeable, and could be reversed only by (1) vigorous steps to expand corrections budgets, or (2) a retrograde amendment to article 15 authorizing the imposition of confinement at hard labor at mast. The assumption is here made that the programs contemplated by the present article 15 are, however, in effect.

than his jurisdictional maximum at a man's initial appearance at captain's mast, the maximum can, in a proper case, be imposed at his next appearance, thus providing an intermediate step prior to appearance before a special court-martial. Alternatively, if the man's initial appearance at nonjudicial punishment were for an offense sufficiently serious to invoke the command's jurisdictional maximum powers, there seems to be no impropriety in referring the next, more serious, charge to a special court. As always, the commander will then have the discretion to approve only so much of the sentence, in case of conviction, as he deems just.

Commanding officers in the field and on floating units are the best judges of whether the summary court-martial is essential to the military justice system. The data already cited suggest that they are concluding it is not essential. There is reason to suspect that if the tribunal were no longer available, no one but the historians would miss it.

B. *Signs of Doubt*

When the Military Justice Act of 1968[7] was enacted, part of the legislative history amassed by the Senate indicated that the summary court-martial survived only because of a compromise on Capitol Hill.[8] Unmistakably, there was substantial congressional opinion in favor of abolishing the tribunal. The lack of congressional confidence in 1968, perhaps a foreshadowing of future legislative battles for abolition, is symptomatic of a long-standing dissatisfaction with the summary court.

This dissatisfaction has been expressed by all three branches of the government. Congress has specifically prohibited the exercise of summary court jurisdiction over "officers, warrant officers, cadets, aviation cadets, and midshipmen,"[9] manifesting a belief that these classes of service personnel were "entitled" to a greater degree of formality in criminal proceedings.[10] Even more funda-

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7 Act of Oct. 24, 1968, Pub. L. No. 90-632, 82 Stat. 133-5.

8 1968 U.S. CODE CONG. & AD. NEWS 4501, 4506 (Senate Report). For more recent abolition proposals by Sen. Hatfield and Sen. Bayh, see S. 4177, 91st Cong., 2d Sess. (1970) and S. 1127, 92d Cong., 1st Sess. (1971).

9 10 U.S.C. § 820 (Supp. V, 1970); *See also* 1969 MANUAL para. 16*a*.

10 This may be an improper discrimination by the federal government against either officers or enlisted men. *Cf.* Bolling v. Sharpe, 347 U.S. 497 (1954). "Strictly speaking, no offense committed by a commissioned or non-commissioned officer

mentally, the 1968 Act authorized all accused persons to refuse trial by summary court, regardless of whether they had previously been offered and declined nonjudicial punishment.[11] This particular feature, a right of refusal on the part of the accused, can be viewed both as a sign of diminished confidence in the institution, and as a saving grace without which the institution would fall under its own unconstitutional weight.[12] The President, for his part, narrowed even further the powers of the summary court where personnel of pay grade E-5 and above are accused. Such persons may not be sentenced by a summary court to confinement, hard labor without confinement, or reduction of more than one pay grade.[13]

Finally, the military courts have shown some reluctance to upgrade this level of tribunal. In *United States v. Long*,[14] for instance, the United States Court of Military Appeals avoided holding that summary courts are courts of the United States for

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can be considered minor." Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225, 247 n.72 (1961). Even assuming the primary standards of conduct established for commissioned officers and enlisted personnel can be differentiated, *compare* Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 A.F. JAG L. REV. 124 (1970) *and* Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697, 1761 n.342 (1968) *with* United States v. Claypool, 10 U.S.C.M.A. 302, 304, 27 C.M.R. 376, 378 (1959) *and* United States v. Hale, No. 22974, n.1 (U.S.C.M.A. Nov. 20, 1970) (Darden, J., concurring), or that the appellate process might treat specially flag and general officers, United States v. Gallagher, 15 U.S.C.M.A. 391, 35 C.M.R. 363 (1965) *injunctive relief denied sub nom.* Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir.) *cert. denied*, 385 U.S. 881 (1966), it is difficult to perceive a justification for providing, in effect, separate trial courts to enforce the rules.

11 UCMJ art. 20, 10 U.S.C. § 820 (Supp. V, 1970). Prior to 1968 a person who had declined nonjudicial punishment could be tried by summary court even over his objection to the proceeding.

12 *See, e.g.*, People *ex rel.* Pantano v. Sheriff of City of New York, 38 Misc. 2d 879, 238 N.Y.S.2d 886, 888 (Sup. Ct. 1963); Application of Palacio, 238 Cal. App. 2d 545, 550, 48 Cal. Rptr. 50, 54 (2d Dist. Ct. App. 1965) ("[T]he provisions of section 820 of the Uniform Code of Military Justice with reference to the right to object to trial by summary court-martial is [*sic*] applicable to members of the State Guard, and that by reason thereof the denial of assistance of independent defense counsel before a summary court does not infringe upon or violate any constitutional right which members of the militia may possess."). In a recent federal case, it was argued that a state may not distinguish between active and inactive National Guardsmen for purposes of the right to reject trial by a summary court. Miller v. Rockefeller, 8 Crim. L. Rep. 2477 (S.D.N.Y. 1971).

13 1969 MANUAL para. 16*b*, codifying Ex. Ord. No. 11081, 28 Fed. Reg. 945 (1963).

14 2 U.S.C.M.A. 60, 72-75, 6 C.M.R. 60, 72-75, (1952) (Brosman, J., concurring).

purposes of the intimidation of witnesses statute.[15] Also, two early cases held that trial by summary court-martial need not constitute an effective return to military jurisdiction for purposes of terminating an unauthorized absence.[16] In many other respects, however, both military and civilian courts have upheld the judicial status of the summary tribunal.

Each of these aspects of the summary court-martial can be, and has been, rationalized in terms of practical or historical considerations independent of any evaluation of the underlying constitutional issues. It is equally possible, however, to read these signs as reflecting a basic lack of faith in the tribunal.

I. Institutional Issues

A. *Justice in a Nonadversary Forum*

The feature of the summary court-martial that conflicts most with accepted standards of fairness applied in the civilian community is the frequent lack of an adversary structure to the proceedings.[17] The language and spirit of the Manual for Courts-Martial, the current edition of which provides that "[t]he summary court will thoroughly and impartialy inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded,"[18] are indicative of the nature of the problem. In practice, the notion prevails that the summary court officer is both trial and defense counsel, as well as tribunal.[19]

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15 18 U.S.C. § 1503 (Supp. V, 1970). *See* text following note 136 *infra*.

16 United States v. Jackson, 1 U.S.C.M.A. 190, 2 C.M.R. 96 (1952); United States v. Branch, 1 U.S.C.M.A. 189, 2 C.M.R 95 (1952)

17 It has been incorrectly stated that "no serviceman ever gets a counsel" at summary courts-martial. R. Sherrill, Military Justice is to Justice as Military Music is to Music 88 (1970). *But see Joint Hearings on S. 745-60, 2906-07 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess., pt. 2, App. A, at 627, pt. 3, App. B, at 914, 939, 964 (1966) [hereinafter cited as *1966 Hearings*].

18 1969 Manual para. 79*a*. "On behalf of the accused, the court will obtain the attendance of witnesses, administer the oath and examine them, and obtain such other evidence as may tend to disprove or negative guilt of the charges, explain the acts or omissions charged, show extenuating circumstances, or establish grounds for mitigation." 1969 Manual para. 79*d* (3).

19 *See, e.g.*, Application of Palacio, 238 Cal. App. 2d 545, 546, 48 Cal. Rptr. 50, 52 (2d Dist. Ct. App. 1965); R. Everett, Military Justice in the Armed Forces of the United States 162 (1956); Douglass, *One-Man Court*, JAG J., Jan. 1954, 7,

This development is completely foreign to the common law tradition, and current practice in the civilian federal judiciary.

One of the earliest expressions of the policy that the trier of fact should not be associated with either side of a matter in litigation is the famous decision in *Dr. Bonham's Case*.[20] There, it will be recalled, the Court of Common Pleas, per Coke, C.J., condemned a procedure whereby the Royal College of Physicians shared in the fines they assessed for unlicensed practice of medicine:

> The censors cannot be judges, ministers, and parties; judges to give sentences or judgment; ministers to make summons; and parties to have the moiety of the forfeiture. . . . , and one cannot be Judge and attorney for any one of the parties. . . .[21]

Plainly the reliability of the fact-finding and law-determining processes is undermined when the private interests of the tribunal are affected by the outcome. Thus, in *Tumey v. Ohio*[22] the Supreme Court, referring to the accused's right to have an impartial judge, invalidated a state procedure under which magistrates' fees were contingent upon conviction of the accused.

It can be argued that the summary court officer has the same direct, personal interest in the outcome as was condemned in *Tumey* and *Dr. Bonham's Case*. Many believe that it is the rare summary court-martial that will grant a complete acquittal or dismissal for a technicality, due to a generalized fear of incurring the subtle wrath of a convening authority. Could this be avoided by permitting the appointment only of officers not attached to the command of the convening authority? Perhaps so, but even without this rumored regime of fear the summary court would still offend the standards of fair procedure. It is not sufficient to assume that summary courts, as commissioned officers, will act with the highest sense of honor and consistently with their oaths for, as the Court noted in *Tumey*:

8-9; Nesmith, *Summary Court-Martial Procedure*, JAG J., Oct. 1957, 12, 13; United States v. Carreon, No. 70 1135 (NCMR Jul. 6, 1970). The source for this doctrine was the clear statement in the 1951 Manual for Courts-Martial that "the summary court represents both the Government and the Accused." MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 79*a* (1951).

20 8 Co. Rep. 114a, 2 Brownl. 255, 77 Eng. Rep. 647 (C.P. 1610). *See also* 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 25 (ed. 1817).

21 8 Co. Rep. 118.

22 273 U.S. 510 (1927) (Taft, C.J.).

> the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.[23]

Even where the summary court officer cannot be said to have an interest in any pecuniary or other practical sense, there is substantial authority for the proposition that the combination of prosecutorial and judicial functions in one person is constitutionally unacceptable. For example, in *In re Murchison*,[24] the Supreme Court held that a Michigan one-man grand jury could not try contempts that had been committed before it. This same approach is evident in the Judicial Code, which requires that

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.[25]

This provision does not extend to courts-martial,[26] but the policy behind it surely ought to apply to military as well as civilian courts. Unless some way can be found to relieve the summary court of its joint duty to the accused and the government, there can be little hope that the proceedings will meet the test of adversariness implied in Mr. Justice Douglas' reference in *Augenblick*[27] to the criminal trial as "a disciplined contest."

B. *The Lay Judge Problem*

Still another difficulty with the summary court is that the person responsible for stating and interpreting the law *is often a layman.*

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23 273 U.S. at 532. *Cf.* United States v. Villa, 19 U.S.C.M.A. 564, 567, 42 C.M.R. 166 (1970) (Ferguson, J., dissenting).

24 349 U.S. 133 (1955). *See also* Mayberry v. Penna., 39 U.S.L.W. 4133 (U.S. Jan. 20, 1971). *Murchison* was unsuccessfully relied upon by the defense in Priest v. Koch, 19 U.S.C.M.A. 293, 41 C.M.R. 293 (1970); *see* Brief in Support of Petition for Writ of Prohibition at 16, Priest v. Koch, *supra.*

25 28 U.S.C. § 455 (1964).

26 28 U.S.C. § 451 (1964).

27 United States v. Augenblick, 393 U.S. 348, 356 (1969). There is scant connection between the criminal and the "probate" jurisdictions of the summary court, 10 U.S.C. §§ 4711-12, 9711-12 (1964), although both can be viewed as fundamentally nonadversary proceedings.

Even with the right to appeal and mandatory review by a lawyer, this weakness in the system should not be overlooked,[28] particularly because of the lack of an adequate trial record in summary cases. In a very real sense, if the law is not properly applied at the summary court-martial trial, it often cannot be so applied at a later stage.[29]

The question whether an accused has the right to have legal questions decided by an attorney under the Constitution appears never to have been raised successfully. In the state courts, several jurisdictions have taken the position that there is no requirement that judges be lawyers in the absence of a state constitutional or statutory provision to that effect.[30] Indeed, in one case the Texas courts held that a state constitutional provision that judges must be "well informed in the law" did not require admission to the bar.[31]

A similar approach has obtained thus far in the military context. In *Owings v. Secretary of the Air Force*,[32] review was sought of a decision of a board for the correction of records. The petitioner had requested that the board remove from his record a conviction involving a bad conduct discharge for larceny, arguing that the conviction was invalid under a decision of the United States Court of Military Appeals.[33] The District Court noted that

> [d]espite the fact that the Board was aware in advance that these legal arguments were the foundations of his petition, no member of the Board hearing the case had legal training

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28 *Cf.* 1968 U.S. CODE CONG. & AD. NEWS 4266, 4267 (dissenting views of Rep. Cahill regarding Federal Magistrates Act): "It has been held over the years that the right to an appeal does not cure a constitutionally defective trial procedure," *citing* District of Columbia v. Clawans, 300 U.S. 617, 627 (1937); Callan v. Wilson, 127 U.S. 540, 557 (1888).

The converse situation—use of lawyers where not required, as members in pre-1968 Act or non-bad conduct discharge special courts-martial—has not been without difficulties. *See* United States v. Glaze, 3 U.S.C.M.A. 168, 11 C.M.R. 168 (1953); United States v. Sears, 6 U.S.C.M.A. 661, 20 C.M.R. 377 (1956); *compare* 1951 MANUAL para. 4*d with* 1969 MANUAL para. 4*d*.

29 *See* Douglass, *One-Man Court*, JAG J., Jan. 1954, 7.

30 State v. Peck, 88 Conn. 447, 91 A. 274, 276 (1914); State *ex rel.* Swann v. Freshour, 219 Tenn. 482, 410 S.W.2d 885 (1967); Moats v. Jonco, 39 U.S.L.W. 2427 (W. Va. 1970), *revised on rehearing*, 39 U.S.L.W. 2588 (1971).

31 Ex parte Craig, 150 Tex. Crim. 598, 193 S.W.2d 178, 185 (1946), *rev'd on other grounds*, 331 U.S. 367 (1947).

32 298 F. Supp. 849 (D.D.C. 1969).

33 United States v. Wallace, 15 U.S.C.M.A. 650, 36 C.M.R. 148 (1966).

> and the record discloses confusion over the legal theory upon which the petition was based.[34]

The board referred the petition to the Judge Advocate General of the Air Force, and adopted his conclusions as their own. Of this procedure the judge said: "In future cases, this [delegation] issue may be avoided by requesting legal opinions from opposing counsel,"[35] and held for the petitioner that the board had erred in not following the relied-on Court of Military Appeals decision. Seemingly the court believed that the flaw in the board's procedure would have been cured if both sides had been given the opportunity to brief the legal issues.

This approach fails to meet the objection that a lay decision-maker may be unable adequately to analyze legal issues — whether they have been briefed by one or both parties. *Owings* can be viewed as suggesting a special need for an adversary treatment of legal issues where the decision-maker is a nonlawyer, but it does not follow from this that where the two sides are separately represented the need for a lawyer decision-maker is obviated. By analogy of reasoning, one could just as well argue that so long as a lawyer was detailed as the summary court officer there is no reason to allow the accused and the government to be separately represented by counsel. Neither conclusion is consistent with fundamental fairness in the judicial process.

The problem of lay judges is also emphasized by the decision of the Court of Military Appeals in *Priest v. Koch*,[36] where the court upheld the provisions of Article 62(a) permitting the convening authority to exercise a limited appellate jurisdiction over certain dismissals of specifications. Referring to the exercise of a judicial function[37] by Rear Admiral Koch, who was not a lawyer, Chief Judge Quinn said:

> We perceive no constitutional impediment to investiture by Congress, of a convening authority with certain judicial powers in relation to the administration of military justice because he is not specially trained in the law.[38]

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34 298 F. Supp. at 853.
35 *Id.*
36 19 U.S.C.M.A. 293, 41 C.M.R. 293 (1970).
37 *See generally* Hansen, *Judicial Functions for the Commander?* 41 MIL. L. REV. 1 (1968).
38 19 U.S.C.M.A. at 296, 41 C.M.R. at 296.

Priest, however, is not dispositive of the right to a legally trained decision-maker on legal issues. The case involved — as did, in a sense, *Owings*—the appellate level. A legally qualified military judge presided at the trial, and lawyer counsel were available in an adversary proceeding. Other legal minds would be brought to bear at the appellate levels of review, and indeed, the convening authority would have the benefit of the advice of his staff judge advocate in ruling on the government's interlocutory appeal under article 62(a).[39] A verbatim record of trial would be available to aid the reviewers. In view of these factors, the injection of a nonlawyer's decision on the interlocutory question under article 62(a) would scarcely be as prejudicial to the proper resolution of the legal issues as would the exercise of a nonlawyer's judgment on legal questions at the trial of a summary court.

Priest and *Owings* do not, then, resolve the question of whether laymen should act as summary court officers. A review of developments in civilian jurisprudence suggests that the notion of lay decisions on legal questions involves a very fundamental unfairness. These developments have come about chiefly in the context of the nation's lower civilian courts.

The tradition of lay judges is deeply rooted in Anglo-American law.[40] The roots of dissatisfaction with the lower courts are equally deep. For example, twenty-five years ago one commentator observed that

> The most serious and widespread complaint against the justice of the peace courts is that the justice is ordinarily not a lawyer.
>
> . . . .
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> Rules of evidence are as important in a minor court as in a superior court, and they cannot be understood or properly administered by anyone without legal training.

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39 10 U.S.C. § 862(a) (1964). It is interesting to note that counsel for the government in *Priest* describes the article 62(a) procedure as a "patent incongruity," adding that the fact that the convening authority "may act on advice of his staff judge advocate or legal officer does not eliminate the incongruity, for that lawyer will not be an active member of the judiciary, may have been active in the institution of the prosecution, and receives his evaluation reports from the convening authority." Floyd, *Government Appeals in Military Criminal Cases*, 24 JAG J. 129, 147 (1970).

40 *See generally* J. DAWSON, A HISTORY OF LAY JUDGES (1960); A[n anonymous] Chairman of Quarter Sessions, *The Lay Justices: Some Criticisms and Suggestions*, 1961 CRIM. L. REV. 657.

> The questions of substantive law which arise in small cases are no less difficult than those arising in large cases, and if the rights of small litigants are to be protected according to law, the judges of the minor courts must know what the law is.[41]

Considerations such as these contributed to the ill-concealed surprise of the President's Commission on Law Enforcement and Administration of Justice when it reported in 1968 that "[i]n some cities lower court judges are not even required to be lawyers."[42]

Corrective measures have been taken in a number of the states, either by abolishing the justice of the peace system,[43] by requiring that the judges be lawyers,[44] or by requiring that nonlawyer judicial officers undergo an intensive training program, as in New York.[45] These changes suggest a growing hostility in American law to the lay judge, but the closest parallel for present purposes comes not from the states but from the federal system. This parallel lies in the system of trials before United States commissioners or, under 1968 legislation, United States magistrates.[46]

Prior to the 1968 Federal Magistrates Act, there was no requirement that United States commissioners, who possessed a limited trial jurisdiction over federal enclaves, be members of the bar. This flaw was one of those most often pointed to by critics during the debate which led to enactment of the 1968 legislation.[47] In practice, perhaps one-third of the 700 commissioners were not attorneys at the close of the 1960's.[48] The implications of this statistic were brought out by Senator Tydings:

> It was not surprising then to learn that many commissioners lack even a basic understanding of their own statutory role

41 Sunderland, *Qualifications and Compensation of Minor Court Judges*, 29 J. AM. JUD. SOC'Y 111 (1945).

42 PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967).

43 *E.g.*, ILL. CONST. art. 6.

44 *E.g.*, CONN. GEN. STAT. ANN. § 51-47 (Supp. 1970); ME. CONST., art. 4, § 2.

45 *See* N.Y. CONST. art. 6 § 20c; 1962 LAWS OF N.Y. ch. 705; Ronayne, *Law School Training for Nonlawyer Judges*, 17 J. LEGAL ED. 197 (1964).

46 28 U.S.C. §§ 631-39 (Supp. V, 1970).

47 *See Hearings Before a Subcomm. of the House Comm. on the Judiciary on S. 945*, 89th Cong., 2d Sess., 70, 96, 99-100, 103, 107, 109 (1966) [hereinafter cited as *Magistrates Act Hearings*].

48 PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 36 (1967).

> in our system of justice, that there is great disparity from district to district in the way even fundamental commissioner duties are handled, that scores of commissioners rely solely upon the advice and counsel of the U.S. attorneys in the granting of search and arrest warrant applications, or that the exercise of other commissioner functions is commonly founded upon confused notions of substantive or procedural law applicable in a given case.
>
> In short, we found that nonlawyer commissioners, as well as lawyer commissioners, were being called upon to apply some of the most sophisticated rules of constitutional law — rules that the best-informed attorneys and judges are hard pressed to apply correctly.[49]

This problem has been largely eliminated by the Federal Magistrates Act, which now requires that all such officers be members of the bar except where "no qualified individual who is a member of the bar is available to serve at a specific location."[50] In addition, the Act requires that new magistrates attend a training program during the first year of their tenure.[51]

The system of commissioners and magistrates is not wholly analogous to the summary court-martial, but there are some basic parallels. The commissioner and his successor under the new Act, the federal magistrate, are judicial officers of rather limited jurisdiction. True, under the 1968 Act the magistrate may try offenses punishable by up to one year in prison and fines of not more than $1,000 — a jurisdiction far in excess of that of the summary court-martial — but his role in the civilian Federal judiciary is parallel to that of the summary court. Even the terminology used to describe the two jurisdictions is similar: the magistrate possesses a jurisdiction over "minor offenses,"[52] while the summary court officer tries "relatively minor offenses."[53]

Another striking parallel lies in the fact that an accused person may decline to be tried by either of these tribunals.[54] In the case of the federal magistrate the compulsion is based on the constitu-

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49 *Magistrates Act Hearings*, at 70.
50 28 U.S.C. § 631(b)(1) (Supp. IV, 1969).
51 28 U.S.C. § 637 (Supp. IV, 1969).
52 18 U.S.C. § 3401 (a) (Supp. IV, 1969).
53 1969 MANUAL para. 79*a*.
54 *Compare* UCMJ art. 20, 10 U.S.C. § 820 (1964), *with* 18 U.S.C. § 3401 (b) (Supp. IV, 1969) *and* FED. R. MAGIS. P. 2(c), 3(b), 39 U.S.L.W. 3330 (U.S. Jan. 27, 1971).

tional guarantee of trial before an article III judge. In the case of the summary court the reasons for permitting a defendant to refuse to be tried have not been officially articulated in precise constitutional terms thus far. However, the analogy with the magistrate's jurisdiction fails when one considers that the accused whose case is referred to a summary court-martial may decline such a trial only at the risk of increasing the possible punishment to that which could be awarded by a general or special court-martial, if the convening authority deems one of these appropriate. In marked contrast, the accused who refuses to be tried by a federal magistrate stands in no worse position: all that awaits him is a plenary trial before a federal district judge, with no change in the maximum possible punishment. This distinction between the two systems does not reflect favorably on the summary court, and indicates a major inconsistency with the civilian practice. The recent magistrates act is suggestive of the need for reforms in the area of lay judgment on legal questions. Even if this particular aspect of the summary court does not, in itself, indicate unconstitutionality, the cumulative effect of this and other features of the institution could well result in constitutional invalidity.

C. *The Right to Counsel*

One of the most often voiced objections to the summary court is that the accused is not provided with legal counsel as a matter of right, even when such counsel could be made available in individual cases.[55] Whether this failure to provide a lawyer is a flaw of constitutional dimension turns on the application of *Gideon v. Wainwright*[56] to "petty offenses," a question on which the Supreme Court has recently agreed to rule.[57] Some state courts

55 *See 1966 Hearings*, pt. 3, App. B, at 914, 939, 964. In practice, such counsel may be a lawyer or a layman, but appointment of a lawyer is more often the case. *Id.* at 939.

56 372 U.S. 335 (1963). Congress' judgment on the scope of the sixth amendment right to counsel is revealed in 18 U.S.C. § 3006A (1964), which confers upon indigents a right to free counsel except in "petty offense" cases. For this purpose "petty offense" means a maximum of six months in prison and a $500 fine. 18 U.S.C. § 1(3) (1964).

57 *See* Argersinger v. Hamlin, 236 So. 2d 492 (Fla. 1970), *cert. granted*, 39 U.S.L.W. 3360 (Feb. 22, 1971); *cf.* Heller v. Connecticut, 4 Conn. Cir. 174, 228 A.2d 815 (1966), *cert. denied*, 389 U.S. 902 (1967). Justices Black and Douglas complained that the Court was taking a position on this issue in prescribing the 1971 Rules of Procedure for the Trial of Minor Offenses Before Magistrates. FED. R. MAGIS. P. 39 U.S.L.W.

have apparently found a right to counsel in such cases.[58] Little purpose would be served by recapitulating the uncertain state of the law in this article, but some comments can be profitably offered concerning possible special circumstances arising from the military situation.

One such special factor is that summary court convictions, as will be more fully discussed below,[59] have an "explosive quality" when used to trigger the escalator clauses appended to the table of maximum punishments in the Manual of Courts-Martial. There is sufficient documentation available (in addition to the undocumented realities familiar to judge advocates and commanding officers) to suggest that summary courts are often convened with a specific purpose of using the conviction to escalate punishment at subsequent prosecutions of the same accused.[60] Thus, as a matter of practice, as well as theory, it is proper to view the summary court-martial procedure in its relation to such subsequent prosecutions before special and general courts-martial and to apply right to counsel concepts derived from those tribunals to the summary court itself.[61] This approach avoids the issue of the extension of *Gideon* to petty offense cases.

A second problem encountered in the military situation is that it is impossible to determine whether misconduct will be treated as a "petty offense" until the case is referred for trial. Of course, the commander must be accorded a broad discretion in this respect,[62] but one of the effects of this discretion is to

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3330, 3331-32 (U.S. Jan. 27, 1971) (Black, J. dissenting). *See generally* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 695 (1968).

58 *E.g.*, State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967) (exercise of court's "supervisory power to insure the fair administration of justice"). *See also* Moats v. Jonco, 39 U.S.L.W. 2427 (W. Va. 1970), *revised on rehearing*, 39 U.S.L.W. 2588 (1971); People v. Witenski, 15 N.Y.2d 392, 259 N.Y.S.2d 413, 207 N.E.2d 358 (1965) and other materials cited in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 53 n.11 (1967).

59 *See* text accompanying notes 102-09 *infra*.

60 *See, e.g.*, United States v. Popolo, 3 C.M.R. 453 (NBR 1952).

61 *But see* United States v. Carreon, No. 70 1135 (NCMR July 6, 1970).

62 It is questionable whether this discretion is unbridled. Capital offenses cannot be referred to a summary court. UCMJ art. 20, 10 U.S.C. § 820 (1964). The guidelines other than the suggestion of the Manual for Courts Martial that the summary court be reserved for "relatively minor offenses," 1969 MANUAL para. 79*a*, are found in the provisions for captain's mast. "Generally the term 'minor' includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by summary court-martial. This term ordinarily does not include misconduct of a kind which, if tried by general court-martial, could be punished by

create an uncertainty as to the right to counsel. This can lead to some anomalous results: for example, if, in the preliminary investigation stage a suspect is questioned, he must be accorded advice as to counsel pursuant to Article 31 and *Tempia*[63] even though the case is later referred to a summary court-martial at which he will not enjoy a right to counsel. For no intelligible reason, the pretrial rights of such an accused are more carefully protected than his rights at trial.[64] As a practical matter, a suspect who is questioned, advised of, and exercises his right to counsel, and whose case is later referred to a summary court, stands a *fair* chance of enjoying the services of counsel so provided at the trial itself. In contrast, the suspect who waives his right to counsel at an interrogation, and whose case is also later referred to a summary court, will probably not have legal counsel at the trial. In practical effect, his waiver at the interrogation may have greater consequences than are pointed out to him by his interrogators.

Finally, the question of the right to counsel must not be evaluated *in vacuo*. Access to a trained lawyer, even if not required ordinarily by the Constitution in petty offense cases, may nevertheless raise an issue of constitutional scope where the tribunal consists solely of a layman. Thus, the lack of a law-trained decisionmaker on questions of law, *and* the lack of trained counsel, while perhaps not independently in violation of the fifth and sixth amendments, may have a cumulative unconstitutional impact.[65]

D. *The Record of Trial*

A fourth weakness of the summary court-martial lies in the fact that its errors are effectively immunized from review by the ab-

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dishonorable discharge or confinement for more than one year." 1969 MANUAL para. 128*b*. The power of the convening authority, in spite of these guidelines, to treat a particular offense as a petty offense, misdemeanor or felony, is questionable. *Compare* Hutcherson v. United States, 345 F.2d 965 (D.C. Cir.), *cert. denied* 382 U.S. 894 (1965), *with* Olsen v. Delmore, 48 Wash. 2d 545, 295 P.2d 324 (1956) *and* State v. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (1959), *all noted in* L. HALL, Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 781-784 (1969). *See also* Fidell, *Is There a Common-Law of Footnote Five?*, 24 JAG J. 157, 160-61 & n.31 (1970).

63 United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

64 Junker, *supra* note 57, at 695-96; *see also* U.S. Navy, Judge Advocate General Notice 5800 JAG:20 para. 4a (Feb. 9, 1970) (all persons in confinement to be advised of right to counsel within 48 hours).

65 *See* Brief for Appellant at 17, United States v. Carreon, No. 70 1135 (NCMR July 6, 1970).

TABLE 2
Percent Findings Disapproved and/or Sentence Reduced
U.S. Air Force: 1963-1965

Year	General Court-Martial	Special Court-Martial Bad-Conduct Discharge	Special Court-Martial Non-Bad-Conduct Discharge	Summary Court-Martial
1963	29.2%	23.1%	15.9%	2.1
1964	28.3	22.2	17.6	9.3
1965 [first half]	33.3	24.9	18.3	8.1

Source: *1966 Hearings*, pt. 3, App. A, at 1056.

sence of a meaningful record of the proceedings.[66] The data in Table 2 comparing rates of revision for general, special, and summary courts are suggestive in this respect, although other explanations may be offered for the much lower rate of revision for summary courts.[67] Because the matter has received so little attention, the data are necessarily incomplete.

The importance of the record of trial has been recognized repeatedly by the civilian courts. In *Griffin v. Illinois*,[68] the Supreme Court struck down a procedure which limited access to the appellate courts to those who could afford a transcript. Similarly, in *In re Oliver*,[69] another case involving the Michigan one-man grand jury, Mr. Justice Rutledge, concurring, argued that the system "denies the equal protection of the laws by leaving to the committing functionary's sole discretion the scope and contents of the record on appeal."[70] To the extent that regulations of the services require the summary court officer, for example, to summarize testimony in not guilty plea cases,[71] they do not seem to run afoul of either of these cases, but where the convening author-

66 *See* Douglass, *One-Man Court*, JAG J., Jan. 1954, at 7. One observer has suggested that the "record" of nonjudicial punishment may be more complete than in summary courts. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 107 & n. 385 (1965).

67 *E.g.*, *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary Pursuant to S. Res. 260*, 87th Cong., 2d Sess., 873 (1962) (effect of pretrial agreements).

68 351 U.S. 12 (1956).

69 333 U.S. 257 (1949).

70 *Id.* at 279 (Rutledge, J., concurring).

71 *Compare* U.S. COAST GUARD, MANUAL FOR COURTS-MARTIAL 1969 (Supp. rev. ed. 1969) § 0106*b* *with* U.S. NAVY JAG MANUAL § 0120*d*.

ity enjoys an unfettered discretion to make a court reporter available,[72] Justice Rutledge's concerns are relevant.

The government has an interest in avoiding the added expense of providing a court reporter, but this interest is outweighed when prejudice to the substantial rights of the accused can be shown. The sole reported state court decision in point found no necessary prejudice from the mere absence of a verbatim transcript.[73] It is submitted, however, that the inadequacies of the record may well work to the practical disadvantage of not only the accused, but of the government as well. The trade-off is not an even one.

For example, on the government side, the absence of a record may in some small number of cases lead the zealous reviewing lawyer to rule against jurisdiction on grounds similar to those in *O'Callahan v. Parker*.[74] Frequently the existence of the required "service connection," *e.g.*, wearing a uniform, may be needlessly lost because of record inadequacies. This assumes, of course, that the "petty offense" exception to *O'Callahan* does not automatically apply to summary courts-martial, a matter that is not entirely free from doubt.[75]

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72 One wonders whether, in addition, the summary court officer has the power to require the services of a court reporter. For an excellent illustration of the kinds of review problems which may be avoided by having a reliable record of trial, see Miller v. Rockefeller, 8 Crim. L. Rep. 2477 (S.D.N.Y. 1971).

73 People *ex rel.* Pantano v. Sheriff of City of New York, 38 Misc. 2d 879, 238 N.Y.S.2d 886, 889 (Sup. Ct. 1963).

74 O'Callahan v. Parker, 395 U.S. 258 (1969) (court-marital has no jurisdiction where offense is committed off-post while on pass and is not "service connected").

75 *See* United States v. Sharkey, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969), where the Court of Military Appeals looked to the penalty imposable under the table of maximum punishments in order to define "petty military offenses." *Id.*, at 27. This was arguably erroneous, since one would have assumed that impairment of the constitutional right to jury trial for *O'Callahan* purposes would turn on the civilian level of punishment, not that set by the President. However, as Mr. Justice White recently observed in a case concerning the right to jury trial in misdemeanor prosecutions, the "possible penalty" is the "only objective criterion by which a line could ever be drawn." Baldwin v. New York, 399 U.S. 66, 72 (1970) (White, J., announcing judgment). *What* is the possible penalty in a court-martial, and *when* is this line to be drawn — before or after referral of charges to a particular court? *See* note 62 *supra*. Assuming the *Sharkey* approach was sensible, reference to the table — as opposed to the court-martial's jurisdictional limits — would operate to assimilate summary cases to other courts-martial for *O'Callahan* questions. Any other result would permit military convening authorities to manipulate *O'Callahan-Sharkey* issues by referring offenses plainly covered by *O'Callahan* to summary courts.

For an illustration of how the government was adversely affected by lack of a

On the side of the accused the opportunities for prejudice are quite real and as varied as the errors found in the other classes of courts-martial. Thus, a pattern of leading questions by the summary court officer in the proof of the government's case will go undetected. So too, where an Article 31 issue is involved, the court's summary of testimony will not admit of the kind of examination into the details of the warnings to which other military appellate tribunals are by now accustomed. As a third illustration, contrast the likelihood of insuring compliance with the requirements of *United States v. Care*[76] as between summary, special and general courts-martial. A mere notation of compliance on the charge sheet[77] can scarcely be deemed a substitute for the painstaking inquiry demanded of the higher trial courts on the issue of providency.[78] There also seems to be no effective way to prevent a summary court officer from discovering that an accused has been previously punished at captain's mast. What assurance is there that such facts are not improperly considered by the court[79] in view of the universal practice of summary court officers of examining the accused's service record?

Disregarding reviews pursuant to article 69, what kinds of errors will show up in the usual review at the supervisory authority level? Pleading errors will be spotted, as will cases involving partial failures of proof or "no evidence" situations.[80] Errors in reference for trial may also occur, but these are not often prejudicial. Hearsay problems may also be anticipated, as well as irregularities in the admission of documentary evidence; such errors will probably be detected.

summary court record under the Hiss Act, see McHughes, *The Hiss Act and the Military*, 14 MIL. L. REV. 67, 85 n.63 (1961).

76 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) (establishing standards for determining the validity of guilty pleas).

77 1969 MANUAL para. 79*e*.

78 *See, e.g.*, 69-23 U.S. ARMY, JUDGE ADVOCATE LEGAL SERVICE 12-17.

79 Since 1969 MANUAL para. 75*d* is limited to cases where the court is "constituted" with a military judge, the rule of inadmissibility of records of non-judicial punishment stated in United States v. McDowell, 13 U.S.C.M.A. 129, 32 C.M.R. 129 (1962) would still apply to summary courts — presumably even if the summary court officer were also a military judge. This result could, however, be threatened if the Court of Military Appeals were to hold that a military judge retains his powers as such even when not assigned to try a particular case. *See* Zamora v. Woodson, 19 U.S.C.M.A. 403, 42 C.M.R. 5 (1970); United States v. Gagnon, No. 70-2 (AFCMR Apr. 14, 1970).

80 Thompson v. City of Louisville, 362 U.S. 199 (1960).

The analogy to practice before United States magistrates may again be relevant to the inquiry. Under the Commissioner's Rules,[81] it may be argued, there was no need for the preparation of a verbatim transcript, but simply a requirement that the commissioner summarize the evidence. But under the more recent Federal Magistrates Act[82] the proceedings must be recorded verbatim unless the maximum imposable punishment does not exceed six months in prison and a $500 fine,[83] in which case the defendant can waive the verbatim transcript requirement. In light of this latest precedent, there is a sound basis on which to object to the summary court-martial provisions for preparation of the record of trial. Even civilian "petty" offenders are now awarded a complete record — offenders who are often subjected to no greater possible penalties than those facing summary court defendants. The opportunities for hidden errors in such a scheme are sufficiently numerous to suggest that the summary court suffers from the evil alluded to by Mr. Chief Justice Warren in *Sibron v. New York*,[84] when he commented that "[m]any deep and abiding constitutional problems are encountered primarily at a level of *'low visibility'* in the criminal process — in the context of prosecutions for 'minor' offenses which carry only short sentences."[85] Absence of a good record of trial is a principal factor in the low visibility of summary court adjudication. Even if the absence of a record offends no constitutional standard, it is still not amiss to suggest detailing court reporters, as available, to record summary courts. Such a procedure is authorized[86] and is particularly desirable where a substantial likelihood of a not guilty plea exists, or where the resolution of difficult issues or weighing of testimony[87] may be anticipated on review. If the course of reform does not culminate in abolition of the summary court, as advo-

81 Fed. R. Comm'r P. 3(5) (1941).

82 18 U.S.C. § 3401(e) (Supp. IV, 1969).

83 FED. R. MAGIS. P. 2(d)(3), 3(c)(2), 39 U.S.L.W. 3330 (Jan. 27, 1971), *superseding* FED. R. MAGIS. P. 5(c), 7(c) (1969).

84 392 U.S. 40, 52 (1968) (citation omitted). *See also* Groppi v. Wisconsin, 91 S. Ct. 490, 495 (1971) (Blackmun, J., concurring).

85 392 U.S. at 52.

86 U.S. COAST GUARD MANUAL FOR COURTS-MARTIAL 1969 § 0104*a* (Supp. rev. ed. 1969); U.S. NAVY, JAG MANUAL § 0110*a*(1).

87 *See* Nesmith, *Summary Court-Martial Procedure*, JAG J., Oct. 1957, 12, 13.

cated in this article, regular detail of a reporter could nevertheless substantially improve the review process, and therefore the fairness at trial, without the expense of detailing two or more judge advocates to act as counsel.

II. Challenging the Summary Court

The serious, and perhaps constitutional, defects of the summary court-martial raise the question of what legal methods are available to challenge the institution. Analysis shows that there are a variety of forums in which to raise the problem of reform, and this fact alone provides grounds for some optimism.

A. *Direct Challenges*

In view of the institutional infirmities of the summary court discussed above, challenges raised directly in the court itself seem the least likely to succeed. As has been indicated, one of the primary faults of the summary court is that the tribunal consists of a layman in the majority of cases. With a layman as the decision-maker, an argument attacking the summary court on constitutional grounds couched in legal terms is not likely to be understood by the court and is even less likely to be persuasive. A related difficulty at the summary court level is that the assistance of legal counsel may be denied the accused. Where an accused before a summary court is without such counsel, there is scant likelihood that he himself will have the acuity to appreciate or the eloquence to articulate the delicate legal arguments against the tribunal.

A final difficulty with attacking the summary court as an institution, one which will be present even if the summary court officer is a lawyer and the accused is defended by a lawyer, lies in the right to the accused to reject trial by the court.[88] Since the summary court has the appearance of being optional with the accused, the argument can be made that the accused waives those constitutional objections to the tribunal that he might otherwise have. A summary court officer might be tempted, upon hearing

88 UCMJ art. 20., 10 U.S.C. § 820 (Supp. V, 1970).

an attack upon his court from an accused or from his counsel, to interpret that attack as a rejection of trial by the court. Such a response should not be an end to the matter, however, since error of a constitutional dimension is not waived by accepting trial by the tribunal, any more than fundamental errors are waived by a plea of guilty in a court-martial of any variety. Thus, an accused could insist that his argument be taken for what it is, an attack upon the validity of the tribunal, and not as a rejection of trial by the summary court. If thereafter the accused is able to persuade the court officer of the merits of his argument, and the charges are dismissed for lack of jurisdiction in the court, it would still be possible for the convening authority to refer the case to a higher court-martial. However, even if the summary court officer insists upon construing the constitutional argument as a rejection of trial under Article 20, and the charges are referred to a higher tribunal, a powerful indirect route of attack will have been made available.[89]

Mention should be made under this heading of the review process for summary courts-martial. Success on review is only slightly more likely than at the summary court level.[90] Since the record on review is very incomplete the effectiveness of appellate scrutiny by a legal specialist will be severely curtailed, although defense counsel can seek to avoid this particular difficulty either by requesting that a verbatim transcript be prepared, or by taking extensive minutes of the proceedings before the court. Where such a record is available, and where the facts and proceedings place in unusual relief the flaws of the system, a reviewer might give serious consideration to the claim of unconstitutionality. The likelihood of success increases in direct proportion with the extent to which the reviewing lawyer is removed from the sphere of influence of the convening authority. Advantage may be taken of such circumstances through the timely submission of an appellate brief under Article 38(c), but this device will be unknown even to the most skilled "sea lawyer" tried at a summary court unless trained counsel is at his side.

89 *See* text accompanying notes 110-16 *infra.*
90 UCMJ art. 65(c), 10 U.S.C. § 865(c) (1964).

B. *Indirect Challenges*

Habeas Corpus and Similar Remedies. — Since the most serious immediate consequence of conviction by a summary court-martial may be a period of confinement at hard labor, an effort could be made to release the accused from such confinement through the habeas corpus proceeding. Because military appellate courts have no direct appellate jurisdiction over summary courts, and because the All Writs Act is limited to writs in aid of jurisdiction,[91] such habeas relief would have to be sought in the federal district courts or in the state courts for summary courts-martial arising in unfederalized militias.[92] Relief would have to be sought with great dispatch, in light of the relative brevity of the confinement which a summary court can impose. "Present case law requires that the court-martialed prisoner be in actual confinement before habeas will lie,"[93] but the writ might also be available to test confinements arising out of any subsequent special or general court-martial case over which a court of military review or the Court of Military Appeals had appellate jurisdiction. For example, where a bad conduct discharge was awarded by a special court-martial in which Section B of the table of maximum punishments had been activated by the admission of a summary court-martial conviction, military habeas corpus might be available as well.[94]

Where confinement and restriction are not imposed, but financial penalties or reduction are applied, other remedies in the nature of actions to correct military records or claims against the United States could be considered. The use of habeas corpus, other extraordinary writs, the correction board, and other such

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91 28 U.S.C. § 1651 (1964); Thomas v. United States, No. 70-26 (U.S.C.M.A., Mar. 27, 1970) (*coram nobis* denied for summary court martial conviction).

92 32 U.S.C. §§ 329-30 (1964); *see, e.g.*, McGorray v. Murphy, 80 Ohio St. 413, 88 N.E. 881 (1909); State *ex rel.* Klingle v. Fisher, 174 Minn. 82, 218 N.W. 542 (1928), *cert. denied*, 278 U.S. 636 (1928); People *ex rel.* Pantano v. Sheriff of City of New York, 38 Misc. 2d 879, 238 N.Y.S.2d 886 (Sup. Ct. 1963); Application of Palacio, 238 Cal. App. 2d 545, 48 Cal. Rptr. 50 (2d Dist. Ct. App. 1965). A state court would be without power to free a federal prisoner. Tarble's Case, 80 U.S. (13 Wall.) 397 (1872).

93 *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1229 & n.137 (1970). *But see* Cushman, *The "Custody" Requirement for Habeas Corpus*, 50 MIL. L. REV. 1 (1970).

94 *See generally Developments, supra* note 93, at 1234-36; Graftman, *Extraordinary Relief and the U.S. Court of Military Appeals*, 24 JAG J. 61 (1969).

remedies has been treated elsewhere in the recent literature,[95] and need not be recapitulated here.

Matter in Aggravation. — Because prior summary court convictions are admissible in subsequent, more serious courts-martial, one of the most frequent collateral uses of the summary court-martial conviction is as matter in aggravation at subsequent trials.[96] Attack at this stage runs head-on into the finality provision of Article 76 of the Uniform Code of Military Justice,[97] but there is reason to believe that the strict terms of the article will give way when questions of a constitutional dimension are raised. For example, in *United States v. Cranmore*[98] an accused was permitted to explain the circumstances of a prior summary court-martial conviction in the extenuation and mitigation portion of a later trial, despite the provisions of Article 76. Five years later, in *United States v. Olson*,[99] the finality section was given little weight by the Air Force Board of Review when faced with the issue of the admissibility of a record of conviction by a prior special court-martial where the specification was plainly faulty. The Board noted that courts-martial are not, in general, open to collateral review and said there was no need to "determine whether there may be exceptions to this rule." "In consequence," the Board continued, "we believe that an injustice has been worked upon the accused in this case which it is within our power to correct."[100] The Board then proceeded to reassess the sentence. Similar relief could be available if a reviewing court were persuaded of the impropriety of admitting a conviction by summary court-martial as matter in aggravation.

An effort was made in 1967 to expand the approach indicated in *Olson*. In *United States v. Jewell*,[101] evidence of a prior summary court conviction had been admitted. On review the conviction was

95 *See generally* Everett, *Collateral Attack on Court-Martial Convictions*, 11 A.F. JAG L. REV. 399-400, 410-12 (1969); *Developments*, *supra* note 93, at 1219 n.70.

96 1969 MANUAL para. *75b*(2). *See, e.g.*, United States v. Cranmore, 17 C.M.R. 749 (AFBR 1954); United States v. Engle, 3 U.S.C.M.A. 41, 11 C.M.R. 41 (1953); United States v. Carreon, No. 70 1135 (NCMR July 6, 1970). United States v. Molo, No. 70, 3060 (NCMR Dec. 9, 1970).

97 UCMJ Art. 76, 10 U.S.C. § 867 (1964).

98 17 C.M.R. 749 (AFBR 1954).

99 28 C.M.R. 766 (AFBR 1959).

100 *Id.* at 775.

101 38 C.M.R. 645 (ABR 1967).

held admissible in aggravation despite the lack of defense counsel at the prior summary trial.[102] To the defense's argument that *Burgett v. Texas*[103] prohibits the use of a conviction obtained without the assistance of counsel for the purpose of increasing the punishment, the Board held that the right to counsel simply does not extend to summary courts-martial. Despite the result in *Jewell* the issue raised in that case is a strong one. In principle a motion for relief in the nature of a motion to suppress the conviction should lie at the later trial. To state that *Burgett* is inapplicable because there is no right to counsel at a summary court begs a major constitutional question pertaining to summary proceedings.

The right to counsel may be viewed as springing from the summary court-martial's later effectiveness under the escalator clauses in Section B[104] of the table of maximum punishments. In a sense, every summary court stands as the germ of the subsequent possible punishments imposable under the escalator provisions.[105] Viewing the summary conviction as a constituent element of later general or special courts-martial, it is submitted that there should be a right to counsel at the summary court-martial because of the escalators. The concerns which motivated the Supreme Court in *Burgett* apply with special force in such situations:

> Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.[106]

It was this "explosive quality"[107] of the summary court that

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102 *Id.* at 648.

103 389 U.S. 109 (1967), *discussed in* United States v. Johnson, 19 U.S.C.M.A. 464, 42 C.M.R. 66 (1970).

104 *See* R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 163 (1956). Conviction by a summary court could also operate to increase the punishment powers of a later summary court. Now that the table of maximum punishments prescribed by the President as part of the Manual for Courts-Martial lists none below the summary court's jurisdictional limit, the escalator clause could only operate in the unlisted article 134 area for very trivial offenses. 1969 MANUAL para. 127c, § A.

105 Discussing the effect of the escalator clauses, Chief Judge Quinn has observed: "I doubt . . . that any offense can, abstractly, be described as minor." United States v. Sharkey, 19 U.S.C.M.A. 26, 28, 41 C.M.R. 26, 28 (1969) (concurring opinion). *See also* Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225, 247 n.72 (1961).

106 389 U.S. at 115.

107 Feld, *The Court-Martial Sentence: Fair or Foul?*, 39 VA. L. REV. 319, 322-24

caused the Navy Board of Review in the early case of *United States v. Popolo*[108] to declare that "[c]ourts-martial are enjoined to avoid using previous convictions of a few relatively trivial offenses as justification for imposing punitive discharges and other excessively severe sentences."[109] In *Popolo* the Board ruled that a conviction by a deck court (a predecessor of the summary court) should not have been used to trigger the escalator provision where the prior offense was a failure to report for a work detail. The case went off on what might be called "equitable" grounds, but it constitutes precedent for the proposition that at least some summary court convictions should not be given effect under the escalators. Despite this awareness of potential injustice of subsequent trials, summary court convictions have been consistently used to increase punishment levels. Nevertheless, the high visibility of the problem and the seriousness of the consequences for the accused may mean that a motion to suppress or to limit punishment to that which would have been imposable without the summary conviction will be successful before long.

The Burdened Waiver Argument. — Still another forum in which the summary court may be attacked is the special or general court-martial which may be awarded after a member rejects trial by the summary court.[110] Strictly viewed, this is not so much an

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(1953). *See, e.g.*, United States v. Clark, 4 U.S.C.M.A. 650, 16 C.M.R. 224 (1954); United States v. McKnight, 4 U.S.C.M.A. 190, 15 C.M.R. 190 (1954).

108 3 C.M.R. 453 (NBR 1952). *See also* United States v. Carreon, No. 70, 1135 (NCMR July 6, 1970) (Jones, J., concurring), suggesting — without citing *Popolo* — that "situations where the records of prior summary courts-martial are used solely to predicate the ultimate sentence" could lead to acceptance of the *Burgett* approach. Would this necessitate an inquiry into the motive of the command referring the earlier charges to summary courts-martial? What if subsequent effect at a superior court-martial was not the "sole" purpose of such referral?

The impropriety, as well as the difficulty, of pursuing the inquiry implied by Judge Jones supports the conclusion that no summaries should be given effect under the enhanced punishment provisions.

A parallel problem of showing "purpose" arises from the statement in the Manual for Courts-Martial that "[d]isobedience of an order . . . which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under" Article 90, 10 U.S.C. § 890, 1969 MANUAL para. 169*b*. *See* United States v. Stock, 2 C.M.R. 494 (ABR 1952); United States v. Morgan, 17 C.M.R. 584, 588-89 (AFBR 1954).

109 3 C.M.R. at 454.

110 UCMJ art. 20, 10 U.S.C. § 820 (Supp. V, 1970). In United States v. Carreon, No. 70 1135 (NCMR July 6, 1970), the court declined to hold that the effect of summary court convictions at later trials makes the summary court a "critical

attack on the summary as an effort to limit the punishment to that which could have been imposed by the summary court originally awarded or offered. The theory behind this move follows from that successfully argued in *United States v. Jackson*,[111] where the Supreme Court struck down certain provisions of the Lindbergh Act.[112] The Court, per Mr. Justice Stewart, held that the kidnapping law unduly burdened the right to trial by jury and the right to plead not guilty by providing that the death penalty could be avoided only if an accused pleaded guilty or elected trial by the district judge sitting without a jury. One commentator observed that "the theory employed in *Jackson* is a familiar one and requires that the exercise of constitutional rights cannot be penalized unless there are no less burdensome means to secure a more important policy goal."[113]

This same theory may be applied in the rejection-of-summary-court situation by noting the substantially increased punishments to which an accused opens himself by turning down a summary court in order to secure the greater protections afforded by the special and general courts-martial. Thus burdening the access to these rights is as noxious as failing to advise an accused of his statutory right to reject trial by summary court.[114] Only by limiting the punishment to that imposable by a summary court may a command avoid penalizing a member who wishes to arm himself with the full panoply of constitutional rights provided in higher tribunals.[115]

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stage" for purposes of the right to counsel. This argument is more persuasive when applied to the rejection of summary trial and subsequent referral of charges to a higher court-martial. *See* R. RIVKIN, GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW 228 (1970). In view of the severe consequences attaching to a special or general court conviction, an accused should be able to consult with counsel — as the Air Force now permits — before rejecting a summary court. If denied counsel for that purpose, he should be permitted to revoke his rejection once he is given counsel for a higher court, or alternatively, the punishment at the higher court should be limited to summary court levels.

111 390 U.S. 570 (1968).

112 18 U.S.C. § 1201(a) (1964).

113 *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 159 (1968) (citations omitted).

114 *See* Application of Palacio, 238 Cal. App. 2d 545, 48 Cal. Rptr. 50 (2d Dist. Ct. App. 1965).

115 At the Senate Hearings on the Military Justice Act of 1968, a spokesman for the Association of the Bar of the City of New York suggested that personnel who refuse nonjudicial punishment should be tried by a one-officer special court-martial.

There are two advantages to this approach. First, unlike a finding by the summary court officer or the reviewing authority that the summary court had no jurisdiction to proceed, the granting of a *Jackson* motion would not preclude a special or general court from convicting and punishing the accused. However, such punishment would still be limited to that imposable below. If the unconstitutionality argument had succeeded at the summary court level, the court would have been without authority to proceed, and trial then could be had in a special or general court with unencumbered sentencing powers. There is, therefore, some wisdom to rejecting the summary court and waiting for the charges to be referred to a higher court, rather than attacking directly at the summary proceedings. Second, the *Jackson* approach places the issues before a lawyer decision-maker in all cases except the increasingly rare special court-martial where award of bad conduct discharge is not authorized. With access to lawyer counsel and a military judge with legal credentials, the chances for success on the *Jackson* motion rise sharply.[116]

Impeachment. — Since the Manual permits previous convictions to be used to impeach both an accused and witnesses,[117] it is not surprising that the effectiveness of convictions by summary court for this purpose has been litigated.[118] The conceptual problem with using the summary conviction in this context is that a witness may be impeached only with a conviction "which involves moral turpitude or otherwise affects his credibility,"[119] whereas the Manual suggests elsewhere that summary courts-martial are appropriate only for "relatively minor offenses."[120]

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presided over by a lawyer, and that such a court should have no greater power than a summary court-martial. *1966 Hearings*, pt. 1, at 116. Presumably this proposal reflects *Jackson*-like concerns.

116 *But cf.* United States v. Kajander, 31 C.M.R. 479 (CGBR 1962) (summary court conviction from one-officer command vacated and rehearing ordered before another officer; other charges having arisen, all — including those from the summary — were referred for trial by special court-martial). *See also* North Carolina v. Pearce, 395 U.S. 711, 744 (1969) (Harlan, J., concurring in part and dissenting in part), 726 (Douglas, J., concurring).

117 1969 MANUAL paras. 138*g*, 153*b*(2)(b). *See generally* Amery, *Impeachment of Witnesses by Evidence of Prior Misconduct*, 10 A.F. JAG L. REV. 16 (1968).

118 United States v. Moore, 5 U.S.C.M.A. 687, 18 C.M.R. 311 (1955); United States v. Darling, 36 C.M.R. 620 (ABR), *rev'd on other grounds*, 36 C.M.R. 540 (1966). *See also* United States v. Green, 20 C.M.R. 606, 609 (ABR 1955).

119 1969 MANUAL para. 153*b*(2)(b).

120 1969 MANUAL para. 79*a*.

At times the categories of offenses involving moral turpitude or affecting credibility and those involving "relatively minor offenses" will overlap, as in *United States v. Moore*.[121] There the Court of Military Appeals held that a prior summary court conviction for wrongful use of military pass with intent to deceive could be used for impeachment of the accused in a subsequent prosecution for aggravated assault. Said the court:

> Clearly in military law it is envisaged that a serious offense — one involving moral turpitude — will ordinarily *not* be tried by a summary court. Yet, with the exception of capital crimes, nothing whatever *precludes* the exercise of summary court jurisdiction over serious offenses. . . . Further, we find no predicate in the Manual for building any sort of exception for inferior *civilian* courts. Yet it would be incongruous to conclude that, under the Manual for Courts-Martial, a witness may be questioned concerning a prior conviction of petty larceny rendered by a civilian police court, but could not be asked of the same previous offense if he had instead been found guilty by summary court-martial. This exact result would be compelled if we were to accept the suggestion of appellate defense counsel to the effect that a previous conviction by a summary court is not usable for impeachment.[122]

The court assumes that a conviction by a civilian criminal court of summary jurisdiction could be used for impeachment, a postulate that may come to be inconsistent with developments in the right to counsel area. Another weakness is that the court's formulation creates a whipsaw effect: on the one hand there is no right to counsel because the offense is minor, but on the other hand the offense is significant enough to cast doubt upon the reliability of a witness' statement under oath.

This approach may be turned on its head, so that the conclusion reached would be that the summary court-martial can render a

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121 5 U.S.C.M.A. 687, 18 C.M.R. 311 (1955). "Of the 211 summary court-martial cases [tried in the Coast Guard in 1967], 105 involved absence offenses. While these cases disposed mainly of minor infractions, occasionally more serious charges were referred for trial by summary court-martial; for example, *there were 26 cases of larceny or wrongful appropriation tried by summary court-martial.*" 1967 REP. OF GEN'L COUNSEL, U.S. DEP'T OF TRANSPORTATION, *in* 1967 USCMA ANN. REP. 33, 34 (emphasis supplied). There is also evidence of Air Force use of the summary court for disposition of charges of larceny and wrongful appropriation as well as simple assaults. *1966 Hearings*, pt. 3, App. A, at 1056.

122 5 U.S.C.M.A. at 697-98, 18 C.M.R. at 321-22.

conviction which is grave enough to constitute grounds for impeachment, and for that reason, the right to counsel should have been afforded at the summary trial.

In an unfortunate decision eleven years after *Moore*, the Army Board of Review in *United States v. Darling*[123] reaffirmed the earlier position of the Court of Military Appeals. Ignoring the decisions of the Air Force Board of Review in *Cranmore* and *Olson*, which marked an erosion of the strict finality rule under Article 76, the Board held that that section of the Code forecloses any possibility of collateral attack on a summary conviction offered as matter in impeachment.[124] The opinion went on to reject, in dicta, the defense's argument that the accused had not been represented by counsel at the prior summary, indicating that even after *Tempia* and *Gideon*, Congress retains plenary power to "eliminate the requirement of counsel before a summary court-martial."[125] Further, elaborating on *Moore*, the Board agreed "that the level of the court-martial hearing the case is not controlling as to whether the offense involved moral turpitude or could be used for impeachment purposes."[126]

Passing over the serious doubt which may be raised as to the mechanical application of Article 76, it is not at all clear that the level of court trying a charge is irrelevant to the moral turpitude issue. In fact, the single most reliable guide to the seriousness of an offense is the level of court-martial to which the case is referred, especially in light of the Manual's recommendation that charges be tried "by the lowest court that has the power to adjudge an appropriate and adequate punishment."[127] It must be assumed that cases referred for trial by summary court-martial are referred in accordance with this policy, and it therefore follows that even if the choice of forum is not controlling on the issue of moral turpitude or impaired credibility, the choice of a summary court as the forum is rather strong evidence against such a finding. Conversely, reference to the maximum punishments set by the Presi-

123 36 C.M.R. 620 (ABR), *rev'd on other grounds*, 36 C.M.R. 540 (1966).
124 36 C.M.R. at 621.
125 *Id.* at 622.
126 *Id.* at 621.
127 1969 MANUAL para. 33*h*.

dent is not dispositive of the efficacy of a particular conviction for impeachment purposes.[128]

In *Johnson v. State*,[129] the Maryland Court of Special Appeals held that a conviction obtained in violation of *Gideon* could not be used to impeach an accused who takes the witness stand. Taking the Supreme Court's decision in *Burgett v. Texas*[130] as controlling, the court reasoned that impeachment of a defendant could be determinative on the question of guilt, and would therefore constitute double prejudice just as much as would use of the *Gideon*-violative conviction under an habitual offender statute.

> [W]e cannot say that evidence of a prior conviction to impeach the credibility of an accused testifying in his own behalf does not support guilt of the offense for which he is on trial; the question of his credibility is material to his guilt or innocence.[131]

If this reasoning is applied to the summary court-martial, the result reached in *Moore* and *Darling* should not stand.[132] As in the case where a prior summary conviction is used for aggravation or to increase the maximum punishment, the prior conviction would be open to attack either *per se* through an extension of *Gideon*, or by looking ahead to the gravity of the consequences attaching to later use. The question which this analysis leaves open is the permissibility of employing summary court-martial convictions to impeach a defense witness other than the accused. If the summary court is considered *in vacuo*, without weighing its consequences, the government could argue that the accused in such a case would have no standing to raise constitutional objections to a previous conviction of one of his witnesses.[133] But taking the approach of

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128 *Cf.* McHughes, *The Hiss Act and Its Application to the Military*, 14 MIL. L. REV. 67, 78-79 (1961). Capt. McHughes argues persuasively that the question whether an offense was a felony under the pre-1961 Hiss Act should be decided without reference to the table of maximum punishments where the charges were referred to an inferior court-martial.

129 9 Md. App. 166, 263 A.2d 232 (1970), *aff'd following remand*, 9 Md. App. 436, 265 A.2d 281 (1970).

130 389 U.S. 109 (1967).

131 9 Md. App. at 176, 263 A.2d at 239.

132 *But cf.* United States v. Johnson, 19 U.S.C.M.A. 464, 467, 42 C.M.R. 66 (1970).

133 *Cf.* Alderman v. United States, 394 U.S. 165, 174 (1969) (White, J.).

considering the ramifications of a conviction in resolving the constitutional issue, it is in fact the accused's rights, and not only those of his witness, which are infringed when the witness is impeached with a previous summary conviction.

Defense to Later Prosecutions. — The constitutionality of a summary court-martial could also be litigated as part of the defense to a later criminal charge. Cases involving escapes from confinement or breaches of restriction[134] imposed by a summary court offer a good illustration. Since these matters would not cut as deeply into the dignity of the military judicial process as those just mentioned, it is believed that they would be a more likely springboard from which to mount a constitutional attack. The civilian federal cases do not offer much present hope for this type of argument,[135] but there is some state court authority for the proposition that denial of counsel, for example, can be a defense to a charge of escape.[136] Unlike habeas corpus, or some other types of challenge previously discussed, this route suffers from the significant drawback that the accused is subject to penalties in addition to and more serious than those imposed by the summary court itself.

Civilian Proceedings. — Up to this point discussion has focused chiefly on the impact and avenues for challenge of summary courts-martial within the system of military justice. However, summary convictions may be used (and accordingly may be challenged) in civilian proceedings as well. For instance, summary convictions could be as damaging when used for impeachment in civilian courts as in courts-martial.[137]

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134 *Cf.* United States v. Thornton, 5 C.M.R. 407 (AFBR 1952); United States v. Ervin, 5 C.M.R. 699 (AFBR 1952).

135 *See, e.g.*, Bayless v. United States, 141 F.2d 578 (9th Cir.), *cert. denied*, 322 U.S. 748 (1944).

136 *See* State *ex rel.* Robison v. Boles, 149 W. Va. 516, 142 S.E.2d 55 (1965), *noted in* 79 HARV. L. REV. 847 (1966).

137 *See, e.g.*, Note, *Prior Criminal Convictions to Impeach Credibility in New England*, 42 B.U. L. REV. 91, 98 (1962), *citing* Commonwealth v. Binkiewicz, 342 Mass. 740, 175 N.E.2d 473 (1961), *habeas corpus granted on other grounds sub nom.* Binkiewicz v. Scafati, 281 F. Supp. 233 (D. Mass. 1968) and State v. Mandella, 79 R.I. 476, 90 A.2d 423 (1952). None of the reported cases discovered involved impeachment by summary conviction in the civilian court, but it may be assumed that the same general principles (and problems) involving such use in a court-martial would obtain in the civilian tribunal. To the extent, however, that a civilian court may be less familiar with and tolerant of the summary court as an institution, the civilian court might be less willing to permit impeachment.

An enterprising prosecuting attorney might also attempt to use a summary court conviction as a means of triggering a state's habitual offender law. No cases have been found involving such use of a summary conviction, although numerous state courts have dealt with convictions by special and general courts-martial.[138] The same factors which might lead a civilian court to disregard a special or general court conviction might apply equally to convictions by summary court. It would be possible to advance arguments such as that adopted by the Kansas Supreme Court, when it held a general court-martial conviction for robbery and felonious assault ineffective under that state's habitual offender statute:

> Courts-martial convictions frequently relate to offenses of a strictly military character which have no counterpart in the civil law, such as desertion, willful disobedience of a lawful order of a superior officer, and misbehavior before the enemy. We cannot imagine the legislature contemplated that KSA 21-107a was to be applied to a person previously convicted of an offense peculiar only to the military establishment. On the other hand, were we to say only that those military convictions were to be recognized which would be felonies as defined by Kansas law, we would, in effect, be adding a requirement to the statute that any foreign conviction be a felony under our law. This we cannot do. We hold that a prior conviction by court-martial may not be used to invoke the provisions of the habitual criminal statute.[139]

The rule that purely military offenses should be denied effectiveness in state courts regardless of the level of court-martial involved represents a curious inversion of the "military connection" requirement of *O'Callahan*;[140] but where the misconduct punished by the summary court would have offended no interest of the state as defined in the civilian criminal law, it is proper that the sovereign should be reluctant to give the conviction effect under its recidivism statute.

The summary conviction might also be used to deprive an ex-

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138 *See, e.g.*, People v. Kadin, 41 Misc. 2d 424, 245 N.Y.S.2d 698 (Sup. Ct. 1963) (general court-martial conviction for forgery will trigger recidivism provisions as a felony under state law); State v. Wheeler, 123 W.Va. 279, 14 S.E.2d 677 (1941) (general court martial conviction ineffective to trigger recidivism law).

139 State v. Paxton, 201 Kan. 353, 440 P.2d 650, 660 (1968).

140 395 U.S. 258 (1969).

serviceman of sundry benefits quite apart from criminal proceedings. For example, federal law permits the deportation of aliens who commit two or more separate offenses involving moral turpitude after entry into the United States.[141] In view of the severity of the deportation sanction, it is not surprising that even a general court-martial conviction has been denied effect under this section,[142] and it must follow *a fortiori* that a summary conviction would be denied effect as well. On the other hand, in a 1955 decision in a merchant marine remedial proceeding,[143] the Commandant of the Coast Guard affirmed a hearing examiner's order revoking a merchant mariner's document on charges of assault, where the evidence included a summary court-martial conviction for the same misconduct.[144] Vice Admiral Richmond held "the court-martial record is not res judicata in this proceeding, [but] it makes out a prima facie case. . . ."[145]

In another area, prior to the 1961 amendments,[146] the Hiss Act[147] had been interpreted to require forfeiture of military retired pay rights upon conviction of a felony committed "in the exercise of [the accused's] authority, influence, power or privileges," even if rendered by a summary court-martial.[148] Secretary Zuckert, writing in support of the 1961 amendments, noted two cases where, for unauthorized use of a government vehicle and presentation of a false claim for three dollars, noncommissioned officers convicted by summary courts stood to lose, respectively, $38,922 and

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141 8 U.S.C. § 1251(a)(4) (1964).

142 Gubbels v. Hoy, 261 F.2d 952 (9th Cir. 1958), *rev'g* Gubbels v. Del Guercio, 152 F. Supp. 277 (S.D. Cal. 1957), *discussed in* Cooper, *Court-Martial Conviction of Alien While Serving in the United States Armed Forces Not a Basis for Deportation*, 1 A.F. JAG BULL. (No. 2), 30 (1959).

143 *See* 46 U.S.C. § 239 (1964); 46 C.F.R. §§ 137.01-1 to 137.60-1 (1970).

144 It is doubtful whether court-martial jurisdiction would exist on the same facts today. *See* Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969), *discussed in* Neutze, *Court-Martial Jurisdiction over Civilians in Vietnam*, 24 JAG J. 35, 41-42 (1969); United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

145 U.S. Coast Guard, Commandant Appeal Decision No. 800, at 3 (1955). Is a summary court-martial a "court of record"? If so, convictions for crimes punishable by more than one year in prison would serve to disqualify the accused from Federal jury service. 28 U.S.C. § 1865(b)(5) (Supp. IV, 1969).

146 Act of Sept. 26, 1961, Pub. L. No. 87-299, 75 Stat. 640.

147 5 U.S.C. § 2282 (1)(2) (1964).

148 *See* McHughes, *supra* note 75, at 78-79, 85 n.3; Letter from E.M. Zuckert, Sec'y of the Air Force, to Rep. T. Murray dated June 14, 1961, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 2944-45.

$69,300 in retirement pay.[149] Happily, this particular use of summary court convictions is no longer possible,[150] but the fact that cases involving summary convictions were relied upon by advocates of the 1961 amendments as illustrative abuses of the original act strongly suggests the impropriety of effectively increasing the penalties attached to such a conviction. It is interesting to note that the loss of retirement rights having a dollar value was unacceptable when occasioned by a summary conviction, while punishment depriving a man of his freedom, and impeachment techniques to undermine his word continue largely unquestioned.

III. Conclusions and Recommendations

This survey of the summary court-martial leads one to conclude that it is an unconstitutional forum as presently constituted. Various practical objections may be interposed to this conclusion. Opponents of abolition could say that the military accused enjoys a slightly greater chance of acquittal at a summary court than at a special or general court.[151] This advantage would be lost, and further, the accused would be subject to the greater punishments if the summary courts were abolished. The error in this approach lies in the assumption that, with abolition, cases which would have been referred to a summary court-martial will necessarily be referred to the higher tribunals. On the basis of the known effects of the 1963 expansion of Article 15 powers, however, it would seem more reasonable to assume that much of the present sum-

149 Zuckert Letter, *supra* note 148, at 2945.

150 Court-martial convictions for various national security-related offenses continue to be viable under the Act. 5 U.S.C. §§ 2282(a)(2) & (b)(2) (1964).

151 The following table gives court-martial acquittal rates for U.S. Army, 1961-69.

Year	GCMs	SPCMs	SCMs	All Courts
1961	7%	6%	4%	5%
1962	6	5	4	5
1963	4	5	4	5
1964	6	5	5	5
1965	6	4	6	5
1966	6	4	6	5
1967	6	4	7	5
1968	6	4	8	5
1969	6	5	8	5

Source: 1961-69 USCMA Ann. Reps.

mary court caseload would come to be handled by nonjudicial punishment. Indeed, it may even be anticipated that the unavailability of the summary court option to the commander may cause some personnel to accept captain's mast where they would otherwise have demanded trial by court-martial.[152] Thus, abolition can be seen as strengthening the commanding officer's Article 15 powers. The number of pretrial agreements might also rise with abolition, as commanders would seek to limit the expenses of plenary litigation at special courts-martial made necessary by the change.

Another practical objection to abolition would be the increased strain placed on the pool of military lawyers, an argument which again assumes that abolition of summary proceedings would cause a marked increase in the number of special courts-martial. Even if this assumption were correct, such a consideration must be, at best, of only secondary importance in light of the constitutional questions concerning the summary court process.[153]

Some observers may say that the argument proves too much: that by exposing the flaws of the summary court-martial the deathknell for the concept of captain's mast has also been sounded. It is true, of course, that many of the faults noted in the summary court are present in exaggerated form in Article 15 proceedings, but the hidden effects of nonjudicial punishment are not as serious as those of the summary court. The refusal of the military justice system to recognize fully Article 15 proceedings as court convictions supports a distinction between these and summary courts, even though the admissibility of mast records under *Johnson*[154] has eroded the distinction to a degree.

The failure of the judiciary to condemn the summary court as unconstitutional to date is more a matter of inertia than of legal principle, since stare decisis seems to be the main support for the current state of the law.[155] The time is ripe for change. Congress, for its part, should repeal Article 20 and ancillary provisions in recognition of the flaws of the summary court. Until this is done, military commanders should mitigate the effects of the sum-

152 *See 1966 Hearings*, pt. 3, App. B, at 913.
153 *See* State v. Borst, 278 Minn. 388, 398-99, 154 N.W.2d 888, 894-95 (1967).
154 United States v. Johnson, 19 U.S.C.M.A. 464, 42 C.M.R. 66 (1970).
155 *See* United States v. Carreon, No. 70, 1135 (NCMR July 6, 1970).

mary court martial by refusing to refer further cases to such courts, or by providing lawyers for the accused or for both sides,[156] and meaningful trial record facilities. Preferably only lawyers should be detailed as summary court officers; in case of extreme military necessity this requirement might be relaxed to permit lay graduates of a service justice school to act. The President should promptly change the evidentiary and punishment provisions in the Manual for Courts-Martial to terminate some of the more glaring military effects of summary convictions. Finally, military authorities at all levels should immediately deny further collateral effect to such convictions.

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156 Air Force summary courts apparently include a separately detailed trial counsel where an accused has secured defense counsel. *1966 Hearings*, pt. 1, at 38. If access to defense counsel *and* an adversary proceeding are contingent upon the financial condition of the accused (in the sense that only an accused who could afford civilian counsel can insure the assistance of counsel), an unlawful discrimination has seemingly occurred. *But see* Junker, *supra* note 57, at 712-15.

STATUTE

A MODEL ORDINANCE TO CONTROL URBAN NOISE THROUGH ZONING PERFORMANCE STANDARDS

Introduction

It is becoming recognized that excessive noise, like contaminated water and air, is an environmental pollutant which must be controlled. In the past 30 years community background noise levels have been rising at the rate of one decibel[1] per year.[2] Scientifically derived noise controls have been applied to several of the noise sources which contribute to community background noise. There are scientific standards, for example, which limit industrial noise affecting employees,[3] noise from aircraft,[4] and noise due to ground

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1 Measured on the "A-scale." See text at note 11 *infra.*

2 This statement appears repeatedly in the literature on the subject. See, *e.g.*, Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, 70 COLUM. L. REV. 652, 653 (1970).

3 In 1969 the Secretary of Labor promulgated the Walsh-Healey Health and Safety Regulations regarding noise levels which apply to conditions within factories of firms holding federal contracts valued at $10,000 or more per year. Labor Dep't Reg., 41 C.F.R. § 50-204.10 (Supp. 1971). The standards are as follows:

Exposure Duration (per day)	dB(A)
8 hours	90
6 hours	92
4 hours	95
3 hours	97
2 hours	100
1½ hours	102
1 hour	105
½ hour	110
¼ hour or less	115

Since any decibel increase at these high levels — decibels being on a logarithmic progression — allows quite a jump in permissible sound levels, some feel that the levels are set too high. As one writer notes:

> The regulations benefit some 27 million workers in about 70,000 plants, but exclude millions of others in plants with fewer than twenty workers and less than $10,000 in government contracts, thus omitting small businesses where abuses are no less deplorable. The Johnson Administration, which initiated the action, originally proposed to fix a noise limit of 85 dB(A), with higher levels permitted for short periods. The proposal was so hotly opposed, however, especially by high noise industries like textiles, that the Nixon Administration compromised on a maximum of 90 dB(A) —

transportation.[5] These particular noises comprise only part of general community noise, however. The means for effectively controlling total community background noise have not kept pace

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> or 5 db(A) more than the experts regard as safe. Even at 90 db(A), however, the new regulations will have a notable, indeed historic, impact if they are enforced. At least half of American industry today permits noise levels above 90 db(A). The American Petroleum Institute estimates the cost of compliance to the oil industry alone at $40 million to $50 million to modify its existing equipment.

Mecklin, *It's Time to Turn Down All That Noise*, FORTUNE, Oct. 1969, at 188. For further discussion of noise characteristics and measurement, see text at note 8 *infra*.

Health and safety standards promulgated under the Walsh-Healey Act and certain other acts will be in effect only until superseded by corresponding standards adopted under the Occupational Safety and Health Act of 1970, 84 Stat. 1590.

4 The problems of aircraft noise have been treated elsewhere [starred items cited hereinafter are collected in NOISE POLLUTION AND THE LAW (J. Hildebrand ed. 1970)]: HANDBOOK OF NOISE CONTROL, chs. 33, 34, 37 (C. Harris ed. 1957); W. SHURCLIFF, S.S.T. AND SONIC BOOM HANDBOOK (1970); *Anthrop, *The Noise Crisis*, 20 U. TORONTO L.J. 1, 11-17 (1970); *Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1 (1968); Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, *supra* note 2, at 679-82; *Hill, *Liability for Aircraft Noise: The Aftermath of Causby and Griggs*, 19 U. MIAMI L. REV. 1 (1964); *Kline, *The SST and Inverse Condemnation*, 15 VILL. L. REV. 887 (1970); Larsen, *Improving the Airport Environment: Effect of the 1969 FAA Regulations on Noise*, 55 IOWA L. REV. 808 (1970); Malley, *The Supersonic Transport's Sonic Boom Costs: A Common Law Approach*, 37 GEO. WASH. L. REV. 683 (1967); *Munro, *Aircraft Noise—As a Taking of Property*, 13 N.Y.L.F. 476 (1967); *Ortner, *Sonic Boom: Containment or Confrontation*, 34 J. AIR L. & COMMERCE 208 (1968); Power, *Liability for Damage from Supersonic Flights*, 14 ST. LOUIS L.J. 187 (1969); *Tenzer, *Jet Aircraft Noise: Problems and Their Solutions*, 13 N.Y.L.F. 465 (1967); *Tondel, *Noise Litigation at Public Airports*, 32 J. AIR L. & COMMERCE 387 (1966); *Comment, *Urban Noise Control*, 4 COLUM. J.L. & SOC. PROB. 105, 117-18 (1968); Comment, *Port Noise Complaint*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 61 (1970); Note, *Airplane Noise: Problem in Tort Law and Federalism*, 74 HARV. L. REV. 1581 (1961); *Note, *Sonic Booms: Ground Damage and Theories of Recovery*, 32 J. AIR L. & COMMERCE 596 (1966); *Note, *Torts-Liability-Sonic Boom*, 36 J. AIR L. & COMMERCE 117 (1970); *Note, *Jet Noise in Airport Areas: A National Solution Required*, 51 MINN. L. REV. 1087 (1967).

5 The problems of ground transportation noise likewise have been treated elsewhere [starred items are collected in NOISE POLLUTION AND THE LAW, *supra* note 4]: HANDBOOK OF NOISE CONTROL, chs. 31, 32, *supra* note 4; BOLT BERANEK AND NEWMAN INC., NOISE IN URBAN AND SUBURBAN AREAS: RESULTS OF FIELD STUDIES at 8-14 (U.S. Dep't of Housing and Urban Development 1967); COMMITTEE ON THE PROBLEM OF NOISE, NOISE FINAL REPORT (Her Majesty's Stationery Office, London, 1963); TRANSPORTATION NOISES: A SYMPOSIUM ON ACCEPTABILITY CRITERIA (J. Chalupnik ed. 1970); *Anthrop, *The Noise Crisis*, *supra* note 4, at 8-11; Foster & Mackie, *Noise: Economic Aspects of Choice*, 7 URBAN STUDIES 123 (1970); Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, *supra* note 2, at 672-79; *Comment, *Urban Noise Control*, *supra* note 4, at 111-14; Comment, *Automobile Noise—An Effective Method for Control*, 4 U. RICHMOND L. REV. 314 (1970).

with the technology available. A model ordinance with commentary is proposed here which employs recent acoustical technology to formulate legal controls for that general noise associated with a land-use pattern. This ordinance may be integrated with a municipality's zoning code to regulate a major portion of community noise.[6]

The introduction to the model ordinance will first consider the characteristics and the measurement of noise. It will then mention the effects of noise on the health and welfare of citizens as well as the failure of traditional judicial and statutory remedies. Finally, it will illustrate the development of the scientific controls and enforcement standards used in the ordinance.

I. The Characteristics and Measurement of Noise

Noise is sound unwanted[7] by humans because of its adverse physiological and psychological effects. Sound is measured by three parameters: (1) sound pressure level in decibels (dB), a measure of the "volume" or "intensity";[8] (2) frequency in Hertz (Hz) or cycles

6 Because municipalities may simply forego lawmaking in the absence of understandable noise performance standard guidelines, city planners and environmentalists have urged that model noise performance standard ordinances be formulated. *See, e.g.*, Salzenstein, *Industrial Performance Standards: Do They Work?* 14 Zoning Digest 73, 74 (1962); Hirsch, *Measuring the Good Neighbor: A New Look at Performance Standards in Zoning*, 2 Land Use Controls Q. 5, 16 (1968).

Control of intra-factory, aircraft and ground transportation noise is adequately considered elsewhere. See articles cited in notes 3-5 *supra*. These problems are sufficiently differentiated from the community noise control through zoning contemplated in this model ordinance to preclude further examination. *But see* Fonoroff & Terrill, *Controlling Traffic Through Zoning*, 21 Syracuse L. Rev. 857 (1970).

7 A. Peterson & E. Gross, Jr., Handbook of Noise Measurement (6th ed. 1967); Handbook of Noise Control, ch. 1, *supra* note 4. For other discussions of noise measurement and terminology see generally [starred items are collected in Noise Pollution and the Law, *supra* note 4]: Handbook of Noise Control, *id.* chs. 1-6, 16-17; *Anthrop, *The Noise Crisis, supra* note 4, at 2-4; *Kramon, *Noise Control: Traditional Remedies and a Proposal for Federal Action*, 7 Harv. J. Legis., 533, 535-38 (1970); *Spater, *Noise and the Law*, 63 Mich. L. Rev. 1373, 1374-75 (1965).

8 An important concept to bear in mind concerning the decibel is that it is a logarithmic unit—*i.e.*, in order to produce a sound of 100 dB there must be an energy level 10,000,000,000 times greater than that producing a 1 dB sound. This fact is a key one for performance standards because the reduction of a loud sound by just a few decibels can have a substantial quieting effect. Conversely, setting permissible levels a few decibels higher may mean a substantial noise increase.

FIGURE 1

SOUND LEVEL AND EVALUATION OF TYPICAL NOISES IN INDOOR AND OUTDOOR ENVIRONMENTS

Subjective Impression	Relative Loudness: Human Judgment	dB(A)	Typical Noises [Exact level given for some in dB(A)]	Significant Levels of Human Tolerance
		150		Short exposure can cause hearing loss
		140	Jet plane takeoff.	
	32×	130	Artillery fire; machine gun.	
Deafening	16×	120	Siren at 100 ft.; jet plane (passenger ramp); thunder—sonic boom.	Threshold of pain (120)
	8×	110	Riveting (110); woodworking shop; accelerating motorcycle; hard rock band (108); subway (steel wheels) (102).	Threshold of discomfort
	4×	100	Commercial air conditioner (100); loud street noise; power lawnmower (98); outboard motor.	
Very Loud	2×	90	City traffic, heavy (90); factory, median (90); truck, unmuffled; train whistle; kitchen blender (88); pneumatic jackhammer.	Hearing damage if prolonged (85-90)
	1	80	Garbage disposal (80); subway (rubber wheels); office, noisy; factory, average.	Intolerable for phone use
Loud	1/2×	70	Vacuum cleaner (70); street noise, average; electric typewriter (64); freight train at 100 ft.; radio, average.	Stress caused Speech interference begins (65-70)
	1/4×	60	Dishwasher (60); home, noisy; office, average; conversation, normal (60); window air conditioner (55).	
Moderate	1/8×	50	Office, general; radio, quiet; home, average; street, quiet.	
		40	Office, private; home, quiet.	Annoyance, rest-interference begins (40-45)
Faint		30	Conversation, quiet; broadcast studio.	
		20	Empty auditorium; whisper (20).	
Very Faint		10	Rustling leaves (10); soundproof room; human breathing.	
		0		Threshold of audibility

Sources: Farr, *How Loud is Loud? Noise, Acoustics and Health,* 12 ARCH. AND ENG. NEWS 20, 21 (Feb. 1970); Mecklin, *It's Time to Turn Down All That Noise,* [illegible] 1969, 180, 188; BOLT BERANEK AND NEWMAN INC., CHICAGO

per second (cps),[9] a measure of pitch or wave length; and (3) time, a measure of the sound's duration. Human sensitivity to sound is a function of all three factors. The ear is more sensitive to higher frequencies like screeches; such sounds are louder to the listener than low-frequency sounds such as rumbles. A tone of 5 dB at 2000 Hz is as loud to the ear as a tone of 70 dB at 20 Hz. Thus to say that "no noise shall exceed 75 dB" is meaningless; that intensity at 20 Hz would be tolerable, but at 2000 Hz would be quite loud.

Since a single sound often contains many frequencies at various levels of intensity, several methods have been devised to detect those portions of the overall sound falling in each of a given number of octave frequency bands. Most of these methods of measurement are too complex for day-to-day use by municipal agencies.[10] Fortunately, the refined measurements which these multi-step methods produce can be approximated by a single reading on a simple sound meter having an "A-scale weighting network," which yields readings in dB(A). The "A-scale" measure corresponds to what people call "annoyance," and takes into account pitch as well as volume.[11] The "A-scale" is therefore ideal for use with noise performance standards aimed at the protection of humans against excessive noises. Furthermore, the instruments for measuring dB(A) are easy to operate, portable and comparatively inexpensive. They consist basically of a microphone, an amplifier, a rectifier, an indicator, and a frequency weighting

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9 Most standardizing agencies have adopted Hertz (Hz) as the preferred unit of frequency. A. PETERSON & E. GROSS, JR., HANDBOOK OF NOISE MEASUREMENT, *supra* note 7, at 3.

10 However, one of these methods — commonly referred to as the octave-band analysis system — is used by those few U.S. cities which have enacted noise performance-standard ordinances. See Figure 8 and text at notes 30, 31 *infra*. That method divides the frequency spectrum into eight-octave bands, and an average decibel level called band pressure level is determined for each. Since 1960, standard practice has been to utilize for the eight octave-bands, center frequencies at 63, 125, 250, 500, 1000, 2000, 4000 and 8000 Hz.

11 Cohen, *Effects of Noise on Psychological State* in NOISE AS A PUBLIC HEALTH HAZARD, PROCEEDINGS OF THE CONFERENCE (American Speech and Hearing Ass'n Report no. 4, W. Ward & J. Fricke eds. 1969) [hereinafter cited as NOISE AS A PUBLIC HEALTH HAZARD].

Indeed, "dB(A) is becoming the standard measurement relating to the probable subjective assessment of the loudness level of sounds of any frequency or intensity." A. LAWRENCE, ARCHITECTURAL ACOUSTICS 25 (1970).

network (the A-scale). Under the proposed ordinance the microphone is to be placed at a specified geographic point. The indicator reading will then be measured against the appropriate statutory standard.

II. The Harm to Man from Noise

The literature on the subject of how man is harmed by noise is ample and requires no complete review here.[12] The chief physical danger is hearing impairment. It is generally agreed that long-term exposure to noise above 85-90 dB(A) can cause permanent hearing loss. Short term exposure to these levels can cause temporary hearing loss. The federal Walsh-Healey industrial noise regulations, for example, take cognizance of this danger in their prohibitions of noise above these levels.[13] It is rarely realized, however, that noise in communities sometimes exceeds levels known to be injurious within industrial facilities.[14]

Hearing loss is not the only danger from excessive noise. Other physical reactions include cardiovascular troubles, digestive upsets, endocrinal and reproductive malfunctions, fatigue and headaches. Psychological effects include annoyance, anxiety, fear,

12 Discussions in law review articles include: Anthrop, *The Noise Crisis, supra* note 4, at 5-6; Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research, supra* note 4, at 656-63, 699-70; Kramon, *Noise Control: Traditional Remedies and a Proposal for Federal Action, supra* note 7, at 533-35; Comment, *Urban Noise Control, supra* note 4, at 105-107.

Discussions in non-legal publications include: *Hearings on Noise: Its Effect on Man and Machine Before the Special Investigating Subcomm. of the House Comm. on Science and Astronautics,* 86th Cong., 2d Sess. 23 (1960); W. Burns, Noise and Man (1968); Committee on Environmental Quality of the Federal Council for Science and Technology, Noise—Sound Without Value (1968); Handbook of Noise Control, *supra* note 4, chs. 7-10, 38; The Mayor's Task Force on Noise Control, New York City, Toward a Quieter City, 18-24, 52-53 (1970); A. Peterson & E. Gross, Jr., Handbook of Noise Measurement, *supra* note 7, at 39-69; Beranek, *Noise,* Scientific American, Dec. 1966; Dougherty & Welsh, *Community Noise and Hearing Loss,* 275 New England J. Med. 759 (1966); Mecklin, *It's Time to Turn Down All That Noise, supra* note 3; School Environments Research Project ch. 4, *Behavior and the Sonic Environment* in SER 1: Environmental Abstracts 483 (Architectural Research Laboratory, University of Michigan ed. 1965) (*See also* SER 2 in this series); Sullivan, *Noise in the Cities: Its Effect on the Hearing in Man,* 113 Cong. Rec. H670-71 (daily ed. Jan. 26, 1967); Welch, *Physiological Effects of Audible Sound,* Science, Oct. 24, 1969.

13 See note 3 *supra.*

14 Dougherty & Welsh, *Community Noise and Hearing Loss, supra* note 12.

privacy-loss feelings, propensities for violence, loss of sleep, tension, task interference, and speech impairment.[15] These reported harms demonstrate the need for noise control legislation to protect the health, safety and welfare of citizens.

III. The Failure of Traditional Controls

A. *Common Law Controls*

The instrument which the common law provides for controlling noise is the nuisance suit. However, the utility of nuisance law is limited, especially when interests wider than those of the litigants are at stake.[16] The initial obstacle is finding a plaintiff. There may be no one willing to invest the time and expense entailed in a lawsuit for private nuisance abatement. Once a suit is brought, the plaintiff bears the heavy burden of proving damages or the threat of injury sufficient to warrant an injunction. It is often difficult to demonstrate a causal connection between defendant's conduct and plaintiff's actual or imminent harm. And a finding that an activity is injurious does not always lead to abatement; the court may "balance the equities" and allow the nuisance to continue rather than subject the defendant to severe penalties.[17] Finally, the *ad hoc* nature of common law nuisance leaves potential offenders uncertain as to the standards which they must observe in order to avoid liability. Thus common law controls over noise are inherently inadequate, and communities must resort to statutory measures.

B. *Anti-Noise Ordinances*

The legislative fight by municipalities against urban noise dates from an anti-noise ordinance enacted by Philadelphia in

15 *See, e.g.*, articles cited note 12 *supra*.

16 Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research, supra* note 2, at 683-84; Lloyd, *Noise as a Nuisance*, 82 U. Pa. L. Rev. 567 (1934); Spater, *Noise and the Law, supra* note 7, at 1373, 1375-81; Comment, *Urban Noise Control, supra* note 4, at 107-08.

17 With noise performance standards a municipality may already have "balanced the equities." With them there may be no need for the introduction of other evidentiary facts such as damage, cost to repair the damage or to control the nuisance, value of the noise-making use to the public, conditions of the surrounding neighborhood, and other matters customarily referred to by the courts in nuisance cases. Schulze, *Performance Standards in Zoning*, 10 J. Air Pollution Control Ass'n 156, 158 (1960).

1830.[18] Interest in noise abatement developed rapidly in the 1920's and 1930's, due in part to the dramatic rise in motor traffic.[19] Ordinances enacted in this era were usually directed at noise in general. A typical example is Boston's enactment: "the creation of any unreasonably loud, disturbing and unnecessary noise in the city is prohibited."[20] Such imprecise legislation is difficult to enforce because of the lack of objective standards. Worse, the ordinance might be subject to attack as unconstitutionally vague. Yet according to a recent survey, two-thirds of the existing noise-control ordinances are of this type.[21] The other traditional class of ordinances is customarily aimed at specific offenses such as horn-blowing or street-hawking.[22] The narrowness and rigidity of these enactments are obvious limitations on their effectiveness.

IV. Scientific Controls: Noise Performance Standards

The proposed model ordinance differs from traditional enactments in its use of precise, empirically derived, "noise performance standards" rather than vague, subjective criteria. A "noise performance standard" is a maximum permissible sound level, expressed in decibels on the A-scale (dB(A)),[23] authorized for a given property use. The sound level is measured at a geographic point — either the user's property line or a zone boundary — by means of an electronic meter. A well-designed performance standard generally

> will substitute a quantitative measurement of an effect for the qualitative description of that effect that we have used in the past. It will not use the terms "limited," "substantial," "ob-

18 Glisch, *Noise Control,* in Planning 1957: Selected Papers from the National Planning Conference 188 (American Soc'y of Planning Officials ed. 1957).

19 *Id. See also* the famous noise survey reported in Noise Abatement Commission of the City of New York, City Noise (E. Brown *et al.* eds. 1930).

20 Boston, Mass., City Ordinances, § 97(a) (unnecessary noises).

21 Kaufman, *Compilation of State and Local Ordinances on Noise Control,* in Extension of Remarks by Senator Mark Hatfield, 115 Cong. Rec. E9031 (daily ed. Oct. 29, 1969) [hereinafter cited as *Noise Control Ordinances*]. The lack of a quantitative measure by which to determine violations was concluded to be the single greatest defect of these ordinances. *Id.* E9047.

22 *See* ordinances cited *id.* E9058 *et seq.*

23 The A-scale was utilized in this statute for the reasons discussed in the text at note 11 *supra.*

jectionable," "offensive." Instead, it will establish definite measurements, to determine whether the effect of a particular use is within predetermined limits, and therefore is permissible in a particular zone.[24]

A. *History of Performance Standards*

Performance standards in zoning ordinances are an outgrowth of the belief that land use should be classified according to *effect* rather than type.[25] Such standards were first used in the early 1950's to regulate industrial activity for the protection of residential and commercial neighborhoods.[26] By 1955 they were employed in at least eleven proposed or enacted zoning ordinances.[27] By 1959 performance standards were being applied in commercial and residential zones as well.

There is no clear record of how widely performance standards have been incorporated into zoning ordinances. In 1965 the American society of Planning Officials reported that 200 cities had zoning ordinances containing some sort of performance standards.[28] *The Municipal Year Book: 1965* reported that of 1,204 cities surveyed, 476 (40 percent) controlled industrial emissions through zoning ordinances; 87 percent of these ordinances contained controls on noise.[29] A 1966 study of 50 of these enactments revealed that most employed primitive, subjective standards while only eight used truly scientific methods.[30]

A 1969 survey found only 15 cities out of 56 using scientific

24 O'Harrow, *Performance Standards in Industrial Zoning*, PLANNING 1951 42, 44 (1952).

25 J. DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 43 (1969).

26 In 1951 Dennis O'Harrow recommended that standards be quantified, if feasible, for noise, smoke, odor, dust and dirt, noxious gases, glare and heat, fire and industrial wastes as well as for transportation and traffic. O'Harrow, *Performance Standards in Industrial Zoning, supra* note 24.

27 However, serious flaws were discovered in some of the standards, mostly of a technical nature. One ordinance permitted a sound level of up to 85 decibels without regard to frequency; above 4000 Hz this sound level would be intolerable. PLANNING ADVISORY SERVICE, INDUSTRIAL PERFORMANCE STANDARDS, INFORMATION REPORT No. 78 (1955).

28 Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 411 (1965).

29 INTERNATIONAL CITY MANAGER'S ASS'N, MUNICIPAL YEAR BOOK 1965, at 317 (1965).

30 Hirsch, *Measuring the Good Neighbor: A New Look at Performance Standards in Zoning, supra* note 6, at 7. The MUNICIPAL YEAR BOOK has not printed the data in subsequent years.

standards to curb noise; and of this number only four had ordinances applying performance standards to noise emanating from residential uses.[31] Yet property uses in residential zones, like those in industrial or commercial zones, produce offensive sounds on a scale wide enough to warrant control. To some extent these noises are generated by nonconforming uses — *e.g.*, a supermarket.[32] But it is the home air conditioner that causes most of the complaints. In Beverly Hills, California (which uses noise performance standards), an official testified that "the air-conditioning unit is the one single piece of equipment that requires most of our attention."[33] Detroit, Michigan (which does not employ noise performance standards) found that in 1967, complaints of air conditioner noise ranked fifth among all noise complaints received, including those for industrial noise.[34] Other common residential noise offenders are lawn mowers, construction equipment and vehicular traffic.

B. *Legality of Performance Standards*

Performance standards are easily adapted to the framework of zoning ordinances.[35] This permits specification of different

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31 *Noise Control Ordinances* E9047-52. See Figure 8.

32 For example, a supermarket in Portland, Oregon, installed a multiple-ton air-conditioning system which "sounded like a wind tunnel to the neighbors," according to that city's Director for the Bureau of Noise Abatement. *Noise Control Ordinances* E9051.

33 *Id.* E9048. The same experience was reported by Fair Lawn, N.J., which utilizes noise performance standards. *Id.* E9050.

34 *Id.* E9070.

35 On the other hand, some planners have spoken of using performance standards to liberate zoning from the self-imposed shackles of use districts. They argue that if a "clean" industry can meet the stringent multiple performance standards for a residential zone, it should be allowed to locate there. The theory is that the placement of a new factory adjacent to a residential section may lessen congestion, promote health and welfare, prevent overcrowding, provide adequate light and space, and in general achieve the traditional goals of zoning. *Cf.* Blair, *Is Zoning A Mistake? Thoughts on Performance Standards for Non-Euclidian Non-Zoning*, 14 ZONING DIGEST 251, 252 (1962). While this idea may be wishful thinking, it may also be the trend of the future in land-use control:

> No city has been bold enough to abandon traditional use district boundaries, but several have adopted performance standards to provide a higher degree of differentiation among industrial zones and to map out the least noxious of these close to residential districts.

J. Delafons, *Land-Use Controls in the United States, supra* note 25, at 43.

Since noise is only one of many factors to be considered in allowing — for

sound maxima for residential, commercial and industrial zones.[36] The statutory grant of authority from the state legislature for a municipality to enact a zoning ordinance should constitute authority for inclusion of noise performance standards. No cases have ever reached this question; but judicial approval of other modern trends in zoning — such as contract or conditional zoning, floating zoning, planned unit developments, and cluster zoning — indicates that courts are favorably disposed to new techniques.[37]

Some ordinances using noise performance standards weaken control by specifically exempting pre-existing nonconforming uses. This exemption is grounded on a fear that requiring pre-existing uses to conform to new standards would be a violation of due process. Even though there have been no legal tests of the retroactive application of performance standards themselves, in recent years the accelerating trend has been toward making zoning regulations in general applicable to nonconforming uses and to require their termination within a reasonable time.[38] The proposed statute allows five years for termination of nonconforming

example — an industry into a residential zone, this model ordinance retains traditional zoning use districts and integrates its noise performance standards with them.

36 A few cities — notably Beverly Hills, Cal., and Fair Lawn, N.J. — have enacted noise performance standard ordinances on a uniform, city-wide basis, where one standard is applied equally to all uses. There is no need for integrating such an ordinance with existing zoning districts, but the cost is undue rigidity.

37 Gillespie, *Industrial Zoning and Beyond: Compatibility Through Performance Standards*, 46 J. URBAN LAW 723, 744-45 (1969).

38 Cunningham, *Land-Use Control — The State and Local Programs*, *supra* note 28, at 379. *See, e.g.*, Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950) (upheld ten year compliance period for service station); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954) (upheld five year compliance period for wholesale plumbing business); Spurgeon v. Board of Comm'rs of Shawnee County, 181 Kan. 1008, 317 P.2d 798 (1958) (upheld two year compliance period for automobile wrecking business); Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957) (upheld five year compliance period for billboards); Lachapelle v. Town of Goffstown, 107 N.H. 485, 225 A.2d 624 (1967) (upheld one year compliance period for automobile wrecking business); *cf.* Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S.2d 598 (1958).

Contra: Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965); City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953). Both of these cases have been criticized. *See* 67 HARV. L. REV. 1283 (1954); 45 NEB. L. REV. 636 (1966); 44 TEXAS L. REV. 368 (1965); 11 VILL. L. REV. 189 (1965).

Where the enabling act expressly provides that nonconforming uses may continue, it must be amended in order to make possible the elimination of non-conforming uses without compensation. A sizeable majority of the current zoning

noise-making uses, which should afford ample time for compliance.[39]

Another due process question concerns the validity of the noise performance standards themselves. Scientific noise performance standards should meet or exceed the tests set down by the meager case law on the subject;[40] however, to escape charges that standards are arbitrary, they must have a rational basis.

> [I]f arbitrariness is to be avoided, there must first be a scientifically valid means of measuring the physical phenomena which adversely affects human beings or their affairs in some way. If . . . these conditions are not met, the standards are

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enabling acts contain no reference whatsoever to existing uses which become nonconforming by reason of the enactment of zoning regulations. Cunningham, *Land-Use Control — The State and Local Programs, supra* note 28, at 379.

39 The recent revision of Chicago's 1957 noise performance standard ordinance does away with its previous total exemption for pre-existing uses and substitutes no compliance period whatsoever. From July 1, 1971 — the effective date of the revised ordinance — all uses will be covered. CHICAGO, ILL., MUNICIPAL CODE ch. 17, § 17-4.9. This step is not so harsh as it may at first sound, however, as the draftsmen's comments explain:

> The basic provisions of the present Zoning District Noise Performance Standards are sound, and were a noteworthy first when adopted [in 1957] . . . . Since the present standard has been in effect for more than ten years, only a short period should be required for compliance by property uses operating under the former exception.

Thus "pre-existing" uses have in effect had an almost thirteen year compliance period. BOLT BERANEK AND NEWMAN INC., CHICAGO URBAN NOISE STUDY, PHASE 2: NOISE CONTROL BY LAW 56 (1970). Charles W. Dietrich of Bolt Beranek and Newman, one of the principal authors of the Phase 2 report, provided invaluable advice in the preparation of this model statute and discussion.

40 The two cases on the subject concerned subjective or primitive performance standards. In Kenville Realty Corp. v. Board of Zoning Appeals of Village of Briarcliff Manor, 48 Misc. 2d 666, 265 N.Y.S.2d 522 (Sup. Ct. 1965) (noisy shoppng center refrigeration and air-conditioning units), the Supreme Court of Westchester County held "offensive, obnoxious, or detrimental" invalid as performance standards, claiming that more effective standards than those in the ordinance were not only feasible but necessary to avoid complete subjectivity. In an analogous situation in Simeone Stone Corp. v. Oliva, 350 Mass. 31, 213 N.E.2d 230 (1965) (smoke, dust and traffic congestion from proposed sand, gravel and bituminous concrete processing plant), the Supreme Judicial Court of Massachusetts upheld "obnoxious, injurious or hazardous" as adequate standards. The scientific standards utilized in this model statute exceed the *Simeone* threshold and meet the higher *Kenville* test. Of course, one must not discount the possibility of capricious treatment of performance standards by courts. There is an unreported case in which a judge actually listened to the noise source and decided that the noise was not loud enough to be oppressive. Thereafter the city (Peoria, Illinois) essentially stopped enforcing this noise performance ordinance (which applied to motor vehicles). *Noise Control Ordinances* E9051.

> arbitrary regardless of the fact that they contain a host of detailed and superficially precise numbers and formulae. Furthermore, if [these] conditions are not satisfied, it is questionable whether it can be shown that the standard has a reasonable relation to public health, welfare, morals, and safety — a necessary showing for the validity of the ordinance.[41]

To show how this model ordinance meets these tests, the following section discusses the empirical derivation of the noise performance standards.

C. *Derivation of Performance Standards*

1. Acceptable Noise Levels for Human Activity

Acceptable noise levels must be based on considerations of human physiological and psychological welfare. Adequate scientific data exists to measure the adverse impact of noise on persons and to establish concrete standards for noise control. These data both determine the standards and provide evidence of their reasonableness.

Three levels of sound are significant in terms of human well-being. The first is the level at which hearing damage may occur.

> Numerous studies have been undertaken to assess those critical noise levels which may potentially damage hearing. The results are in fair agreement. The acoustic areas of concern lie, *minimally*, [above] 85 dB . . . within the frequency region 300 cps-4800 cps. The extent of effect on hearing depends upon the duration and frequency of exposure to this noise . . . .[42]

This hearing damage threshold has been recognized by the Secretary of Labor in the Walsh-Healey noise regulations, which set 90 dB(A) as the maximum level for exposures of eight hours' duration per day.[43] Statutes and ordinances in this country and abroad recognize this maximum level.[44] The Mayor's Task Force on Noise Control in New York City concluded that noises "above

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41 Schulze, *Performance Standards in Zoning, supra* note 17, at 158.

42 THE MAYOR'S TASK FORCE ON NOISE CONTROL, NEW YORK CITY, TOWARD A QUIETER CITY, *supra* note 12, at 20 (emphasis added).

43 See note 3 *supra*.

44 For municipal limits currently in effect on noise, by zone of use see Figure 8.

the hearing conservation criterion of 85 dB(A) on a continuous basis are injurious and should not be permitted."[45] Thus, 85-90 dB(A) over several hours is the most widely agreed range at which hearing loss commences.

The secondary level of concern is that of noises interfering with speech. The amount of background noise which will interfere with speech varies with the distance between speaker and listener and with the volume of their voices. One authority calculates that about 71 (±1) dB(A) is the top noise level acceptable to most people for conversation at three feet.[46] The U.S. Navy has set a maximum background noise criterion of 70 dB(A) for areas where communication is to take place.[47] The London Noise Commission recommends that noise levels outside the window of an occupied room nearest a temporary construction site not exceed 70 dB(A) for areas away from main road traffic or industry, and 75 dB(A) for areas near main roads or heavy industry.[48] Another authority concludes that noises of 65-70 dB(A) will interfere with conversational speech in ordinary speaker-to-listener distances of three to six feet.[49]

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45 THE MAYOR'S TASK FORCE ON NOISE CONTROL, NEW YORK CITY, TOWARD A QUIETER CITY, *supra* note 12, at 52.

46 Webster, *Effects of Noise on Speech Intelligibility,* in NOISE AS A PUBLIC HEALTH HAZARD, *supra* note 11, at 69-70. By a convoluted process the New York Task Force arrived at a recommended 52 dB(A) background noise limit which would permit speaking in a normal voice at eight feet. This figure seems optimistically low, perhaps because of an overgenerous downward correction to guard against pure tone noises and those whose spectra peak in high frequency ranges. The Task Force applied a correction of 9 dB(A) to guard against excessive noises with spectra uncharacteristic of the land use spectrum shape upon which the standard is based. Though the Task Force started with the accurate 85 dB(A) hearing damage level, they overcorrected, resulting in unrealistically strict standards such as 30 dB(A) for nighttime residential sounds (which is the same level as a watch-tick at two feet).

47 Webster, *Effects of Noise on Speech Intelligibility,* in NOISE AS A PUBLIC HEALTH HAZARD, *supra* note 11, at 69-70.

48 Soroka, *Community Noise Surveys,* in NOISE AS A PUBLIC HEALTH HAZARD, *supra* note 11, at 177-78.

49 NOISE AS A PUBLIC HEALTH HAZARD, *supra* note 11, at 382:

> [O]rdinary conversation is difficult near many room air conditioners, in the patio next to your neighbor's outdoor air conditioner, in homes or in schools within several hundred feet of express highways, and furthermore, conversation will be virtually impossible in about half of the noisy factories, many military environments, within 100 feet of an express highway, and within a couple of miles of airports under flight paths.

FIGURE 2

LONDON NOISE COMMISSION'S RECOMMENDED INDOOR LEVELS

Locale	Level[dB(A)] Day	Night
Country Areas	40	30
Suburban Areas, Away from Main Traffic Routes	45	35
Busy Urban Areas	50	35

Source: Soroka, *Community Noise Surveys*, in NOISE AS A PUBLIC HEALTH HAZARD, PROCEEDINGS OF THE CONFERENCE (American Speech and Hearing Ass'n Rep. No. 4, W. Ward and J. Fricke eds. 1969) 177-78.

A third level of concern is that of annoyance or interference with rest. Noise levels in this category are somewhat difficult to ascertain. The London Noise Commission recommends that noise levels inside dwellings not exceed (for more than ten percent of the time) the levels in Figure 2. The New York Task Force recommends 40 dB(A) in daytime hours and less than 30 dB(A) at night as a desirable noise limit in wholly residential areas.[50] A Swedish national recommendation suggests 40-45 dB(A) for interior rooms in particularly noisy districts and 30-35 dB(A) for those in particularly quiet districts.[51]

In general the need for protection from annoyance, from speech interference and from hearing loss are exemplified in the Swiss noise level recommendations shown in Figure 3.

Like the Swiss recommendations, the model ordinance presented here provides: (1) protection in all zones from sounds above the hearing damage level of 85-90 dB(A); (2) protection in all zones from sounds of significant duration above the speech interference level of 65-70 dB(A); and (3) limited protection in residential zones at night from sounds above the annoyance or rest-interference level of 40-45 dB(A) (a nighttime maximum of 51 dB(A) for industrial noises in a residential area is permitted). This model ordinance's nighttime residential level of 45-51 dB(A) pro-

50 THE MAYOR'S TASK FORCE ON NOISE CONTROL, NEW YORK CITY, TOWARD A QUIETER CITY, *supra* note 12, at 52-53.

51 Data from paper on file at the Harvard Student Legislative Research Bureau.

FIGURE 3

RECOMMENDED NOISE LIMITS IN SWITZERLAND
[dB(A)]

Zone	Basic Noise Level		Frequent Peaks (7-60 per hr.)		Infrequent Peaks (1-6 per hr.)	
	Night	Day	Night	Day	Night	Day
Quite Residential	45	55	55	65	65	70
Mixed	45	60	55	70	65	75
Commercial	50	60	60	70	65	75
Industrial	55	65	60	75	70	80

Sources: Soroka, *Community Noise Surveys*, in NOISE AS A PUBLIC HEALTH HAZARD, PROCEEDINGS OF THE CONFERENCE (American Speech and Hearing Ass'n Rep. No. 4, W. Ward and J. Fricke eds. 1969) 177-78; Grandjeau, *Summary, id.* at 101.

tects restful noise levels at the time and place when freedom from annoyance is most desired, while the highest permitted daytime level (except for infrequent peaks) of 67 dB(A) protects against speech interference and hearing damage.

2. Determination of Community Needs

Extant community noise performance standards were often derived after extensive and expensive community noise surveys.[52] Because noise level results obtained from a number of these surveys correlate closely,[53] it is no longer necessary for each municipality to mount a costly survey to determine standards. Background noise levels to be expected in residential neighborhoods with varying traffic and industrial activity, as determined by surveys in nine U. S. cities, are indicated in Figure 4.[54] Similar

52 A typical step-by-step survey is described in A. LAWRENCE, ARCHITECTURAL ACOUSTICS, *supra* note 11, at 195-97. *See also* Parrack, *Community Reaction to Noise*, in HANDBOOK OF NOISE CONTROL, *supra* note 4, ch. 36.

53 As concluded in BOLT BERANEK AND NEWMAN INC., CHICAGO URBAN NOISE STUDY, PHASE 1: NOISE IN THE URBAN ENVIRONMENT 31 (1970): "[S]tudies of urban noise lead generally to the same conclusions: the spectrum shape of urban noise is broadband, peaking in the lower frequency bands."

54 In one survey, measurements were made in a large number of residential and industrial areas in or near the city of Chicago. In the other, measurements were taken in 24 different neighborhoods of all types in each of eight major U.S. cities. Both studies are cited in Stevens & Baruch, *Community Noise and City Planning*, in HANDBOOK OF NOISE CONTROL, *supra* note 4, at 5-8. An outline of out-

FIGURE 4

SUMMARY OF RANGES OF AVERAGE SOUND PRESSURE LEVELS IN TYPICAL RURAL, SUBURBAN AND URBAN RESIDENTIAL AREAS OF NINE U. S. CITIES

Noise Levels [dB(A)]	Day	Night
Below 34	Daytime levels in rural areas remote from industry or heavy traffic	Nighttime levels in quiet suburban areas
34-39	Daytime levels in quiet suburban areas	Nighttime levels in typical suburban areas near cities but without industry or heavy traffic nearby
39-45	Daytime levels in typical urban suburban areas near cities but without industry or heavy traffic	Nighttime levels in typical urban residential areas without industry or heavy traffic nearby
45-51	Daytime levels in typical urban residential areas without industry or heavy traffic nearby	Nighttime levels in typical residential areas near industry or heavy traffic
51-57	Daytime levels in typical residential areas near industry or heavy traffic	Nighttime levels in urban residential areas with considerable industry or heavy traffic nearby
Above 57	Daytime levels in residential areas with considerable industry or heavy traffic nearby	

Source: STEVENS & BARUCH, *Community Noise and City Planning*, in HANDBOOK OF NOISE CONTROL ch. 35 (C. Harris ed. 1957) 5-8; (Plottings in their Figure 35.10 in octave bands were translated into A-scale readings. A. PETERSON & E. GROSS, HANDBOOK OF NOISE MEASUREMENT, (6th ed. 1967) 9, 57-59, 209).

results based on surveys in six other cities are shown in Figure 5. Figure 6 contains the results of a Tokyo noise survey, one of the most up to date and comprehensive community noise studies.[55]

The standards of the proposed ordinance are compared with the results of these surveys and with the Swiss and ISO recom-

door noise surveys from 1930 through 1955 is found in Hardy, *Twenty-five Years' Research in Outdoor Noise*, 1 NOISE CONTROL 20 (1955).

55 Mochizuki & Imaizumi, *City Noises in Tokyo*, 23 J. ACOUST. SOC. JAPAN 146 (1967) cited in Soroka, *Community Noise Surveys*, in NOISE AS A PUBLIC HEALTH HAZARD, *supra* note 11, at 178-83. To Tokyo's existing four levels of zoning — heavy industrial, light industrial, commercial and residential — the surveyors added a fifth "suburban" zone. In each of 17 zone areas, measurements were made at 20 points during different times of the day to produce an average and a range of sound levels for each of the five levels of zoning.

FIGURE 5

SUMMARY RANGES OF AVERAGE SOUND PRESSURE LEVELS MEASURED IN SIX CITIES: DUSSELDORF, NEW ORLEANS, OTTAWA, SEATTLE, TOKYO AND VIENNA

Zone	Day [dB(A)]	Night [dB(A)]
Quiet Residential	40-50	35-45
Average Residential	50-60	40-50
Residential, Semi-Commercial	50-60	45-55
Commercial	55-65	45-55
Industrial	60-70	50-60

Source: BOLT BERANEK AND NEWMAN INC., CHICAGO URBAN NOISE STUDY, PHASE 1: NOISE IN THE URBAN ENVIRONMENT, 60 (1970).

mendations in Figure 7. The approximate correlation of these data indicates (1) that the proposed standards provide protection from hearing damage, speech interference and annoyance as discussed in the preceding section; and (2) that many communities will have little difficulty in meeting the proposed standards. It is important to note that the standards of the model ordinance generally prohibit noises in excess of the average noise levels shown in Figure 7. If the ordinance were enacted in the surveyed cities, its effect would be to reduce these averages by eliminating the loudest noises. By contrast, noise performance standards currently in use in many cities are largely inconsistent with one

FIGURE 6

RANGES AND AVERAGES OF SOUND PRESSURE LEVELS MEASURED IN FIVE ZONES OF TOKYO, JAPAN

Zone	Daytime 10-11 a.m. average [dB(A)]	Daytime 10-11 a.m. range [dB(A)]	Pre-dawn 5-6 a.m. average [dB(A)]	Pre-dawn 5-6 a.m. range [dB(A)]
Suburban	43	36-56	38	34-44
Residential	55	45-70	41	38-51
Commercial	65	54-79	52	46-75
Light Industrial	64	58-69	46	41-61
Heavy Industrial	66	60-77	47	40-65

Source: Soroka, *Community Noise Surveys*, in NOISE AS A PUBLIC HEALTH HAZARD, PROCEEDINGS OF THE CONFERENCE (American Speech and Hearing Ass'n Rep. No. 4, W. Ward and J. Fricke eds. 1969) 178-83.

FIGURE 7

COMPARISON OF AVERAGE DAYTIME AND NIGHTTIME SOUND PRESSURE LEVELS[1] FROM RECOMMENDATIONS, ACTUAL SURVEYS AND PROPOSED MODEL ORDINANCE

	Swiss (Fig. 3) [dB(A)]	ISO[2] [dB(A)]	Nine-city (Fig. 4) [dB(A)]	Six-city (Fig. 5) [dB(A)]	Tokyo (Fig. 6) [dB(A)]	Model ordinance[3] (Fig. 9) [dB(A)]
Rural Residential		40/30	34/			
Suburban Residential	55/45	45/35	39/34	45/40	43/38	
Urban Residential		50/40	51/45	55/45	55/41	55/45
Mixed (Residential & Commercial)	60/45	55/45	57/54	55/50		
Commercial	60/50	60/50		60/50	65/52	61/51
Industrial	65/55	65/55		65/55	66/47	67/57

1 First sound level given is day; the second is night.

2 Source: The International Standards Organization figures are from A. LAWRENCE, ARCHITECTURAL ACOUSTICS 195-197 (1970) (based on ISO draft proposal ISO/TC 43/SC 1).

3 Standards given for the proposed model ordinance are those applicable when the sound source and sound recipient are both the same kind of use (*e.g.*, residential-residential).

another and are often unrelated to the recommended levels of physical protection (See Figure 8).

3. Selection of Measurement Points

Two basic geographical measurement points are utilized by noise control statutes: zone borders (interzone measurement) and property lines (intrazone measurement). An ordinance which uses both, as does the one proposed here, is superior to a statute which uses only one or the other. Interzone standards alone do not protect adjacent uses within the same zone, *e.g.*, neighboring houses, from each other's noise. Likewise, intrazone standards alone do not prevent noises from crossing zone borders, *e.g.*, from an industrial zone to a residential zone. Many cities still employ only interzone measurement because they have been concerned chiefly with protecting commercial and residential uses from industrial noise (as Figure 8 suggests). Of course, even industrial users prefer neighbors who do not produce excessive noise, which makes intrazone limitations necessary. Furthermore, intrazone

FIGURE 8

DAYTIME NOISE PERFORMANCE STANDARDS CURRENTLY IN EFFECT IN SELECTED CITIES, INTERPRETED ON THE A-SCALE [± 2 dB(A)]

City	Zone of Noise Source	Zone of Noise Recipient: Industrial [dB(A)]	Commercial [dB(A)]	Residential [dB(A)]
Beverly Hills:	All uses	40	40	40
Chicago:	Industrial, heavy	—	66	61
	Industrial, medium	—	64	58
	Industrial, light / Commercial	—	62	55
	Residential	—	55	55
Columbus:	Industrial	—	62	52
Dallas:	Industrial, heavy	70	63	56
	Industrial, medium / Industrial, light	65	63	56
	Commercial	63	63	63
	Residential	56	56	56
Dayton:	Industrial, heavy	—	64	64
	Industrial, medium	—	60	60
	Industrial, light and Commercial	56	60	56
Fair Lawn:	All uses	60	60	60
Madrid, Spain:	Industrial	70	70	70
	Shopping area	65	65	65
	Apartments, Offices	55	55	55
	Hospital, Residential	45	45	45
Miami:	Industrial / Commercial	62	62	55
Minneapolis:	Industrial	—	62	55
Peoria:	Industrial / Commercial	63	63	53
Tucson:	Industrial	—	55	55
Warwick:	Industrial, heavy	—	51	51
	Industrial, light	51	51	51

Sources: Data for Madrid from paper on file at Harvard Legislative Research Bureau. Data for all other cities from BOLT BERANEK AND NEWMAN INC., CHICAGO URBAN NOISE STUDY, PHASE 1: NOISE IN THE URBAN ENVIRONMENT 86-86h (1970).

limitations offer some protection to nonconforming uses within the industrial zone, as well as to other uses in cases where the industrial zoning is cumulative rather than exclusive.[56]

Maximum allowable noise levels are formulated with reference to either the noise source or the noise recipient or both. If the statute limits noise with reference only to source, a factory in an industrial zone is allowed to transmit as much noise to nearby residential zones as it may to other industrial users. If, on the other hand, the standards relate only to noise heard by the recipient, a factory may make no more noise in a residential zone than may the residential uses. While this latter alternative would seem the ideal solution, it is often impossible to achieve where a residential zone lies in close proximity to an industrial zone. The preferable mode of regulation therefore is to control noise according to both source *and* recipient. This is the scheme of the proposed ordinance. As Figure 9 illustrates, the amount of noise that a use in a particular zone may produce depends upon the location of the source as well as the location of the recipient. An industrial use, for example, may transmit more noise to its industrial neighbors [67 dB(A)] than it can to its commercial neighbors [64 dB(A)] or to its residential neighbors [61 dB(A)]. The fact that industry may make more noise in a commercial zone than may a commercial use in the same zone [64 dB(A) as compared to 61 dB(A)] is a reflection of the compromise achieved by this statute which renders it more realistic than the flat recipient statute. This same compromise is carried out with respect to industrial-residential and commercial-residential transmissions.

To enforce the standards of the ordinance, noise level readings are made at various points on the suspected offender's property line or zone boundary as appropriate. If an excessive reading is registered at any point, the ordinance has been violated.

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56 In cumulative zoning, industry is usually relegated to the bottom of the hierarchy of uses; all other uses may also coexist legally in an industrial zone. Noise performance standards without intrazone protection (*i.e.*, with no property line measurements) would subject these nonindustrial users to an unmitigated din. Some might argue that if these "aberrational" uses choose to locate within an industrial zone, they must be prepared to tolerate the noise; but this viewpoint overlooks nonindustrial users who did not *voluntarily* locate in an industrial zone, *e.g.*, pre-existing uses.

FIGURE 9

NOISE PERFORMANCE STANDARDS FROM PROPOSED MODEL ORDINANCE
[dB(A)]

Zone of Noise Source	Zone of Noise Recipient		
	Industrial	Commercial	Residential
Industrial	67	64	61
Commercial	64	61	58
Residential	61	58	55

V. ENFORCEMENT

A. *Advantages of Performance Standards*

1. In General

Since noise performance standards themselves are superior to the uncertainties of nuisance actions and traditional noise control ordinances, the chances for effective enforcement are much improved. A legislative determination will already have been made as to what is offensive or harmful,[57] and each potentially offending noise can be measured objectively to determine whether it exceeds that level. Indeed, performance standards complement rather than replace common law nuisance doctrine in that violations of the ordinance could be used in nuisance actions as evidence that the violator has created a nuisance.[58] Furthermore, unlike some traditional noise control ordinances which specifically prohibit barking dogs or clanging bells, noise performance standards focus on the level of noise regardless of the instrumentality producing it. Hence, the model ordinance responds to unforeseen community needs by automatically covering noise problems as they arise. Finally, the prosecution of alleged violations on a scientific basis (and public awareness this that is being done) would probably lessen the incidence of excessive noise in much the same way that the use of radar has reduced motor vehicle speeding. Vol-

57 See note 17 *supra.*

58 C. HAAR, LAND-USE PLANNING, A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 205 (1959). Whether such a violation is mere evidence of a nuisance, creates a presumption of nuisance or creates a nuisance *per se* will depend upon local statutory tort doctrine. The enacting municipality may wish to make explicit in its version of this ordinance which of these rules will apply in the jurisdiction.

untary compliance would come about as word of the successful, even-handed application of the noise performance standards spread.

2. In Particular: The A-Scale

The few U.S. cities which have enacted scientific noise performance-standard ordinances have employed the elaborate octave-band analysis system[59] rather than the simpler A-scale weighting method.[60] There have been problems with these octave-band analysis performance standard ordinances, despite contentions by critics of the old subjective standards that enforcement problems would largely disappear if an "objective" standard such as the octave-band system was used.[61]

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59 See note 10 and text at notes 30, 31 *supra*. This method requires eight separate measurements of each noise. Even Chicago's recently revised noise performance standard ordinance (*supra* note 39) uses the octave-band analysis system with A-scale readings employed only for monitoring purposes. The comments of the Chicago ordinance's draftsmen state:

> Single number levels in dB(A) are provided for monitoring and survey purposes. The measurement of dB(A) levels can be done with simpler and more portable equipment, and is intended to serve as a means of determining whether complete octave-band measurements are needed to establish a violation.

BOLT BERANEK AND NEWMAN INC., CHICAGO URBAN NOISE STUDY, PHASE 2: NOISE CONTROL BY LAW, *supra* note 39, at 58-60.

60 In recommending the use of the A-level as a base measure for comparison, the staff of Bolt Beranek and Newman Inc., state:

> The many studies analyzed and summarized . . . show consistently the utility of the A-level in predicting various aspects of subjective response, including noisiness, speech intelligibility, loudness, acceptability, etc., for most common sound encountered in the urban environment. . . . It has the further merit of simplicity to such extent that it will lend itself well to monitoring urban noise levels. Finally, the A-level has already been widely chosen in other measurement programs so that the results from measurements in Chicago can be readily compared with those of other workers.

BOLT BERANEK AND NEWMAN INC., CHICAGO URBAN NOISE STUDY, PHASE 1: NOISE IN THE URBAN ENVIRONMENT, *supra* note 53, at 40-42.

The A-scale does have one disadvantage, but it can be remedied by applying given corrections in situations where certain noise characteristics are present. A-scale measurement agrees most with actual human reactions to noise when all noises being measured possess similar characteristics (*e.g.*, noise from automobile engines). However, the A-scale does not always accord full value to the human annoyance factor associated with such sound characteristics as pure tones (especially at high frequencies), impulsiveness and periodicity. *See* A. PETERSON & E. GROSS, JR., HANDBOOK OF NOISE MEASUREMENT, *supra* note 7, at 57. Thus, corrections for these characteristics are used in this model ordinance when necessary to keep the A-level measurements accurate.

61 Comment, *Urban Noise Control*, *supra* note 4, at 114.

The enforcement techniques required by these statutes are complex. If a municipality does not understand the operation of the intricate standards or the sophisticated measuring devices, or cannot afford these devices or technicians to operate them, then the community may allow the standards to go unenforced. Peoria, Illinois, for example, has not fared well with its octave-band-analysis noise performance statute. A Peoria official reported that, "When the Peoria noise ordinance was first passed, it was considered a pioneer ordinance. However, it was somewhat difficult to enforce. We had purchased a complex decibel meter which was difficult to operate and, as a result, it was ineffective."[62]

Much is made of the barrier to effectiveness posed by lack of funds. Denver, Colorado, tried for several years to get octave-band analysis performance standards enacted but was hindered by inadequate funding until it obtained a federal grant.[63] Under Denver's plan, direct costs for one year were estimated at $46,803 for personnel and $8,952 for equipment, a total of $55,755.[64] Again, this problem would be obviated if the less expensive A-scale meters are used. The meters themselves may be purchased for less than a few hundred dollars and do not require high-salaried engineers for operation.

B. *Enforcement Authorities and Techniques*

Cities may differ, in their choice of an agency to enforce noise performance standards. This model ordinance can be enforced by a zoning commission, department of public health, building inspector or similar agency. An agency assigned the responsibility for environmental protection is preferable however.[65] While it would be possible to provide for police enforcement, the technical and administrative procedures involved are not readily adaptable

62 *Noise Control Ordinances,* E9049.

63 *Id.* E9067.

64 *Id.*

65 Utilizing an environmental protection agency for the enforcement of noise performance standards is preferable for several reasons: (1) noise control efforts could be more readily coordinated with other environmental protection programs, (2) enforcement provisions of other statutes regulating environmental quality could be employed to aid enforcement of the noise control ordinance, and (3) since an environmental protection agency is organized specifically to maintain the quality of environment it would provide more diligent, efficient and responsive enforcement.

to traditional police department organization and enforcement techniques. Therefore, this model ordinance is designed to be enforced by an administrator. He should be one with training in acoustical engineering or an equivalent field so that he commands the necessary expertise to (1) train field inspectors (who themselves would not need prior acoustical training);[66] (2) purchase measuring instruments and train inspectors in their calibration and operation; (3) testify in court, and train inspectors to testify in court;[67] (4) formulate rules and procedures to be used in measuring noise with the specified sound instruments;[68] and (5) institute a public education program if desired.

The quantity of personnel and money required will in each case depend upon the area of jurisdiction, the population density and the scope of activities — industrial, commercial and residential — conducted within the jurisdiction.

Measurements of suspected violators would be made pursuant to complaints of citizens as well as on the initiative of the administrator. The administrator may establish a program of routine surveillance at random locations and times. This ordinance is not intended to supplant existing breach-of-peace ordinances which would continue to be enforced by police departments.

A MODEL ORDINANCE TO CONTROL URBAN NOISE THROUGH ZONING PERFORMANCE STANDARDS

Section 1. *Declaration of Purpose and Policy*

It is hereby declared to be the policy of this city and the purpose of this ordinance to prevent the exposure of citizens to the harmful physiological and psychological effects of excessive noise.

Section 2. *Definitions*

(a) "Administrator" means [official to be designated] whose duties shall include but not be limited to:

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66 The policy is to allow lower salaried technicians to carry out work under supervision of the trained administrator, rather than requiring all employees to be high-salaried engineers.

67 *See* BOLT BERANEK AND NEWMAN INC., CHICAGO URBAN NOISE STUDY, PHASE 2: NOISE CONTROL BY LAW, *supra* note 39, at 10-14.

68 Measurements must not only be accurate but must be capable of passing judicial scrutiny as well. *Id.* 13-14. An example of noise measurement procedures is set forth *id.* 89-91, 98-133.

(1) training field inspectors;

(2) purchasing measuring instruments and training inspectors in their calibration and operation;

(3) testifying in court, and training inspectors to testify in court;

(4) formulating rules and procedures to be used in measuring noise with the specified sound instruments; and

(5) instituting a public education program.

(b) "A-Scale sound level [dB(A)]" means the intensity of a sound expressed in decibels read from a sound level meter utilizing the A-level weighting scale.

(c) "Pre-existing use" means any use established prior to the effective date of this ordinance.

(d) Sound characteristics:

(1) "Periodic character" means an attribute of a sound whereby the A-scale sound level varies with time at a rate of 1-10 dB(A) or more per second.

(2) "Impulsive character" means an attribute of a sound whereby the A-scale sound level varies at a rate in excess of 12 dB(A) per second, with no more than five sound peaks per second.

(3) "Pure tone component" means an attribute of a sound whereby the volume of a tone of a single frequency is two times the volume of the tones of all other frequencies in the sound.

(e) "Use" means any activity, occupation, business or operation conducted on land or in or upon a building or other structure, including streets and other thoroughfares.

(f) "Zone" means an area within which certain designated uses are permitted and certain others are prohibited according to established requirements which are the same for all uses in the applicable area; this ordinance applies to:

(1) "industrial zones," which include [list of city's existing zones to be covered under this category] as described in [the municipal zoning ordinance];

(2) "commercial zones," which include [list of city's existing zones to be covered under this category] as described in [the municipal zoning ordinance]; and

(3) "residential zones," which include [list of city's existing zones to be covered under this category] as described in [the municipal zoning ordinance].

COMMENT: Acoustical and land-use definitions are derived from those of authorities in the two fields.[69]

Under section 2, the administrator is to be specified by the enacting community. Section 2 also provides three categories of zoning: industrial, commercial and residential. Since these may not correspond to the existing zoning schema in the enacting jurisdiction, each jurisdiction may assimilate its existing zones to these broad categories.

Section 3. *Applicability*

(a) The provisions of this ordinance shall apply:

(1) to any use established after [date]; and

(2) to any pre-existing use, commencing five years from [date].

(b) The provisions of this ordinance shall apply to all facets of a use, including the construction, repair, or demolition of a structure, including streets and other thoroughfares.

(c) The provisions of this ordinance shall not apply to licensed motor vehicles which are operated primarily on streets and other thoroughfares.

COMMENT: The legality of a five-year period for the termination of unlawful pre-existing uses was discussed earlier in Part IV B.

The ordinance covers construction, repair and razing work, a prime source of noise. Technology has developed several quiet pieces of construction machinery which can be utilized. If a phase of such work is to be unavoidably raucous, it is possible to obtain a temporary exemption under section 6.

The ordinance applies to the on site operation and testing of vehicles, such as fork lifts, tractors, trucks and other vehicles; but does not apply to licensed vehicles operated primarily on public thoroughfares, thus leaving sirens, horns, loud mufflers and traffic noises to be dealt with under other statutes.

Section 4. *Maximum Permissible Sound Levels*

(a) Except as provided in sections 5 and 6 of this ordinance, a sound level which emanates from any operation or activity of a use

69 Technical definitions are adapted from AMERICAN NATIONAL STANDARDS INSTITUTE, INC., ACOUSTICAL TERMINOLOGY S1.1-1960; Roller, *Vocabulary*, 12 ARCH. AND ENG. NEWS, Feb. 1970, 23; and BOLT BERANEK AND NEWMAN INC., CHICAGO URBAN NOISE STUDY, PHASE 1: NOISE IN THE URBAN ENVIRONMENT 10-18, 44-45 (1970). Land-use terminology is adapted from R. ANDERSON, 2 AMERICAN LAW OF ZONING 534-36 (1968).

and which exceeds the maximum permissible sound levels established by the following subsection (b) is prohibited.

(b) The following maximum permissible sound levels are hereby established:

(1) If the sound emanates from a use located within an *industrial* zone, the maximum permissible sound level is

(A) 67 dB(A) at any point on the property line of the use;

(B) 64 dB(A) at any point on a boundary separating the industrial zone from a commercial zone;

(C) 61 dB(A) at any point on a boundary separating the industrial zone from a residential zone.

(2) If the sound emanates from a use located within a *commercial* zone, the maximum permissible sound level is

(A) 61 dB(A) at any point on the property line of the use;

(B) 64 dB(A) at any point on a boundary separating the commercial zone from an industrial zone;

(C) 58 dB(A) at any point on a boundary separating the commercial zone from a residential zone.

(3) If the sound emanates from a use located within a *residential* zone, the maximum permissible sound level is

(A) 55 dB(A) at any point on the property line of the use;

(B) 61 dB(A) at any point on a boundary separating the residential zone from an industrial zone;

(C) 58 dB(A) at any point on a boundary separating the residential zone from a commercial zone.

(c) Where the property line of a use coincides with a zone boundary, the maximum permissible sound level for the zone boundary controls.

(d) In cases involving noise from construction, repair, or demolition on a public street or other thoroughfare, the "property line" shall be the boundary of the public right-of-way.

(e) Measurements shall be made by instruments calibrated by means of accepted acoustical techniques to an accuracy of $\pm$ 1 dB(A).

COMMENT: The maximum permissible sound levels were developed based on studies of the effects of noise on man, recommended noise criteria and empirical surveys of municipal noise as discussed earlier in Part IV C.

The administrator will be responsible for formulating procedures for calibrating instruments under subsection (e). See section 2(a)(2).

Section 5. *Deviations from Maximum Permissible Sound Levels*

(a) Between the hours of 9 p.m. and 7 a.m. the maximum permissible sound levels established by subsections (b)(1)(C), (b)(2)(C), and (b)(3)(A)-(C) of section 4 of this ordinance shall be reduced by 10 dB(A).

(b) The maximum permissible sound levels established by section 4 of this ordinance may be exceeded

(1) by no more than 5 dB(A) for a duration not to exceed 12 minutes in any one hour period; or

(2) by no more than 10 dB(A) for a duration not to exceed 3 minutes in any one hour period; or

(3) by no more than 15 dB(A) for a duration not to exceed 30 seconds in any one hour period.

(c) The maximum permissible sound levels established by section 4 of this ordinance shall be reduced by 5 dB(A) for

(1) sounds of periodic character, or

(2) sounds of impulsive character, or

(3) sounds with a pure tone component.

COMMENT: The correction for noises of short duration permits the brief functioning of stationary sirens, whistles, alarms and bells without violation.

Since dB(A) measurement will generally not reflect the additional human annoyance associated with certain noise characteristics, corrections have been made for "impulsiveness," "periodic character" and "pure tone component." Noises possessing these characteristics are less tolerable than a steady background noise to which people can become accustomed. Hence, such noises should be restricted to a lower overall dB(A) output to compensate for increased annoyance. The 5 dB(A) corrections have been suggested in several sources.[70]

Section 6. *Temporary Exemption*

The administrator is hereby authorized to grant a temporary exemption from the maximum permissible sound levels established by this ordinance if such temporary exemption would be in the public interest. A temporary exemption must be in writing and signed by the administrator or his appointed representative, and must set forth the name of the party granted the exemption, the

70 *E.g.*, BOLT BERANEK AND NEWMAN INC., CHICAGO URBAN NOISE STUDY, PHASE 1: NOISE IN THE URBAN ENVIRONMENT 60 (1970).

location of the property for which it is authorized, and the period during which it is effective. A temporary exemption will be granted only for a reasonable period in view of all the facts, which in no case may exceed 30 days. Temporary exemptions are not renewable and will not be granted more than [3] times in any one calendar year with respect to any location. A holder of a temporary exemption is authorized to exceed the maximum permissible sound levels established by this ordinance by no more than [25] dB(A).

COMMENT: The temporary exemption may be needed for the noisiest phases of construction, repair and demolition work. But the limited availability of the exemption will encourage contractors to employ quieter techniques and equipment which are available. The temporary exemption will not permit sounds in excess of 92 dB(A).

Section 7. *Enforcement*

(a) Whenever the administrator has reason to believe that a provision of this ordinance has been violated, he may cause written notice to be served upon the alleged violator. Such notice shall specify the provision of this ordinance alleged to have been violated and the facts alleged to constitute a violation, including dB(A) readings noted and the time and place of their detection, and may include an order that corrective action be taken within a reasonable time. Any such order shall become final unless, no later than [10] days after the order is served, the person named therein requests in writing a hearing. Upon such request, the administrator shall hold a hearing.

(b) If, after a hearing held pursuant to subsection (a) of this section, the administrator finds that a violation has occurred, he shall affirm or modify his order previously issued or take other appropriate corrective action. The order shall become final upon such modification or affirmation. If after the hearing the administrator finds that no violation has occurred he shall rescind the order.

(c) In lieu of issuing an order pursuant to subsection (a), the administrator may initiate action pursuant to section 8 of this ordinance. If an order is issued pursuant to subsection (a), the administrator may not initiate action pursuant to subsection (a) of section 8 of this ordinance until such order becomes final pursuant to either subsection (a) or subsection (b) of this section.

COMMENT: This section is similar in certain respects to section

9 of the State Air Pollution Control Act developed by the Council of State Governments.[71]

This section provides the administrator with substantial flexibility without diluting the effectiveness of the ordinance's prohibitions. If a violation is detected, the administrator must notify the suspected violator of the particulars of his alleged violation. The administrator may then order corrective action, and, if the violation is aggravated or presents a severe health hazard, may seek immediate abatement under section 8. Or the administrator may elect not to issue an order and instead seek immediate penalties and/or abatement under section 8. If an order is issued, however, the administrator is prevented from seeking penalties under section 8(a) (he may still seek an injunction) until the order becomes final — which may not be until after a hearing is held at the election of the alleged violator. If no hearing is elected, the order becomes final in 10 days.

This section does not in any way limit a private party's right of action under common law nuisance doctrine [see also section 8 (c)].

Section 8. *Penalties*

(a) Any person, firm, corporation or organization who violates any provision of this ordinance shall be guilty of a misdemeanor and subject on account thereof to a fine not in excess of [$1,000]. Each day of violation shall constitute a separate offense.

(b) Action pursuant to subsection (a) of this section shall not be a bar to enforcement of this ordinance by injunction or other appropriate remedy. The administrator is authorized and empowered to institute and maintain in the name of the city any and all such enforcement proceedings.

(c) Nothing in this ordinance shall be construed to abridge or impair the right of any person, firm, corporation or organization to damages or other relief on account of injury to persons or property.

COMMENT: This section is patterned after section 17 of the State Air Pollution Control Act developed by the Council of State Governments.[72]

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71 26 COMMITTEE OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION OF THE COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION A-18 (1967).

72 *Id.* A-27.

Enacting municipalities may wish to substitute a greater or lesser amount than the $1,000 fine suggested in subsection (a). An important consideration is to permit fines great enough to make it unprofitable for a violator to continue his offensive conduct. Such a tactic could also be prevented by injunction, as authorized by subsection (b). Subsection (c) preserves the common law right to bring a nuisance action against violators.

*John C. York**

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NOTES

CAMPAIGN SPENDING REGULATION: FAILURE OF THE FIRST STEP

Introduction

Political campaign expenditures in the United States have risen substantially in recent years.[1] In 1968, candidates spent an estimated $300 million in nomination and election campaigns for offices at all levels of government.[2] This sum represents increases of 50 percent and 100 percent over 1964 and 1952 outlays respectively.[3] These increases have become the subject of renewed comment and criticism in recent years.[4]

Attempts to regulate general campaign spending have generally been unrealistic and ineffective.[5] Although section 309 of the Federal Corrupt Practices Act of 1925[6] purported to set a maxi-

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1 *Hearings on H.R. 13721, H.R. 13722, H.R. 13751, H.R. 13752, H.R. 13935, H.R. 14047, H.R. 14511, and S. 3637 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 93 (statement of Herbert E. Alexander, Director, Citizen's Research Foundation), 99 (statement of Paul B. Comstock, Vice-President and General Counsel, National Association of Broadcasters) (1970) [hereinafter cited as *1970 Hearings*].

2 *1970 Hearings* 92 (statement of H.E. Alexander).

3 *Id.*

4 *See, e.g.*, J. DAVIS, PRESIDENTIAL PRIMARIES: ROAD TO THE WHITE HOUSE (1967); RESEARCH AND POLICY COMMITTEE OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, FINANCING A BETTER ELECTION SYSTEM (1968); *Bills for Politics*, 213 ECONOMIST 240 (1964); *Campaign Bills*, 224 ECONOMIST 33 (1967); Rochester, *The High Cost of Politics*, TRIAL, Dec./Jan., 1967-1968, at 32.

5 Senator Hugh Scott reports:

> As early as March 12, 1906, nearly 65 years ago, Congress felt that it ought to take more than a cursory look at the contributions made to political committees in presidential and other campaigns. *We are still just looking.* Since that day in March, Congress has held no less than 23 sets of hearings, encompassing no less than 45 days. The fruits of these hearings can be seen in the 26 or so special committee reports and the 11 public laws enacted. Since 1937, before which none of the present Members of the Senate were sitting, about 150 bills have been introduced covering the broad range of election reform [emphasis added].

117 CONG. REC. S1913 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott). *See, e.g.*, R. MACNEIL, THE PEOPLE MACHINE: THE INFLUENCE OF TELEVISION ON AMERICAN POLITICS 234 (1968); *Democrats Disentangle*, 223 ECONOMIST 676 (1967); *1970 Hearings* 95 (statement of H.E. Alexander).

6 2 U.S.C. § 248 (1964).

mum level on campaign expenditures, the artificial monetary figures and the broad exceptions make the provision virtually nugatory in practice.[7] On the whole, state regulation of this area is ineffective.[8]

Recently, renewed efforts to regulate campaign spending have been made. In the Ninety-first Congress thirty-four senators introduced a bill to provide a rate discount on certain television spot announcements purchased by candidates for the Senate and House of Representatives.[9] Additional bills in the two houses considerably widened the scope of this initial proposal by providing greater opportunities for the purchase of general television broadcast time by congressional candidates,[10] and by partially repealing the equal-time requirements of section 315 of the Communications Act of 1934.[11] Recognizing radio and television broadcasting as the largest factor contributing to the rising level of campaign expenses,[12] Congress culminated these efforts in the final passage of S. 3637, as amended by the conference committee.[13] This bill represented the first successful Congressional proposal in this area in several years.[14] The act, however, was vetoed by President Nixon on October 12, 1970.[15] The President lauded the basic goals of the legislation but reasoned that its limited scope fell far short of regulating total campaign costs. He asserted that it threatened to "make matters worse" by endangering freedom of

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7 *Id. See* Johnson, *Rising TV Spending Adds to the High Cost of Campaigning*, Washington Post, Nov. 22, 1970, cited in 116 CONG. REC. S18750-51 (daily ed. Nov. 23, 1970); TWENTIETH CENTURY FUND, ELECTING CONGRESS — THE FINANCIAL DILEMMA (1970), in 117 CONG. REC. S1914 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott).

8 *See* H. ALEXANDER, REGULATION OF POLITICAL FINANCE 55-57 (1966); Alexander & McKeough, *Campaign Fund Reporting in New Jersey*, 6 HARV. J. LEGIS. 190 (1969).

9 116 CONG. REC. S18727 (daily ed. Nov. 23, 1970) (remarks of Senator John Pastore).

10 H.R. 13721, H.R. 13722, H.R. 13751, H.R. 13752, H.R. 13935, H.R. 14047, H.R. 14511, 91st Cong., 2d Sess. (1970).

11 S. 3637, 91st Cong., 2d Sess. (1970).

12 *1970 Hearings* 95 (statement of H.E. Alexander); *see* 116 CONG. REC. S18732 (daily ed. Nov. 23, 1970) (remarks of Senator James Pearson); *Newspaper Spending Rises*, Washington Post, Nov. 22, 1970 in 116 CONG. REC. S18751 (daily ed. Nov. 23, 1970).

13 116 CONG. REC. S5734 (daily ed. April 14, 1970); 116 CONG. REC. H8800-01 (daily ed. Sept. 16, 1970); 116 CONG. REC. S16336 (daily ed. Sept. 23, 1970).

14 See note 5 *supra*.

15 116 CONG. REC. S17801 (daily ed. Oct. 12, 1970).

discussion, dicriminating against the broadcast media, favoring the incumbent and the famous candidate, and by allowing campaign expenditures to be shifted to other media with impunity.[16]

This Note considers the necessity for campaign spending limitations in the broadcasting field by discussing the relative merits and weaknesses of both the initial approach provided by S. 3637 and the suggestions offered in the President's veto message. The Note concludes that although S. 3637 leaves numerous areas in need of improvement, the approach suggested by the act represents a worthy beginning toward effective regulation of campaign spending.

I. The Necessity for Campaign Spending Limitations

A. *The Rising Total Costs of Political Campaigning*

Overall campaign expenditures have spiraled upward over the past fifteen years. In the 1956 election, when President Eisenhower won his second term, each vote cast cost 19 cents.[17] By 1960, the 68 million votes cast for Kennedy and Nixon required expenditures of 32 cents per ballot.[18] In 1964, each of the more than 70 million ballots cast cost 41 cents.[19] By 1968, the figure rose to 56 cents per vote cast, or to 67 cents if spending on behalf of third-party candidate George Wallace is included.[20]

This escalation of campaign costs has also been visible in the congressional and gubernatorial elections of several larger states. A recent survey shows that 70 percent of senators spent over $100,000 on their last campaign prior to 1970 and that 40 percent spent over $200,000.[21] Prior to the 1970 elections, three out of every ten members of the House of Representatives spent over $60,000, and in severely contested races, the figure frequently climbed over

16 *Id.*

17 R. MacNeil, The People Machine: The Influence of Television on American Politics 228 (1968).

18 *Id.*

19 *Id.*

20 *1970 Hearings* 41 (statement of Russell Hemenway, National Director, National Committee for an Effective Congress).

21 The Association of the Bar of the City of New York, Report of the Special Committee on Congressional Ethics ch. 4 (1970), cited in *1970 Hearings* 40.

the $100,000 mark.[22] The recent 1970 elections underscored the trend toward ever-increasing campaign costs. In its survey of the 1970 senatorial contests, the *Washington Post* estimated that John V. Tunney's successful campaign for the Senate seat from California actually cost "more than a million dollars," while George Bush, losing candidate for the Texas senatorial position, expended an equal amount.[23] On a similar basis, the *Post* observed that Hubert Humphrey's Minnesota campaign cost "at least $550,000."[24] While Albert Gore spent over $500,000 on his unsuccessful bid for re-election from Tennessee to the Senate, his Republican opponent's victory cost "between $1 and $1.25 million."[25] The rising campaign costs are equally evident in gubernatorial elections. In 1962, Richard Nixon reported that his campaign for Governor of California cost over $1.4 million.[26] In 1966, Governor Ronald Reagan's Affadavit of Expenditures showed that expenses had increased to $2.8 million.[27]

These figures must, of course, be kept in perspective. The more than $300 million spent in the 1968 election at all levels of government was only slightly more than the $270 million expended during that same year by the largest commercial corporate advertiser in the United States.[28] This comparison, however, is qualified by special attributes of political spending. Electoral costs appear especially high because political financial efforts are concentrated during specific years and intensified particularly during the months immediately preceding an election. Very strong competition exists during this period between the various candidates for the financial assistance which is available; furthermore, political donations are few in number.[29]

Candidates are not merely in competition for funds with their opponents in a given race; they face the difficult task of communicating a favorable impression to the voter besieged by appeals from

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22 *Id.*
23 Johnson, *Rising TV Spending Adds to the High Cost of Campaigning*, Washington Post, Nov. 22, 1970, in 116 CONG. REC. S18750 (daily ed. Nov. 23, 1970).
24 *Id.*
25 *Id.*
26 Rochester, *The High Cost of Politics*, TRIAL, Dec./Jan., 1967-68, at 32-33.
27 *Id.*
28 *1970 Hearings* 93 (statement of H.E. Alexander).
29 *Id.*; *see* note 39 *infra*.

dozens of candidates for other offices. Given the diffusion of public interest among all the candidates, the cost to any one candidate of making an impression rises. Finally, the candidate must also compete for attention with the regular advertising programs of leading commercial establishments.

The overall increase in campaign costs raises the possibility that only the independently wealthy or those with ready access to private wealth will be able to seek elective office. As political expenditures continue to rise, candidates have found greater difficulty in relying upon a broad base of smaller contributions.[30] Consequently, large donations have become increasingly important.[31]

Allowing political candidacy to become the exclusive preserve of the affluent class would undermine the very basis of our form of government. "An individual's integrity, ability and dedication to public service," it is said, "and not his private fortune or ability to attract financial backing for his campaign should be the controlling qualifications for public office."[32] The question is not whether wealthy political representatives can provide dedicated and compassionate leadership. Rather it is whether each citizen should have an equal opportunity for full and effective participation in the political process.[33] As Professors Jewell and Patterson observe:

> One of the most persistent popular beliefs in our political culture is the belief in the openness of the political system. The "log cabin" image, the notion that "anybody can become President," and the unpopularity of class interpretations of politics are indicative of the equalitarian orientation of many Americans.[34]

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30 *Cf.* 117 CONG. REC. S1915 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott); 117 CONG. REC. S2414 (daily ed. March 4, 1971) (remarks of Senator Edward Kennedy).

31 *Cf.* CONG. Q., Sept. 18, 1970, at 2290; *id.*, Oct. 2, 1970, at 2417.

32 *1970 Hearings* 76 (statement of Everett Erlick, Group Vice-President and General Counsel, American Broadcasting Cos., Inc.).

33 *Cf.* Reynolds v. Sims, 377 U.S. 523 (1964).

34 M. JEWELL & S. PATERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 101 (1966). While the contemporary American political system is "relatively open to participation by a wide range of citizenry," all elements of the population are not included proportionally in the decision-making process. *Id.* But the move toward democratic equality has been substantial. From the late colonial period

The classic expression of the rationale for this open political system has been given by John Stuart Mill:

> [W]e need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves; it suffices that, in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at is seen with very different eyes from those of the person whom it directly concerns.[35]

The underfinanced candidate does not necessarily become subservient to the influence of his contributors. But even the most able and dedicated citizens may be dissuaded from running for elective office because of the astronomical costs of a campaign and the obligations, real or imagined, which large contributions may entail.[36] "Reports surface almost daily about one candidate or another engaging in some sort of questionable undertaking."[37] The occasional political scandal casts an unfortunate pall over the entire spectrum of representative government. Russell Hemenway, National Director of the National Committee for an Effective Congress has noted the "[n]ational polls indicate that more than half the people in this country believe that politicians are dishonest and do not genuinely attempt to serve in the public interest."[38] Even if unfounded, these beliefs threaten the legitimacy of our democratic system. While any obligation felt by a successful candidate is usually within legal limits, the fact that some citizens may have a larger claim on the attentions of an elected official conflicts with the representative concept of equal access to a government decision-maker.[39]

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to the early nineteenth century, American politics were "generally controlled by shifting alliances within an elite of the influential, wellborn, and rich. By and large, although there was a broad suffrage at the base, the mass of voters were under the unsteady control of oligarchy." H. CARMAN, H. SYRETT & B. WISHY, 1 A HISTORY OF THE AMERICAN PEOPLE 130 (1961).

35 J.S. MILL, *That the Ideally Best Form of Government is Representative Government*, in CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT ch. III (1875).

36 *1970 Hearings* 31 (statement of Eugene Nickerson, County Executive, Nassau County, N.Y.).

37 117 CONG. REC. S1913 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott).

38 *1970 Hearings* 39 (statement of Russell Hemenway).

39 *See id.* 40 ("90 percent of all political funds are contributed by only one percent of the population.")

Thus, restoration of confidence in our democratic system requires a reduction of the cause of these financial liabilities. A logical and symptomatic treatment would seek to control the major cause of rising campaign expenses — the increasing costs of television and radio broadcasting — and to reduce the incentive for large outlays by placing an upper limit on total expenditures.

B. *The Rising Cost of Television and Radio Broadcasting*

Television and radio advertising time accounts for more than 20 percent of the expenses involved in modern campaigning.[40] In 1968, combined political spending for television and radio broadcasts reached $58.9 million, a 70 percent increase over 1964.[41] Total dollar figures alone do not express the full story because political races in which little or no broadcasting time is used are not separated from contests involving heavy utilization of radio and television advertising. In the 1968 general election, fully 50 percent of all broadcasting expenditures went for the presidential election.[42] One recent survey indicates that 73 percent of United States senators in their most recent campaign prior to 1970 spent more than half of their budgets on television time.[43] Fewer than 10 percent of the senators were able to win without any use of the medium.[44] More than one-half of the members of the House of Representatives utilized television in their 1968 elections and one member in four was a "heavy" user.[45] The increased use of this media has been paralleled by an increase in the advertising rate.

Television advertising rates have increased faster than those of any other medium, except billboards.[46] The advertising cost indices for *Media/Scope* magazine show that television spot rates increased three times faster than those for similar coverage in newspapers and nearly twice as fast as magazine advertising rates.[47]

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40 *1970 Hearings* 93 (statement of H.E. Alexander).

41 *Id.; see* J. DAVIS, PRESIDENTIAL PRIMARIES: ROAD TO THE WHITE HOUSE 237 (1967).

42 *FCC Survey on Political Broadcasting 1968*, in *1970 Hearings* 93.

43 THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE ON CONGRESSIONAL ETHICS ch. 4 (1970), in *1970 Hearings* 41.

44 *Id.*

45 *Id.*

46 *1970 Hearings* 41, 44.

47 *Id.*

Twenty to 33 percent must be added to the broadcast advertising rates to cover production charges for programs and spot announcements, and additional costs must be included for promotional or "tune-in" advertising in the other media.[48] The increasing use of color television and of elaborately designed spot announcements continues to escalate the total amount spent for advertising agency talent, films, and video tapes. Yet even these additional figures would not cover the further costs of staff time, travel, or fund-raising related to broadcast utilization.

As television advertising continues its trend toward more sophisticated public relations techniques, increased use of the medium not only suggests problems of expenditure limitation, but also raises apprehensions concerning the impact of television style and form upon the substantive information received by the electorate. Spot announcements have become more popular in the past decade.[49] As broadcasting rates rise, the candidate must shift from lengthy, informative programs to brief announcements carrying high momentum.

These brief announcements may be considered advantageous by the candidate because they can be inserted between regularly scheduled programs, thereby reducing the annoyance to a viewer caused by interruptions. Although spot announcements may be strategically wise, however, they often fail to provide the voter with accurate, relevant information about the candidate and his views on various issues. This shortcoming has produced concern that professional image-making may enable our major candidates to be elected without reference to their respective qualifications or their positions on important issues. As Senator James Pearson expressed in debate, "It is time to return to the process of allowing voters to judge candidates as they are, not as they seem to be. It is time to have more debate on issues and fewer singing commercials."[50] Consideration of these problems suggests that effective limitation of campaign spending should maximize the widest

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48 *1970 Hearings* 93 (statement of H.E. Alexander); *see, e.g., id.* 11 (statement of Dean Burch, Chairman, Federal Communications Commission); *id.* 71 (remarks of Richard Jencks, President, Columbia Broadcasting System).

49 *See, e.g.*, R. MACNEIL, THE PEOPLE MACHINE: THE INFLUENCE OF TELEVISION ON AMERICAN POLITICS 204 (1968); B. RUBIN, POLITICAL TELEVISION 132 (1967).

50 116 CONG. REC. S18733 (daily ed. Nov. 23, 1970) (remarks of Senator James Pearson).

possible dissemination of operative political information while minimizing monetary costs and interference with independent decision-making.

II. S. 3637 AND THE PRESIDENT'S VETO

A. *The Act*

As sent to the President, S. 3637 effected substantial changes in the relationship between political campaigning and the broadcast media.[51] The bill revises section 315(a) of the Federal Communications Act of 1934 by excluding from the equal time requirements all legally qualified candidates for President or Vice President in a general election.[52] Section 315(b) is amended to limit the rates charged to any legally qualified candidate for any public office to the lowest unit charge of the station for the same amount of time in the same time period.[53]

In addition, legally qualified candidates for the office of President, United States senator and representative, governor or lieutenant governor are limited in the amounts which they may spend for radio and television broadcasting.[54] Funds spent by a vice-presidential candidate are allocated to his presidential running mate.[55] Likewise, through a system implemented by the candidate's authorized representative and the broadcasting stations, expenditures by groups on behalf of the candidate are credited against his spending ceiling.[56] Responsibility for policing the spending limits lies with the stations. They must refuse all advertising requests which are not accompanied by a written statement from the candidate's representative certifying that the expenditure will not exceed the relevant limits.[57] Additional provisions allow the states to extend the coverage of the act to campaigns for lower state offices.[58]

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51 See Appendix for the text of S. 3637, 91st Cong., 2d Sess. (1970).
52 S. 3637, 91st Cong., 2d Sess. § 1 (1970).
53 *Id.*
54 *Id.* § 2.
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*

B. *The President's Veto*

While President Nixon agreed with the concept of campaign spending limitation, his veto message criticized S. 3637 for failing to eliminate the financial advantage of well funded candidates, for discriminating against the broadcast media, and for lowering the overall flow of political information to the electorate.[59] The President's basic disagreement apparently stems from the failure to limit campaign costs effectively. As the President observed, broadcasting production and promotion costs are not included; nor are any restrictions placed upon the amounts which may be spent in media other than radio and television. Indeed, the act might stimulate even higher levels of campaign spending by forcing candidates to shift their advertising out of the broadcasting media and into magazines, billboards, newspapers, and direct mail. The President also suggested that the spending limits imposed by S. 3637 did not cover cases where funds might be expended by various organizations and individuals not directly connected with the candidate. He noted that, "[t]his bill does not effectively limit the purchase of television time to oppose a candidate."[60]

In addition, Mr. Nixon observed that the spending ceilings resulted from legislative compromise rather than by scientific analysis of broadcast markets.[61] He noted that the ceiling fails to adjust for the differing campaign expenditure requirements faced by candidates in various broadcast areas caused by differences in geographical rate structures. Further, the President stated that the bill struck a serious blow to the little-known but highly qualified citizen desirous of seeking public office. Because of the campaign expenditure limitations, Mr. Nixon reasoned that a well-known person or an incumbent would have an immeasurable advantage over a lesser-known candidate. Perhaps more significantly, the President implied that any spending ceiling will be unacceptable to the White House. Thus, he suggested that "before we tamper

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59 *See* 116 CONG. REC. S17801 (daily ed. Oct. 12, 1970); *id.* S18724 (daily ed. Nov. 23, 1970).

60 116 CONG. REC. S18724 (daily ed. Nov. 23, 1970) (President's veto message).

61 *Id.; see* 116 CONG. REC. S18730 (daily ed. Nov. 23, 1970) (remarks of Senator Charles Goodell).

with something as fundamental as the electoral process we must be certain that we never give the celebrity an advantage over an unknown or the office holder an extra advantage over the challenger."[62]

Mr. Nixon concluded his veto message with two points. First, he criticized the limitation of radio and television rates to the lowest unit charge as "tantamount to rate-setting" and a "radical departure for the Congress." Second, he feared that the expenditure limitation would frequently be enforced after the election, thus causing serious confusion in instances where an election challenge was still unresolved as of the date on which the winning candidate should take office.

Congress upheld President Nixon's veto of S. 3637.[63] This Note does not address the wisdom of that congressional decision. Rather, it discusses the relative strength and weaknesses of the approach taken by S. 3637.

III. Analytical Discussion of the Merits and Weaknesses of S. 3637

A. *Repeal of the Equal-Time Requirements for Presidential and Vice-Presidential Campaigns*

Presidential elections invariably involve numerous candidates.[64] Section 315(a) of the Communications Act[65] presently requires

62 116 Cong. Rec. S18724 (daily ed. Nov. 23, 1970) (emphasis added).

The campaign spending bill introduced in February, 1971, by Senators Scott and Mathias supports this suggestion. The bill contains no provision for expenditure ceilings. S. 956, 92d Cong., 1st Sess. (1971). Observing that "[t]here are good reasons to support this as the most sensible approach," Senator Scott notes that the bill is "consistent with both my earlier statement and the President's. I have conferred with the White House on this legislation. They have seen the bill and know of its contents." 117 Cong. Rec. S1913 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott). New York Times editorialist Tom Wicker theorizes that the Scott-Mathias bill is not "an official Nixon Administration proposal," but he suggests that it indicates that the President "does not plan to put forward an Administration alternative [to S. 3637] this year. Since Mr. Scott and his co-sponsor Senator Charles Mathias of Maryland, prepared their bill in cooperation with the White House, it also suggests that Mr. Nixon will not support a limitation on spending." Wicker, *Controlling the Cost of '72*, N.Y. Times, Feb. 23, 1971, at 35, col. 1.

63 116 Cong. Rec. S18764 (daily ed. Nov. 23, 1970).

64 *1970 Hearings* 94 (statement of H.E. Alexander).

65 Communications Act of 1934 47 U.S.C. § 315(a) (1964).

broadcasters to provide all candidates with equal acccess to facilities.[66] While problems seldom arise in relation to paid advertisements, broadcasters are reluctant to furnish free air time because of the corresponding obligations to various minor candidates.[67] Repeal of the equal-time requirements of section 315(a) should substantially increase the amount of free broadcast time available to major candidates for President and Vice-President.[68]

Suspension of 315(a) in the 1960 presidential campaign successfully provided additional free television time to the major candidates.[69] The suspension allowed the networks to reach a combined audience of 280 million in the Kennedy-Nixon debates without being obligated to grant equal-time to the 14 fringe candidates.[70] In 1960, networks provided over 82 hours of free time for political broadcasts.[71] However, in 1964 and 1968, when the equal-time provision was again in effect, only 26 to 27 hours of free broadcasts were allowed.[72] Perhaps more significantly, in 1960, the television networks furnished between eight to thirteen times more free programming than they provided in either of the two succeeding presidential elections.[73]

Opponents to a repeal argue that elimination of the equal-time provision could allow broadcasters to dictate campaign strategy.[74] This concern seems serious, although some qualification may be necessary. Although broadcasting companies favor the increased audiences drawn to the excitement of confrontation politics and debates, some candidates are simply not willing to confront either an opponent or an issue, even to gain free time.[75] A leading candidate may prefer to avoid giving equal exposure to a lesser-known opponent.[76] Some candidates may wish to debate and be interviewed while others may choose to speak for themselves. "[T]he

66 *See 1970 Hearings* 94 (statement of H.E. Alexander).
67 *Id.*
68 *1970 Hearings* 8 (statement of Dean Burch).
69 *Id.*
70 *Id.* 10.
71 *Id.*
72 *Id.* 10-11.
73 *Id.* 11.
74 *See id.* 94 (statement of H.E. Alexander); *but see* 117 CONG. REC. S1915 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott).
75 *Id.*
76 *Id.*

campaign interests of the candidate do not always coincide with the interests of the electorate in full discussion; nor . . . with the interests of the broadcasters in format design or time availability."[77]

Despite these possibilities, the danger of interference with campaign strategy seems to necessitate one of two alternatives. As suggested by the President's Commission on Campaign Costs in 1962, section 315(a) could be suspended on a trial basis to allow congressional review of the practices that occur in both broadcasting and political campaigning.[78] Also, as suggested by the Federal Communications Commission,[79] the section could be amended to keep the equal-time requirement applicable to "major party" candidates, while making fringe candidates subject only to the general fairness doctrine. In the FCC proposal "major party candidate" is defined very broadly to ensure the inclusion of any significant third or fourth party candidate.[80]

The FCC proposal is superior to the general repeal suggested by S. 3637 because it minimizes risks of media interference with campaign strategy. Total repeal of section 315(a), on the other hand, would centralize in a private industry decisions concerning free candidate access to broadcasting. However, the risks and consequences of unbalanced coverage at the presidential campaign level do not seem to warrant the minor conveniences which would be accorded the broadcast stations. The fairness doctrine would doubtless cover clear abuse of the discretion provided by a total repeal.[81] But the fairness standard may not be an adequate substitute to section 315(a) since (1) its meaning is uncertain, (2) it involves only after-the-fact administrative procedures; and (3) its overall deterrent effect is questionable.[82]

The dangers of relying on this doctrine are serious. Our system demands that unpopular candidates be able to present themselves to the electorate, even if their views are disturbing to the

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77 *Id.*

78 PRESIDENT'S COMMISSION ON CAMPAIGN COSTS, FINANCING PRESIDENTIAL CAMPAIGNS 27 (1962).

79 *See 1970 Hearings* 8-9, 15-18.

80 *See id.*

81 *Cf. 1970 Hearings* 11 (statement of Dean Burch).

82 *1970 Hearings* 94 (statement of H.E. Alexander). *See generally* Note, *The FCC Fairness Doctrine and Informed Social Choice,* 8 HARV. J. LEGIS. 333 (1971).

majority. Because the air waves effectively belong to the citizens,[83] the broadcast media offer an appropriate forum for this purpose. The problem of using the fairness standard to prejudge the amount of free time these candidates should receive relative to that accorded the two major parties seems exceedingly difficult. The administrative remedies provided in case of violation offer little assistance to the affected candidate or to the electorate denied access to his views.

Yet the granting of equal time to candidates with insignificant popular support is also troublesome. Elimination of the equal time provision could freeze the present state of political philosophy by eliminating the presentation of certain unpopular viewpoints from the media campaign. However, this is a problem only to the extent that these views presently receive substantial benefit from the equal time requirement. In fact, the broadcasting industry is unwilling to provide substantial free time equally to both major and minor candidates. As FCC Chairman Dean Burch explains, the current effect of "section 315 is not that the Socialist Labor or Vegetarian candidate gets free time; rather, no one gets any substantial amounts of free time."[84] If the broadcast media is to provide effective free campaign coverage, a compromise must be reached: the practical ability of the radio and television industry to furnish equal free time must bear a realistic relationship to the demonstrated interest of the public in a given candidacy.

The FCC proposal again provides an advisable solution by repealing the section with respect to fringe candidates while maintaining it for a very broadly defined class of "major" candidates.[85] An unresolved question is whether the equal-time requirement should be repealed, suspended, or modified for lower elections as well as for the presidential contests. The Columbia Broadcasting System has suggested a trial suspension for all candidates at all levels.[86] The FCC draft legislation similarly amends the section for all contests.[87] This question of whether section 315(a)

83 *1970 Hearings* 41 (statement of Russell Hemenway).
84 *Id.* 9 (statement of Dean Burch).
85 *See* § (3) of the FCC proposal, *1970 Hearings* 17.
86 *1970 Hearings* 74 (statement of Everett Erlick); *but see* S. 956, 92d Cong. 1st Sess. § 302(a) (1971).
87 *See* § (3) of the FCC proposal, *1970 Hearings* 17.

should be totally repealed in lower races must be considered separately.

Repeal or revision of section 315(a) for lower elections might be appropriate if the prevalence of fringe candidates in those contests actually reduces the amount of free broadcast time provided. But the present impact of the equal-time requirement in lower elections is unclear.[88] Even a temporary suspension of the equal-time requirements for all positions seems inadvisable until additional information is gained concerning the effects of such an action.[89]

Applying the repeal to additional offices would increase the risks of broadcasting industry interference with personal campaign preferences. The dangers of inappropriate discretion by individual stations would be exacerbated, as would the problems of effectively applying the fairness doctrine. Suspension for a single election could also have profound effects upon the incumbency turnover rate.[90] The incumbent gains public exposure throughout his term of office and thus has a substantial media advantage over any unknown challenger.[91] Equal-time requirements help maintain the incumbent's favorable position by ensuring that any amount of free time furnished the challenger will also be made available to the incumbent. Revocation of an improvident suspension of the equal-time requirements would be little consolation to the defeated incumbent. A trial suspension of section 315(a) can always be reversed; but as Representative Torbert MacDonald observed, "I have a terrible feeling that it would be a new Congress that would do it."[92] Although the injury to specific incumbents could not be mitigated, suspension or repeal of the section would harm the electorate only where the victor was less qualified to represent its interests than the incumbent had been.

These problems with a repeal or suspension of section 315(a)

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88 *See 1970 Hearings* 80 (statement of Everett Erlick).

89 *See 1970 Hearings* 80 (remarks of Everett Erlick and Representative Torbert MacDonald, Subcommittee Chairman).

90 *See generally* Huntington, *Congressional Responses to the Twentieth Century*, in THE CONGRESS AND AMERICA'S FUTURE 9 (D. Truman ed. 1965); M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 118-21 (1966); J. WAHLKE, H. EULAU, W. BUCHANAN & L. FERGUSON, THE LEGISLATIVE SYSTEM 491 (1962).

91 *1970 Hearings* 96 (statement by H.E. Alexander). *See* 116 CONG. REC. S17801 (daily ed. Oct. 12, 1970) (President's veto message).

92 *1970 Hearings* 80.

must be balanced with the increase in free broadcast time which would probably occur. Also, since campaign regulatory legislation is often designed to equalize political opportunities for both rich and poor, incumbent and challenger, suspension of section 315(a) may offset spending ceilings which favor the incumbent. In sum, repeal of the equal-time provision only for presidential elections seems sensible, although the limited repeal offered by the FCC proposal may be the most advisable approach. Additional study seems necessary before the equal-time requirements are abolished for lower contests. To appreciate the impact of the repeal of the equal-time requirement for any election, however, we must first appraise the proposals to limit political advertising rates.

B. *Limitation of Advertising Rates to Lowest Comparable Unit Charge*

Under present law political advertising rates may not exceed those charged commercial concerns purchasing air time under comparable conditions.[93] S. 3637 extends this concept by requiring a broadcaster to offer any legally qualified candidate a rate which does not exceed "the lowest unit charge of the station for the same amount of time in the same time period."[94] The change is designed to remedy several problems. Section 315(b) presently allows the broadcaster to charge candidates a flat charge shown on the station rate card. While some stations offer campaign discounts, most apply this flat rate to political advertisers.[95] However, reduced rates are frequently negotiated with commercial advertisers who purchase multiple spots or considerable blocks of time.[96] Similar reductions are available for local enterprises which may influence the station selection for large national advertising accounts.[97]

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93 Communications Act of 1934, 47 U.S.C. § 315(b) (1964) provides "The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes."

94 S. 3637, 91st Cong., 2d Sess. § 1(b) (1970). *See* S. 956, 92d Cong., 1st Sess. § 302 (1971); S. 1121, 92d Cong., 1st Sess. § 401(b) (1971).

95 *Cf. 1970 Hearings* 94 (statement of H.E. Alexander).

96 *Id.* 105-07 (remarks by Paul Comstock, Vice-President and General Counsel, and John Summers, Chief Counsel, National Association of Broadcasters); Blake & Blum, *Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination*, 74 YALE L.J. 1339, 1347 (1965).

97 *1970 Hearings* 106.

Broadcasters assert that normal business practices justify this disparity in treatment. Sound management dictates that financially valuable advertisers receive preferential treatment. Therefore, transitory commercial accounts seldom receive rate reductions.[98] In addition, by carrying intensive amounts of political advertising for a brief period, stations may create clientele problems by having to displace their steady commercial customers.

> It seems no more than fair that in return for this difficult situation the station is placed in, it should be allowed to charge such transitory advertising accounts a higher rate to compensate for the client relations problems it entails.[99]

From an economic perspective, advertising which provides greater cost savings and income to a station deserves more favorable rates.[100] So long as a broadcaster receives an equal economic return, discrimination between the rates charged political and commercial customers is not justified. But political accounts frequently do involve a larger financial risk to the broadcasting stations.

> There have been experiences in which candidates spent more money than they could afford. They went into the red, and then later the candidates would try to settle the bills on the basis of 20 cents on the dollar or 30 cents on the dollar or perhaps nothing at all.[101]

This reasoning suggests that financially sound political accounts should receive more favorable rates than those accorded candidates deemed to be high financial risks. Likewise, candidates purchasing large volumes of advertising deserve lower rates than those buying only minimal amounts of air time.

Countervailing considerations, however, diminish the importance of the economic approach to broadcasting rates. First, favor-

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98 *See* 116 CONG. REC. S18734 (daily ed. Nov. 23, 1970) (remarks of Senator Roman Hruska).

99 *Id.*

100 *Cf.* FTC v. Procter & Gamble Co., 386 U.S. 568, 579 (1967). For an analysis suggesting that broadcasting volume discounts are not economically justified by resulting cost savings to the stations, *see* Blake & Blum, *Network Television Rate Practice: A Case Study in the Failure of Social Control of Price Discrimination*, 74 YALE L.J. 1339, 1358-62 (1965).

101 116 CONG. REC. S18728 (daily ed. Nov. 23, 1970) (remarks of Senator George Murphy).

itism toward candidates purchasing large blocks of time only increases the present disparity between candidates with strong financial backing and those with inadequate funding. Second, the social value of political advertising lies in its contribution to an informed electorate. Since radio and television stations are federally licensed to use the public air waves, their motive of profit should not take precedence over the important public purpose of political campaigning.[102] This is particularly true when the profit reaped from political advertising may force total campaign costs to a level which will jeopardize basic democratic values of the government itself.[103]

While this reasoning seems compelling, the advisability of regulating free enterprise through rate limitation must also be considered. Increased government control of private industry may be repugnant to American political beliefs and constitutional commands. To some persons, voluntary controls on the part of the media[104] or government subsidization of campaign costs[105] may seem more acceptable than rate regulation of the advertising media. On balance, however, the necessity for ensuring the financial integrity and openness of the election process seems to outweigh the problems inherent in increased governmental regulation. An appropriately devised rate limitation seems both politically acceptable and constitutionally feasible.

This conclusion suggests that the "lowest comparable unit charge" standard should be made applicable to all advertising media. Opponents of S. 3637 argue that by limiting the provision to broadcasting, the bill discriminates in favor of the other media.[106] Broadcasters must charge lower rates, thus providing candidates with additional campaign advertising funds. A portion of this savings will probably be utilized to purchase more air time. But because of the broadcast spending ceiling imposed by the bill, the other media will also be benefited.[107]

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102 *See generally 1970 Hearings* 95 (statement of H.E. Alexander).

103 *See 1970 Hearings* 42 (statement of Russell Hemenway).

104 116 CONG. REC. S18735 (daily ed. Nov. 23, 1970) (remarks of Senator James Eastland).

105 *See* text accompanying notes 145-55 *infra*.

106 *See* text accompanying notes 135-37 *infra*.

107 If there were a discount or lowest unit requirement, some campaigners might use the savings to purchase more time. Nothing is

The limited approach provided by S. 3637 can be explained partially by the fact that the congressional committees considering the bill had neither jurisdiction nor expertise in non-broadcasting areas.[108] But this should not generally prevent a coordinated approach to the rates of all media. For example, the Federal Election Reform Act of 1971[109] has been referred jointly to the Senate committees on Commerce, Rules and Administration, Finance, and Post Office and Civil Service.[110]

A more limited approach may be justified under S. 3637 however. Broad regulation of all media would increase federal power and raise enforcement problems. Also, although broadcasting rates are not set by the government,[111] the privilege of operating a broadcasting station carries with it the responsibility of furnishing programming in the public interest.[112]

> Unlike the owners of newspapers and other advertising media, broadcasters are by law trustees of the airways of the communities in which they are licensed to serve. As a consequence, and again unlike other media owners, they are subject to specific legal obligations and restrictions reasonably calculated to serve the public interest.[113]

> known of elasticity of demand if rates are lower, either for those already buying time or those not now buying time because of the prohibitive cost. Presumably there are limiting factors: a candidate fears backfire from a saturation drive; some stations may not have additional time available or want to sell certain of it for political purposes; and some stations might decide to limit the amount of time sold to certain categories of candidacy. Considering the political psychology, and the drive to power, no doubt some campaigners would purchase more time; others might find ways other than broadcasting to spend the money saved, provided they have it or are willing to go into debt.

1970 Hearings 95 (statement of H.E. Alexander). S. 956, 92d Cong., 1st Sess. §§ 302-03 (1970) applies a rate reduction to broadcast and non-broadcast media services.

108 *See 1970 Hearings* 95, 102-03.

109 S. 956, 92d Cong., 1st Sess. (1971).

110 117 CONG. REC. S1913 (daily ed. Feb. 25, 1971).

111 *1970 Hearings* 12 (statement of Dean Burch).

112 *See, e.g.,* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government."); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) (first amendment right of viewers and listeners, not broadcasters, are paramount); *cf. 1970 Hearings* 9 (statement of Dean Burch); *id.* 77 (statement of Everett Erlick); 116 CONG. REC. S18726 (daily ed. Nov. 23, 1970) (remarks of Senator John Pastore).

113 116 CONG. REC. S18726 (daily ed. Nov. 23, 1970) (remarks of Senator John Pastore).

The public interest in an adequate flow of political information nevertheless must be balanced with possible economic harm to the broadcasting stations. Generally, the financial impact of the "lowest comparable unit charge" should not be onerous.[114] In the House hearings on S. 3637, Paul B. Comstock, Vice President and General Counsel of the National Association of Broadcasters, agreed that the bulk of television stations would be able to absorb some adjustment in the present rate system.[115]

However, the bill may discriminate between broadcasters:

> There are certain Congressional districts where one station in the middle of the district will carry the load [sic] subsidizing the campaign. You may have other congressional districts where broadcasting stations will not be asked to subsidize at all because the candidates do not use the broadcasting medium but instead use newspapers or billboards or some other medium.[116]

This disparity cannot be denied. The suggestion that this results in an unfair private subsidy seems questionable. In effect, this objection is to the fact that stations deriving substantial income from numerous political accounts would gain somewhat less profit from that advertising. To the extent that the rate provision prevents certain stations from earning a fair return on their investment, inappropriate subsidization may occur. However, the stations in areas where the political use of broadcasting is popular are frequently those best able to charge high advertising rates and thus earn a considerable economic return.[117] The large market area which makes the broadcast advertising attractive to candidates also allows the stations to set higher overall rates.

In his veto message, President Nixon asserted that the lowest unit charge provision of S. 3637 "is tantamount to rate-setting by statute and represents a radical departure for the Congress which has traditionally abhorred any attempt to establish rates

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114 *See 1970 Hearings* 104, 108.

115 *Id.* 104.

116 *Id.* 27.

117 *See id.* 105. As President Nixon observed in his veto message, "30 seconds of prime television time in New York City costs $3,500; in the Wichita-Hutchinson, Kansas area, it costs $145. While the New York stations face higher costs of doing business, the rate difference still allows a considerably higher rate of return." 116 CONG. REC. S17801 (daily ed. Oct. 12, 1970) (President's veto message).

by legislation."[118] Arguing that the veto should be overridden, Senator Pastore replied to this:

> I can only say that since 1952, section 315 has required that broadcasters charge candidates no more than comparable rates for other purposes. If S. 3637 is rate-setting by statute, so is the 1952 amendment of § 315. But no one seriously contends that the 1952 amendment is rate-setting by statute. Call it what you will, however, this provision in S. 3637 represents no radical departure from tradition by the Congress.[119]

In addition, setting a "lowest comparable unit charge" standard seems theoretically closer to concepts of "fairness" than to those of rate-setting.[120] The fairness doctrine attempts to ensure that when controversial issues of public importance are discussed on the broadcast media, a reasonable opportunity for the presentation of contrasting opinions is provided.[121] Similarly, the limitation of political advertising rates attempts to ensure that a fair presentation of political opinion will not be hindered by the high cost of broadcasting advertising. However, fairness cannot be attained merely by a restriction on advertising rates. Limiting per unit advertising only emphasizes any financial disparity existing between the candidates. Thus, some ceiling on campaign spending seems to be a necessary counterpart to impose rate reduction.

C. *The Limitation of Campaign Expenditures*

In providing a ceiling for only campaign spending on broadcasting,[122] S. 3637 leaves substantial cost unregulated. Expenditures in most primaries are limited to one-half of the fund allocation for the general election, but presidential primaries are excluded from this provision. Thus, S. 3637 fails to regulate one of the costliest campaign periods.[123] The spending ceiling does not apply to expenditures made before a candidate becomes

118 116 CONG. REC. S17801 (daily ed. Oct. 12, 1970) (President's veto message).

119 *Id.* S18726 (daily ed. Nov. 23, 1970) (remarks of Senator John Pastore).

120 *Cf.* note 79 *supra* and accompanying text.

121 *See* Note, *The FCC Fairness Doctrine and Informed Social Choice*, 8 HARV. J. LEGIS. 333 (1971).

122 S. 3637, 91st Cong., 2d Sess. § 2 (1970); see note 44 *supra*.

123 1968 election estimates place Senator Eugene McCarthy's primary contest expenditures between $6 and $7 million. Senator Robert Kennedy spent from $4 to $5 million. Although he entered none of the primaries, Vice-President Hubert Humphrey expended between $3 and $4 million before winning the nomination

legally qualified,[124] yet a regulation or prohibition of spending during this period seems both advisable and feasible.[125]

In one-party areas where a primary victory is tantamount to an election, the amount of political broadcasting in the election process is effectively cut in half. This occurs because the expenditure ceiling permits only one-half the amount to be spent in the primary that is allowed for the general election. If one-party districts are inappropriate to our two-party political system, their elimination calls for an increased flow of information, not a barrier to the use of productive advertising. This is equally true in districts where the incumbent is heavily favored or where the primary contest for both parties is only a formality. Because any spending ceiling favors the incumbent or well-known citizen, special care must be taken to provide a primary limit which balances the increase in campaign costs with the informational needs of the electorate.

Additional problems occur in both primary and general elections because the seven cents per vote or $20,000 spending ceiling applies equally to all states. In some regions the maximum sum may be inadequate to allow even minimal use of the broadcast media.[126] In large metropolitan areas where the source of the media is outside the campaign district, and where 80 or 90 percent of the viewing audience cannot vote for the candidates, the cost per voter reached is exceedingly high. The operative effect of the spending ceiling in these situations is to limit the use of broadcasting. All candidates in such regions face an equal disadvantage, but this hardly compensates for the voters' lowered opportunity to see and listen to their candidates on the broadcast media.[127]

The basic difficulty arises, as President Nixon observed, because the formula for the spending ceiling resulted from legisla-

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at the Democratic convention. *What It All Cost,* ECONOMIST, Nov. 9, 1968, at 32.

124 The question of when a candidate is "legally qualified" seems unanswered, because S. 3637 defines neither "candidate" nor "legally qualified." In contrast, the Scott-Mathias campaign measure carefully defines "candidate" to include numerous actions designed to effectuate a person's nomination or election to public office. *See* S. 956, 92d Cong., 1st Sess. § 591(b) (1971).

125 *See, e.g.,* FLA. STAT. § 99.161(a)(e) (Supp. 1970).

126 116 CONG. REC. S18724 (daily ed. Nov. 23, 1970) (President's veto message). *But see id.* (daily ed. Nov. 23, 1970) (remarks of Senator Milton Young).

127 *See id.* S18732 (daily ed. Nov. 23, 1970) (remarks of Senator George Murphy).

tive compromise rather than research and analysis.[128] Herbert Alexander has noted that "[t]he amount of the limitation — seven cents per vote based on turnout in the last preceding election — must be arbitrary because political exigencies change and what was spent in one campaign may be inadequate for another."[129] One justification for the amount chosen for the spending ceiling is suggested by Senator Charles Goodell's comment in the debate following the President's veto of S. 3637: "We had to have some kind of figure. We had to set some limit and then try it out with experience."[130] A trial period may be necessary to test the appropriateness of any spending ceiling; but, the need for evaluation is an unacceptable justification for congressional failure to study the matter adequately in advance.

Even if the bill included an appropriate ceiling, the campaign costs not covered by the limitation raise even more serious problems. The bill covers neither broadcast production nor promotional expenses although these items may add up to one-third of the costs of air time.[131] Because of these loopholes, the legislation may stimulate use of sophisticated spot announcements rather than longer informational programs. Thus, the ceiling may eliminate extended discussion of the issues on radio and television.[132] If the objection to broadcast advertising is based upon increased utilization of sophisticated spot announcements, then the appropriate step is not to limit general broadcast spending but rather to restrict the number of those advertisements which can be purchased by each candidate.[133]

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128 *Id.* S17801 (daily ed. Oct. 12, 1970) (President's veto message). The spending limitation was added to S. 3637 in an amendment from the floor. *See* 116 CONG. REC. S5635 (daily ed. April 13, 1970) (remarks of Senator John Pastore); *id.* S5716-17 (daily ed. April 14, 1970).

129 *See 1970 Hearings* 95 (statement of H.E. Alexander).

130 *Id.* S18730 (daily ed. Nov. 23, 1970) (remarks of Senator Charles Goodell). As Representative Donald Brotzman observed in Subcommittee hearings on S. 3637, "I do not know where the 7 cents came from either; I hope we will get someone to testify who will take a realistic figure or peg it for what it is, an arbitrary figure." *1970 Hearings* 84.

131 See note 40 *supra* and accompanying text.

132 *See 1970 Hearings* 10 (statement of Dean Burch); 116 CONG. REC. S18731-32 (daily ed. Nov. 23, 1970) (remarks of Senator George Murphy).

133 *See generally* Weaver, *Dole Backs Curb on Campaign Fund*, N.Y. Times, March 5, 1971, at 16, col. 4. For a discussion of the impact of television "image-making" on the 1970 congressional elections, *compare Selling of the Candidates, 1970,*

The expenditure ceiling also emphasizes any financial disparity existing between the candidates. This is particularly troublesome where there is an incumbent seeking re-election. Any spending limitation tends to favor the incumbent; but also a ceiling on broadcast expenditures hinders the unknown challenger.[134] Because of its high audience impact, television is important to a person trying to present his views for the first time. Frequently the incumbent has gained years of casual broadcast coverage; the public has seen and heard him in their living rooms. Without extensive use of television the challenger may be unable to gain the same kind of informal, yet live, exposure.

The ceiling on broadcasting also encourages a shift of spending into nonbroadcast media.[135] As Senator Eastland reasoned,

> [o]ne has only to look at our attempts to ban cigarette advertising on television. On January 1, we will prohibit the use of this media for cigarette commercials, but it is now reliably predicted that the same money spent on television by the manufacturers will be channeled into the other media. This would be the pattern for a ceiling on television spending.[136]

President Nixon observed that the bill might even increase rather than decrease total spending because "[i]t is a fact of political life that in many congressional districts and states a candidate can reach more voters per dollar through radio and TV than any other means of communication."[137] This suggests that even if advertising rates for television and radio are escalating rapidly broadcasting should be the last medium to suffer from an expenditure ceiling.

One solution to these problems is to include all media within a spending ceiling. The power to do so may be found in the congres-

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NEWSWEEK, Oct. 19, 1970, at 34 *with Punctured Image: Deflation of Television Political Image Makers,* NEWSWEEK, Nov. 16, 1970, at 77; *see Assessing the Campaigners,* SCIENCE NEWS, Nov. 14, 1970, at 381.

134 See note 67 *supra.*

135 *See, e.g., 1970 Hearings* 101 (remarks of Paul Comstock), 116 CONG. REC. S17801 (daily ed. Oct. 12, 1970) (President's veto message); *id.* S18733 (daily ed. Nov. 23, 1970) (remarks of Senator Clifford Hansen); *id.* S18734 (daily ed. Nov. 23, 1970) (remarks of Senator Roman Hruska).

136 116 CONG. REC. S18735 (daily ed. Nov. 23, 1970) (remarks of Senator James Eastland); *see* TIME, Jan. 11, 1971, at 60; *id.,* March 22, 1971, at 73-74.

137 116 CONG. REC. S17801 (daily ed. Oct. 12, 1970) (President's veto message).

sional right to regulate interstate commerce, mailing rates, and the conduct of federal elections.[138] These federal powers are important in two additional respects. First, they provide a basis for requiring media cooperation in the enforcement of a spending ceiling. Second, while this assistance may be helpful, direct criminal and civil remedies against the offending candidate or committee also could be imposed.[139]

But as the Federal Bar Council observed,[140] any expenditure limitation raises serious constitutional questions under the first amendment by restricting a candidate's ability to disseminate his views and the public's ability to hear those views.[141] An expenditure for speech may be viewed as essentially the same thing under the first amendment as speech itself. For example, as New York Times columnist Tom Wicker inquired, "[i]f a candidate already had spent whatever amount the law permitted, would it be constitutional to prevent some individual or group from spending their own money to express support for him or opposition for his opponent?"[142] But to be effective, an expenditure ceiling must apply even if the spending has not been approved by the candidate.

The resulting restraint on individual political expression would be a serious limitation on the marketplace of ideas. Any constitutional objection, however, would seem to be greatest when directed toward a ceiling on total expenditures. As Senator Edward Kennedy states, such a limitation

> is a step that cannot be justified except under the most stringent circumstances, in accord with the standard of 'Clear and Present Danger,' established long ago by the Supreme Court as the test by which denials of free speech under the First Amendment must be measured. To me, no ceiling on

138 *See 1970 Hearings* 95 (statement of H.E. Alexander); 117 CONG. REC. S1915 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott).

139 *See, e.g.*, FLA. STAT. § 99.161 (Supp. 1970); S. 956, 92d Cong., 1st Sess. §§ 104, 209, 210 (1970).

140 FEDERAL BAR COUNCIL, COMMITTEE ON LEGISLATION, REPORT ON LEGISLATION TO PROVIDE REDUCED RADIO AND TV RATES TO CONGRESSIONAL CANDIDATES in *1970 Hearings* 115.

141 116 CONG. REC. S18733 (daily ed. Nov. 23, 1970) (remarks of Senator Thomas McIntyre); Wicker, *Controlling the Cost of '72*, N.Y. Times, Feb. 23, 1971, at 35, col. 3.

142 Wicker, *Controlling the Cost of '72*, N.Y. Times, Feb. 23, 1971, at 35, col. 1.

> total campaign spending in present circumstances can meet this test.[143]

Whether a carefully drafted ceiling on overall expenditures could protect the purity of the election process without abridging first amendment protections is a difficult and unresolved dilemma.

In contrast to a ceiling on all media, a limit on broadcast expenditures may be more easily justified under relevant first amendment standards. As *Red Lion Broadcasting Co. v. FCC*[144] indicates, the public owns the airwaves. Because the number of frequencies is limited, broadcasting activities may be licensed and regulated in the public interest. Thus, intelligent restraints on some expression may be appropriate in order to serve the greater purpose of encouraging a fair exchange of ideas.

The constitutional difficulties raised by expenditure ceilings suggest that alternative approaches should be considered. Several options are possible. As the Twentieth Century Fund reported,

> [i]f there were full public disclosure and publication of all campaign contributions and expenditures during a campaign, the voters themselves could better judge whether a candidate has spent too much. This policy would do more to protect the political system from unbridled spending than limits on the size of contributions and expenditures.[145]

A 1960 report of the Citizens Research Foundation discussed the value of publicity by noting that "an effective publicity system will create financial accountability, increase public confidence in the electoral process and curb excesses and abuses by increasing political risk for those who would undertake sharp practices."[146]

Although S. 3637 did not include provisions for increased disclosure, two bills introduced in early 1971 have taken this ap-

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143 Press release of Senator Edward Kennedy, Testimony on Campaign Financing and Election Reform Before the Senate Subcommittee on Communications, 92d Cong., 1st Sess., March 2, 1971. For a possible modification of the "clear and present danger" test, *see* Brandenburg v. Ohio, 395 U.S. 444 (1969).

144 395 U.S. 367 (1969).

145 TWENTIETH CENTURY FUND, ELECTING CONGRESS—THE FINANCIAL DILEMMA (1970), in 117 CONG. REC. S1914 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott).

146 CITIZENS' RESEARCH FOUNDATION, MONEY, POLITICS AND PUBLIC REPORTING (1960) in 117 CONG. REC. S1913 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott).

proach to election expenses. S. 956, principally cosponsored by Senators Scott and Mathias, establishes a "Federal Elections Commission" for this purpose.[147] Another proposal, introduced by Senator Edward Kennedy, places administration of disclosure under the General Accounting Office.[148] The Scott-Mathias bill does not provide expenditure ceilings, but the Kennedy version includes limits on broadcast spending similar to those found in S. 3637.[149] Full public disclosure does not appear to be incompatible with the concept of expenditure limitation. However, it cannot ensure that poorly-financed candidates will be able to afford adequate access to the media. Therefore, inclusion of both provisions in a campaign spending proposal seems advisable.

Limits on political contributions could also be used as an alternative to a spending ceiling. Although such limits could minimize the financial advantage held by candidates with large personal fortunes,[150] they would not curtail the rapid escalation of total campaign costs. Like full disclosure, limitation of private political contributions would seem most advisable when coupled with expenditure limitation.[151]

Other alternative methods might also ensure the availability of adequate campaign funding. President Johnson proposed a system of direct campaign sudsidies from the federal government for advertising, broadcast and travel expenses.[152] In the 1971 subcommittee hearings, Joseph Califano, Jr., Counsel of the Democratic National Committee, proposed that all presidential and congressional campaigns be underwritten with public funds.[153] The government underwriting of certain campaigns would provide a steady flow of financial assistance with roughly equal amounts provided to major parties or candidates. Present income tax incentives could also be increased to escalate the flow of pri-

147 S. 956, 92d Cong., 1st Sess. § 202 (1971).

148 S. 1121, 92d Cong., 1st Sess. tit. III (1971); *see* Micciche, *Kennedy Files Measure to Control Campaign Spending*, Boston Globe, March 5, 1971, at 12, col. 5.

149 S. 1121, 92d Cong., 1st Sess. § 402 (1971).

150 *See, e.g.*, S. 956, 92d Cong., 1st Sess. §§ 104-06 (1971); S. 1121, 92d Cong., 1st Sess. § 203 (1971).

151 See S. 1121, 92d Cong., 1st Sess. §§ 203, 403 (1971).

152 *Campaign Bills*, 224 ECONOMIST 33 (1967).

153 Weaver, *Dole Backs Curb on Campaign Fund*, N.Y. Times, March 5, 1971, at 16, col. 5.

vate contributions.[154] The advisability of using the tax system to provide indirect subsidies is dubious however.[155] Finally, a federal matching program could balance each private donation with a percentage payment to the given candidate by the government, thus maintaining the citizens' partisan preferences. Although each of these proposals has certain merits and weaknesses, a discussion of these characteristics is beyond the scope of this Note. In any event, if a spending ceiling were the appropriate alternative, Congress would surmount only part of the dilemma of regulating campaign spending. Of equal importance is the question of how the provisions of any ceiling, or any regulation, will be enforced.

D. *The Problem of Enforcement*

Enforcement of most campaign financing legislation is difficult.[156] Unfortunately, S. 3637 is no exception.[157] Repeal or suspension of the equal-time provision would cause only minor compliance problems, but enforcement of the fairness doctrine would be increasingly troublesome, especially if the repeal applied to all political candidates.

The *ex post facto* administrative procedures associated with the fairness standard provide little remedy to the candidate himself,

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154 *See, e.g.*, S. 734, 91st Cong., 2d Sess. (1970); S. 956, 92d Cong., 1st Sess. §§ 501-03 (1971); S. 1121, 92d Cong., 1st Sess. § 101 (1971). S. 956 provides a maximum $25 tax credit, or in the alternative, a maximum $100 tax deduction. S. 1121 provides a maximum tax credit of $50 for an individual and $100 for a married couple. The tax credit would generally be used by low- and moderate-income earners who do not itemize their deductions. The tax deduction would be used by higher income persons who itemize certain outlays. While the indirect government subsidy provided by a tax deduction increases proportionally with the taxpayer's marginal rate of tax, a tax credit equally subsidizes the donations of all taxpayers. *See* 117 CONG. REC. S1915 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott); Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 720-25 (1970).

155 *See* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

156 *See* Micciche, *Kennedy Files Measure to Control Campaign Spending*, Boston Globe, March 5, 1971, at 12, col. 8. *See* TWENTIETH CENTURY FUND, ELECTING CONGRESS — THE FINANCIAL DILEMMA in 117 CONG. REC. S1914 (daily ed. Feb. 25, 1971) (remarks of Senator Hugh Scott); McMasters, *Kennedy Seeks Campaign Reform*, Boston Herald Traveler, March 5, 1971, at B9, col. 7.

157 *See* 116 CONG. REC. S18724 (daily ed. Nov. 23, 1970) (President's veto message); *id.* at S18728 (remarks of Senator Robert Dole); *id.* at S18732 (remarks of Senator George Aiken); *id.* at S18734 (remarks of Senator Roman Hruska).

although their deterrent value may discourage improper station conduct. The presently understaffed FCC[158] will face increased monitoring and adjudicative responsibilities in order to ensure an appropriate dissemination of all points of view. Limiting the equal-time requirements to presidential and congressional elections would diminish this problem. Similar effects would follow from the FCC proposal to delete the equal-time requirements only as applied to fringe candidates.[159]

The provision limiting broadcast advertising rates to the "lowest comparable unit charge" also invites enforcement problems. The wording of the amendment to section 315(b) is dangerously similar to the present version.[160] Because neither provision clearly indicates the legality of negotiated advertising rates, the term "unit charge" may still allow the provision of lower rates to financially valuable volume accounts. As John Summers, Chief Counsel for the National Association of Broadcasters, observed,

> I am not sure the legislation mentions the rate card. It is possible that you might have the same problem with respect to legislation. It says "lowest unit rate." [*sic*] Of course, that could be a negotiated rate on the side, again.[161]

Violations of the rate-equality provision also may be difficult to detect. Neither the FCC nor the candidate will know precisely what rates are charged favored commercial candidates,[162] since individual stations are not required to disclose their rate schedules to the FCC.

The most severe enforcement problems relate to the limitation of campaign expenditures. Federal law furnishes ceilings on overall campaign spending.[163] However, given the numerous ex-

158 *See generally, 1970 Hearings* 14 (statement of Dean Burch); *id.* 54 (remarks of Russell Hemenway).

159 See note 59 *supra.*

160 Communications Act, 47 U.S.C. § 315(b) (1964) presently provides: "The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes." S. 3637 reads: "The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office shall not exceed the lowest unit charge of the station for the same amount of time in the same time period." S. 3637, 91st Cong., 2d Sess. § 1 (1970).

161 *1970 Hearings* 106 (remarks of John Summers).

162 *Id.* 12 (statement of Dean Burch).

163 Federal Corrupt Practices Act, 2 U.S.C. § 248 (1964).

ceptions, and the unreasonably low limits, and the loopholes, the provisions have been ineffective. S. 3637 stipulates that the limitation applies to all advertising submitted in behalf of the candidate. Because no station may charge for air time used on behalf of a candidate without proper written authorization from the candidate's representative, unauthorized usurpation of the candidate's allotted broadcast time is unlikely. However, no provision considers expenditures by committees which oppose one candidate, but are not affiliated with any other contestant.[164] Expenditures by various individuals and organizations speaking on individual issues are likewise unregulated.

Clearly, occasional references to issues and candidates can be excluded from the total spending figure without substantial effect.[165] In cases where the broadcasts are made by a group which is not associated with a candidate, the fairness doctrine could be invoked to require that comparable time be afforded for a reply by any adversely affected candidate.[166] This time could be provided in addition to that purchased under the spending ceiling. But such a system could add considerably to the problems inherent in the application of the fairness standard.[167] FCC fairness regulations presently cover political editorials and certain personal attacks made in the context of controversial public issues.[168] Although present rules, coupled with competent station discretion, should minimize this problem, additional regulation or legislation in this area seems advisable.

While these problems may be limited by appropriate implementation of the fairness standard, the issue of record-keeping may be more serious. The legislation prevents broadcasters from charging for air time unless the candidate's authorized representative certifies that the payment for such charge will not violate the candidate's spending limit. Yet the bill makes no provision for the compilation of advertising records from the various radio

164 *See* 116 CONG. REC. S1780 (daily ed. Oct. 12, 1970) (President's veto message); *id.* S18734 (daily ed. Nov. 23, 1970) (remarks of Senator Roman Hruska).

165 *Id.* S18728 (daily ed. Nov. 23, 1970) (remarks of Senator John Pastore).

166 *Id.* S18726-27 (daily ed. Nov. 23, 1970) (remarks of Senator John Pastore and Senator Jack Miller).

167 See text accompanying notes 82-83 *supra*.

168 *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

and television stations.[169] The Chairman of the FCC observed that his commission has neither the staff nor the facilities to respond to a complaint by surveying the broadcast stations in a candidate's campaign area.[170] For presidential candidates a poll would have to include every broadcast station in the country. For a senatorial candidate the survey would have to encompass all stations within the state as well as those in adjacent areas.

If these evidentiary difficulties can be overcome, several alternative means of enforcement are possible. First, a number of administrative remedies against a broadcast licensee which willfully and knowingly participates in a violation of the provision are presently available under the Communications Act of 1934.[171] Second, the FCC could promulgate rules requiring the broadcast station to declare that it was not a knowing and willful party to violation of the section when it obtained the certified representation by the candidate's representative.[172] In addition, other sanctions are available to the Congress and the Department of Justice. For example, any person who willfully and knowingly fails to comply with the Communications Act is open to criminal prosecution under section 501 of the act.[173] Finally, the House and Senate might refuse to seat a successful candidate found to be in violation of the limitation.[174]

Effective implementation of these remedies may be difficult however. Accurate broadcast expenditure records may not be compiled by the day the winning candidate should take office.[175] In previous elections, the FCC has been unable to complete tabulation of its biennial political broadcast survey until well into the following year.[176] While administrative actions against offending stations may encourage broadcast industry compliance,

169 *See* 116 CONG. REC. S18734 (daily ed. Nov. 23, 1970) (remarks of Senator Roman Hruska).

170 *1970 Hearings* 14 (statement of Dean Burch).

171 *See id.*

172 *Id.*

173 Communications Act, 47 U.S.C. § 501 (1964).

174 *Cf.* Powell v. McCormack, 395 U.S. 486 (1969) (exclusion allowed only if elected candidate fails to meet the formal requirements imposed by article I, *i.e.*, age, citizenship, and residency).

175 *See* 116 CONG. REC. S17801 (daily ed. Oct. 12, 1970) (President's veto message).

176 *1970 Hearings* 14 (statement of Dean Burch).

such remedies would have little impact on the candidate responsible for the violation. If enforcement of the expenditure ceiling is to be effective, additional criminal and civil remedies must be provided.[177]

IV. Conclusion

Some relief from the rapid escalation of political campaign costs seems necessary. The first stage of solving the campaign spending problem requires its recognition; the more difficult step involves selection of the most appropriate approach to the dilemma. The decision involves two issues. First, the Congress and the President must determine whether to wait for the passage of an all-inclusive measure or to initiate a first step toward the control of increasing campaign expenses. Passage of a limited bill might decrease the impetus for more comprehensive steps in the future.[178] While this danger was not emphasized during the initial consideration of S. 3637, the concept of a comprehensive approach was cited by many congressmen in sustaining the veto of the bill.

In contrast, failure to take some timely action may only exacerbate the problem. While the delay might lead to the development of a more comprehensive approach, it could also result in the enactment of no legislation. The rhetoric of reform over the past decade has done little to catalyze congressional action toward a comprehensive measure.[179] As Senator Pearson observed in reference to S. 3637, "If we turn down this opportunity to start the process of meaningful campaign finance reform, then we will have to begin at the bottom of the long legislative trail before we reach this point again."[180] With respect to the President's veto, he further noted, "If the American government, and by that I mean the President and the Congress, had used this kind of reasoning with respect to air pollution, I dread to think what the state of

177 *See, e.g.*, S. 956, 92d Cong., 1st Sess. (1971); S. 1121, 92d Cong., 1st Sess. (1971).

178 *See, e.g.*, 116 Cong. Rec. S18735 (daily ed. Nov. 23, 1970) (remarks of Senator James Eastland).

179 See note 5 *supra*.

180 *See, e.g.*, 116 Cong. Rec. S18733 (daily ed. Nov. 23, 1970) (remarks of Senator James Pearson).

the Nation's health would be today."[181] In the last analysis, the immediate impact of the limited approach seems preferable to the danger that the Congress will not pass all-inclusive legislation.[182]

Even if an initial step seems advisable, the second issue is whether S. 3637 is an acceptable approach. Later steps to widen the regulation of campaign financing cannot be built upon a poor foundation.[183] If S. 3637 proved inappropriate, sufficient harm might occur during the interim between enactment and repeal to warrant its initial rejection.

As this Note suggests, S. 3637 leaves many problems unsolved. Despite its shortcomings, the bill begins with the most appropriate sector — radio and television broadcast advertising. Because this public service area is presently subject to federal regulation, concepts such as "fairness" and "lowest unit charge" are not novel governmental encroachments upon free enterprise. Perhaps most important, this sector is one of the prime areas of escalating costs. Comprehensive reform of campaign financing is necessary. Given the need for some immediate check on rising campaign costs, then the general approach offered by S. 3637, with the previously mentioned modifications, seems to be an appropriate step toward a final solution to the problem.

*H. Leonard Court**
*Charles E. Harris**

APPENDIX

S. 3637, 91st Cong., 2d Sess. (1970)

An act to revise the provisions of the Communications Act of 1934 which relate to political broadcasting

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the first sentence of section 315(a) of the Communications Act of 1934 (47 U.S.C. 315(a)) is amended by inserting before

181 *Id.* S18725 (daily ed. Nov. 23, 1970) (remarks of Senator John Pastore).

182 *But see* S. 1, S. 9, S. 382, S. 402, S. 596, S. 1039, 92d Cong., 1st Sess. (1971); H.R. 824, H.R. 1441, H.R. 4086, H.R. 4340, H.R. 5087, H.R. 5088, H.R. 5089, H.R. 5090, H.R. 5091, H.R. 5092, H.R. 5093, H.R. 5094, H.R. 5095, H.R. 5096, H.R. 5097, H.R. 5098, 92d Cong., 1st Sess. (1971); *cf.* Weaver, *Senate Unit Maps Campaigning Curb,* N.Y. Times, April 22, 1971, at 19, col. 1.

183 116 CONG. REC. S18735 (daily ed. Nov. 23, 1970) (remarks of Senator James Eastland).

* Members of the class of 1972 at the Harvard Law School.

the colon the following: ",except that the foregoing requirement shall not apply to the use of a broadcasting station by a legally qualified candidate for the office of President or Vice President of the United States in a general election."

(b) Section 315(b) of such Act is amended to read as follows:

"(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office shall not exceed the lowest unit charge of the station for the same amount of time in the same time period."

SEC. 2. Section 315 of the Communications Act of 1934 is further amended by redesignating subsection (c) as subsection (f) and by inserting immediately before such subsection the following new subsections:

"(c)(1) For purposes of this subsection, the term 'major elective office' means the office of President, United States Senator or Representative, or Governor or Lieutenant Governor of a State.

"(2)(A) No legally qualified candidate in an election (other than a primary election) for a major elective office may spend for the use of broadcasting stations on behalf of his candidacy in such election a total amount in excess of —

"(i) 7 cents multiplied by the number of votes cast for all legally qualified candidates for such office in the last preceding general election for such office: or

"(ii) $20,000, if greater than the amount determined under clause (i) (or if clause (i) is inapplicable).

"(B) In the case of a candidate for United States Senator in a State in which the total number of votes cast for all legally qualified candidates for Senator in the last preceding election for Senator was less than the greatest total number of votes cast for all legally qualified candidates in any election (held after such preceding senatorial election) for a statewide office in such State, the amount determined under subparagraph (A)(i) shall be 7 cents multiplied by such greatest total number of votes for statewide office.

"(3) No legally qualified candidate in a primary election for nomination to a major elective office, other than President, may spend for the use of broadcasting stations on behalf of his candidacy in such election a total amount in excess of 50 per centum of the amount determined under paragraph (12) with respect to the general election for each office.

"(4) Amounts spent for the use of broadcasting stations on behalf of any legally qualified candidate for major elective office (or for nomination of such office) shall, for the purposes of this subsection, be deemed to have been spent by each candidate. Amounts spent for the use of broadcasting stations by or on behalf of any legally qualified candidate for the office of Vice President of the United States shall, for the purposes of this subsection, be deemed to have been spent by the candidate for the office of President of the United States with whom he is running.

"(5) No station licensee may make any charge for the use of such station by or on behalf of any candidate for major elective office (or for nomination to such office) unless such candidate, or a person specifically authorized by such candidate in writing to do so, certifies to such licensee in writing that the payment of such charge will not violate paragraph (2) or (3) whichever is applicable.

"(d) If the Commission determines that —

"(1) a State by law —

"(A) has provided that a primary or other election for any office of such State (other than Governor or Lieutenant Governor) or of a political subdivision thereof is subject to this subsection, and

"(B) has specified a limitation upon total expenditures for the use of broadcasting stations on behalf of the candidacy of each legally qualified candidate in such election, and

"(2) the amount of such limitation does not exceed the amount which would be determined for such election under subsection (c) had such election been an election for a major elective office, or nomination thereto, then no station licensee

may make any charge for the use of such station by or on behalf of any legally qualified candidate in such election unless such candidate, or a person specifically authorized by such candidate in writing to do so, certifies to such licensee in writing that the payment of such charge will not violate such limitation upon total expenditures.

"(c) For the purposes of this section, the term 'broadcasting station' includes a community antenna television system, and the terms 'licensee' and 'station licensee' when used with respect to a community antenna television system, mean the operator of such system."

SEC. 3. (a) The amendment made by subsection (b) of the first section of this Act shall take effect on the thirtieth day after the date of its enactment.

(b)(1) The amendments made by section 2 of this Act, insofar as they relate to primary elections, shall take effect on January 1, 1971. Except as provided in paragraph (2), the amendments made by section 2, insofar as they relate to general elections, shall apply with respect to amounts paid for broadcast time used after the thirtieth day after the date of enactment of this Act.

(2) If the Federal Communications Commission determines that —

(A) on August 12, 1970, a person is a legally qualified candidate for major elective office (or nomination thereto),

(B) there are in effect on such date one or more written agreements with station licensees for the purchase of broadcast time to be used after such thirtieth day on behalf of his candidacy for such office (or nomination thereto), and

(C) such agreements specify amounts to be paid for the purchase of such time to be used after such thirtieth day which, in the aggregate, exceed the limitation imposed by section 315(c)(2) of the Communications Act of 1934 with respect to the general election for such office,

then such amendments shall not apply to any of the candidates for election to such office in an election held before January 1, 1971.

FEDERAL LAND DISPOSAL AND THE NEED FOR URBAN OPEN SPACE

Introduction

In the recent surge of concern for the environment and the quality of urban life, attention has been focussed by the President[1] and others[2] on the possibility of using urban real estate currently owned by the federal government to meet the growing need for park and recreation land in urban areas. Unique parcels of federally owned property frequently outlive their value to federal users.[3] Once such land is determined to be in excess of federal needs, its disposition is entrusted to the General Services Administration (GSA) acting pursuant to federal legislation. Typically the land is sold by the GSA to private parties at its fair market value, swapped with privately owned land,[4] or transferred to another public user.[5] It has been argued that much of this federal land is especially suited to use as city park and recreational areas. The disposition process, it is said, fails to permit adequate consideration of this alternative.

This Note will examine the desirability and feasibility of using federally owned urban real estate for parks and recreation. It will trace the history of federal statutes governing the disposal of this land, with special emphasis on recent attempts to establish more flexible policies. Finally it will discuss possible means available to local citizens groups for challenging the disposition of this urban property.

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1 ENVIRONMENTAL CONTROL — MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 225, 91st Cong., 1st Sess. (1970), reprinted at 116 CONG. REC. H743, H746.

2 The research forming the basis of this Note was undertaken by the Harvard Student Legislative Research Bureau in answer to a request from the San Francisco Planning and Urban Renewal (SPUR) Association, a private urban conservation group, which noted several difficulties in present land disposal mechanisms, particularly with regard to San Francisco Bay area properties. SPUR is a volunteer community improvement organization which began in 1911, and assumed its present identity in 1959.

3 *See, e.g.*, text following note 19, *infra*.

4 *See, e.g.*, text following note 23, *infra*.

5 This may be another federal agency in need of the property. See text at note 74. Since 1944 non-federal public and non-profit entities have been eligible to receive the property for various purposes. See text at note 42.

I. The Problem — Open Space in the City

The need for publicly held open space land in urban areas has become an issue of high priority as the value of such land has become recognized. The principal purpose of public, urban open space land is to provide areas for park and recreational uses. It may also provide a physical identity and cohesiveness to a neighborhood. As a visual amenity, open space land ameliorates urban blight, curbs urban sprawl, and affects the character of nearby land development. Finally, it preserves biological processes of the land which may be significant to ecology and scenery.[6]

Despite the recognition of the importance of open space land, local governments do not satisfy their open space requirements. Most cities have been unable to meet the open space standards that they have set for themselves.[7] They have also been unable to meet the "national standards" of ten acres of park land for every 1,000 urban residents.[8]

PARK ACREAGE PER 1,000 RESIDENTS IN 15 SELECTED CITIES[9]

City	Estimated population 1968	Park acreage per 1,000 residents		
		Actual 1960	Estimated 1968	Estimated 1973
New York	8,171,000	4.5	4.6	4.8
Chicago	3,587,000	1.9	2.0	2.0
Los Angeles	2,873,500	4.8	4.5	4.2
Baltimore	923,900	6.0	6.2	6.3
San Antonio	722,400	5.0	5.8	6.0
St. Louis	684,800	3.6	4.2	4.5
Pittsburgh	564,000	3.6	4.1	NA
Atlanta	516,600	NA	4.9	NA
Minneapolis	493,100	11.5	11.4	NA
Nashville	457,500	20.5	11.5	12.0
Oakland	391,300	5.7	6.2	6.3
Tampa	324,900	NA	3.7	NA
Dayton	281,000	9.5	10.5	12.7
Peoria	137,900	17.0	46.0	50.0
Portland	71,400	8.2	9.8	18.0

6 *See generally*, E. Williams, Open Space; The Choices Before California (1969).

7 National League of Cities, Recreation in the Nation's Cities: Problems and Approaches 3-4 (1968). For some examples of open space standards that cities have individually set for themselves see Bureau of Outdoor Recreation, Space Standards 1-11 (1970).

8 *Id.*

9 National League of Cities, Recreation in the Nation's Cities: Problems and

Furthermore, the demand for parks and outdoor recreation in urban areas will surely increase. This demand is a function of population, mobility, leisure time, and income.[10] An increase in any of these factors will cause an increase in demand but leisure time is by far the most important factor. A percentage increase in leisure time has a greater effect on demand than does an equal percentage increase in income.[11] By the year 2000 it is estimated that employed persons may expect a one-third increase in their leisure time.[12]

To provide more urban open space land, planning has proceeded at both the local[13] and federal level.[14] One common form of plan sets aside cash for the purchase of open space land. Such plans face two problems typically; the cash is insufficient, and the land is too valuable as a revenue producer to remove it from the property tax rolls. The federal government's approach to the acquisition of open space land has been to transfer directly to local governments surplus federal land which is suitable for parks and recreation. These surplus land disposals have shared one fault of the cash grant plans. Although the cost of the land has been written down to levels reaching fifty percent in some cases it has still been too great.[15] The most recent amendment to park

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APPROACHES 5 (1968). This study includes only park land that is available to the public and not land which is only privately accessible.

10 *See* M. CLAWSON & J. KNETSCH, ECONOMICS OF OUTDOOR RECREATION 41-112 (1966).

11 OUTDOOR RECREATION RESOURCES REVIEW COMMISSION, PROSPECTIVE DEMAND FOR OUTDOOR RECREATION, ORRC STUDY REPORT 26, at 37 (1962).

12 *Id.* 29.

13 *See, e.g.*, BUREAU OF OUTDOOR RECREATION, DEP'T OF INTERIOR, OUTDOOR RECREATION ACTION REPORT No. 1, at 36-42 (1966); CALIF. LEGIS. JT. COMM. ON OPEN SPACE LAND, FINAL REPORT (1970).

14 Open Space Land Act of 1961, 42 U.S.C. § 1500 (1964); Land and Water Conservation Act of 1963, 16 U.S.C. § 4601 (1964). An example of proposed legislation may be found in a Harvard Student Legislative Research Bureau Project, *Legislation to Preserve and Control Open Space Land*, 6 HARV. J. LEGIS. 57 (1968).

15 Under the Federal Surplus Property Act of 1944, *as amended*, 50 U.S.C. § 1622 *et seq.* (1964), local governments could acquire surplus land suitable for park and recreational use at a cost of 50 percent of its fair market value. From 1948 to June 1970, there was an annual average disposition of 2,700 acres at a fair market value of $1,760,103. (Source: Bureau of Outdoor Recreation, Dep't of Interior). Compared to all federal surplus land disposals for the period of 1964 through the first half of 1969, park and recreational disposals for that period accounted for only 5 percent of the total appraised value. S. REP. No. 227, 91st Cong., 1st Sess. 6 (1969). Both the absolute and comparative figures are low. The Citizens Advisory Committee on Recreation and Natural Beauty found that the price of 50 percent of fair market value was a great deterrent to local governments seeking to make

and recreation disposal statutes is Public Law 91-485[16] (hereinafter referred to as the Full Discount Act). This act expands the traditional write-down approach by lowering the cost by a discount ranging up to one hundred percent, if the property is suitable for park or recreation use.[17] This favorable attribute of the Full Discount Act, however, is balanced by the discretion placed with the Administrator of the General Services Administration (the Administrator). Each conveyance is subject to final approval by the Administrator. This provision parallels previous disposal statutes which were developed in accordance with the philosophy of utilizing GSA as a "business manager" in charge of economical usage of federal property. This conception of the GSA role, coupled with the broad grant of discretion residing therein, may still prove a hindrance to transfers of property.

There are other advantages to a federal transfer program, however. A transfer disposal scheme, for example, saves administrative costs; the costs to the federal government are only those of transferring the deed. There is no need to supervise how a sum of money is spent. The administrative costs to the local government of purchasing land from private owners by means of a cash grant include the expense of negotiations or condemnation proceedings. The latter method of acquisition especially involves substantial expenses and will most likely be necessary in urban areas where many lucrative competing uses make the private owner reluctant to dispose of his land.

More important than savings on administrative costs is the possibility that direct transfer assistance lessens the chance of an irretrievable loss. A cash grant system forces a city to compete with limited funds in an open market. In such a market cities with the most resolute intentions run the risk of being outbid by private developers.[18] The developers' plans also raise the hope of an

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use of surplus disposal land for park and recreational purposes. ANNUAL REPORT TO THE PRESIDENT OF PRESIDENT'S COUNCIL ON RECREATION AND NATURAL BEAUTY 30 (1968).

16 84 Stat. 1084 (1970).

17 A complete analysis of the Full Discount Act, its provisions, and the disposal statutes it amends and accompanies may be found in section III of this Note.

18 Under a cash grant program the translation of public desire for open spaces into a sum of money is time consuming and expensive. For this reason the city's purchasing power may not reflect the public's current needs, and hence the argu-

enlarged tax base and this temptation must deter some cities from unqualified pursuit of open spaces. Since federal lands add little or nothing to real property tax revenues, however, the direct transfer to another non-tax entity does not seem insufferable. These points are important for once the land is transferred to a private party and developed it is not likely to be retrievable for open spaces. Local government will again be chary of tax revenues and any land-use change will require expensive condemnation and clearing costs. Thus, the one-time-only situation magnifies the importance of at least offering the local government a chance to acquire the land.

II. An Illustration: San Francisco's Forts

The San Francisco Bay Area presents a palpable example of how uniquely valuable urban open spaces are lost to a combination of urban pressures and unresponsive governmental policies. A major open space resource of the Bay Area is a group of seven military installations — Forts Barry, Baker, Cronkhite, Funston, Mason, Miley and the Presidio — located at various points along the shore of San Francisco Bay. With the exception of the Presidio (which serves as west coast headquarters of the United States Army) these forts are of marginal military usefulness. The Army has already declared Forts Miley and Funston, and 39 of the 65 acres of Fort Mason to be in excess of its needs, leaving the General Services Administration (GSA) responsible for their further disposition.[19] They represent an unusual example of urban property adaptable to park and recreation use. They are located near a large population center, easily accessible by public transportation, fairly undeveloped, and reputedly without scenic parallel — yet their future use is in doubt.

These seven forts, together with Alcatraz and Angel Islands, and several other sites now in government and private hands, tenta-

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ment is dubious that the open market constitutes the appropriate regulator of how much open space should be preserved.

19 Letter to Harvard Journal on Legislation from E. A. Saylor, Jr., Property Management and Disposal Service, Regional Office, GSA (San Francisco), March 3, 1971 (on file in office of Harvard Student Legislative Research Bureau) [hereinafter cited as GSA letter].

tively comprise the proposed Golden Gate National Recreation Area, which has long been under study at the federal and state level.[20] Separately, the state of California has, in its comprehensive outdoor recreation plan, proposed that Forts Barry, Baker, and Cronkhite become the Marin Headlands State Park. But while planning goes on at an uncertain pace, there is fear that in its zeal for efficient management of governmental resources GSA may prevent the property from ever realizing its recreational potential.[21]

There is much evidence to support these fears. The GSA has attempted to locate non-military government activities at the forts, rather than leaving the land open for recreation. At Fort Miley GSA attempted to build a large warehouse for the Federal Archives Service, one of its subdivisions. The facility when completed would have occupied nearly three and one-half acres of potentially prime park land overlooking the Golden Gate; its bulk would have destroyed views from neighboring acreage. The plan was dropped after considerable pressure from citizen planning groups.[22] Similar pressure halted an attempt to locate a Food and Drug Administration office building on a wooded, seven-acre site at the Presidio.[23]

In addition to building upon suitable open space sites, GSA in San Francisco is attempting to sell such sites in the private development market in which local government cannot hope to compete. The transaction may be a sale for cash; often, however, it is an exchange of the federal surplus holding for land that is already held by the private developer and that fulfills the current needs of federal government. Whether the transaction is one of sale or exchange, the loss is always irreversible. The gain to the

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20 *See, e.g.*, H.R. 18922, 91st Cong., 2d Sess. (1970) (bill to establish Juan Manuel de Ayala National Recreation Area at the Golden Gate headlands in California); and Calif. Assembly J. RES. No. 53 (1970) (request that the President and Congress establish a Golden Gate National Recreation Area).

21 *See* San Francisco Planning and Urban Renewal Association SPUR Newsletter No. 45, Jan. 1970, and No. 48, June 1970.

22 *See* Calif. Assembly J. RES. No. 54 (1970) (request that GSA find another site) and GSA letter (plans dropped because of public opposition).

23 Telephone interview with Michael Fischer, Associate Director of SPUR (February 9, 1971). The GSA gave the further reason that the Presidio site had been included in the property evaluation review called for under Executive Order 11508. GSA Letter.

exchanging agency is obvious; it has avoided seeking an appropriation to do directly what it has done indirectly. The private owner is free to develop the land as he sees fit. At no time in the disposal process is the public given the opportunity to conserve the property for park use.

Examples of the land exchange technique abound in San Francisco. The National Forest Service, desiring to acquire land on the shore of Lake Tahoe, is seeking title to Fort Funston in order to trade parcels with the private owner.[24] A similar proposal has been made for Fort Mason, a 65–acre site of great scenic potential on the northeast shore of San Francisco. Thirty-nine of the installation's acres have been found excess to the Army's needs and turned over to the GSA. The GSA, however, needs an office building and motor pool in downtown San Francisco. Thus, it hopes to convey the Fort Mason site to a private developer in exchange for the needed facilities downtown. The economies of the exchange require heavy development of the Fort Mason site.[25] The city would be able to control use of the site only through its zoning power which, although subject to pressures of public opinion, may not be amenable to legal challenge on environmental grounds.

III. Federal Surplus Land Legislation

As noted above, under the Full Discount Act, the General Services Administration has final discretion over the disposal of federal surplus land. This discretion includes whether a local government will receive surplus land, and at what price, even though the Act is arguably intended to read as providing up to 100% discount. A comparison of current national policy with the history of land disposal legislation shows that the current act is the product of a desire for statutory symmetry in the area of federal property management. It is not a fresh response to a reordering of priorities. Rather than dictating new statutory con-

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24 GSA Letter.

25 San Francisco Examiner, June 5, 1970, at 1, col. 5. One possible plan for private development entails ten 45-story apartment buildings. This would drastically interfere with the now spectacular views northward onto the bay from various neighboring sites.

tent, policy in the light of new legislation may still be influenced by old statutory contours.

A. *A Public Policy Expressed*

In his environmental message to Congress on February 10, 1970, President Nixon acknowledged that recreational facilities were to be ranked "among the most vital of our public resources," and that "plain common sense argues that we give greater priority to acquiring now the lands that will be so greatly needed in a few years."[26] He went on to aver that "good sense" would argue that "the Federal Government itself, as the nation's largest landholder, should address itself more imaginatively to the question of making optimum use of its own holdings in a recreation-hungry era."[27] The proposals the President put forward to implement these "good sense" arguments included: (1) full fiscal year 1971 funding through the Land and Water Conservation Fund[28] for additional park and recreation facilities;[29] (2) a review by the Administrator of the GSA and the heads of all federal agencies of "all Federally owned real properties that should be considered for other uses" (with a special emphasis on "identifying properties that could appropriately be converted to parks and recreation areas, or sold, so that proceeds can be made available to provide additional park and recreation lands");[30] and (3) a proposal that "the Department of the Interior be granted the authority to convey surplus real property to local and state governments for park and recreation purposes at a public benefit discount ranging up to 100 percent."[31] The President also indicated that he intended to set up a Property Review Board to review the GSA reports and make recommendations to him regarding properties to be converted or sold.[32] An

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26 H.R. Doc. No. 225, *supra* note 1.

27 *Id.*

28 Established by the Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, 78 Stat. 897 (1964). 16 U.S.C. §§ 460d, 4601-4 to -11 (1964).

29 H.R. Doc. No. 225, *supra* note 1.

30 *Id.*

31 *Id.*

32 On Feb. 8, 1971, in his "First Annual Report on the State of the Nation's Environment," President Nixon announced that the Review Board had identified 40 pieces of surplus Federal real property "with high potential for park use," and that five of these were then available for conversion to park use. 117 CONG. REC. H505, H510 (daily ed. Feb. 8, 1971). Such executive action is commendable, but if

Executive Order,[33] "Providing for the Identification Unneeded Federal Real Property," which President Nixon issued on February 12, 1970, mandated the review board and detailed responsibilities further to include recommendations on "conflicting claims on, and alternative uses for, any property listed in such reports."[34]

On the same day the President delivered the environmental message, the Secretary of the Interior, Walter J. Hickel, submitted to Speaker of the House, John W. McCormack, a draft of proposed legislation which "would carry out certain recommendations in the President's message on the environment which are concerned with parks and public recreation."[35] The cover letter explicitly predicted that the upcoming real property review would result in the availability of "much additional Federal land which can be made available for park and recreation purposes or which can be sold and the proceeds transferred to the Land and Water Conservation Fund for such purposes."[36] This draft, essentially unchanged, became the Full Discount Act on October 22, 1970.[37] This Note will provide an analysis of the act's provisions and will discuss whether it will mean anything new to the possible emergence of new, urban parks and recreational facilities. A look at the predecessors of the Full Discount Act, as well as some of the major alternatives proposed during the 91st Congress provides a useful backdrop for analysis of the present statute.

B. *The Development of Federal Land Disposal Legislation*

Under the Surplus Property Act of 1935,[38] surplus[39] federal real property was either leased or sold to the highest bidder. The

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it does not continue in the future, dependence on the statutory disposal system will have to suffice.

33 Exec. Order No. 11508, 35 Fed. Reg. 2855. This order seems to have been made primarily as a prod, since there were statutory provisions requiring the federal agencies to conduct such an on-going review and reporting at all times; see 40 U.S.C. §§ 483(b), (c) (1964).

34 35 Fed. Reg. 2856.

35 H.R. REP. No. 1225, 91st Cong., 2d Sess. 15 (1970); H.R. REP. No. 1313, 91st Cong. 2d Sess. 5 (1970).

36 H.R. REP. No. 1225, 91st Cong., 2d Sess. 15 (1970); H.R. REP. No. 1313, 91st Cong. 2d Sess. 5 (1970).

37 84 Stat. 1084.

38 Ch. 744, 49 Stat. 885.

39 See text at note 74 *infra* for federal meaning of "surplus."

Surplus Property Act of 1944[40] was intended to provide for the post-World War II transition to a peace-time economy, not to establish a permanent procedure for the disposal of surplus property. No special discount was provided in this act for the purchase of parks, recreational facilities or historic monuments.

The Surplus Property Act of 1944 provided that surplus federal real property could be disposed of to public or non-profit institutions for educational, medical, and public health purposes.[41] The Surplus Property Board[42] would determine the cost, which could be lowered to a 100 percent discount. In computing the cost, the board was to take into account any benefit which had accrued or might accrue to the United States from the use of such property by the particular institution.[43] It would also dispose of the property in such a way that the institution was afforded "an opportunity to fulfill, in the public interest, their legitimate needs."[44] The initiative for making such transfers lay with the board rather than with the agency then holding the property.[45] A 1947 amendment[46] made available for transfer to state and local entities both real and personal property for public airport purposes, "without monetary consideration to the United States,"[47] but subject to conditions determined by appropriate federal officials.[48]

Surplus federal real properties were explicitly made available to states and their political subdivisions for park or recreational purposes under a 1948 amendment[49] to section 13 of the Surplus Property Act of 1944.[50] In the Senate Report on the amendment, it is stated that the measure was to give transactions such as these "a priority immediately following that given transfers among

40 Ch. 479, 58 Stat. 765.

41 § 13(a)(1)(A), (B), 58 Stat. 765, 771.

42 Established by *id.* § 5, 58 Stat. 768. When the Act was later repealed, ch. 288, Title VI, § 602(a)(1), 63 Stat. 377, 399 (1949), the Board's duties were transferred to the General Services Administration. *See id.* § 105, 63 Stat. 381.

43 § 13(a)(1)(C), 58 Stat. 765, 771.

44 *Id.* § 13(a)(2).

45 § 12(a), (b), 58 Stat. 765, 770, repealed in 1949; see note 42 *supra.*

46 Act of July 30, 1947, § 2, 50 U.S.C. § 1622(g) (1964).

47 50 U.S.C. § 1622(g)(1) (1964).

48 *Id.*

49 Act of June 10, 1948, ch. 433, 62 Stat. 350, continued in effect by the Federal Property and Administrative Services Act of 1949, ch. 288 Title VI, § 602(a)(1), 63 Stat. 377, 399.

50 58 Stat. 765, 770.

federal agencies, and for airport purposes."[51] By regulation, if the Secretary of the Interior had determined that the specific parcel was suitable and desirable for such uses, then the "disposal agency" (that is, the executive agency[52] designated by the predecessor of the present General Services Administration to dispose of surplus property[53]), was authorized, providing he had the approval of the Administrator, to make a conveyance of the park property to the particular government entity.[54] The price for park or recreational purposes was to be fifty percent of the fair value of the property based on its "highest and best use" at the time of the offering.[55] Historic monuments could be obtained for nothing, subject to certain qualifications.[56] The success of this cost formula has not been especially striking.[57]

The next development in federal property disposal law was the Federal Property and Administrative Services Act of 1949.[58] It was an attempt to respond to the "need for improved and efficient property management programs," and "to simplify the procurement, utilization, and disposal of Government property."[59] This act gave the GSA the responsibilities of the numerous agencies that had grown up over the course of several decades, especially during the war years.[60] The act repealed much of what was left of the Surplus Property Act of 1944, as amended.[61] However, the airport, park, recreation, and historic monument provisions were

51 H.R. REP. No. 1697, 80th Cong., 2d Sess. (1948).

52 This term was later defined in the Federal Property and Administrative Services Act of 1949, § 3(a), 63 Stat. 377, 378, as "any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation."

53 The text of the amendment speaks of "the Administrator" which at the time of its passage referred to the War Assets Administrator, the head of the War Assets Administration. Under the Federal Property and Administrative Services Act of 1949, ch. 288, Title I, § 105, 63 Stat. 377, 381, the functions, records, property, etc., of this agency were transferred to the General Services Administration, so that today "the Administrator" refers to the GSA Administrator.

54 41 C.F.R. 101-47.103-6 (1970).

55 50 U.S.C. § 1622(h) (1964).

56 50 U.S.C. § 1622(h)(2) (1964).

57 See note 15, *supra*.

58 Ch. 288, 63 Stat. 377 (codified in scattered sections of 471 *et seq.* and 751 *et seq.*, 40 U.S.C.).

59 H.R. REP. No. 670, 81st Cong., 1st Sess. 1 (1949) (minority report).

60 40 U.S.C. § 751 *et seq.* (1964).

61 Repealed June 30, 1949, ch. 288, Title VI, § 602(a)(1), 63 Stat. 377, 399, eff. July 1, 1949, renumbered Sept. 5, 1950, ch. 849, § 6(a), (b), 64 Stat. 578, 583.

maintained as permanent legislation,[62] residing until recently in the U.S. Code title devoted to "War and National Defense."[63] The section entitled "Disposal of Surplus Property"[64] of the act includes the substance of the old 1944 Act provisions regarding disposals for educational, public health and civil defense purposes.[65]

The initiative in these transfers now rests with the Secretaries of HEW or Defense or the Federal Civil Defense Administrator.[66] If one of them recommends to the Administrator of GSA that a specific parcel of real property is needed for a purpose falling under their purview, then the GSA Administrator is authorized to assign that parcel to the respective Secretary for disposal to public or non-profit institutions.[67] The sale value of property for purposes of education and public health might be discounted up to 100 percent by taking into consideration "any benefit which has accrued or may accrue to the United States from the use of such property" by the purchaser or donee,[68] as was provided by the Surplus Property Act.[69] The price remained subject to the Administrator's disapproval, however.[70] Under the 1949 Act the procedure outlined above for parks and recreational purposes would remain as it stood earlier. Conveyances for these purposes were to remain at a price equal to 50 percent of the fair value of the property at the time it was offered for disposal, regardless of its former character or use, as determined by the Administrator.[71]

Two elements are common to the development of the federal disposal statute: (1) a cost provision which limits the maximum discount to an evaluation of "any benefit which may accrue to the United States from the property's use," (2) an emphatic placement of final discretion with the GSA. The key role of the GSA Admin-

62 *Id.*
63 50 U.S.C. § 1622(h) (1964).
64 40 U.S.C. § 484 (1964).
65 See note 41, *supra.*
66 40 U.S.C. § 484(k)(2) (1964).
67 40 U.S.C. § 484(k)(1) (1964).
68 40 U.S.C. § 484(k)(1)(C) (1964). The public benefit discount is a matter of practice and discretion exercised in carrying out the statute. H.R. REP. No. 1225, 91st Cong., 2d Sess. 5 (1970).
69 See note 40, *supra.*
70 40 U.S.C. § 484(k)(1)(b), (c) (1964).
71 50 U.S.C. § 1622(h)(2) (1964).

istrator's discretion should be noted in both the Surplus Property Act and the Property and Administrative Services Act. If the Administrator, for example, chooses not to be convinced by the entity seeking the public park, then any executive agency may be designated by him "to dispose of the surplus property by sale, exchange, lease, permit or transfer, for cash, credit, or other property . . . and upon such other terms and conditions as the Administrator deems proper. . . ."[72] Thus, GSA feels free to condone land swapping between federal agencies and private developers.[73]

Federal property management is based on the "surplus-excess" distinction. Excess property is property under the control of any federal agency which is no longer required for its needs, as determined by the agency's head. This property is then advertised to other federal agencies for possible use. If in due course it becomes clear that this excess property is not required for the needs of any federal agency, then the Administrator may declare it to be surplus property, available for any of the various disposal programs.[74] Disposal has been an aim secondary to economical management in past acts, and query whether the new expressions of priority which can be drawn from the Full Discount Act will be treated as overcoming past practice. Arguments for priority may be weakened by the fact that the present act parallels past statutory language, instead of being cast in the forms of its alternatives proposed by Congress.

C. *Origin of a Changeling — the Full Discount Act and Its Alternatives*

Such was the statutory background against which President Nixon called for a more creative development program for parks and recreation. To implement this he issued the Executive Order and submitted the Full Discount bill. The draft was described by Secretary Hickel as carrying out "the entire park and public recreation program proposed in the President's environmental message."[75] However, there were a number of other legislative

72 40 U.S.C. § 484(c) (1964).
73 GSA Letter, note 19, *supra*.
74 *See* 40 U.S.C. § 472(e), (g) (1964).
75 Letter from Secretary Hickel to Congressman Wayne H. Aspinall, Chairman,

proposals in Congress at the time dealing with that subject. Their provisions warrant analysis.

In the Senate, during the first session of the 91st Congress, the principal disposal bill was one introduced by Senator Henry M. Jackson of Washington, the Chairman of the Committee on Interior and Insular Affairs. He presented it for himself and twenty companions on March 17, 1969.[76] The Jackson bill[77] as amended was reported out from this committee on June 5, 1969.[78] Its stated purpose was to make surplus federal property which was suitable for park and recreational uses more readily available to state and local governments. It provided that states and their political subdivisions should be able to acquire, until June 30, 1973, for public park and recreation purposes, surplus federal real property recommended to the Administrator by the Secretary of the Interior for such acquisition, based upon certain standards by which the Secretary was to be guided. These standards were (1) the suitability of the property for park and recreational uses; (2) the accessibility of the property to major population centers; (3) the need for park and recreation facilities in the immediate geographical area, as identified in the comprehensive nationwide outdoor recreation plan required under the Land and Water Conservation Fund Act[79] and (4) the highest and best use of the property, taking into consideration the need of future generations for parks, open spaces, and recreational opportunities. The pricing methods by which a state or political subdivision thereof might acquire the property were three: (1) if the state or its political subdivision originally donated the property to the federal government, it could be reacquired at no cost; (2) where the state or subdivision so elected, the property could be acquired at 0-50 percent of the fair market value, which price would be determined by the Administrator in accordance with the recommendations of the Secretary of the Interior; or (3) the property might be acquired at the purchase

House Comm. on Interior & Insular Affairs, April 10, 1970, in H.R. REP. No. 1225, 91st Cong., 2d Sess. 13 (1970).

76 S. 1708, 91st Cong., 1st Sess. (1969).

77 Alternative bills will be named for their chief sponsor solely for the purpose of clarity in this Note.

78 S. REP. No. 227, 91st Cong., 1st Sess. (1969).

79 Title I, § 5(d), 78 Stat. 897, 901 (1964).

price which the federal government paid for it. These provisions were products of the amending process which took place in committee. The bill, as amended and reported, adopted the suggestions made in separate resports by the Department of the Interior and the Bureau of the Budget of May 13, 1969, to the Committee.[80] The Jackson bill was passed by the Senate on June 26, 1969, and referred to the House Committee on Interior and Insular Affairs. This, it will be noted, was more than seven months before President Nixon's Executive Order which called for the survey of federal real property holdings with a view to making some available for such surplus disposal.

Meanwhile, during the second session of the 91st Congress there were a number of bills in the House similar to the Jackson bill and the Administration's Full Discount bill (which became H.R. 16031)[81] on June 24, 1970, the House Committee on Interior and Insular Affairs reported out a bill introduced by the Chairman of the Committee, Rep. Wayne N. Aspinall of Colorado.[82] The Aspinall bill was by way of an amendment to the Land and Water Conservation Fund Act of 1965, as was the Jackson bill. The Aspinall bill was more moderate than the one passed in the Senate. It proposed to include as one of the basic purposes of the act the authority for the Secretary of the Interior to transfer surplus federal property to state and local governments for park and recreation purposes. The Secretary would determine whether federal property declared to be "excess to the needs of any Federal agency[83] was needed and suitable for such uses, the suitability being reckoned by the highest and best use of the property under present and foreseeable needs. If this determination were positive, then the Administrator could transfer the property to the Secretary of the Interior for conveyance to the state or local government. The grantee might elect from one of three payment plans, only one of which was different from the Jackson bill's plans.

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80 S. REP. No. 227, note 78 *supra*, at 8, 11.

81 H.R. 15916, H.R. 11650, H.R. 11788, H.R. 12651, H.R. 12701, H.R. 13011, H.R. 14974, H.R. 11072, H.R. 11127, H.R. 16483, and H.R. 16593, 91st Cong., 2d Sess. (1970). H.R. 16031 was the bill submitted by the Administration; see letter from Secretary Hickel to Congressman William L. Dawson, Chairman, House Comm. on Government Operations, H.R. REP. No. 1313, 91st Cong., 2d Sess. 5 (1970).

82 H.R. REP. No. 1225, 91st Cong., 2d Sess. 1-2 (1970).

83 H.R. 15913, § 2, 91st Cong., 2d Sess. (1970).

The committee report was careful to emphasize that the provisions of the Aspinall bill did not diminish the discretionary authority of the Administrator with respect to the disposition of surplus lands. It will be recalled that the Jackson bill provided that until June 30, 1973, the inferior governmental entities might purchase the properties if the Secretary of the Interior had recommended the acquisition. The Administrator would not be part of the decision-making process, at least not by statute. The Jackson bill's standards for acquisition were more explicit, paralleling those of the Aspinall bill as to suitability, need, and highest and best use, but also requiring accessibility to major population centers and conformity with a comprehensive statewide outdoor recreation plan.

The Jackson and Aspinall bills were nearly identical in their cost procedures. The "flexible" provision of each was different in wording if not in anticipated practice, the Jackson bill specifying a 50 to 100 percent discount of fair market value, to be determined by the Administrator in accordance with the Secretary's recommendations, while that of the Aspinall bill used the vague "benefit accrued" standard[84] to guide the Secretary in determining the price, which of course would also be subject to the concurrence of the Administrator. Although it is unclear from the language of the bill whether this price could be less than the 50 percent limit stipulated in the Surplus Property Act, the purpose of the bill and the thrust of the Committee report indicate that it definitely was intended to be possible to set a lower figure.[85]

However, there was another bill in the legislative pipeline, H.R. 18275, before the House Committee on Government Operations. When H.R. 18275 and the Aspinall bill came before the Rules Committee, it appeared that there was a jurisdictional conflict between the committees on the point of using unneeded federal property for park and recreational purposes. The Government Operations Committee has the responsibility for overseeing the federal property disposal programs, and felt that the Interior

84 This standard is used in 40 U.S.C. § 484(k)(1)(C) (1964) in regards to disposal by the Secretary of HEW for educational and public health purposes, and is used to dispose of property at up to a 100% discount rate. See note 68, *supra*.

85 *See* H.R. REP. No. 1225, note 82, at 5-9, *supra*.

Committee had overstepped its bounds. Both committees felt that unneeded federal lands suitable for park and recreation purposes should be made available to state and local governments at a discount greater than the existing 50 percent. "The only difference between the committees was the selection of the mechanism and the timing of the operation to achieve the result," according to Congressman Aspinall.[86] His bill had spoken of "property . . . declared to be in excess to the needs of any Federal agency."[87] While it was arguable that the intent of the bill was aimed at what is more properly called surplus property in the federal lexicon, the distinction was noted and viewed as critical by the Government Operations Committee. The criticism of the Aspinall bill pointed out that it appeared to make excess property available to the non-federal governmental entities, in equal competition with federal agencies. Indeed, it would give, said the critics,[88] parks and recreation a priority over the education, health, civil defense, housing and airport programs. The Committee on Interior and Insular Affairs, upon being apprised of this, agreed to leave jurisdiction over surplus property to the Committee on Government Operations, retaining jurisdiction only over the increase in the Land and Water Conservation Fund.[89] The leadership of the two committees met, reconciled the differences between their two bills, and agreed that an amendment to the Aspinall bill would be offered "at the appropriate time"[90] to accomplish their common objective stated above. Accordingly, during the floor debate on the Aspinall bill, an amendment was offered, with the support of Interior Chairman Aspinall, the sponsor of the bill, and the Government Operations Acting Chairman. The amendment preserved the substance of the provisions for increasing the Land and Water Conservation Fund, but substituted for the rest of the bill the property disposal provisions of H.R. 18275, which was the reported bill of the Government Opera-

86 116 CONG. REC. H8012 (daily ed. Aug. 10, 1970) [hereinafter cited as House Debate].

87 H.R. REP. No. 1225, 91st Cong., 2d Sess. 1 (1970).

88 116 CONG. REC. H8014 (daily ed. Aug. 10, 1970).

89 *Id.* H8012.

90 *Id.*

tions Committee.[91] According to the report on that bill[92] it was a "clean bill,"[93] introduced by the chairman of the Government Activities Subcommittee after hearings on a number of proposed bills all relating to the disposal of surplus federal property for park and recreational purposes.[94] It was presented as "embodying the essential provisions of these bills [introduced by 135 Members of Congress[95]] with regard to surplus property disposal,[96] but, *mirabile dictu*, the bill was the very one proposed initially by Secretary Hickel, verbatim, with the exclusion of one section relating to a cost-of-transfer matter that was nonessential. It had been one of the bills heard, as H.R. 16031, and, with the deletion of one section, came out as "clean bill" 18275. The amendment arrangement having had the prior endorsement of Chairman Aspinall, it was agreed to and passed by the House.[97] In turn, Chairman Aspinall moved that the Jackson bill be amended to strike everything after the enabling clause and add the provisions of his bill as just amended. The motion was agreed to and the Senate bill as amended was passed.[98] The amended Aspinall bill was tabled[99] and a message sent to the Senate regarding disposition and the status of the Jackson bill.[100] The bill ultimately passed, then, as the Full Discount Act proposed by the Secretary of the Interior. It remains to be seen what effect the passage of such a changeling bill will have on land disposal, given the fact that it was substituted for bills which were seemingly more favorable to urban needs for open space.

The Full Discount Act promised to make legislation dealing with the surplus property parks problem "consistent with that of the other donable property programs" and to retain "responsibility for the determination of the highest and best use of federal

91 Reported out June 20, 1970. H.R. REP. No. 1313, 91st Cong., 2d Sess. (1970).
92 *Id.* 1.
93 *I.e.*, a "new" bill, one written on a clean slate.
94 House Debate H8014. (Hearings were held June 9, 1970; *see* H.R. REP. No. 1313, 91st Cong., 2d Sess. 1 (1970)).
95 House Debate H8014.
96 *Id.*
97 *Id.* H8017.
98 *Id.* H8018.
99 *Id.*
100 116 CONG. REC. S17494 (daily ed. Oct. 8, 1970) [hereinafter cited as Senate Debate].

property in the Administrator of General Services."[101] Accordingly, the bill finally took parks and recreation, although not historic monuments, out of the "War and National Defense" title of the U.S. Code, and created a new subsection in 40 U.S.C. § 484(k), the general "Disposal of Surplus Property" section of the Code.[102] According to the committee report, the Full Discount bill was "to provide for the sale or lease of surplus federal property to state and local governments, at discounts of up to 100 percent, for park and recreational use."[103] The report flatly states that this discount would be 100 percent "in all but the rarest of cases."[104]

The mechanisms of the disposal procedures are identical to those used earlier for educational and health purposes. The Secretary of the Interior recommends that a given piece of surplus federal real property is "needed" for use as a public park or recreation area. The Administrator may then assign the property to the Secretary for disposal. The Secretary may either sell or lease the property to any state, political subdivision, or municipality, although the Administrator has 30 days after being notified of the proposed transfer to register disapproval. According to the report, disapproval would be indicated if in the Administrator's discretion the transfer were not considered to be "in the best interests of the federal government."[105] The Secretary would fix the price of the sale or lease, taking into consideration the benefits which have accrued or might accrue "to the United States" from such use. This is the guideline already set down for cost determination for the educational and health disposal uses,[106] and in practice permits discounts of up to 100 percent. The analysis accompanying the Full Discount bill stated that this standard means that "the Secretary would be given discretionary authority to sell on terms which he deems best, taking account of the values inherent for

101 *Id.* The report on the bill stated, "This legislation . . . leaves the responsibility for making the decision as to the highest and best use in the Administrator without creating any priorities or fragmenting the surplus property program." H.R. REP. No. 1313, *supra* note 91, at 3.

102 Which of course was done by further amending § 203 of the Federal Property and Administrative Services Act of 1949, as amended, ch. 288, 63 Stat. 377, 385.

103 H.R. REP. No. 1313, *supra* note 91, at 1.

104 *Id.* 2.

105 *Id.* 3.

106 40 U.S.C. § 484(k) (1964).

the people and the uses to which the land will be put. The terms set by the Secretary of the Interior may embrace a 100 percent discount from market value; that is, they may constitute a donation."[107] This of course is subject to the Administrator's approval. Thus, the mechanisms for initiating the disposal process as well as the cost-determination provisions are identical to those of the Secretary of HEW for educational and health purposes. Park and recreational purposes are put on a level of equal competition with such programs, by which competition alone, according to the Government Operations Committee Report, "can such property be applied to its most beneficial use."[108]

There is certainly some appeal to the symmetry achieved by the Full Discount Act, but the costs, measured by reference to the terms of the two principal bills reported out in the House and the Senate, are not insignificant. The relative lack of specificity will mean that the Administrator will have absolute power over determination of disposal for whatever purposes or ends. There are no statutory standards by which the Secretary is to make his determination and recommendation that the property is "needed" for park and recreational purposes, compared to the stated standards of the other two measures. The cost provisions are likewise vague and wholly discretionary, to be determined ultimately by the Administrator through the threat or deployment of his disapproval powers. There are no statutory price formula options open to the inferior governmental entity; rather they are left to rely on the Administrator's benevolence. Although the Jackson bill granted authority to the *Secretary* to make such transfers only through fiscal year 1973, it did at least vest final power over them with the Secretary. The Full Discount Act leaves open the possibility that such transfers will continue subject to the complete discretion of the Administrator.

The new law omits the Jackson and Aspinall bills' equitable pricing option of donation in a case where the federal government acquired the land by donation from the prospective transferee. In addition, the new law fails to establish a priority for park and recreational uses. It puts them on a competitive level not only

107 H.R. REP. No. 1313, *supra* note 93, at 8.
108 *Id.* 3.

with health, education, civil defense, airport, housing and other needs, but also with the contingencies implicit in the Administrator's discretionary determination of the "highest and best use of the property in the best interests of the Federal Government," which includes simply maximizing government revenues from land disposal. In contrast, the Jackson bill set up a highest priority period for 2 to 3 years, while the Aspinall bill was viewed by some as putting such a use priority on a competitive level with federal interagency bidding for an unspecified period of time. In any event, the bill, engineered by the Administration in the face of more generous disposal bills pending, is a tightly qualified fulfillment of President Nixon's proposal in his environmental message to the Congress that "the Secretary of the Interior be given authority to convey surplus real property to state and local governments for park and recreational purposes at a public benefit discount ranging up to 100 percent."[109]

The trade-off of specificity for symmetry bothered the author of S. 1708, Sen. Jackson, and he consequently solicited the views of both the Secretary of the Interior and the Administrator to clarify what might be expected of the vague, discretionary, and complete power vested in the Administrator. He asked of Secretary Hickel whether he agreed with the declaration of the House report[110] that the discount would be "100 percent in all but the rarest of cases," and asked what considerations would reduce the full discount.[111] Hickel agreed,[112] and outlined a "Public Benefit Allowance System," which contained three types of allowances. A basic 50 percent allowance would be available if the applicant agreed to develop and/or maintain the property for park and recreational uses "in perpetuity;" an additional 50 percent allowance would be based on the capability of the area sought to meet

109 In an example of dissatisfaction with current disposal laws, the Sierra Club recently proposed that *all* laws allowing the Federal Government to sell or give away public lands be repealed. The Club suggested that remaining public lands be placed in a Federal "land reserve," to be administered by the Bureau of Land Management of the Department of the Interior, and called on Congress for laws that emphasize retaining rather than disposing of public lands. N.Y. Times, Feb. 15, 1970, at 24, col. 1.

110 H.R. REP. No. 1313, *supra* note 91, at 2.

111 Senate Debate S17495.

112 *Id.*

recreational needs; and a "special consideration" allowance of up to 50 percent would be given for a variety of other factors. These bases had several sub-bases, e.g., need, capability of the applicant, accessibility to population centers, expense of conversion, and scenic and historic resources, which certainly go beyond the standards laid down in either the proposed Senate or House bills. The Secretary also noted that a survey of forty properties transferred under the old amended Surplus Property Act provisions[113] from 1966 to 1969 showed that each property would have qualified for the full 100 percent discount under this Public Benefit Allowance System.

But this is all commentary on the role of the Secretary of the Interior; the final determination rests with the Administrator. Robert L. Kunzig, the Administrator, offered some clarifying responses to Sen. Jackson's inquiries.[114] The GSA would make every effort to offer the appropriate surplus property for park and recreation purposes, but the Interior recommendations would have no higher priority than those from HEW, nor from eligible public agencies under other laws of general application. An additional consideration would be "the benefits to be derived from negotiated or competitive sale of the property involved."[115] Indeed, the Administrator would have the power to determine whether the Secretary of the Interior should even be allowed to make a recommendation, which he could not do "where a property is clearly unsuitable for park use."[116] The Administrator stated that no standards would be formulated by which to assess the suitability of property for park and recreational uses in comparison with other potential uses, the only criterion being "what will best serve the overall interest of the federal government and the community consistent with the nature of the property."[117] Although Mr. Kunzig claimed that the probability of sale would not affect

113 50 U.S.C. § 1622(h) (1964).
114 Senate Debate S17496.
115 *Id.*
116 *Id.*
117 *Id.* One of the Administrator's immediate subordinates stated in an official letter to Senator John S. McClellan that the GSA would find it difficult to establish criteria for evaluating recommendations submitted by the Secretary of the Interior, and would use the procedures followed for evaluating HEW recommendations. Letter from Rod Kreger, Acting Administrator, *Id.* S17497.

a decision on a transfer at less than fair market value for park and recreation purposes, he stated that nevertheless the benefits to be contemplated from sale would have to be weighed against such uses. Clearly such benefits would include those to be realized from a negotiated exchange to acquire other property needed to satisfy existing federal requirements.[118] This sort of exchange or sale may be conducted by the Administrator or by any executive agency authorized by him.[119] These clarifying statements of the Administrator leave no doubt that he is taking full and authoritative advantage of the reassuring declaration made by the House Government Operations Committee that "the primary responsibility for determining the most efficient and effective use of federal government property remains in the Administrator of General Services."[120]

Senator Jackson, during the final floor debate on "his" bill, expressed his disappointment over the gutting of his original bill. He voiced concern over the uncertainties and vagueness of its replacement, and also noted the enormous discretion vested in the Administrator.[121] Yet he felt that further delay in approving the legislation would have jeopardized its passage during the second session, and so he recommended that the Senate concur in the House version of his bill. In doing so, he not only expressed his preference for the terms passed by the Senate, but also made a pointed effort to assert the purpose of the legislation and the intent of Congress in passing it. He praised Secretary Hickel and Administrator Kunzig for "their strong desire to carry out the congressional mandate and the President's declared policy to provide park and recreational facilities where there is a demonstrated need at no cost or at minimal cost to local governments."[122] He referred to the "legislative history in both Houses of Congress of similar purport," in an attempt to pick up some of the flavor of the other two bills. Senator Jackson referred to the stipulation in the House Committee Report, also made on the floor during debate on the House amendment by its "author," that the public

118 *Id.* See text at note 24, *supra.*
119 See note 72, *supra.*
120 H.R. REP. No. 1313, *supra* note 91, at 2.
121 Senate Debate S17497.
122 *Id.*

benefit discount would be 100 percent in all but the rarest of cases.[123] To avoid creating the impression that he or the Congress were softening in their resolve to get more parks for less by transfer of surplus federal property in urban areas, Senator Jackson delivered a strong plea and exposition on the need therefor. A notable portion of this clarification of intent was a clear warning to the GSA that its discretion in disposing of property that might be used for urban parks should not be exercised in a fashion that read "the best interests of the Federal Government" to be cost-maximization:

> Park and recreational use may not be the use that generates the most immediate revenues, but government is not a business for profit. And the success of government is not measured by maximizing the monetary returns or investment. It is measured by the caliber and the quality of the life made available to the people which government serves. . . . We need a policy to reverse the one-way process of urban sprawl, development and shrinking open spaces. . . . I am in basic and fundamental disagreement with those who propose that the Federal Government should let marketplace economics dictate whether and where our States and cities will have park and recreational facilities. We need only to look around any major city to see that the marketplace does not make decisions which are in the public interest. The marketplace makes decisions which maximize private profits. And at the same time, it generates air and water pollution: it gobbles up land with urban sprawl and concrete; and it inititates many other private actions which are often flatly opposed to the public interest.[124]

Having thus clarified the terms as he assented to them as the author of the bill whose substance had been replaced by the Full Discount bill, and having met nothing to the contrary from his colleagues, he moved that the Senate concur in the House version, and this was done.[125]

D. *Discretion Unbound*

Considering the discretion vested in the Administrator, Senator Jackson's concerns were valid ones. The restrictions placed on this

123 *Id.*, citing remarks of Congressman Jack B. Brooks at House Debate H8016.
124 Senate Debate S17498.
125 *Id.* S17500.

discretion by statute and regulation afford little comfort. The policy of the Administrator is that "surplus real property shall be disposed of in the most economical manner consistent with the best interests of the government."[126] As noted above, the Administrator may authorize any executive agency to dispose of surplus property, although usually the GSA will be the disposal agency.[127] The pertinent regulations require that if the GSA determines that a given piece of surplus real property is potentially available for statutory benefit discount purposes, then the eligible public agency shall be notified prior to any public advertising, negotiations or other disposal actions.[128] The eligible public agency desirous of acquiring the property has twenty days from the date of the notice to so inform the GSA; if no response is received, then the property is put up for public sale.[129] Indeed, the secretaries of HEW or Interior might even get notice of the potential surplus status of existing excess property, and proceed to screen potential applicants under stated conditions as ordained by the Administrator.[130] If the Administrator does approve of notifying eligible public agencies of newly declared surplus property he can determine what would constitute a reasonable time for the development and submission of a formal application for the property.[131] In conducting the review of initial responses and statements of intention, and in determining the application deadline, the Administrator is to coordinate with the proper regional office of the pertinent federal agency. For park and recreational purposes, this would be the Bureau of Outdoor Recreation of the Department of the Interior.[132] But the Administrator has ultimate authority to determine the disposal transferee and outcome. GSA determines which surplus property may be made available for disposal to non-federal public agencies, and it controls the process at every point, even to the extent of having a 30 day option to reject an already authorized transfer by the respective Secretary. While public pressure has in the past occasionally been effective in delay-

126 41 C.F.R. 101-47.301-1(a) (1970).
127 *Id.* 101-47.302-2 to 302.3.
128 *Id.* 101-47.303-2.
129 *Id.* 101-47.303-2(f).
130 *Id.* 101-47.303-5(b).
131 *Id.* 101-47.303-2(g).
132 *Id.* 101-47.303-2(g)(1).

ing or blocking agency disposals,[133] the absence of clear standards in the disposal statutes foreshadows future failures to check dispositions of land better suited for urban open space use. The similarity of present law to past acts indicates that past procedures and past results may remain unchanged in the future.

The Property Review Board referred to above might be thought to provide some independent check on GSA's control of the disposal business. But with its members being the Director of the Bureau of the Budget, the Chairman of the Council of Economic Advisors, the Chairman of the Council on Environmental Quality, the Administrator of GSA, "and such other officers or employees of the Executive Branch as the President may from time to time designate,"[134] it would seem likely that considerable deference would be paid the Administrator. Whether this will be so or not, the board has among its responsibilities that of making "recommendations to the President on further Federal use or disposal of real property which may be brought to its attention from any source and to resolve conflicts by [sic] Federal agencies relating to individual properties."[135] So far, the Board has identified properties which are suitable for disposal[136] and disposal has been promised.[137] Its actions thus far seem to have been chiefly the result of White House response to public opinion, and a different result may obtain when lesser forces attempt to bypass disposal statutes by marshalling executive support through the Property Review Board.

The Executive Order which established the Board is quite clear: the Board is to give "particular attention to conflicting claims on, and alternative uses for, any property listed in" reports of the Administrator identifying land which is not being put to its optimum use.[138] One might read the Executive Order and the GSA's interpretation of it to create in the board a forum in which

133 See text at notes 22, 23.

134 Executive Order No. 11508, "Providing for the Identification of Unneeded Federal Real Property," 35 Fed. Reg., 2855, 2856 (1970).

135 Letter from Daniel T. Kingsley, Comm'r, General Services Administration, to the HARVARD JOURNAL ON LEGISLATION, Jan. 5, 1971, on file in the office of the Harvard Student Legislative Research Bureau.

136 See note 32, *supra*.

137 *See* N.Y. Times, Apr. 1, 1971, at 1, col. 3.

138 Executive Order No. 11508, § 3(c), 35 Fed. Reg. 2855 (1970).

to challenge a given disposal determination. A challenge might be lodged by the Secretary of the Interior or by the interested non-federal governmental agency. How much success this would attain is of course an open question, and would depend in part on the creativity of the challenging agency's strategy in mobilizing public opinion and pressure.

IV. Challenges to Disposition of Federal Land

A. *Grounds for Challenge*

The Full Discount Act is an authorization statute. Read by itself, it expresses no environmental policies or goals and prescribes no mandatory procedures which the Administrator must follow. Any complaint challenging a GSA urban land disposition, whether acquisition, sale, or exchange, may utilize the Federal Urban Land-Use Act,[139] or the National Environmental Protection Act (NEPA).[140] The procedures and policies of the Urban Land-Use Act must be followed whenever the land in question is in an urban area, defined broadly in the Act.[141] The policies and procedures of the NEPA are applicable to all major land-use transactions.[142] These acts when read in conjunction with one another may give public environmental interest groups and local governments a chance to bring court review of federal land dispositions and force compliance with federally expressed urban land-use and environmental policies.

Recognizing the strong local interest in the disposal of federal lands in urban areas, Congress declared that the aim of the Urban Land-Use Act was to prescribe

> policies and procedures . . . in order that urban land transac-

139 40 U.S.C. § 531 *et seq.* (Supp. V, 1970).
140 42 U.S.C. § 4321 *et seq.* (Supp. V, 1970).
141 40 U.S.C. § 535 (Supp. V, 1970).
142 It is assumed that land disposal transactions are "major federal actions" within the meaning of the NEPA as interpreted by the Council on Environmental Quality. The disposal of land in urban areas, where competing demands for land are high, and where environmental externalities are intensified, is not likely to have much difficulty qualifying as a major federal action. In addition it had been noted that a substantive duty to implement national environmental policy still exists even if the federal action is not a "major action" within the meaning of § 102(2) of the NEPA. *See* Peterson, *Title I of the National Environmental Policy Act of 1969* 1 Envir. L. Rep. 50035, 50038 (1971).

> tions of the General Service Administration . . . shall, to the greatest extent practicable, be consistent with zoning and land-use practices, and to the greatest extent practicable, be in accordance with planning and objectives of the local governments and local planning agencies.[143]

Though the "to the greatest extent practicable" clause may give the Administrator a means of escape, the goal of Congress was well articulated. The act requires the Administrator to insure that federal urban land dispositions are consistent with the policies outlined in the act. Additionally, in any alteration or acquisition of real property as a site for a public building, the Administrator shall, to the extent he determines practicable, "comply with local governmental planning and development objectives."[144] These substantive requirements exist wholly apart from the procedural notice requirement of the Land–Use Act.[145]

While the federal government has a rightful interest in the efficient and profitable disposal of its surplus property, it must also make certain that the disposition does not eventually frustrate other federal objectives. Last year Congress clearly declared such an objective in section 101 of the NEPA.[146]

The NEPA imposes both substantive and procedural duties upon all federal officials and agencies. The duties imposed by section 101(b), "to improve and coordinate Federal plans, functions"[147] to meet broad environmental objectives therein articulated, unfortunately have a discretionary appearance because of the qualifying language requiring the federal agencies and officials only to use "all practicable means." However, granted the

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143 40 U.S.C. § 531 (Supp. V, 1970).

144 40 U.S.C. § 534 (Supp. V, 1970).

145 40 U.S.C. § 532(a) (Supp. V, 1970) requires that whenever the Administrator contemplates disposal of any real property situated in urban areas, he must give notice to the head of the relevant local government, if this will not prejudice the disposition, prior to offering such land for sale. Additionally, before disposal of excess or surplus real property, comments are solicited from the Governor, regional and metropolitan comprehensive planning agencies and local elected officials as to the compatability of the proposed disposal with the state, regional and local development plans and programs, under Bureau of Budget (OMB) Circular No. A-95, implementing the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4201 *et seq.* (Supp. V, 1970).

146 42 U.S.C. § 4321 *et seq.* (Supp. V, 1970).

147 42 U.S.C. § 4331(b) (Supp. V, 1970).

possible weakness of section 101(b), the section 102 duties[148] are not, nor are they intended to be, discretionary.

That section imposes an affirmative substantive duty to implement national environmental policy. All section 102 duties are qualified by the clause, "to the fullest extent possible," although the legislative history indicates that the phrase was inserted to require that agencies implement the policy unless precluded by statute from doing so, or unless compliance under existing statutes is impossible.[149] The Council on Environmental Quality, which was created by the act, adopted this interpretation and stated in its interim guidelines that each agency "shall comply . . . unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.[150]

There is nothing in the statutory language governing surplus land disposal which would "expressly prohibit or make compliance impossible." It is arguable therefore that the Administrator is fully bound by the substantive requirements of the NEPA. It should be noted, however, that the policies and goals set forth in the NEPA are to be read as "supplementary to those set forth in existing authorizations of federal agencies."[151] Thus the NEPA in no way supersedes existing disposal statutes and their requirements.[152]

Apart from the substantive duty to implement national environmental policy, section 102 of the NEPA imposes numerous procedural requirements on the Administrator. For example, it requires that an "impact statement" be made when legislative

148 42 U.S.C. § 4332 (Supp. V, 1970).

149 115 CONG. REC. H12635 (daily ed. Dec. 17, 1969) (Statement of the Managers on the Part of the House); 115 CONG. REC. S17453 (daily ed. Dec. 20, 1969) (major changes in S. 1075 as passed by the Senate). Representative Aspinall's dissent from this otherwise unanimous interpretation appears to be without foundation. 115 CONG. REC. H13904 (daily ed. Dec. 23, 1969) (Remarks of Mr. Aspinall).

150 35 Fed. Reg. 7391 (1970). Even if implementation of part of the policy is precluded by statute, the agency is nevertheless required to comply insofar as possible. 115 CONG. REC. H12635 (daily ed. Dec. 17, 1969) (Statement of the Managers on the Part of the House). 115 CONG. REC. S17453 (daily ed. Dec. 20, 1969) (major changes in S. 1075 as passed by the Senate).

151 42 U.S.C. § 4335 (Supp. V, 1970).

152 When a complainant sues "in the public interest" protesting the Administrator's refusal to assign a piece of urban land to the Secretary of the Interior under authorization of the Full Discount Act, he may therefore in some circumstances sue under both the Federal Urban Land Use Act *and* the NEPA.

proposals or "other major Federal actions" are involved.[153] It would seem, then, that if the Administrator fails to consider adequately the environmental impact of a proposed action, then the decision to take such action could be set aside as "arbitrary and capricious" or at least enjoined until the Administrator complies with the NEPA. There could be, for example, a "lack of substantial evidence that adverse environmental effects would not occur or could not be prevented."[154]

The District Court for the District of Columbia, for example, in *Wilderness Society v. Hickel*[155] granted a preliminary injunction on the grounds that the defendant had not "adequately considered" the environmental impact of the proposed Alaska pipeline and the necessary construction road.

The NEPA imposes an additional duty to consider alternatives to proposed actions "in a proposal which involves unresolved conflicts concerning alternative uses of available resources."[156] Failure to consider reasonable alternatives may likewise be sufficient grounds for finding noncompliance, though problems of what is appropriate consideration are raised. In the recent *Gillham Dam*[157] case the Army Corps of Engineers was enjoined from further construction of a dam until it filed a more complete and detailed impact statement adequately considering the alternatives. Although significant construction had already been undertaken, the court insisted that nevertheless one of the alternatives that should be considered is "no dam at all."

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153 42 U.S.C. § 4332(2)(c) (Supp. V, 1970).

154 Peterson, *Title I of the National Environmental Policy Act of 1969*, 1 ENVIR. L. REP. 50035, 50038 (1970). The Counsel on Environmental Quality, for example, has asked the Department of the Interior and the Federal Power Commission to prepare § 102(2)(c) statements when they failed to do so with regard to the "Blue Ridge" hydroelectric project (Federal Power Commission Project No. 2317).

The District Court for the Eastern District of Arkansas in the *Gillham Dam* case, although enjoining further federal construction until a more complete impact statement is filed, went on to state that it would review the action "only to determine that the procedural requirements of NEPA were met." This seemingly erroneous interpretation of the act leads the agency into mere procedural compliance isolating its interpretation from review in light of the intent and express dictates of the NEPA. Environmental Defense Fund v. Corps of Engineers, —— F. Supp. —— (E.D. Ark. 1971).

155 Civil No. 728-70, (D.D.C., filed April 23, 1970).

156 42 U.S.C. § 4332(2)(d) (Supp. V, 1970).

157 —— F. Supp. —— (E.D. Ark. 1971).

Senator Jackson stated that the purpose of the "action-forcing" procedures outlined in section 102(2) of the NEPA is "to force federal officials and agencies to implement the national environmental policy, not to enable them to evade implementation."[158] It should be noted in addition that bare compliance with these procedures does not necessarily satisfy the overall substantive duty of implementing the policy when making decisions.[159] Surely the intent of Congress cannot be avoided by merely going through the motions of procedure.

Although land disposal power still lies, it seems, to a great extent within the Administrator's discretion, the cumulative effect of the Urban Land-Use Act and the NEPA with the disposal statutes may be to open the door to effective challenge of his decisions by public interest litigants. The Administrator is now working under the demands of a more clearly defined "public interest," and no matter how broad his discretion was before the act, he now may have the substantive duty to implement articulated policy.[160] This would be true regardless of possible procedural compliance with these acts. Thus in an "environmental" suit brought to challenge the Administrator's action or proposed action the group plaintiff would most likely only be able to allege a failure to act "in the public interest" by not fulfilling the con-

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158 *Hearings on S. 1075, S. 237 and S. 1752 Before the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess. 116, 117, 121 (1969).

159 Peterson, *supra* note 154, at 8.

160 The NEPA is relatively new and generally the performance of other federal agencies in implementing it has been at best erratic. See 116 CONG. REC. S3726 (daily ed. Mar. 13, 1970) (Department of Transportation News Release) (withholding of federal funds for airport runway extension pending results of environmental study); 116 CONG. REC. E 5253 (daily ed. June 4, 1970) (Remarks of Mr. Dingell) (detailed statement regarding use of chemical defoliants along Canadian-United States border *only* after Congressmen's pressure); Peterson, *Title I of the National Environmental Policy Act of 1969,* 1 ENVIR. L. REP. 50035, 50045 (1970) (letter of Congressman Reuss to Secretary of Transportation Volpe regarding failure of Dept. of Transportation to prepare a detailed statement on civil supersonic aircraft until after House appropriations vote despite request by several congressmen to do so). Though some agencies have submitted detailed statements to the Council on Environmental Quality, some have been rejected as inadequate. *See* Wilderness Society v. Hickel, Civil No. 728-70, (D.D.C., filed April 23, 1970). There has also been interdepartmental disagreement as to what constitutes "adequate consideration" of environmental affects. *See, e.g.,* N.Y. Times, (June 9, 1970) at 21 (without explicit reference to the NEPA, the Dep't of the Interior requests U.S. Army Corps of Engineers to suspend canal construction pending further investigation of environmental effects).

gressional substantive and/or procedural duties imposed on him by the statutes discussed above.

B. *Standing*

Often, because of an absence of "personal" or "particular" injury and because of the possibly more elusive nature of the injury ("aesthetic" rather than simply "economic"), problems of standing in this type of suit have been raised. The standing barrier[161] has been significantly eroded by a series of recent decisions[162] broadening the category of "aggrieved" persons entitled to judicial review of an administrative action under the Administrative Procedure Act.[163] While "adversely affected or aggrieved" in fact is not enough to gain standing in and of itself, the courts have increasingly been willing to replace the "legal right" test with a purpose or "intent to protect" test.[164] Thus the courts seem to have accepted Professor Jaffe's argument that "where the legislature has recognized a certain 'interest' as one which must be heeded," it should be considered a "legally protected interest as warrants standing to complain of its disregard."[165]

An important difference between judicial resolutions of the standing issue in recent cases may be the proximity and the nature of the relationship between the plaintiffs and the interest sought to be protected.[166] In challenging the disposal plans of land in

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161 *See generally* JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-500 (1965); Allen, *The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier*, 41 COLO. L. REV. 96 (1969); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

162 *See, e.g.*, Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965); *contra*, Sierra Club v. Hickel 433 F.2d 24 (9th Cir. 1970), *cert. granted sub nom.* Sierra Club v. Morton 91 S. Ct. 870 (1971).

163 The availability of review under the APA is governed by § 10(a) of the Act, 5 U.S.C. § 702 (1964). Under that section a person who suffers a "legal wrong" or is "adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

164 *See, e.g.*, cases *supra* at note 162.

165 L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 508 (1965).

166 This may be exemplified by comparing Scenic Hudson Preservation Conference v. Fed. Power Comm'n, 354 F.2d 608 (2d Cir. 1965), with Sierra Club v. Hickel 433 F.2d 24 (9th Cir. 1970) *cert. granted sub nom.* Sierra Club v. Morton, 91 S. Ct. 870 (1971). The *Scenic Hudson* case involved the proposal of Consolidated Edison to construct a pumped-storage hydroelectric plant on top of Storm King Moun-

urban areas, it is strongly suggested that municipal governments and local organizations join in the suit as co-plaintiffs. A California based conservation organization for example may run into great standing problems when challenging the Administrator's actions alone in Tennessee. The court may take note of the implied absence of "local" concern and may rightly infer that the plaintiff organization is not the "best representative of the interest allegedly violated."[167] The potential complainant under the present rules of standing should be able to obtain standing in federal courts.

C. *Administrative Discretion*

Once a complainant has been granted standing he still faces problems even under the NEPA regarding the scope of review which the court will make. There are in essence two situations in which the question will come up. The disposal statutes, the Urban Land-Use Act and the NEPA, have prescribed procedures which the Administrator is required to follow. If the Administrator does not follow the prescribed procedure (for example if he refuses or neglects to prepare an "impact statement") can the plaintiff effectively argue that the conclusion of the Administrator

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tain. Unlike the plaintiff in *Sierra Club*, the *Hudson* plaintiff organization was composed of conservation groups, local municipalities, and private individuals. The court granted standing, holding that to insure that "the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas must be held to be included in the class of 'aggrieved' parties under § 313(b)" of the Federal Power Act, 16 U.S.C. § 825L(b). Probably even more significant with respect to suits challenging actions of the Administrator in disposing of land in urban areas is that the Court gave standing to the municipalities because the proposed paln would decrease the property values of publicly held land, reduce tax revenues collected from privately held land, and *significantly interfere with long-range community plans* (emphasis added).

The Sierra Club was not granted standing in the Ninth Circuit. The court found that the challenged conduct was merely personally displeasing or disatisfactory" to the Sierra Club members and this could not be a basis for standing. The Circuit court noted that the Sierra Club had been granted standing to challenge administrative action in two recent cases, but distinguished them on grounds that in both the Sierra Club was joined by local conservationist organizations.

The decision of the Ninth Circuit may be overturned upon review by the Supreme Court, but still it possibly should be read as suggesting important tactical, if not legal, considerations.

167 Allan, *The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier*, 41 COLO. L. REV. 96, 97 (1969).

must be set aside as "arbitrary and capricious"? Beyond this, even though the Administrator has followed all prescribed procedures established by Congress, may the plaintiff still effectively challenge his conclusion as an "abuse of discretion"?

Procedural compliance under the Urban Land-Use Act and the NEPA is mandatory and the complainant may have little difficulty forcing the Administrator to so comply. The court is not there faced with the theoretical and legal difficulty of reviewing discretion. The primary problems will arise when there has been procedural compliance but it has been merely perfunctory and in substance meaningless.

Some cases have held that when agency action is committed to agency discretion it may be nonreviewable if within constitutional limits.[168] Others have held that under section 10(e) of the Administrative Procedure Act (APA)[169] an administrative decision resting on the discretion of a dependent head is not reviewable "so long as there was substantial compliance with applicable procedures and statutes."[170] However, better reasoned cases hold that the exercise of discretion and compliance with procedure do not in and of themselves negative the right to review under the APA.[171]

Except in those situations where judicial review of administrative action is required under the Constitution,[172] it may be granted or withheld as Congress chooses.[173] Though it has been held that congressional intent to preclude judicial review must be clearly and positively stated, the courts have generally been

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168 *See, e.g.*, Seatrain Lines, Inc. v. United States, 233 F. Supp. 40 (D.N.J. 1964); First Nat'l Bank of Smithfield v. First Nat. Bank of E.N.C., 232 F. Supp. 735 (E.D.N.C. 1964) (dicta), *rev'd on other grounds*, 352 F.2d 267 (1964).

169 Under § 10(e) of the APA, courts are free to "set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, [or] abuse of discretion. . ." 5 U.S.C. § 706(2) (1964). Judicial relief does not extend to cases limited by APA § 10(a) to the extent that (1) statutes preclude judicial review, or (2) agency action is committed to agency discretion by law. 5 U.S.C. § 701(a) (1964).

170 *See, e.g.*, Harget v. Summerfield, 243 F.2d 29, 32 (D.C. Cir. 1957), *cert. denied*, 353 U.S. 970 (1957).

171 *See* United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); *cf.* United States v. Laughlin, 249 U.S. 440 (1919).

172 *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 54-65 (1931) (dealing with injuries under maritime law); Ng Fung Ho v. White, 259 U.S. 276, 284 (1921) (due process claim of alleged immigrant challenging deportation on citizenship grounds).

173 *See, e.g.*, Switchmen's Union v. Mediation Bd., 320 U.S. 297, 301 (1943); Fitzgerald v. Douds, 167 F.2d 714, 717 (2d Cir. 1948).

hesitant to review actions which by statute, though not expressly foreclosing the right of judicial review, seem to lie wholly in the hands of the official.

A literal reading of the language of the APA indicates that "whenever the agency has discretion the court is prohibited from setting aside an abuse of discretion." But that is clearly not what Congress intended.[174] The language of APA, section 10(e) "clearly implies reviewability despite the presence of discretion."[175] Before a court can find "abuse" it must obviously find "discretion."

The Senate and House Reports[176] imply that the section 10(e) exception was not intended to foreclose judicial review[177] but merely was to bar the courts from "substitution of judgment in matters of discretion."[178] The Court stated in *Scenic Hudson* that:

> [the] court cannot and should not attempt to substitute its judgment for that of the Commission [Federal Power Commission]. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the 'licensing of the project would be in the overall public interest.' . . . The Commission has an affirmative duty to inquire into and consider all relevant facts.[179]

Thus while the court cannot simply substitute its interpretation of the relevant facts, it can inquire into whether or not the agency has met its affirmative duty.

Professor Davis' reading of the statutory language of APA, section 10(e) turns on the word "committed."[180] What is "committed by law" requires the court to look back to the statutes and common law. Therefore in essence Davis argues that the APA did not change the existing law with regard to the availability of judicial review and the "pre-Act law on this point continues."[181] He ar-

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174 4 K. DAVIS, ADMINISTRATIVE LAW § 28.16 (1958).

175 Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 769, 793 (1958).

176 S. Doc. No. 248, 79th Cong., 2d Sess. (1946); H.R. 1203, 79th Cong., 1st Sess. § 10 (1945).

177 See generally 4 K. DAVIS, ADMINISTRATIVE LAW § 28.08 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 374-76 (1965).

178 Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 63 (1965).

179 354 F.2d 608, 620 (2d Cir. 1965).

180 4 K. DAVIS, ADMINISTRATIVE LAW § 28.16 (1958).

181 *Id.*

gues further that "some administrative action is not, never has been, and from a practical standpoint cannot be subject to judicial review even to the extent of an inquiry into arbitrariness or abuse of discretion."[182]

The administrator's land disposal decisions are not protected from judicial review by any statutory language. To determine whether the Administrator's actions are immune from judicial review and within the limits of his discretion, the court should consider the relevant statutes, their language and purpose,[183] the nature of the activity regulated, and whether the agency's determination is in its nature merely ministerial or whether the agency is called upon "to exercise an informed discretion."[184]

A disposal determination is not merely ministerial. It requires the Administrator to "exercise informed discretion" — "informed" in the sense of being sensitive to possible environmental effects, to competing community land needs and to long-range urban development plans. Professor Jaffe has written that while delegations to administrative agencies may be very broad, they cannot be boundless:

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182 *Id.* However, Berger contends that the "argument against review of arbitrary action boils down to a matter of convenience; discretion to perform given tasks is confided to administrators and performance may be hampered by judicial review." Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 81 (1965). This view seems overly harsh in view of the fact that many functions *are* merely "ministerial" with no criteria, considerations, nor consultations necessary. Granted it is partly a matter of convenience, but also it is a question possibly of the practicality and meaningfulness of review. A much stronger argument is made in the same article against a broad general rule foreclosing judicial review. While experience may lead the courts to impose limits upon § 10(e), "despite the fact that those terms and their legislative history bespeak an unqualified intention to reach any abuse of discretion, that possibility scarcely requires us to engraft a priori limitations upon a remedial statute instead of waiting for case by case exclusions as occasions may demand."

183 In the *Overton Park* case the court held that in the light of the legislative history of the statute in question showing a strong interest in parks, the Commissioner of Highways would have to sustain a special burden of justification before replacing a city park with a six-lane highway. Citizens to Preserve Overton Park, Inc. v. Volpe, 91 S. Ct. 814 (1971). This is, in a sense, a burden of proof ruling and implies an adoption of a form of the "public trust" doctrine. Generally by this doctrine public lands which have been dedicated to certain uses (e.g., public parks, open space, recreation areas) cannot be diverted by public officials to other uses without a strong showing that the adverse environmental impacts are relatively insubstantial. See Sax, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970).

184 *Cf.* Switchmen's Union v. Mediation Bd., 320 U.S. 297 (1943) ("type of problem involved;" "history of statute in question").

> . . . [U]nless we are to abandon the promise that parliamentary grant is an expression by popular consent to the exercise of power, a delegation of power implies some limit. Action beyond that limit is not legitimate.[185]

After thorough consideration of the relevant factors the Administrator may exercise discretion, but if he exceeds that power by making a decision which is clearly not in the public interest, the delegation of "limited" discretion cannot save him and "judicial relief from this illegality would be available."[186] An example of this may be the sale of historic and aesthetically beautiful land to a private contractor with knowledge of its intended use as an industrial park. The public revenue gain may not justify the environmental loss.

Wholly apart from congressional intent and statutory construction, any attempt to limit judicial review of whether the Administrator has acted in excess of his authority may be unconstitutional.[187] An agency is a body of statutory creation and authorization. Congress unquestionably has the power to entrust final determination of certain facts in certain cases to administrative agencies and to make these decisions nonreviewable. However, both that delegation and that nonreviewability must lie within the purview of the Constitution, and constitutional due process requires that there exist the necessary basis for administrative action — *e.g.*, it must be supported by evidence.[188] Berger points out that, since the Supreme Court has held that an arbitrary and capricious law violated due process, the "arbitrary application" of lawful statute should be equally violative.[189]

Thus the group litigant should have standing to complain of a determination of the Administrator. It is suggested that (if possible) he sue under both the NEPA and the Federal Urban Land-Use Act to compel both procedural and substantive compliance. As a tactical, if not legal,[190] measure it is suggested that co-plain-

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185 Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401 (1958).

186 Harmon v. Bruckner, 355 U.S. 579, 582 (1958); *accord*, Leedom v. Kyne, 358 U.S. 184, 190 (1958).

187 *See, e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

188 *Id. See also* United States ex rel. Vatjauer v. Commissioner, 273 U.S. 103, 106 (1927).

189 Berger, *supra* note 182, at 73.

190 To a degree, this depends on the Supreme Court's disposition of Sierra Club

tiffs include local municipalities, local conservationist organizations and residents. The plaintiff should be able to invoke judicial review of the Administrator's actions despite the latter's procedural compliance. But he will have to show that such compliance was perfunctory or that the Administrator's decision is not in the public interest.

V. Conclusion

The need to preserve urban open space is clear. What is not clear is the role that federal surplus lands suitable for park and recreational use will play in fulfilling that need. If the discretion in the disposal statutes is exercised with an eye toward clearly expressed policy goals, federal surplus lands will make a condign contribution to urban open spaces. If that discretion is exercised in any other fashion and is not checked successfully in the courts by public interest groups or local governments, irretrievable losses will result. Most importantly, a properly drafted statute (whether it allows discretion or sets firm standards for the disposal process) effectively removes the specter of irretrievable losses in our urban environment.

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*David K. Ford**
*Renwick D. Martin**

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v. Hickel, 433 F.2d 24 (9th Cir. 1970) *cert. granted sub nom.* Sierra Club v. Morton, 91 S. Ct. 870 (1971).

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BOOK REVIEW

LAW AND THE BEHAVIORAL SCIENCES. Edited by *Lawrence M. Friedman*[1] and *Stewart Macaulay*.[2] Indianapolis: Bobbs-Merrill, 1969. Pp. xxxv, 1059. $14.50.

SOCIETY AND THE LEGAL ORDER: CASES AND MATERIALS IN THE SOCIOLOGY OF LAW. Edited by *Richard D. Schwartz*[3] and *Jerome H. Skolnick*.[4] New York: Basic Books, 1970. Pp. 652. $12.50.

Reviewed by Barry C. Feld[5]

The number of recent publications dealing with various aspects of the relationship between society and the law is indicative of the increasing interest in this subject.[6] Anthropologists have traditionally viewed the workings of the law within the total context of a primitive society.[7] Sociologists have adopted a more limited perspective on the other hand, considering such problems as the relationship between law and social structure or law and social change. Neither of these approaches, however, easily lends itself to introduction into a law school curriculum.

The growing complexity of social problems as well as the broadened scope of social engineering undertaken by legislatures, administrative agencies and courts highlights the importance of inter-disciplinary approaches to problem formulation and solution. A number of calls have been issued by lawyers and sociologists for

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1 Professor of Law, Stanford University.

2 Professor of Law, University of Wisconsin.

3 Professor of Sociology, Northwestern University.

4 Professor of Sociology, University of California at San Diego.

5 Russell Sage Fellow in Law and Social Science at Harvard University, Department of Sociology, where he is a candidate for the Ph.D. degree. B.A. 1966, University of Pennsylvania; J.D. 1969, University of Minnesota Law School.

6 *See, e.g.*, V. AUBERT, SOCIOLOGY OF LAW (1969); E. SCHUR, LAW AND SOCIETY (1968); R. SIMON, THE SOCIOLOGY OF LAW (1968); L. NADER, LAW IN CULTURE AND SOCIETY (1969); M. GLUCKMAN, POLITICS, LAW, AND RITUAL IN TRIBAL SOCIETY (1965); W. EVANS, LAW AND SOCIOLOGY (1962). More recently, W. CHAMBLISS has brought together a far more comprehensive bibliography in SOCIOLOGY OF LAW: A RESEARCH BIBLIOGRAPHY (1970).

Another indication of this interest is the LAW AND SOCIETY REVIEW, a quarterly journal designed to share interdisciplinary perspectives.

7 *See, e.g.*, B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926); GLUCKMAN, *supra* note 6; NADER, *supra* note 6; E. HOEBEL, THE LAW OF PRIMITIVE MAN (1954); and K. LLEWELLYN and E. HOEBEL, THE CHEYENNE WAY (1941).

cooperative ventures into the overlapping areas of concern shared by the several disciplines.[8] Until recently, however, these efforts have been handicapped, in part, by the lack of teaching tools which would foster the development of a common vocabulary and intellectual tradition. This shortcoming has contributed to the traditional disciplinary isolation, reducing potential interchanges and developments in this fruitful area.

It is very encouraging, therefore, that two casebooks have appeared which lend themselves to the teaching of law in an interdisciplinary context. They are both designed to explore "the ways in which the legal system affects society and in which society affects the legal system" and should significantly reduce the communications gap between the disciplines.

As a consequence of the similarities in their objectives, the conceptual organization of these two volumes tends to be parallel. Examining the relationship between law and society raises certain fundamental questions: what is a law; what are the sources of law; in what ways is the legal system a reflection of the larger society; in what ways can a legal system affect changes in the society; and in what ways can a legal system be organized? In an effort to answer these questions and consolidate the relevant literature from law and the social sciences, comparable divisions in the material emerge.

Before considering the substantive similarities and differences in these two efforts, some mention should be made of the basic method of presenting the respective materials. These volumes are unlike the typical casebook in several respects. Normally, a casebook is a compilation of edited opinions of common law courts interspersed with a variety of textual materials. The task of the editor is to provide comprehensive coverage of an area of legal study by organizing the materials with reference to each other so as to achieve an overall coherence. In a casebook examining the relationship between society and the law, the traditional case-by-case approach is simply inapplicable and the emphasis here is on materials drawn from a variety of other sources.

Friedman and Macaulay, in compiling the materials for their

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8 *See* Auerback, *Legal Tasks for the Sociologist*, 1 LAW & SOCIETY REV. 91 (1966); Skolnick, *Social Research on Legality*, 1 LAW & SOCIETY REVIEW 105 (1966).

volume, have edited a veritable compendium of the relevant sociological literature. They have attempted to impart a certain coherence to these materials by including a number of questions and extensive editorial comments. Schwartz and Skolnick, on the other hand, have prepared a book that is shorter and less comprehensive in terms of number and breadth of materials presented. Moreover, they have deliberately eschewed editorial comment, leaving to the reader the job of formulating the nature of the relationship between law and society. One irony in the organization of materials for these two volumes is that the book edited by the lawyers, Friedman and Macaulay, is little more than two percent cases, with the materials drawn primarily from law reviews and social science journals. On the other hand, Schwartz and Skolnick, the sociologists, have compiled the more traditional casebook although there is still a heavy emphasis on related materials, 80 percent or more.

Apart from the lack of emphasis on cases, there is a considerable area of overlap in the materials selected by the respective editors. Nearly 30 percent of the selections appearing in the Schwartz and Skolnick volume are also contained in Friedman and Macaulay. This in part reflects the scarcity of research in this whole area, the substantial consensus on that which does represent a contribution to the field, and the considerable parallel in organization and approach taken to the field by the respective authors.

Turning to the substantive content of these books, Friedman and Macaulay approach their task by looking at the relationship between law and the social sciences and asking what each may offer the other. The nature of cooperative ventures will vary depending on the role allotted to the social sciences. On the one hand, its primary contribution may consist of methodological tools, the use of various techniques and measures to determine specific facts for the law-makers. On the other hand, its contribution may extend beyond empirical determinations to theoretical generalizations about the nature and role of a legal system in society. The authors provide a brief example of these latter efforts by summarizing some of the anthropological views of "what is a law."

Friedman and Macaulay then turn to a consideration of the way in which a legal system works. This represents a sociological

approach to the legal distinction between the "law in action" and "the law on the books." The materials presented represent an effort to revise the formal model of legislative function, or administrative and criminal law process, to conform with their "social reality." The unifying concept the editors employ is a "*bargaining* process in the law" — what sociologists have long studied under the rubrics of informal organization or social accommodation. Thus, while the first-year law curriculum normally contains a course on contract law — the formal analysis of offer, acceptance, and consideration — a study by Macaulay indicates that most commercial transactions occur as part of a non-contractual ongoing customary relationship in which a truly negotiated "meeting of the minds" would be unnecessary and even counterproductive. This study of the non-use of formal law points to one of the important areas for consideration by all students of the law — the divergence of actual practices from the formal legal model. If the legal system is to be one of laws, and not men, then the study of informal process and discretion is particularly important. This problem of deviation from the formal model is illustrated by selections considering police discretion in arrests and plea bargaining. Throughout this section, Friedman and Macaulay emphasize the "bargaining process in the law" to raise critical questions about the way in which institutional structures, social processes, and informal accommodations may all converge to produce a system at odds with the formal declarations of the system.

Schwartz and Skolnick organize their materials in a manner similar to that employed by Friedman and Macaulay. The first part of their book deals with social values and the law, considering the sources, nature and function of law in a society. The articles examine the effect of social values on developments in the legal order:

> We believe that law does not develop in a vacuum, and that it is strongly influenced by the values and beliefs prevailing in the society that promulgates the law. Consequently, to the extent that there are conflicts in such values, they will be reflected in certain difficulties in developing law and in administering it.[9]

Viewing the law as a reflection of and mechanism for implement-

9 Schwartz and Skolnick p. 7.

ing social values, they consider the nature of legality, the problems of value conflicts and the difficulties in implementing legal standards in the face of value conflicts.

They select a variety of perspectives in which the law is described as a means of settling disputes and defining relationships within the society, or as a means of implementing certain fundamental value choices in the society, or as possessed of an inner morality derived from natural law. After indicating the value bases inherent in law, they consider the conflict which may occur when a system of law enacts one set of values while subordinating the beliefs of others under its jurisdiction. They present cases of "colonial law" wherein the law of the state is made applicable to people living within the state who are not culturally or historically of that state's law. This, in turn, raises questions about the administration of a legal order where there is a fundamental conflict between the values of the governor and the governed. In a more familiar context, cases and materials dealing with the problem of Mormon polygamy graphically illustrate this problem. These materials focus attention generally on the law as a reflection of morals and value-choices in a pluralistic society where a consensus is lacking on what is proper conduct.

In their respective introductory sections, both authors deal with various aspects of the basic question of what law is and the nature and functions of law. Friedman and Macaulay then consider the relationship between formal and informal processes in the legal system while Schwartz and Skolnick turn to the problems of culture conflict and law as value choice. These introductory sections, however, would also have been the most appropriate area to include some discussions by lawyers on "what is law" and the relationship of law to the study of society. Since this deficiency is not remedied at a later point, some recognition of the legal perspective should have been presented. While a separate course in jurisprudence satisfies some of the objections raised here, some reference to the contributions of Utilitarianism (Bentham, von Ihering), of Sociological Jurisprudence (Ehrlich, and especially Roscoe Pound), and of Legal Realism (Holmes, Llewellyn, and Frank) to the Sociology of Law should have been made. Friedman and Macaulay present a "bargaining process in the law" as a model

of the legal system. However, this analysis of the "law in action" proceeds without any attribution to the intellectual tradition that first distinguished it from the "law in the books."

In a second chapter, Friedman and Macaulay turn from the law as an informal system of bargaining and accommodation to an analysis of the impact of law on society. One section considers the conditions under which a law could be effective by focusing on the responses of individuals. The authors provide materials that illuminate a host of issues associated with using the law as a mechanism to effect social change: "While there is little doubt that a legal system responds to broader patterns of normative and structural change, there is a great deal of controversy as to whether law can induce, rather than simply reflect, such change."[10] The Social Darwinists, Spencer and Sumner, argued that changes in mores preceded changes in law, and that "Stateways cannot change Folkways." It is clear from the materials which Friedman and Macaulay present that Sumner's proposition, stated that broadly, would be difficult to defend. One study suggests that people alter their view of the propriety of an action on the basis of their belief that it is legal or illegal. Another found that appeals to conscience may be more effective in motivating behavior than threats of sanctions. Another series of studies examines the effectiveness of the law to deter certain types of crime. It raises the important policy question of what to do with "undeterrable" crime if a primary rationale for a penal sanction is deterrence.

Limitations on the effectiveness of the legal system to affect social change may also arise from institutional factors that generate countervailing pressures. Friedman and Macaulay view jury nullification as one countervailing factor institutionalized within the legal system itself. Other excerpts explore the power of those who are to be regulated, suggesting again the process of bargaining and informal accommodations within the formal structure. This occurs in a number of contexts — from the power that prisoners have over their guards to the power that "regulated" industries have over their regulatory agencies.

Related to the question of the kinds of behavior which the law can control is the question of how the effectiveness of law is to be

10 SCHUR, *supra* note 6, at 127.

measured, raising the question of defining the multiple functions of law. A selection dealing with the Prohibition suggests that even an unenforceable law may still have symbolic functions for salient groups in the society with the enactment of a law reflecting the dominance of their values as the choice of that society. Other selections, more methodological in orientation, deal with some of the problems in controlling external variables and accounting for plausible rival interpretations of data and events.

Schwartz and Skolnick consider the impact of law on society in a chapter examining the capacity of law to affect social behavior. They, too, are concerned with both "the capacity of law and its limitations as a means of ordering human behavior." The first issue they raise is the inherent dilemma in the use of law to prevent or reduce immorality. Employing law to regulate morality was questioned by John Stuart Mill; the issue remains alive today in a series of exchanges between Sir Patrick Devlin and H. L. A. Hart.[11] Schwartz and Skolnick present a variety of materials addressed to efforts to "legislate morality." One position argues that "when we attempt to enforce conventional morality through law, what we are in fact promoting is a crime tariff." They are concerned with the effects that moral or value conflicts may engender for the administration of the legal order. Included are selections dealing with the practical difficulties associated with enforcement (limits on effectiveness), the effect these difficulties have on enforcement techniques (obtaining evidence through entrapment, or illegal search and seizures) and the development of means of controlling such police behavior (the theory of the "exclusionary rule"). In summing up the general problems associated with enforcing morality, Schwartz and Skolnick note that "so long as legislatures require the enforcement of conventional morality, police will be tempted to violate constitutional restrictions. Thus, the underlying issue . . . is whether or not we have been placing undue demands upon our criminal law as an instrument of social control."[12]

Turning from some of the issues involved in the use of law to

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11 *Compare* H. L. A. HART, LAW, LIBERTY, AND MORALITY (1966), *with* Devlin, *Law, Democracy and Morality*, 110 U. PA. L. REV. 635 (1962).

12 Schwartz and Skolnick p. 426.

control morality, Schwartz and Skolnick examine one of the most far reaching legal efforts to alter social attitudes and behavior — the 1954 school desegregation cases. There follows a series of articles analyzing the effectiveness of the law for securing racial equality, the limitations that customary practices have in effecting full compliance with the law, and the problems of extending legally secured rights into new areas. Articles by the authors of the book consider the limitations of the conventional legal process and the problems posed by political and judicial conservatism as well as by liberal "incrementalism" in a period of rapid social change and upheaval.

Another section dealing with the impact of law on society considers legal attempts at social engineering under a variety of circumstances. Included here are studies documenting efforts at rent control or the ineffectiveness of legislation to change long-standing patterns of employer-employee relations. More general articles raise the issue of the ability of the law to realize and implement social values. Some deal with inherent limitations in the legal system to resolve certain kinds of disputes. Others deal with the capacity of the law to expand its protection to those presently excluded from the system, or to establish new "rights" in areas currently deemed "privileges."

In their respective considerations of the impact of law on society, both groups of editors posed similar fundamental issues: the uses of law as a tool for social change, the consequences of its use, and the limitations on its effectiveness. In light of their interest in the limits of effectiveness, it seems unfortunate that neither considered more fully the arguments of Sumner and others that "Stateways cannot change Folkways." While Schwartz and Skolnick examined the use of law for the enforcement of conventional morality — along with some of the social, political and legal consequences — Friedman and Macaulay gave this large question of law and morality too little attention. One method of focusing attention here might examine the problem of "crimes without victims"[13] and the related issues of over-criminalization and the use of law to regulate too many forms of questionably anti-social conduct.

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13 *See, e.g.*, E. SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY (1965).

The basic issues involved in these criticisms revolves around the questions of what kind of behavior should the law try to regulate and how this can best be accomplished. The use by Schwartz and Skolnick of the *Brown v. Board of Education*[14] decision and the related materials as a case study of one legal effort to modify social behavior is an efficacious technique for demonstrating these processes. Friedman and Macaulay might well have used this method to document similar processes in some other area, thereby illustrating those principles which they developed exclusively through articles from legal or sociological journals.

Friedman and Macaulay turn from a consideration of the impact of law on society to the impact of society on law. This includes: how laws are generated; alternatives to laws as a means of social control; and the political, social, economic, and cultural forces in a society that influence or create particular kinds of law. Looking for the social sources of law, for example, they examine the way in which custom or public opinion is reflected in law. Various selections explore the relationship between public opinion and the law. These raise the question of whether there is any such entity as "the Public" and whether legislation must, or does, conform to its opinion. Other materials deal with the role of particular publics — interest groups and lobbies — as these publics' opinions are transformed into law. Political scientists have long recognized that interest groups organized around an economic orientation are those publics which are most able to participate in the structures of American government. This benign view is countered by several "radical" critiques of the pluralist theories. Another section of materials accepts the existence of these pressure groups and considers some of the policy issues that their techniques and practices may raise.

In addition to the role that general public opinion and economic interest groups may play in the formation of laws, Friedman and Macaulay note the effects of expert opinion and the way in which scientific and technological advances may be fed into the legislative or judicial decision-making process. A number of articles deal with various aspects of these problems. Some forms of law-making and decision-making may involve an actual delegation

14 347 U.S. 483 (1954).

of authority to "experts." In other cases, the lawmaker must decide whether or not some technically feasible methods should be employed, *e.g.*, wiretapping or computer data banks. Other problems at the junction of law and scientific knowledge involve deciding what is within the province of expertise as well as the weight which should be accorded this opinion. Perhaps the classic example of this problem lies in the jury's determination of the criminal defendant's sanity based on the expert testimony of psychiatrists.

Schwartz and Skolnick identify the impact of society on law in their examination of the social bases of law. They are concerned with the way in which law develops, and the relationship between law and public opinion. They, too, include materials on the relationship between custom and legal development, and the effects of various forms of public and private opinions on legislation. In a series of articles by Schwartz and others, the relationship between social structure and the legal system is examined. The growth of legal formalism in complex society is viewed as an alternative to customary behavior regulated by informal norms in smaller or more primitive societies. The relationship between customary practices and the formal legal system is mentioned in Friedman and Macaulay's "bargaining process" of accommodation in the social order. The importance of the relationship between customary law and the more formal law is inadequately explored, a condition deplored by Professor L. Fuller.[15] Schwartz and Skolnick's exposition partially remedies this deficiency.

They also consider the role of public opinion and interest group opinion in the formation of laws. In addition to traditional lobbies,

> [i]nterest groups may exist within the governmental structure itself as well. . . . The commonly held notion that the legislature is a group responding to public interests and pressures may be increasingly challenged with the growth of bureaucracy. As government grows, pressures on the legislature may arise directly from bureaucratic interests, which have the capacity to shape public opinion in a direction that they favor.[16]

Thus, they suggest, the public's opinion may in fact be influenced

15 Fuller, *Human Interaction and the Law*, 14 AMERICAN JOURNAL OF JURISPRUDENCE 1 (1969).

16 Schwartz and Skolnick p. 116.

by leaders deliberately attempting to shape it to support their position.

There are other ways in which society may have an impact on the law. A group of readings considers ways in which social influences may be brought to bear on judicial decision-making. This may occur simply because judges, holding certain values, are appointed to represent particular geographical, racial, or religious groups. Another source of social influence may be the effect of legal opinion as enunciated in legal commentary. A different form of public opinion bearing on judicial decisions may be reflected in the *amicus curiae* brief which enables various interests to carry their partisan positions into the court itself. Or, as is sometimes argued, judicial policy may respond to political reality — "judges follow the election returns."

Both sets of authors have considered the impact of society on law primarily in terms of the way various "public" opinions are organized and heard by the law-makers. Schwartz's treatment is strengthened by this consideration of influences on the courts; Friedman's by his consideration of the role of expert opinion, science and knowledge on the law. Both provide similar treatment to issues of customary law and examine some alternatives to a formal legal system.

At least some of the attention devoted to the influence of public opinion on law might better have been devoted to the ways in which social structure and social organization affect the development and form of a legal system. This has long been a rich source of sociological inquiry.[17] Inquiry might also have been directed to those publics which have had no opinion — those with no economic interest around which to mobilize, such as the poor, or those too diffuse to mobilize, such as the consumer. Vast changes, occurring in these sectors are being translated into far reaching changes in the legal system. In just a few years, courses in poverty law and consumer legislation have become part of the curriculum in nearly every law school, clearly demonstrating the impact of society on the law.

17 *See, e.g.*, M. WEBER, ON LAW IN ECONOMY AND SOCIETY, (M. Rheinstein ed. 1967); K. MARX, SELECTED WRITINGS IN SOCIOLOGY AND SOCIAL PHILOSOPHY 215-30 (T. Bottomore ed. 1956); E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY, (George Simpson ed. 1933).

In their respective treatments of the relationship between the legal system and the social system, the editors each devote a section to intra-system considerations — the legal system as a social system and the organization for the administration of the law. As Friedman notes, "A system must do a number of things to function. Two important tasks are adapting to pressures from the environment and coordinating the activities of the people who are part of the system so that they work to attain its goals." This includes attention to the way in which the legal work load is kept within manageable limits, and in which various agencies are organized and coordinated to carry out the system's goals. Several selections deal with the problem of controlling the internal behavior of administrative agencies.

The bulk of this chapter, however, is devoted to a consideration of some of the specific actors within the legal system — the judge, the lawyer, and the police. The materials are organized so as to analyze their conduct in terms of role theory.

> Theorists use the concept of "role" to describe and explain the link between individuals and larger social groupings. A role is a pattern for conduct in a particular social position. . . . These patterns are not a precise job description covering all possible contingencies, and so an individual may play his part in a fashion that reflects his personality. . . . Roles tend to be defined so that the important functions of a social organization are served. . . .[18]

With this in mind they examine the functions and conduct of the lawyer, the judge, or the policeman. Because of the integral part that one's occupation plays in establishing his social identity, sociologists have studied occupations for some time. They have learned that factors in the occupational environment markedly affect the individual and the way he views the world. Articles here deal with various ways in which the social situation of the lawyer shapes the manner in which he conducts his practice. The section on police suggests that the operating patterns of the police are decisively shaped by inherent contradictions in their role within the legal system. This occupational environment in turn gives rise

18 Friedman and Macaulay p. 824.

to a "working personality" that may result in certain practices contrary to some of the goals of this system.[19]

Schwartz and Skolnick also present various materials dealing with the organization and administration of the law as a social system. They examine the legal profession, the jury, and the courts. They contrast two views of the legal profession, focusing first on the highest status lawyers who provide a variety of services for corporate clients, including many forms of financial and commercial advice not normally subsumed under the practice of law. They then focus on the lawyers who represent the poor. These articles illustrate some of the problems that occupational stratification and role multiplicity may pose for the practicing lawyer.

They also consider the role of the jury within the overall administration of the law. This section includes several selections from the Chicago jury study which deal with patterns of disagreement between judge and jury and the effect of social status on jury deliberations. A final series of articles deal with the courts and present several views of the problems of judicial work load and delay of trial. An interesting pair of articles examines the role of the public defender in the criminal justice system and highlights many of the issues associated with role theory, the effects of occupational demands and the informal accommodations that almost necessarily develop in the course of any series of on-going relationships.

As noted earlier, the purpose of a casebook is to achieve an overall coherence in the presentation of a circumscribed topic of legal study. Although these two volumes do not always achieve that goal, it is due primarily to the inherently broad scope of the subject matter and the lack of clear topical delineation. The Schwartz and Skolnick volume is the more restrained effort of the two. They attempt to be neither exhaustive in their coverage nor conclusive in their judgment. On the contrary, they limit their selections and organize their materials primarily to suggest relationships and avenues for further exploration.

Friedman and Macaulay seek to be more comprehensive in their

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19 *See* Feld, *Police Violence and Protest*, 55 MINN. L. REV. 738 (1971); W. WESTLEY, VIOLENCE AND THE POLICE (1970).

anthology and more panoramic in their approach. They try to spell out the nature of the relationship with considerably more explicitness than do Schwartz and Skolnick. Whether or not this will be appreciated is left to the reader.

What must be appreciated, however, is the contribution that both of these books make to expanding the scope of legal dialogue. In this, they are useful and timely. Interdisciplinary research has languished partly for lack of effective teaching tools to bridge the disciplines. And legislative decision-making has often lacked the sound empirical bases for framing policy issues. Hopefully, these volumes are the vanguard of a new growth which can only benefit everyone.