AN HISTORICAL ANALYSIS OF THE 1968 'INDIAN CIVIL RIGHTS' ACT

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Introduction

In the Indian Civil Rights Act,[1] enacted as a rider to the Civil Rights Act of 1968,[2] Congress faced a number of the problems involved in the relationship between the various Indian tribes and the federal constitutional system. In order to properly understand its provisions, however, the Act must be seen in historical perspective — in terms of the development of the place of the Indian in the American legal system and of the legislation itself. Because the debate in 1968 over the Civil Rights Act centered on the sections intended primarily to benefit other minorities, so have most of the commentaries written on it since then, and the necessary historical analyses of the Indian provisions have not been undertaken.

Judicial sensitivity is especially important in the area of Indian civil rights. The United States Commission on Civil Rights recently noted: "In enforcing the act, the courts will have the serious responsibility of drawing a balance between respect for individual rights and respect for Indian custom and tradition. Many important questions . . . will not be answered until the courts have settled them."[3] In deciding cases involving these provisions, some courts have not engaged in the sort of historical discussion and analysis that should be essential.[4] An underlying thesis of this article is that a sense of history will engender greater judicial sensitivity for the need to preserve effective tribal institutions. A better understanding of the relevant history should aid judicial analysis and guide the courts and the agencies implementing the legislation.

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1 25 U.S.C. §§ 1301-03, 1311-12, 1321-26, 1331, 1341 (1970).

2 82 Stat. 73 (codified in scattered sections of 18, 25, 42 U.S.C.).

3 UNITED STATES COMMISSION ON CIVIL RIGHTS, AMERICAN INDIAN CIVIL RIGHTS HANDBOOK 11 (1972).

4 *See, e.g.*, United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971).

This article, first briefly outlines the history of the issue of Indian tribal sovereignty and the ways in which federal law in this area has developed. It next traces the legislative process, especially the part played by Senator Sam Ervin of North Carolina, which resulted in the Indian civil rights provisions. This analysis focuses on Senator Ervin's apparent objectives, the interests of the affected parties, the areas of conflict and accommodation, and the process of enactment. It then examines the ways in which various courts have interpreted the Act and how the tribes have been affected by it.

I. Tribal Sovereignty from 1786

A. *The Early Years: Seminal Concepts*

The federal government's Indian affairs policy originated in times when it regarded the tribes as enemy nations. In 1786, Congress delegated responsibility for Indian affairs to the War Department.[5] The Bureau of Indian Affairs (BIA) was created in 1824, and President Jackson appointed a Commissioner of Indian Affairs within the War Department in 1832.[6] The responsibility for administration in the field rested with the local agent, often a cavalry officer, who was given broad powers "to manage and superintend the intercourse with the Indians" and "to carry into effect such regulations as may be prescribed by the President."[7] The President, in turn, was "authorized to prescribe such rules and regulations as he may think fit."[8]

The states took little part in the management of Indian affairs, for the Removal Act of 1830[9] transferred many eastern tribes to the plains west of the Mississippi River where no states yet existed. Moreover, in *Worcester v. Georgia*,[10] the Supreme Court held that native tribes were not subject to the jurisdiction of the states in which they were located. Chief Justice Marshall described the

5 H. Driver, Indians of North America 485 (2d ed. rev. 1969).
6 *Id.* at 482.
7 Act of June 30, 1834, ch. 162, § 7, 4 Stat. 736-37.
8 *Id.* at § 17, 4 Stat. 738.
9 Act of May 28, 1830, ch. 148, 4 Stat. 411-12.
10 31 U.S. (6 Pet.) 515 (1832).

Cherokee tribe as "a distinct community, occupying its own territory with boundaries accurately described in which the laws of Georgia can have no force."[11] In an earlier decision holding that the Cherokees were not a foreign nation within the meaning of the Constitution for the purpose of determining the Supreme Court's original jurisdiction, Chief Justice Marshall had described the tribe as a "domestic dependent nation" and had likened each Indian's relationship to the federal government to that of a "ward to his guardian."[12] These analogies reflected the traditional view that Indian tribes remained sovereign bodies empowered to regulate their own affairs, limited only by acts of Congress.[13] By virtue of the federal government's conquest, Congress was viewed as enjoying plenary authority over Indian affairs.[14] The treaties enacted under congressional authority often reserved to the Indians the right to retain their traditional institutions and to continue such essential activities as hunting and fishing.[15] Their implications were commonly broad, "[giving] the Indians every warrant to believe that they could retain their lands, their governments, and their way of life as long as they wished."[16]

Thus, the place of Indians and Indian tribes in the American system was uncertain. Indians were commonly regarded as federal wards; yet tribal organizations were acknowledged as "distinct communities" of a sovereign nature.

B. *The Era of Conquest: The Rule of the BIA*

Following the Bureau's transfer from the War Department to the Department of the Interior in 1849,[17] BIA policy continued to

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11 *Id.* at 560.

12 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

13 *See* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1347 (1969).

14 *See* Crosse, *Criminal and Civil Jurisdiction in Indian Country*, 4 ARIZ. L. REV. 57 (1962).

15 *See* 2 C. KAPPLER, LAWS AND TREATIES, S. Doc. No. 452, 57th Cong., 1st Sess. (1903).

16 W. BROPHY & S. ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS 25 (1966) [hereinafter cited as BROPHY]. This volume expands FUND FOR THE REPUBLIC, REPORT OF THE COMMISSION ON THE RIGHTS, LIBERTIES AND RESPONSIBILITIES OF THE AMERICAN INDIAN (W. Brophy & S. Aberle eds. 1961).

17 DRIVER, *supra* note 5, at 482.

reflect these conflicting views. The field agents still exercised the broad statutory power previously noted, but they also created indigenous police forces and courts or retained them where they already existed. Of course, this policy was not simply a concession to the sovereign powers of the tribes. The Indian police, directed by the local agent, served not only to enforce law and order, but also to set examples of acculturation to the native communities and to undermine the authority of recalcitrant chieftains and councils.[18] In the 1890's the Indian police were instrumental in suppressing the Ghost Dance movement among the Sioux, the last great organized resistance to the inexorable white dominance.[19]

The law enforced by these indigenous police detachments was a mixture of tribal custom and rudimentary codes drafted by the BIA in the early 1880's. In part, these codes were intended to supplant native customs, but they were also required because the trauma of conquest had weakened traditional social controls.[20] The "successful" experiment with Indian police encouraged the BIA to establish Indian courts with native judges. Courts of Indian offenses were established by the Secretary of the Interior in 1883, and that year's Annual Report of the Commissioner of Indian Affairs set forth rules, approved by the Secretary, governing the operation of the new courts.[21] In practice, these courts operated very informally.[22]

By the mid-1880's a structure for Indian affairs management had emerged. Alert to the uncertain legal status of the tribes and the unclear extent of their sovereign powers, the BIA adopted a middle course. Certain trappings of tribal sovereignty (in the form of Indian police and courts) were encouraged, but matters of pol-

18 W. HAGAN, INDIAN POLICE AND JUDGES 69-79 (1966).

19 *Id.* at 103. For an examination of what underlay the Ghost Dance movement, see P. FARB, MAN'S RISE TO CIVILIZATION AS SHOWN BY THE NORTH AMERICAN INDIANS FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE 280-84 (1968).

20 HAGAN, *supra* note 18, at 9.

21 SUBCOMM. ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS ON CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN, 99th Cong., 2d Sess., 14 (Comm. Print 1964) [hereinafter cited as SUMMARY REPORT OF HEARINGS].

22 The extent to which the native judges served the will of local BIA agents varied with circumstances and personalities; but a report of the Board of Indian Commissioners in 1892 charged that agent influence remained unduly strong, partly because appeals from court decisions could be taken to BIA administrators. HAGAN, *supra* note 18, at 110.

icy, such as the drafting of codes, remained exclusively in the hands of the Bureau.

C. *The Settlement Era: The Indians and the Law*

As white America pursued its "Manifest Destiny," Indian country ceased to be remote. Law and order on the reservations gravely concerned burgeoning numbers of settlers, and the increase in crimes committed by whites on reservations troubled the Indians as well. The new courts of Indian offenses exercised jurisdiction in civil and criminal cases in which both parties were Indian and also occasionally in cases involving whites on the reservations. But the creation of states as sovereign entities and a reluctance by the settlers to entrust serious criminal cases to Indian tribunals resulted in a substantial limitation of Indian court criminal jurisdiction.

State jurisdiction over crimes committed by whites on the reservations was extended in *United States v. McBratney*[23] in which the Supreme Court held that the United States Circuit Court for Colorado did not have exclusive jurisdiction over the murder of one white man by another on the Ute Reservation in Colorado. The Court said that the United States did not have exclusive jurisdiction over a reservation unless Congress had expressly exempted it from state jurisdiction when it had admitted the state to the Union. No such exemption had been made with respect to the Ute Reservation,[24] and, as a result, Colorado had "acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of its territory . . . including the Ute Reservation. . . ."[25]

As the Supreme Court extended state criminal jurisdiction over whites on the reservations, Congress limited Indian court authority over Indians committing crimes against other Indians on the reser-

23 104 U.S. 621 (1881).

24 The Court sought support from United States v. Ward, 28 Fed. Cas. 397 (No. 16,639) (C.C.D. Kan. 1863) and The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866). But these cases held merely that where express provisions *did* exist, Indian lands were exempt from state jurisdiction. They did not hold that express provision was an absolute prerequisite. Nevertheless, pressure to extend state jurisdiction, founded partly in fear of reservations becoming "no man's lands," was so great that *McBratney* became a landmark precedent.

25 United States v. McBratney 104 U.S. 621, 624 (1881).

vations. In the celebrated *Crow Dog* case,[26] the Oglala court had convicted the defendant of murder and ordered him to make restitution in the form of services and property to the victim's family. This form of penalty was fully consistent with traditional tribal practices, but outraged whites demanded a more severe punishment. The defendant was tried again and convicted in a Dakota Territory district court sitting as a United States circuit court. The Supreme Court held that the district court did not have jurisdiction over a crime committed in Indian country by one member of a tribe upon another of the same tribe.[27] In response, Congress eliminated tribal jurisdiction over cases involving serious crimes.

The Seven Major Crimes Act[28] gave territorial courts jurisdiction over enumerated major offenses committed by Indians within a territory, whether or not on a reservation and gave federal courts jurisdiction over such offenses when committed by Indians on a reservation within a state. The validity of the Act was established in *United States v. Kagama*,[29] in which the Supreme Court upheld the exercise of federal jurisdiction over the murder of an Indian by two other Indians on the Hoopa Valley Reservation in California. The Court recalled Congress' plenary power and reiterated Marshall's wardship concept: "These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights."[30]

At the same time, state courts and lower federal courts began to extend the logic of the Seven Major Crimes Act to give the states

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26 *Ex Parte* Crow Dog, 109 U.S. 556 (1883).

27 *Id.* at 562.

28 Indian Appropriations Act of 1885, 23 Stat. 385 (1885) [informally and hereinafter referred to as Seven Major Crimes Act], *as amended* 18 U.S.C. § 1153 (1970). In the original Act of 1885, federal courts and law enforcement agencies were granted jurisdiction over cases of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny committed by one Indian upon another on the reservation. Incest, assault with a dangerous weapon, and embezzlement were added later. Pub. L. No. 89-707, § 1, 80 Stat. 1100, and Pub. L. No. 90-284, § 501, 82 Stat. 80, *amending* 23 Stat. 385 (1885). The Act did not abrogate existing treaties. 18 U.S.C. § 1153 (1970) (as amended). The Cherokee, expressly granted jurisdiction over all crimes committed on their reservation by 1785 treaty (7 Stat. 18), were unaffected.

29 118 U.S. 375 (1886).

30 *Id.* at 383-84.

criminal jurisdiction over Indians off the reservation.[31] The resulting diminution of the jurisdiction of tribal courts to include only less serious offenses committed by Indians while on the reservation led an Oregon district court to declare that the Indian courts were merely "educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."[32]

In 1896, however, the Supreme Court clearly reaffirmed its adherence to the principle of tribal sovereignty. *Talton v. Mayes*[33] presented the question whether a Cherokee practice of using a five-man jury to institute criminal proceedings violated the grand jury requirement of the fifth amendment. In a landmark opinion, the Court held that the requirement was applicable only to the federal government,[34] saying that because the sovereign powers of Cherokee governing bodies had existed prior to the white man's arrival, the Indian courts were not federal agencies subject to the fifth amendment.[35] This reaffirmation of tribal sovereignty carried into the present century as tribal governments were acknowledged to enjoy immunity to suit without prior consent. In *Turner v. United States*,[36] the Supreme Court indicated this view as dictum, and in 1940, it held flatly that "Indian Nations are exempt from suit without Congressional authorization."[37]

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31 *In re* Wolf, 27 F. 606 (W.D. Ark. 1886) (conspiracy of Indians to obtain money from tribe under false pretenses); Pablo v. People, 23 Colo. 134, 46 P. 636 (1896) (murder of Indian by Indian); Hunt v. State, 4 Kan. 60 (1866) (murder of Indian by Indian); State v. Williams, 13 Wash. 335, 43 P. 15 (1895) (murder of Indian by Indian).

32 United States v. Clapox, 35 F. 575, 577 (D. Ore. 1888).

33 163 U.S. 376 (1896).

34 In this respect, *Talton* paralleled Hurtado v. California, 110 U.S. 516 (1884), in which the Supreme Court had held that states were not required by the due process clause of the fourteenth amendment to prosecute only after indictment by a grand jury.

35 Recently, one distinguished commentator has suggested that *Talton* means only that a tribal government will not be required to grant a *remedial* right under the Constitution, the question of *fundamental* rights being left open. Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 NO. DAK. L. REV. 337, 341 (1969).

36 248 U.S. 354 (1919).

37 United States v. United States Fidelity Co., 309 U.S. 506, 512 (1940). The Court also held the tribes immune to counterclaim except as authorized by statute.

D. *1920 to 1940: Nations in a Nation*

After World War I, Congress passed the Indian Citizenship Act, which provided that "all noncitizen Indians born within the territorial limits of the United States [are] declared to be citizens of the United States."[38] Most states extended the franchise with this new citizenship although several states did not.[39]

Following this grant of citizenship, the Secretary of the Interior hired the Brookings Institute to survey Indian tribes and to recommend further steps to bring the Indians more completely into the American mainstream. In 1928, the Institute issued the Meriam Report,[40] which revealed grim economic, educational, and health conditions on the reservations and stressed the impossibility of integrating the Indians directly into white society.[41] The Report was highly critical[42] of the Indian General Allotment Act of 1887,[43] which was an earlier attempt to achieve rapid assimilation. That Act had distributed Indian land to individual natives in 40, 80, or 100 acre allotments. Through white exploitation of native ignorance of the formalities of land titles, Indian land holdings decreased from 138 million acres in 1887 to 48 million acres in 1934.[44]

Drawing heavily on the Meriam Report and work begun during the Hoover administration,[45] New Deal appointees to the Department of the Interior were instrumental in drafting and guiding through Congress the Indian Reorganization Act of 1934,[46] a major reform measure. It cancelled the general allotment policy and radically changed BIA procedures regarding economic development and community self-government. The most important self-government provision was section 16, which authorized the tribes to adopt

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38 8 U.S.C. § 3(c) *amended* 8 U.S.C. § 1401(a)(2) (1970). A number of Indians, such as those who had previously enlisted in the armed forces or who had accepted land allotments were already citizens by previous legislation. Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. & INT'L L. 78, 86 (3d Ser. 1934).

39 *E.g.*, Porter v. Hall, 34 Ariz. 308, 271 P. 411 (1928) (holding Indians ineligible to vote under a state statute denying the franchise to "persons under guardianship").

40 L. MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION (1928).

41 *Id.* at 86-90.

42 *E.g.*, *id.* at 7.

43 Act of Feb. 8, 1887, ch. 119, 24 stat. 388.

44 BROPHY, *supra* note 16, at 20.

45 *Id.* at 181.

46 25 U.S.C. §§ 461-79 (1970).

their own constitutions and by-laws, to be ratified by a majority of the members and by the Secretary of the Interior. An elected tribal council was authorized to pass ordinances consistent with the tribal constitution.[47] The Act authorized the establishment of tribal courts, to be manned by judges elected by the tribes or appointed by the councils and to be guided by rules drafted by the tribes themselves, subject to the Secretary's approval. Wherever a tribal court was established, it superseded the court of Indian offenses if one existed.[48] Finally, the Secretary was authorized to draft a model code as a guide to the tribes and as an operative code for those tribes who did not draft their own.[49] Although the original version of the Act provided for a court of Indian affairs with appellate jurisdiction, this provision was removed before passage, leaving unchanged the old system of appeals to BIA administrators and ultimately to the Secretary.[50]

The motivation behind the Indian Reorganization Act was to encourage the establishment of Indian governing bodies to exercise the sovereign powers which the Supreme Court in *Talton* had said belonged to the tribes. This view was expressed by Felix Cohen, one of the drafters of the Act: "These powers are subject to qualification by treaties and by express legislation by Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and their duly constituted organs of government."[51] This notion of "internal sovereignty"[52] was to become the watchword of the courts in ensuing decades.

Because many tribes, however, were ill-prepared for self-government, the BIA often simply imposed its own code and created the tribe's constitution, by-laws, council, and court.[53] "While the trappings of autonomy had been created the substance was lacking.

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47 The Act provided no express authority for the Secretary to review council-passed ordinances, but it became customary for him to do so through his local superintendent. *See* 25 C.F.R. § 11.1(e); *see also* SUMMARY REPORT OF HEARINGS, *supra* note 21, at 3.

48 25 C.F.R. § 11.1(b) (1969).

49 25 C.F.R. § 11 (1969).

50 H.R. REP. No. 1804, 73d Cong., 2d Sess. 6 (1934).

51 U.S. SOLICITOR FOR DEPT. OF INTERIOR, FEDERAL INDIAN LAW 143 (1940).

52 "Internal sovereignty" was contrasted with "external sovereignty" — the tribes' powers vis-a-vis non-Indians. The tribes enjoyed full sovereign independence from outside forces except for the federal government.

53 Oliver, *The Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193 (1959).

No major transfers of governmental functions from the Bureau of Indian Affairs to the tribes took place."[54]

In fact, the 1934 Act strengthened the role of the BIA in tribal affairs, and the Secretary's review powers ensured that the BIA would still have considerable influence even among those tribes capable of creating their own governing bodies. While the Bureau role at first seems inconsistent with the principle of tribal sovereignty which the Act was apparently designed to implement, BIA involvement conformed with the Meriam Report which had acknowledged that true Indian self-government was a long-term objective at best, and that Indians should prepare for the eventual control of their own affairs through the gradual extension of tribal power.[55]

E. *World War II to 1955: Termination and Assimilation*

Nearly 25,000 Indians served in the American armed forces during World War II, and almost twice that number worked in industry.[56] As had been the case following World War I, new efforts were made after World War II to bring the Indians into the mainstream of American society. It appeared, however, that while white America was making room for the native American, it also threatened to destroy his Indian identity.

> The cultural conquest of the recalcitrant red man, by cajoling and by assimilation was at hand. He was measured for the melting pot. It was with this hope in mind that the Hoover Commission on postwar governmental reorganization, which had been appointed by President Truman, recommended "complete integration" . . . . Evidently it was thought that if the Indian could fight and work like everyone else then he must be like everyone else.[57]

Advance warnings of an attempt to remove the confining but protective fabric woven into the 1934 Act appeared as early as 1943, when the Senate Indian Affairs Subcommittee called for liquidation of the BIA and termination of its services.[58] In 1947,

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54 Schifter, *Trends in Federal Indian Administration*, 15 S.D. L. REV. 1, 4 (1970).

55 MERIAM, *supra* note 40, at 86-90.

56 DRIVER, *supra* note 5, at 495.

57 S. STEINER, THE NEW INDIANS 23 (1968).

58 S. REP. No. 310, 78th Cong., 1st Sess. 17 (1943).

the Commissioner of Indian Affairs presented a plan to the subcommittee for termination of federal services to some more "advanced" tribes.[59] The Hoover Commission, in 1948, coupled its plea for integration with a proposal to terminate federal services to tribes and to transfer these functions to the states.[60] The next year, measures were introduced in Congress to abolish the BIA[61] and to amend the Constitution to eliminate the power of Congress over Indian affairs.[62]

In 1948, Congress authorized New York to assume criminal jurisdiction over all Indians residing within its borders,[63] and a year later it extended coverage to include all civil disputes.[64] Because the Indians in New York were relatively assimilated and voiced no objection to the legislation, these actions created little controversy. The movement for further extension of state jurisdiction over Indian reservations throughout the country was slowed temporarily in 1948 when a bill to that effect failed in the Senate after passing the House.[65]

However, the move to transfer tribes from BIA guardianship to state jurisdiction gained momentum as the Bureau brought discredit on the system created in 1934. In 1950, Dillon Myer, former director of the World War II Japanese-American Relocation Program, was named Commissioner of Indian Affairs. In order to implement the BIA's plan to relocate Indians into the cities, Myer used the Bureau to control or to dispose of reservation lands and individual property.[66] The BIA also allegedly meddled in tribal politics, froze tribal funds to quiet dissent on the reservations, interfered with the tribes' efforts to obtain legal counsel, and re-

59 STEINER, *supra* note 57, at 23.

60 Report of the Committee on Indian Affairs to the Commission on Organization of the Executive Branch of the Government (Oct. 1948), cited in BROPHY, *supra* note 16, at 36. The idea of turning Indian problems over to the states was an old one. In 1882 the Commissioner had recommended that when the Dakota and New Mexico territories became states they be given jurisdiction over reservations, but four years later the Supreme Court warned: "They [the Indians] owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375, 383 (1886).

61 S. 2726, 81st Cong., 1st Sess. (1949).

62 95 CONG. REC. 9745 (1949).

63 25 U.S.C. § 232 (1970).

64 25 U.S.C. § 233 (1970).

65 H.R. 4725, 89th Cong., 2d Sess. (1948).

66 *See generally* STEINER, *supra* note 57, at 179.

fused to build permanent community facilities on reservations (such as a hospital in Papago country) because it would encourage the natives to remain on their land rather than to relocate.[67]

The BIA's abuse of its power to prepare Indians for self-sufficiency moved Congress to attempt "to get out of the Indian business."[68] After bills to set tribes "free" under state jurisdiction nearly passed the Eighty-second Congress, the Eighty-third Congress adopted House Concurrent Resolution 108, stating in part:

> [I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . . .[69]

Bills to transfer jurisdiction over Indians to California, Minnesota, Nebraska, Nevada, Oregon, and Wisconsin were introduced.[70] Of these, H.R. 1063 was enacted and became known as Public Law 280.[71] Although originally drafted to affect only Indians in California, in its final form it covered Indians in Minnesota, Nebraska, Oregon, and Wisconsin. Sections 6 and 7 permitted states whose constitutions contained disclaimers of jurisdiction over Indian affairs to amend their constitutions to exercise such jurisdiction. In making this open-ended transfer of authority Congress did not even require that the Indians be consulted before a state assumed jurisdiction over them. President Eisenhower signed the bill reluctantly, terming the legislation an "unchristianlike approach" to Indian problems, and noting further:

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67 Cohen, *The Erosion of Indian Rights, 1950-1953*, 62 YALE L.J. 348, 352-59 (1953).

68 *Hearings on H.R. Con. Res. 108 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess., ser. 7, at 28 (1953) (remarks of Representative Saylor of Pennsylvania), *quoted in* Oliver, *The Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193, 238 n. 247 (1959).

69 H.R. Con. Res. 108, 83d Cong., 1st Sess., 99 CONG. REC. 9968 (1953).

70 These states had no disclaimers of jurisdiction over Indians written into their constitutions, and their tribes had been previously "consulted" about the transfer, although no claim was made that their consent had been obtained. H.R. REP. No. 848, 83d Cong., 1st Sess. 7-8 (1953).

71 Act of August 15, 1953, 67 Stat. 588, *as amended* 18 U.S.C. § 1162 (1970) and 28 U.S.C. § 1360 (1970).

> The failure to include in these provisions a requirement of full consultation in order to ascertain the wishes and desires of the Indians and of final Federal approval, was unfortunate. I recommended, therefore, that at the earliest possible time in the next session of the Congress, the act be amended to require such consultation with the tribes . . . .[72]

The administration, however, did not submit a bill to implement the President's recommendation. While several members of Congress responded in the Second Session of the Eightythird Congress and continued to introduce modifying legislation during the remainder of the decade,[73] none was successful.

In 1954, Congress proceeded with legislation to terminate federal services to selected tribes, as contemplated by House Concurrent Resolution 108.[74] Several bills proposed to terminate tribes throughout the west and midwest. The most significant legislation to emerge was the termination of the Menominee,[75] Klamath,[76]

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72 *Hearings on S. 961-968 and S.J. Res. 40 Before Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th *Cong.*, 1st Sess. 243 (1965) (testimony of Eagle Seelatsee, Chairman, Yakima Tribal Council) [hereinafter cited as *1965 Hearings*].

73 S. 2625 and S. 2838 were introduced by Senators Murray and Goldwater, and H.R. 7193 by Representative Metcalf, in the next session; all of these bills died in committee. Similar bills were introduced in later years by these members of Congress, joined by Representatives Rhodes, Senner, and Olsen, and Senators Burdick and Mansfield. One bill was successfully shepherded through the Senate by Senator O'Mahoney of Wyoming, despite resistance of Senator Watkins of Utah, Chairman of the Indian Affairs Subcommittee, and despite an adverse report from the Interior Department. 102 CONG. REC. 399 (1956). However, the bill failed to clear the House Interior and Insular Affairs Committee. *Id.* at 661.

74 House Concurrent Resolution 108 states in part: ". . . [A]t the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potowatamie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota. It is further declared to be the sense of the Congress that upon the release of such tribes and individual members thereof from such disabilities and limitations, all offices of the Bureau of Indian Affairs in the States of California, Florida, New York, and Texas and all other offices of the Bureau of Indian Affairs whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished." H.R. Con. Res. 108, 83d Cong., 1st Sess., 99 CONG. REC. 9968 (1953).

75 25 U.S.C. § 891 *et seq.* (1970).

76 25 U.S.C. § 564 *et seq.* (1970).

and various western Oregon[77] tribes. The Klamaths promptly lost most of their timberlands and farmlands, which a Portland bank acting as trustee sold to the government and to private users following what appeared to be little consultation with the tribe. The tribe then began to disintegrate as a political and social organization.[78] The termination of the Menominee also caused the disintegration of the tribal structure, in addition to the near insolvency of several large tribal enterprises and the depletion of its treasury reserves before an adjustment to the new situation could be made.[79]

The termination policy sent a shock through Indian country which continues to this day.[80] The termination controversy also split the Department of the Interior and the BIA.[81] To calm the storm around him, Secretary Seaton announced in a radio broadcast that henceforth no tribe would be terminated unless it fully understood the program and clearly consented to it.[82] An old lesson had been re-learned: "The Indian tolerates his present impotent and unjust status in his relations with the Federal Government because he sees the Bureau of Indian Affairs as the lesser of two evils. . . . [T]he Bureau and only the Bureau stands between the Indian and extinction as a racial cultural entity."[83] The federal burden was again accepted as part of white society's debt to the Indian:

> As to special Indian rights, since being an Indian is hereditary, the rights at first glance seem anomalous in a democracy; when we study them, however, the anomaly fades. They are part of a quid pro quo promised solemnly by us in treaties, agreements and laws, and upheld over and again by our courts, in exchange for the whole area of the United States and for the ending of rightful independence.[84]

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77 25 U.S.C. § 691 *et seq.* (1970).

78 BROPHY, *supra* note 16, at 199.

79 *Id.* at 201-03.

80 "Fear of termination pervades Indian thinking. It colors the Indian's appraisal of every proposal, suggestion and criticism." E. CAHN, OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 16 (1969).

81 BROPHY, *supra* note 16, at 182.

82 105 CONG. REC. 3105 (1959).

83 CAHN, *supra* note 80, at 14.

84 LaFarge, *Termination of Federal Supervision: Disintegration and the American Indians*, 311 ANNALS 41-42 (1957).

F. *The Recent Years: The Indians and the Courts*

In *Tee-Hit-Ton Indians v. United States*,[85] the Supreme Court held that certain tribal property rights established by occupancy "since time immemorial" could be cancelled by Congress at its discretion and without compensation. This much-criticized decision[86] has been seen to undercut the principle of the Indian's sovereign control of tribal lands and to run counter to the spirit of a decision in 1941 upholding the notion of sovereign control and requiring compensation for cancellation of that control.[87] In *Tee-Hit-Ton* the Court declared: "Our conclusion . . . leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of government-owned land rather than making compensation for its value a rigid constitutional principle."[88] As termination fever cooled, the significance of *Tee-Hit-Ton* diminished. A number of subsequent decisions by the Court of Claims recognized the tribes' sovereign control of their lands and resources and ordered compensation on statutory, not constitutional, grounds.[89]

Lacking clear direction, lower federal courts rendered divergent, uncertain opinions on issues of tribal sovereignty. The Eighth Circuit, for example, took the traditional position in *Iron Crow v. Oglala Sioux Tribe*,[90] upholding the enforcement of a tribal court's sentence for adultery. The Tenth Circuit was guided by similar principles in *Martinez v. Southern Ute Tribe*[91] as it declined to review a decision by a tribal council which allegedly denied an Indian the benefits of tribal membership. In *Oglala Sioux Tribe v. Barta*,[92] however, a district court agreed to hear a tax collection action brought by the tribe against a non-member who was leasing tribal land. Normally such a matter would be

85 348 U.S. 272 (1954).
86 *E.g.*, *The Supreme Court: 1954 Term*, 69 HARV. L. REV. 119, 150 (1955).
87 United States v. Santa Fe & Pacific R.R., 314 U.S. 339 (1941).
88 348 U.S. at 290-91 (1954).
89 *See, e.g.*, United States v. Seminole Indians, 180 Ct. Cl. 315 (1967); Whitefoot v. United States, 155 Ct. Cl. 127 (1961); and Tlingit and Haida Indians v. United States, 147 Ct. Cl. 315 (1959).
90 231 F.2d 89 (8th Cir. 1956).
91 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958).
92 146 F. Supp. 917 (D.S.D. 1956).

under tribal court jurisdiction. The court suggested that the 1934 Act had changed the tribe from a sovereign entity to a federal agency: "Thus the rights derived from original sovereignty have been directly channeled into a Federal statutory scheme and all tribal powers are exercised under Federal law."[93] When the lessee appealed, the Eighth Circuit upheld the tribe's right to exact a discriminatory tax on non-Indians on the reservation, despite the due process protections of the fifth amendment or the equal protection clause of the fourteenth.[94] It also held that the lower court had not acted improperly in hearing the cases.[95] Thus, the appeals court implied that federal jurisdiction rested on the tribe's operation under federal law but that provisions of the federal Constitution remained inapplicable.

A less puzzling retreat from the tribal sovereignty principle appeared when the plaintiff in *Martinez*,[96] who had failed in federal court, sought a remedy in Colorado courts. The Colorado Supreme Court,[97] noting that the plaintiff's remedy had been denied in tribal and federal courts, reasoned that to deprive her of any remedy whatever would deny her equal protection of the laws and agreed to hear the case. The court maintained that incorporation under the 1934 Act constituted an expression of consent by the tribe to be sued in state court, because as a corporation, the tribe had recourse to state courts for protection of its rights, and it should, therefore, be required to answer the claims of others in state courts as well.

Notwithstanding the Colorado Supreme Court's decision, the movement away from tribal sovereignty during the years following 1954 slowed as two widely publicized decisions in Navaho country again reaffirmed the principle of tribal sovereignty by denying constitutional guarantees of individual rights to Indians in disputes with their tribal governments. In 1959, members of the Native American Church brought a first amendment attack in federal court on a Navaho ordinance which prohibited them from using or possessing peyote, a mild hallucinogen, as a substitute for the usual

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93 *Id.* at 918.

94 259 F.2d 553, 556-57 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1958).

95 *Id.* at 555-57.

96 Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958).

97 Martinez v. Southern Ute Tribe, 150 Colo. 504, 374 P. 2d 691 (1962).

Christian sacraments. In an earlier first amendment action, charging infringement of religious freedom of Protestants in a Catholic pueblo, a federal district court had dismissed for lack of jurisdiction;[98] but in *Native American Church v. Navaho Tribal Council*,[99] the Tenth Circuit did not refuse jurisdiction, even though the Navaho tribe had not organized under the 1934 Act. Rather, the court held that, with respect to freedom of religion, the Constitution did not apply to the Navaho tribe. The first and fourteenth amendments were interpreted as restrictions on the state and federal but not on tribal governments. The argument that the tribe was actually a federal agency was dismissed.

In the same year, the Supreme Court clarified limitations of state jurisdiction over civil disputes on the reservation in cases where the state had not assumed full jurisdiction under Public Law 280. In *Williams v. Lee*[100] the Court held that a state court could not compel payment by Indians for goods purchased on credit at a non-Indian's store on the reservation. The Court noted that the Navaho court system could exercise broad criminal and civil jurisdiction over suits by outsiders against tribesmen. It issued a sweeping endorsement of tribal sovereignty, suggesting the following guideline for allocating disputes between state and tribal courts: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[101]

Students of Indian problems, deeply affected by the failure of instant assimilation, entered the 1960's with a renewed awareness of the need to retain sovereign power in tribal institutions. This theme was struck in an independent report,[102] in the report of a Department of the Interior Task Force created by the newly ap-

98 Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954).

99 272 F.2d 131 (10th Cir. 1959).

100 358 U.S. 217 (1959).

101 *Id.* at 220. *But cf.* Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962) (dictum). The restriction of non-Indians to tribal courts or courts of Indian offenses for certain civil remedies, by *Williams* and subsequent decisions such as United States *ex rel.* Rollingson v. Blackfeet Tribal Court, 244 F. Supp. 474 (D. Mont. 1966), is said to have caused concern among white businessmen on the reservations. Often viewed by the Indians as exploiters, they feared they could not expect impartial treatment from a native tribunal.

102 FUND FOR THE REPUBLIC, REPORT OF THE COMMISSION ON THE RIGHTS, LIBERTIES AND RESPONSIBILITIES OF THE AMERICAN INDIAN (W. Brophy & S. Aberle eds. 1961).

pointed Secretary of the Interior, Stewart Udall,[103] and in the Declaration of Indian Purpose issued from a native American convocation at the University of Chicago in 1961.[104] Unresolved was the fundamental problem of how tribal institutions should relate to the constitutional system of the surrounding society.

II. The Ervin Indian Inquiry and Proposed Legislation

A. *Senator Ervin and the Indians*

When Congress passed the Removal Act of 1830,[105] Andrew Jackson deployed troops throughout the southeastern United States to force the Indians westward. One hundred thousand Indians were resettled, and thousands more died along the "Trail of Tears" to Oklahoma. However, some tribes, including the Choctaw, the Seminole, and a band of the Cherokee, resisted. After $50 million and 1500 men had been lost pursuing the Seminole in the Everglades for two decades, further efforts to enforce the Removal Act against southern tribes were abandoned.[106]

Unlike the Seminole who remained isolated in the Everglades and the Choctaw who regrouped in sparsely settled areas of Mississippi, the surviving Cherokee continued to live in close contact with southern white society. Acquisition of a small reservation in North Carolina over which federal jurisdiction was concluded in 1868[107] established the Cherokee people as permanent residents of that state.

The co-existence between the white man and the Indian in the South, nurtured perhaps by a sense of common defeat at the hands of armies sent from Washington, has resulted in what one observer has termed the "romantic" southern affection for the Indian and his heritage.[108] Among the southerners who have publicly proclaimed this feeling for the Indian is Senator Sam Ervin of North

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103 Task Force on Indian Affairs, A Program for Indian Citizens (1961).

104 American Indian Chicago Conference, Declaration of Indian Purpose (June 13-20, 1961).

105 Act of May 28, 1830, ch. 148, 4 Stat. 411-12.

106 Driver, *supra* note 5, at 486.

107 *Id.* at 499.

108 Letter from Arthur Lazarus, Jr., counsel to the Association on American Indian Affairs, to the author, March 3, 1970, on file at office of Harvard Legislative Research Bureau.

Carolina.[109] His professed interest in Indian affairs may also be reinforced by a large naitve-American constituency in his home state.[110] It has surely been augmented by his repeatedly demonstrated concern for the protection of constitutional rights.

When the *Williams*[111] and *Native American Church*[112] decisions reaffirmed that systems of tribal government were largely unregulated by the Constitution, Helen Scheirbeck, a Lumbee serving with Senator Ervin's Subcommittee on Constitutional Rights, initiated a preliminary inquiry to determine whether such immunity from constitutional restraint had resulted in actual deprivations of constitutional rights by the Indian tribes. As the investigation progressed, it broadened into one of Indian rights in general, as the Subcommittee staff received numerous complaints about violations of constitutional guarantees not only by tribal authorities but also by federal, state, and local officials. However, Senator Ervin appeared to find the conflict between the Constitution and tribal sovereignty more intellectually stimulating than the broader issue of white relations with the Indians.[113] Furthermore, Senator Ervin, who had opposed previous civil rights measures, was careful at this time to separate the fledgling Indian project from the volatile issues of race relations concerning other minority groups.

In order to maintain his stand on Negro civil rights while investigating those of the Indian, Senator Ervin and his staff deftly distinguished red from black. Indians came to be known as "the minority group most in need of having their rights protected by the national government."[114] Senator Ervin was later to claim, "[e]ven though the Indians are the first Americans, the national policy relating to them has been shamefully different from that relating to other minorities."[115] The Indian project in fact later

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109 110 CONG. REC. 22081 (1964).

110 With 40,000 Indians in 1960, North Carolina trailed only Arizona, New Mexico, Oklahoma, and California in Indian population. STEINER, *supra* note 57, at 324. 1970 figures reveal approximately 45,739 Indians in the state. UNITED STATES BUREAU OF THE CENSUS GENERAL CHARACTERISTICS OF THE POPULATION.

111 See text at note 100, *supra.*

112 See text at note 99, *supra.*

113 *See, e.g.*, 107 CONG. REC. 17121-22 (1961).

114 Letter from Lawrence M. Baskir, Chief Counsel and Staff Director, Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary, to the author, March 5, 1970, on file at office of the Harvard Legislative Research Bureau.

115 114 CONG. REC. 393 (1968).

provided Senator Ervin with occasional opportunities to embarrass his northern liberal colleagues, who were allegedly less interested in the first Americans than in the politically powerful black community.

Senator Ervin could politically afford to support Indian rights largely because of the extensive assimilation of North Carolina Indians into southern life. The Cherokee and Lumbee settlements had been fully integrated into the state's governmental structure as counties and municipalities.[116] It has been said that they represent a small, unaggressive, poorly differentiated minority in the state.[117] This integration has been facilitated, especially in the case of the Cherokee, by the early evolution of legal institutions modeled after those of their white neighbors. Their codes, courts, sheriffs, and police forces, for example, have long been in existence.[118]

While this fact freed Senator Ervin to investigate Indian rights without political difficulty at home, it limited his perspective. During the hearings, he revealed his inclination to try to duplicate the North Carolina assimilation experience on a national level. He demonstrated this predilection by focusing on how the systems of tribal justice outside North Carolina failed to conform to the country's constitutional scheme. As Senator Ervin launched the investigation, he cited the preliminary inquiries of his own staff, the Fund for the Republic Report, and the Department of the Interior Task Force Report, as factors in his decision to proceed.[119] Each had advanced the conventional thesis that deviations from constitutional government in the United States were improper in themselves and required eventual correction.[120]

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116 *Hearings on Constitutional Rights of American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 4 (1961) [hereinafter cited as *1961 Hearings—Part 1*].

117 In a 1970 school desegregation dispute, the BIA declared that the Lumbees lacked a tribal culture and did not constitute a tribe. Franklin, *Indians Resist Integration Plan in Triracial County in Carolina*, N.Y. Times, Sept. 13, 1970, § 1, at 78, col. 4.

118. HAGAN, *supra* note 18, at 19-21.

119 107 CONG. REC. 17121 (1961).

120 This language from the Fund for the Republic Report, is expanded in BROPHY, *supra* note 16, at 44: "No government should possess the authority to infringe fundamental civil liberties . . . . For any tribe to be able to override any of them violates the very assumptions on which our democratic society was established."

B. *The Subcommittee Field Hearings*

For the Subcommittee's first official hearing on Indian rights, Senator Ervin turned to non-Indian authorities.[121] An assistant secretary of the Department of the Interior, various BIA administrators, and interested members of Congress were heard first. Then the hearings moved west to Colorado, New Mexico, Arizona, North and South Dakota, and California before returning to Washington where further sessions were held in 1963 and 1965. Native testimony mixed self-interest and tribal loyalty, bitterness about white mistreatment and cautious acceptance of Anglo-American precepts. From this mixture emerged a broad picture of constitutional neglect which Senator Ervin was determined to remedy. The focus fell first on the tribal system.

1. Constitutional Guarantees and the Tribal System

Tribal politics is politics in a closed circle; it is intense and deeply personal.[122] Traditionally, tribal government has been fully participatory, controlled mainly by the prospect of shame before the group. One commentator described nineteenth century tribal systems:

> Law in the sense of formal written codes, of course, they did not have, but there were clearly defined customary codes of behavior enforced by public opinion and religious sanctions . . . . For most Indians the prospect of scornful glances and derisive laughter from the circle around the campfire was the chief instrument of social control.[123]

In this century, group pressure remains central, but individuality is not stifled; rather, the security of tribal identity has encouraged differentiation without fear of being ostracized and isolated. Thus, the "[c]ommunality of tribalism does not diminish the Indian's individuality. On the contrary it protects him socially and thus frees him individually. . . . The more secure his tribe is, the more secure the Indian feels — and the more independent and

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121 *1961 Hearings — Part 1*, *supra* note 116.

122 Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1830 (1968).

123 HAGAN, *supra* note 18, at 11.

self-confident he is."[124] Because the individual's sense of well-being is based in part on the security of the tribe, an Indian will frequently react more strongly to an attack on tribal institutions than to an attack on his own individual rights or powers.[125] This tribal orientation has been reinforced by the fact that all of the rights which the United States reserved to Indians by treaty pertained to the tribes as group entities rather than to individuals and in light of the conflict with white society over control of group-owned reservation resources.[126]

The traditional lack in most tribes of established social classes further cements tribal ties since there are fewer sources of localized power and sub-group disaffection. Tribes of the plains, prairies, and the East (such as the Cheyenne, the Creek, and the Iroquois) had well-defined systems of rank, but these were primarily based on achievement and only secondarily on heredity.[127] Certain tribes of the Northwest which maintained slave systems and the Pueblo communities of the Southwest were exceptions to this general rule. The Pueblo communities have been termed theocratic, because seats on the governing council were filled by the leaders of the many religious societies.[128] The social adhesive in the tribal systems appears to have been the collective manner in which decisions were made — community consent was required before the council would act. The emphasis was on group harmony: "In council meetings, it was considered bad form to become self-assertive and vociferous, and those who did almost never gained the assent of the council to their proposals."[129] There is some evidence that the aura of harmony was protected in the past by a policy of expurgation, as deviants were occasionally expelled or put to death.[130] Thus, no decisions were made without group consent, but the group was constantly adjusted to render consent possible.

The scope of tribal governments is generally similar to that of

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124 STEINER, *supra* note 57, at 140.

125 *1961 Hearings—Part 1*, *supra* note 116, at 223 (statement of Arthur Lazarus, Jr.).

126 *Id.* at 187.

127 DRIVER, *supra* note 5, at 298, 341.

128 *Id.* at 297.

129 *Id.* at 338-39.

130 *Id.* at 297.

state or municipal governments in non-Indian communities.[131] These bodies make, enforce, and interpret laws affecting the general welfare, including the control on the reservation of criminal behavior not within federal jurisdiction by the Seven Major Crimes Act. Testimony in Washington revealed that of 247 organized tribes, 117 (most of them organized under the 1934 Act) operated under constitutions protecting individual civil rights, while 130 did not.[132] What rights provisions there were in these constitutions, however, were often incomplete.[133] In addition, 188 other tribes or bands were not organized under any tribal constitution.[134] In tribal courts, the absence of guaranteed rights was illustrated in four critical areas of due process — right to counsel, right to remain silent, right to trial by jury, and right to appeal.

The testimony at the hearings made it clear that few, if any, tribal courts allowed professional attorneys to appear before them. Courts of Indian offenses had been prevented by federal regulation from hearing professional counsel until the Secretary of the Interior revoked the regulation on May 16, 1961.[135] Generally, representation by another member of the tribe was permitted, but an assistant secretary of the Interior informed the Subcommittee that he knew of only one Indian lawyer practicing with his tribe.[136] Consequently, a de facto prohibition of professionals prevailed, in keeping with the informal nature of low-budget courts, managed by a single judge, without aid of a prosecutor.[137]

Many courts failed to advise defendants of their right to remain silent. In Phoenix, a BIA area director indicated that he knew of no tribe with protection against self-incrimination written into its constitution. In practice, however, courts for tribes which were capable of devoting substantial resources to evidence-gathering

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131 BROPHY, *supra* note 16, at 24.

132 *1961 Hearings — Part 1*, *supra* note 116, at 121.

133 *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., pt. 4, at 823 (1963) [hereinafter cited as *1963 Hearings*].

134 *1961 Hearings — Part 1*, *supra* note 116, at 166.

135 26 Fed. Reg. 4360 (1961).

136 *1961 Hearings — Part 1*, *supra* note 116, at 23.

137 The Criminal Justice Act of 1964, 18 U.S.C. § 3006A later provided legal assistance for Indians charged with violations of the Seven Major Crimes Act, and tried in U.S. district courts, but the 1964 Act did not extend to violators of tribal regulations brought before tribal courts.

usually protected the right to silence.[138] Smaller tribes, with less adequate enforcement facilities and personnel, did not offer this protection. Asked if he believed silence would prejudice a defendant's case, a Pima-Maricopa judge replied, "It certainly would."[139]

Most tribes provided for jury trial in some form, following the pattern established by regulations governing the old courts of Indian offenses. Even in those cases, however, the right to jury trial was often partially abridged. Typically, the jury consisted of six persons. They received compensation of only 50 cents per day, making it very difficult to assemble a jury. Accordingly, defense challenges were limited to three members of the jury panel. To prevent hung juries and new trials, verdicts could be decided by majority vote.[140] In some areas, moreover, the right to jury trial was lacking entirely. The Southern Utes of Colorado, for example, had no provision in their code for jury trials.[141] At Fort Totten-Devil's Lake, a BIA-appointed judge, pressured by the tribal council and police to maintain a high conviction rate,[142] simply refused all pleas of not guilty.[143] Similarly, a Standing Rock Sioux judge occasionally circumvented jury trials by incarcerating defendants even if they had not pleaded or been found guilty.[144]

Appellate procedures were similarly attenuated. Among many tribes, such as the Navaho, the court of appeals was comprised of all the trial judges sitting together as a panel.[145] Tribes with only a single judge devised more ingenious procedures; for example, the Shoshone-Bannock system provided trial by jury on appeal,[146] while the Pima-Maricopa tribal council appointed two laymen

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138 *1963 Hearings, supra* note 133, at 862.

139 *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 2, at 366 (1961) [hereinafter cited as *1961 Hearings—Part 2*].

140 25 C.F.R. § 11.7(d) (1971).

141 *1961 Hearings—Part 2, supra* note 139, at 436.

142 A BIA practice of receiving efficiency reports on judges from law enforcement personnel made such pressure inevitable. *1961 Hearings—Part 1, supra* note 116, at 88 (statement of Senator Quentin Burdick).

143 *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess., pt. 3, at 769 (1962) [hereinafter cited as *1962 Hearings*].

144 *Id.* at 734.

145 *1963 Hearings, supra* note 133, at 862.

146 *Id.* at 826.

when the need arose to serve with the tribal judge on a three-member appeals panel.[147]

The principal reason for the denial or abridgement of these rights was apparently the paucity of resources which most tribes could allocate to law enforcement. Prohibition of trained lawyers made possible the continued functioning of the tribal court system with untrained judges and without prosecutors. Compulsory testimony of defendants eased the costly burden of police investigation. Eliminating the jury or shifting it to the appeals level relieved pressure on court budgets. Redundancy of judges at the trial and appeals levels and ad hoc appointment of laymen for appealed cases produced similar savings. Despite strivings toward professionalism and the acceptance in principle by many tribal courts of due process requirements,[148] budgetary restrictions made infringement of these rights unavoidable. Average family incomes of $1,500,[149] land held in trust by the BIA, and meager royalties received for white development of reservation resources[150] provided inadequate bases for tribal revenue. The approximately 6000-member Pima-Maricopa tribe allotted only $4,500 annually to cover all court and police operations.[151] Even larger more affluent tribes, such as the Warm Springs Confederation, which spent $50,000 annually on judicial and law enforcement activities, regarded the financial burden of putting trained personnel in tribal courts as "impossible." The Confederation's general counsel observed that without financial assistance, "imposition upon the tribal courts of all the requirements of due process as we non-Indians know them, would mean the end of our tribal courts."[152]

Infringement of constitutional rights by tribal councils, in contrast to that by the tribal courts, appeared to manifest more than

147 *1961 Hearings — Part 2, supra* note 139, at 366.

148 Representative E. Y. Berry later informed Congress that the tribal judges had formed their own professional society, whose purpose was "to upgrade the Tribal court system through professional advancement and continuing education." 115 CONG. REC. 938 (1969).

149 Current estimates of Indian family income are generally in the area of $1500. CAHN, *supra* note 80, at viii; Collier, *The Red Man's Burden*, RAMPARTS, Feb., 1970, at 30.

150 CAHN, *supra* note 80, at 82-92.

151 *1961 Hearings — Part 2, supra* note 139, at 367-68.

152 *1963 Hearings, supra* note 133, at 872.

simply budgetary distress. One issue which drew Subcommittee attention to the abuse of council power was freedom of religion. The refusal of the Tenth Circuit to void the Navaho ordinance prohibiting the use of peyote in *Native American Church*[153] clearly illustrated the power of tribal councils. Outlawing the use of peyote was tantamount to outlawing the Native American Church. In the hearings, members of the Church complained to the Subcommittee that they were also victims of police harassment and of employment discrimination, even at the hands of the BIA, as a result of religious affiliation.[154]

Other witnesses also charged that some tribal councils violated individuals' constitutional rights. An attorney for the Rosebud Sioux claimed that many South Dakota tribal councils had with BIA approval enacted unconstitutional ordinances prohibiting private drunkenness.[155]

2. Constitutional Guarantees and the BIA

As the discussion of the authority of tribal councils has indicated, the BIA frequently shared culpability with tribal councils for failure to observe the requirements of due process. Because the Bureau was decentralized, with little upward accountability, there was considerable potential for the abuse of authority at the local agency level.[156] One Shoshone-Bannock attorney charged the BIA with neglect of reservation law enforcement. He claimed that although the tribe was authorized to have two chief judges and three associate judges, the BIA had without cause refused to provide more than one; and that one was considered arbitrary and prejudiced. The BIA refused to remove her from office, even when petitioned by the tribal council to do so.[157] When pressed by Subcommittee counsel in the initial hearings, Interior's Assistant Solicitor for the Division of Indian Affairs testified that he knew of no systematic study undertaken by the Department to ascertain if the code contained unconstitutional provisions.[158]

The director of the BIA's law enforcement branch further ad-

153 See text at note 99, *supra*.
154 *1961 Hearings — Part 2*, *supra* note 139, at 467-78.
155 *1962 Hearings*, *supra* note 143, at 608.
156 CAHN, *supra* note 80, at 147-55. Reforms in 1970, especially elimination of area offices, may help to alleviate this problem.
157 *1963 Hearings*, *supra* note 133, at 817.
158 *1961 Hearings — Part 1*, *supra* note 116, at 112.

mitted that the Bureau had never attempted to supply Indian courts with adequate law libraries and had failed even to request funds for this purpose.[159] The executive director of the National Congress of American Indians subsequently charged that the Bureau's neglect also extended to inadequate facilities, personnel, and training; the BIA simply had refused to request greater appropriations for these purposes.[160]

The Subcommittee received testimony alleging that in numerous instances attorney contracts requiring BIA approval had been delayed for such extended periods as to deprive the Indians of legal counsel. The Shoshone-Bannock reported a delay of eight months,[161] and the Quechan (Yuma) testified that a delay of 13 months had caused its prospective attorney to withdraw without ever serving.[162] The Navaho reported in later hearings that the entire staff of the tribe's chief counsel had resigned because of Bureau delay of contract approval.[163]

The Bureau's refusal to act on requests for code review, pleas for adequate resources for law enforcement, and submissions of attorney contracts contrasted sharply with its conscientious screening of tribal council legislation for adherence to BIA policy. Yet the Subcommittee failed to find statutory authority for this sort of activity.[164] Subcommittee counsel noted that there was no provision for further review by the courts of such BIA decisions; appeals were confined to the Interior bureaucracy.[165]

The thrust of the testimony was that the BIA was less interested in the adequacy of law enforcement on the reservations and in the constitutional rights of the people for whom it was responsible than in maintaining control over tribal courts and councils and over the affairs of individuals. The attitude was neatly expressed, said the Shoshone-Bannock attorney, in a remark attributed to a BIA employee at Fort Hall: "We didn't have any trouble with the Indians until they found out they had constitutional rights."[166]

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159 *Id.* at 152.
160 *Id.* at 190, 202.
161 *1963 Hearings*, *supra* note 133, at 824.
162 *1961 Hearings—Part 2*, *supra* note 139, at 410.
163 *1965 Hearings*, *supra* note 72, at 300.
164 SUMMARY REPORT OF HEARINGS, *supra* note 21, at 3.
165 *1961 Hearings—Part 2*, *supra* note 139, at 317.
166 *1963 Hearings*, *supra* note 133, at 819.

3. Constitutional Guarantees and State and Local Authorities

Subcommittee counsel indicated that a principal reason for investigating Indian rights was the large number of complaints about civil liberties violations by federal, state, and local agencies.[167] The hearings, however, produced only scattered complaints about federal officials outside the BIA.[168] Rather, if the volume of complaints is any guide to the seriousness of a problem, the greatest threat to the civil liberties of Indians was presented by the enforcement of state criminal laws by local authorities in communities relatively near Indian reservations.[169] For example, the Shoshone-Bannock and Rosebud Sioux asserted that police from surrounding communities entered the reservations, where they lacked jurisdiction, to make arrests.[170] Moreover, the Cheyenne River Sioux claimed that Indians were frequently arrested for crimes for which whites would not have been prosecuted.[171]

Testimony also revealed occasional mistreatment of Indians while in custody. The South Dakota Indian Commission charged that Indian prisoners in some city jails were compelled to perform manual labor not demanded of non-Indian prisoners.[172] The Shoshone-Bannock testified that a tribesman intoxicated on cleaning fluid was jailed by Pocatello authorities who allegedly were aware that he required hospitalization. The Indian died within

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167 *1962 Hearings, supra* note 143, at 769.

168 A tribal judge for the Hualapai claimed that the United States attorney repeatedly refused to prosecute major criminal cases that were placed under federal jurisdiction by the Seven Major Crimes Act. *1961 Hearings—Part 2, supra* note 139, at 383-4. The Crow tribe of Montana charged federal game wardens with failing to enforce hunting and fishing regulations against non-Indians on Indian reservations. Moreover, the tribe claimed, one federal official had used his airplane to drive elk herds off the Crow Reservation into Wyoming, where white hunters waited. *1963 Hearings, supra* note 125, at 887.

169 *1961 Hearings—Part 1, supra* note 116, at 224 (testimony of Arthur Lazarus, Jr.)

170 *1963 Hearings, supra* note 133, at 827; *1962 Hearings, supra* note 143, at 639.

171 *1965 Hearings, supra* note 72, at 331.

172 *1962 Hearings, supra* note 143, at 588. The deliberate nature of this discriminatory treatment was illustrated in the testimony of the Chairman of the Crow Creek Sioux who quoted a police commissioner in a small South Dakota town: "Well, I think the boys are going to have to get some more Indians in jail, because we need a lot of snow moved over there on the north side of town." *1963 Hearings, supra* note 133, at 898.

hours.[173] The Navaho charged police in Gallup, New Mexico, with "frequent" murder of Indians, citing as a typical case the blackjack bludgeoning of a tribesman jailed for drunkenness. He died in his cell the next day without having received medical treatment.[174] Spokesmen for the Crow tribe alleged that police in Billings and Hardin, Montana, customarily released intoxicated Indians at the city limits, dropping them there even in sub-zero weather.[175]

During these hearings, non-Indian courts were linked with non-Indian police as villains.[176] The Shoshone-Bannock charged that Indian defendants confronted a presumption of guilt in courts off the reservation.[177] The Hualapai claimed that these courts cooperated with police who had made unauthorized arrests on reservations by attempting to sentence the defendants even though the courts knew they lacked jurisdiction.[178] Representatives of several tribes, as well as an assistant attorney general of South Dakota, testified that these courts sentenced Indians to penitentiary terms for "escape" when the local police negligently or intentionally allowed the prisoners to "walk away" before completing jail terms served for misdemeanors.[179] One such court was accused of ordering the release of Indian prisoners from jail and causing them to be transported to another state, where they were turned over to a farmer and forced to harvest crops.[180]

Attorneys also related to the Subcommittee deprivations of due

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173 *Id.* at 820-21.

174 *Id.* at 860-61.

175 *Id.* at 882-83.

176 Witnesses also claimed that their rights off the reservations were being violated by local and state officials other than those involved in law enforcement. Numerous instances were reported of Indians who lived off the reservation and were legal residents of the states involved being denied care at state hospitals. *E.g.*, *1961 Hearings — Part 2, supra* note 139, at 650. Senator Burdick of North Dakota testified that reservation Indians were denied use of state correctional schools and that they could not be accepted in state mental institutions because they were not considered residents of the states. *1961 Hearings — Part 1, supra* note 108, at 88. Indians residing off the reservations in South Dakota were said to be issued periodic certificates of non-residency, rendering them ineligible for state welfare benefits. *1961 Hearings — Part 2, supra* note 139, at 603.

177 *1963 Hearings, supra* note 133, at 828.

178 *1961 Hearings — Part 2, supra* note 139, at 373-75.

179 *E.g.*, *1962 Hearings, supra* note 143, at 631, 699.

180 *1963 Hearings, supra* note 133, at 860.

process in arraignment. Right to counsel allegedly was denied or was not explained to defendants.[181] Instances of local judges disallowing pleas of not guilty were recounted.[182] One attorney claimed that in a number of cases when he surprised the prosecutor by appearing for Indian defendants, the charges were dropped. In many other cases, he asserted, the presence of a lawyer resulted in lesser sentences; in general, unrepresented Indian defendants received heavier penalties than their white counterparts.[183]

Testimony received in California revealed another form of discriminatory treatment. California was charged with failing to devote adequate resources to law enforcement on its reservations after jurisdiction over them had been extended following passage of Public Law 280. The Quechan (Yuma) testified that after California had obtained jurisdiction over its reservation, the tribe was "left stranded." Its own law enforcement system was dissolved, but the California county officials claimed that because the reservation remained federal land, the county had no jurisdiction. The tribe was, therefore, required to re-hire and to pay its own law enforcement personnel.[184] Joined by the Rincon, Pala, and Puma representatives, the Soboba Band of Mission Indians reported problems of inadequate police protection of their lands and claimed that the local sheriff occasionally failed to respond to calls for assistance.[185]

Frequently, the failure of state officials to provide law enforcement services on reservations where they were empowered to do so resulted in legal "no man's lands."[186] Such a situation had been created on the Soboba reservation. The Navaho reported a similar

181 *1962 Hearings, supra* note 143, at 598.
182 *1961 Hearings—Part 2, supra* note 139, at 375.
183 *1962 Hearings, supra* note 143, at 634-35.
184 *1961 Hearings—Part 2, supra* note 139, at 406-12.
185 *Id.* at 330.
186 A similar problem was found occasionally in civil disputes. A merchant, for example, could not compel an Indian on the reservation to pay a debt or to relinquish property through a non-Indian court. In practice, however, this problem has been minimized by the willingness of many tribal authorities to intervene on the merchant's behalf to avoid refusal of credit to all Indians. Moreover, some tribes have provided for concurrent state and tribal court jurisdiction in such cases, but the validity of these arrangements is in doubt unless they are preceded by tribal referendum and by state authorization under Public Law 280. See text at notes 316-17, *infra*.

difficulty, claiming that when tribal police apprehended whites for crimes such as rape, murder, and assault committed on the reservation and delivered them to New Mexico authorities for trial, the state disclaimed jurisdiction and released the prisoners.[187]

Extradition posed a related problem. Many tribes were found not to enjoy reciprocal agreements with the states, or even with other tribes. The Mescalero Apache testified that an Indian might commit an offense off the reservation, then find sanctuary on the reservation if tribal officials were not inclined to arrest and deliver him.[188] The Papago claimed that such difficulties had arisen with defendants finding refuge on other California reservations.[189]

Many of the problems of extradition, "no man's lands," and the failure of law enforcement in states extending jurisdiction over the reservations under Public Law 280 had their roots in the unwillingness of the states to accept the entire burden of law enforcement on the reservations. In addition, the assumption of jurisdiction by the state created a great deal of confusion, as, virtually overnight, tribal councils were rendered powerless to legislate and members of the tribe were required to conform to a "foreign" legal system. Arrangements for a "piecemeal" transfer of jurisdiction, by negotiation between state and tribe, with careful groundwork laid prior to each transfer of a specific function, offered a better solution. One state tried this alternative. In 1963, Idaho assumed jurisdiction over some formerly Indian responsibilities including school attendance, youth rehabilitation, public assistance, and domestic relations; but it refrained from further extension until each tribe affected gave its consent.[190]

When the field hearings ended in 1963, nearly 1100 pages of testimony had been recorded and nearly 2500 questionnaires distributed in the field had been returned. Expressions of Indian

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187 *1963 Hearings, supra* note 133, at 856-57. Authority of New Mexico courts to try persons of crimes committed on the Navaho reservation had been established in State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963). However, a recent decision in the Ninth Circuit, State *ex rel.* Merrill v. Turtle, 413 F.2d 683 (1969), held that Arizona authorities could not enter the Navaho reservation to arrest an Indian. This decision is criticized in Comment, *The "Right to Tribal Self-Government" and Jurisdiction of Indian Affairs*, 1970 UTAH L. REV. 291.

188 *1961 Hearings—Part 2, supra* note 139, at 491.

189 *Id.* at 393.

190 IDAHO CODE §§ 67-5101 to 5103 (Supp. 1969).

discontent focused on the violation of constitutional rights by tribal courts and councils, the inadequate support of tribal legal systems by the BIA, and the violation of constitutional rights by non-Indian authorities off the reservation or the failure of these authorities to provide law enforcement services on the reservation when empowered to do so. As these issues emerged, the interested parties began to take sides. Indian tribes, the Department of the Interior, other federal agencies, members of Congress, various associations of non-Indians, and state governments advocated positions on issues affecting their interests. At the hub of the controversy was Senator Ervin. His self-assigned task was to sift the information and to examine the positions of the parties in order to formulate a complete and sensible response.

C. *Proposed Legislation and the Washington Hearings*

In 1965, Senator Ervin introduced bills S. 961-968 and S.J. Res. 40, to provide a frame of reference for the hearings convened in Washington in June of that year.[191] The open-ended inquiry of 1961 through 1963 had produced a broad overview of and sufficient data on the Indian rights problem; it was, therefore, time to focus the attention of the interested parties on the specific provisions of tentative legislation.

The legislation Senator Ervin initially proposed reflected his personal interests. The first four bills affirmed his conviction that tribal systems of justice should not be allowed to operate outside the Constitution. Each measure displayed Senator Ervin's intention to bring the tribes more fully into the nation's legal mainstream, establishing the uniformity he had known in North Carolina. The bills were addressed primarily to bringing the Constitution to the reservations, integrating tribal systems into the overall legal system of the country, and protecting the principle of consent of the governed. But the legislation avoided harder, less abstract questions: how to control the sometimes arbitrary and unresponsive BIA, how to more adequately fund tribal systems

191 111 CONG. REC. 1784 (1965). Senator Ervin had introduced the same bills as S. 3041-48 and S.J. Res. 188 in 1964. At that time he cautioned that the bills were "not to be interpreted as final solutions" and acknowledged that "the language . . . . may be revised and concepts clarified as the Senate deliberates these matters." 110 CONG. REC. 17326 (1964).

of justice, how to halt violations of Indian rights by state and local officials. The hearings had revealed that the Indians were more concerned about these questions than they were about any others. These questions did not, however, present the theoretical constitutional dimensions to capture Senator Ervin's interest; the only mundane matters to which he responded were lawyers' contracts and the availability of legal research materials.

1. S. 961

S. 961 provided that any tribe exercising its powers of self-government would be subject to the same limitations and restraints as imposed upon the federal government by the Constitution. Senator Ervin's only concession to the special nature of Indian tribes was a recognition of their ethnic character; S. 961 would not have subjected them to the "equal protection" requirement of the fourteenth amendment, which applied only to states.

Indian reaction to S. 961 varied considerably. The Hopi claimed to be unaffected, since their constitution was already "in accordance with the U.S. Constitution."[192] Most tribes, however, echoed the sentiments of the Mescalero Apaches who were sympathetic to the purposes of the bill but deemed it "premature" because the tribes were not psychologically or financially prepared for it.[193] At the other extreme were the Pueblos, who were determined to maintain their closed, traditional societies. Their position was clear and unyielding:

> We have long held to our tradition of tribal courts and we have our own codes. Naturally, we are most familiar with the special conditions existing in our various communities, and the status of sovereignty which we have always enjoyed has made us dedicated to the task of preserving it.[194]

For the Crow tribe the question remained open: "We, at the Crow Indian Reservation, cherish the opportunity of selecting our own form of government. . . . [W]e mean the action of the Crow Tribal Council shall continue to remain as it is today. . . . [W]e are confident that the people are satisfied with the present

192 *1965 Hearings, supra* note 72, at 325.
193 *Id.* at 340-41.
194 *Id.* at 352.

system."[195] While such statements occasionally betrayed the hint of self-interest which was to be expected of tribal leaders with a stake in the existing order, a valid point was expressed nonetheless. American Indian tribes were many and various, and each had its unique problems; they were not equally prepared or willing to accommodate themselves to the structures of the Constitution.

A number of attorneys acknowledged this point and recommended that certain enumerated rights be protected by legislation rather than by imposing constitutional government in full.[196] The Department of the Interior and BIA also agreed that the blunt insertion of all constitutional guarantees into tribal systems would produce disorder and confusion. But the Department adamantly maintained that "Indian citizenship and tribal freedom from constitutional restraint have been incompatible."[197] Accordingly, the Department of Interior offered a substitute for S. 961 which was limited to the following guarantees: the privilege of writ of habeas corpus by order of a federal court; the right to jury trial with six-member panels in certain criminal cases; first amendment rights, excluding the prohibition of establishment of religion; fourth amendment protection against illegal search and seizure; fifth amendment rights, excluding the right to grand jury indictment; sixth amendment rights to fair trial, excluding the right to jury trial except as otherwise provided but including the right to counsel at the defendant's own expense; protection against excessive bail or fines; prohibition of ex post facto laws or bills of attainder; and the right of each member of a tribe to equal protection of its laws.[198]

Among the constitutional rights not included in the Department of the Interior's substitute which would have been guaranteed by blanket provision in S. 961 were the right to a grand jury indictment and to a jury panel in all criminal prosecutions and in all civil disputes involving more than twenty dollars, and the right to the assistance of counsel.[199] In each instance the cost which

195 *Id.* at 234.
196 *Id.* at 222.
197 *Id.* at 317.
198 *Id.* at 318-19.
199 Other exclusions created no controversy. The rights to bear arms and to refuse housing to soldiers were omitted on the theory that Indian tribes were not

the guarantee would impose on the already impoverished tribes was a major reason for its exclusion. In addition, the rights to a grand jury indictment and to a jury panel in civil cases were considered to be of questionable contemporary merit.

The Department of the Interior's response to the issue of the right to defense counsel revealed, however, its insensitive attitude that the Indians had testified about in the earlier hearings. The Solicitor recommended that defendants have the right to counsel but only at their own expense. He claimed that the alternative was to obtain appropriations from Congress to pay lawyers appointed by the tribal courts and, in order to maintain a balance, also to provide prosecutors for the courts. If the problem was one of maintaining a balance, there was no reason to accord the wealthy defendant a special advantage. Rather, it appeared that the BIA was reluctant to assume the initiative to obtain extra appropriations from Congress,[200] as it had similarly failed to request adequate funds to maintain tribal libraries and other facilities. In view of the Bureau's past performance, it was not surprising that it presented the choice essentially as one between the right to counsel at the defendant's expense or no right to counsel at all, instead of being prepared to seek funds for a balanced, professional tribal court system.

Wisely, the Department's substitute for S. 961 deleted fifteenth amendment protection because the tribes, as ethnic units, were required to restrict voting to an ethnically determined, rather than to a geographically defined, community. For the same reason, equal protection of the laws was guaranteed only to members of the tribe, in order that non-Indians on reservations could not claim benefits of tribal membership. Finally, laws respecting the estab-

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authorized to maintain troops. No reason was given for exclusion of thirteenth amendment protection against involuntary servitude, but it may have had something to do with the fact that, in accord with established custom, courts of Indian offenses were authorized in civil cases to require performance of assigned duties for individuals or for the tribe in lieu of monetary restitution. 25 C.F.R. § 11, 24 (1971).

200 Another example of the Bureau's delinquency in acquiring funds for Indians had become manifest when health functions were transferred in 1955 from the BIA to the Public Health Service. Appropriations instantly increased and stood in 1969 at four times their 1955 level. A sweeping change in attitude was noted by one Bureau of the Budget official: "The difference between the aggressive presentation of the PHS and the defensive supplications of the BIA is really something to see." CAHN, *supra* note 80, at 59.

lishment of religion were not prohibited, because such prohibition would have dissolved the social and political fabric of the theocratic Pueblos. The Department of the Interior and the BIA did not express long-term support for theocratic forms of government, but they did acknowledge the immediate need to maintain the social cohesion of the Pueblos during a period of transition.

The Interior-BIA position on S. 961 was thus a combination of a sound historical sense and a reluctance to do more to support the reservation court systems than had been done in the past. When sensitivity to Indian problems could be expressed without a commitment, the Department and the Bureau were sensitive; but when a commitment was required, even to the relatively innocuous matter of submitting a new appropriations request, they demurred.

2. S. 962

S. 962 authorized appeals of criminal convictions from tribal courts to federal district courts, with trials de novo on appeal. Senator Ervin thus recommended a solution to the appeals problem beyond that established by the Ninth Circuit in 1965. In *Colliflower v. Garland*,[201] the court had held that courts of Indian offenses functioned in part as federal agencies since they were

201 342 F.2d 369 (9th Cir. 1965). Lauded by Senator Ervin as "forward looking," *Colliflower* was something of a surprise, following refusal of a federal district court in Montana to issue a writ of habeas corpus on grounds that the Constitution afforded protection of due process and right to counsel only as against the federal or state governments. Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963). The point of distinction appeared to be that the Montana case involved a tribal court, created by the tribe and governed by a tribal code, which could not be termed a federal agency. *Colliflower* appeared to authorize the issue of writs of habeas corpus only in criminal cases tried by courts of Indian offenses, although there was little qualitative difference between the functions of such courts and those of tribal courts.

In Settler v. Yakima Tribal Court, 419 F.2d 486 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970), the court held that the power of federal district courts established in *Colliflower* to issue writs of habeas corpus applied to tribal courts as well as to courts of Indian offenses. The court found no functional basis for distinguishing between the two types of courts. The Ninth Circuit also held that writs of habeas corpus may issue even if the petitioner has been punished by fine rather than by detention. In a companion case, Settler v. Lameer, 419 F.2d 1311 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970), the court ruled that the writ may issue when the punishment is detention even when the petitioner is free on bail. In the latter case, an appeal was still pending within the Yakima system. The Ninth Circuit apparently rejected a contention that the tribes, like states, have a legitimate interest in freedom from premature federal court intervention and took a major step toward relegating tribal courts to the screening function Senator Ervin originally had envisioned.

creations of the BIA and were governed by the BIA's model code.[202] As federal agencies, their decisions, therefore, were subject to limited review under the federal habeas corpus statute.[203] The Ervin bill made tribal court decisions similarly reviewable and expanded the scope of the review of all Indian court decisions by providing for trial de novo. S. 962 integrated criminal justice on the reservations directly into the existing federal system and reduced the Indian courts to a screening role. Senator Ervin noted that the North Carolina magistrate system operated in this way and that it had "worked very well for one hundred years."[204]

Many tribes, while not opposed to S. 962's authorization of appeals of criminal convictions from tribal courts to federal district courts, objected to the bill's provision for trial de novo in the district court because it would severely restrict the functions of the tribal courts. The Pima-Maricopa claimed that law enforcement on the reservation would suffer as a result.[205] The United Sioux Tribes expressed opposition because Indians could not afford to pay for the legal representation needed in federal court,[206] and the American Civil Liberties Union called for absolute right to appointed counsel not provided by the 1964 Criminal Justice Act.[207] The Mescalero Apache suggested that cases be remanded to the tribal courts upon a finding of error.[208] The Fort Belknap attorney concurred, urging that this procedure would serve as a training device and improve the quality of the tribal courts. The attorney warned, however, that S. 962, like S. 961, would impose an impossible financial burden; for review by federal courts almost certainly would require the tribes to keep fuller court records, use proper procedures, and hire prosecutors.[209]

The Department and the BIA were opposed to S. 962. The Department had appellate jurisdiction over courts of Indian offenses and was unwilling to surrender it. It suggested that the district courts should be empowered to review reservation court

202 25 C.F.R. § 11 (1969).
203 28 U.S.C. § 2241 (1970).
204 *1965 Hearings, supra* note 72, at 91.
205 *Id.* at 328.
206 *Id.* at 148.
207 *Id.* at 224. The Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1970).
208 *Id.* at 341.
209 *Id.* at 337.

decisions only upon the full exhaustion of the administrative remedy.[210] But the Department's insistence on retaining a role in the tribal justice system contradicted its earlier testimony to the effect that the Solicitor's office had received no appeals from courts of Indian offenses.[211] It became clear to Subcommittee counsel that the Department was fighting for a nominal power only, and had never regarded its appellate role with commitment.

3. S. 963

S. 963 authorized the Attorney General to investigate Indian claims of violations of their civil rights. This bill served as Senator Ervin's response to the flood of testimony about the arbitrary treatment by the BIA and the occasional brutality and discrimination by state and local officials. The bill appeared to be a broad commitment to the protection of Indian rights in general, but its breadth was circumscribed by Senator Ervin's opposition to any further growth in the investigatory function of the federal government. In any event, S. 963 was diluted in significance by its partial redundancy with authority granted to the Attorney General by previous legislation,[212] by its failure to authorize funds, and by its inappropriate reliance on the Attorney General's office to challenge arbitrary practices in another federal agency, the BIA.

Although S. 963 was considered a token gesture, it nevertheless won the support of many tribes, who welcomed any additional pressure on the federal government to investigate civil rights complaints. But the leaders of some tribes, including the Pueblos, opposed the bill, explaining, "[w]e understand, better than non-Indians, the background and traditions which shape Indian conduct and thinking, and we do not want so important a matter to be tried by those who are not familiar with them."[213] Thus, while some Indian leaders welcomed the investigation of non-Indian

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210 This position varied from that expressed by the Assistant Secretary in 1961, when he opposed any kind of institutionalized review of reservation court decisions on the ground that such a review structure might tend to make these courts permanent, while he believed that they should eventually disappear, as all other vestiges of Indian "separateness" from the rest of society should disappear. *1961 Hearings—Part 1, supra* note 116, at 12, 26.

211 *Id.* at 115.

212 18 U.S.C. § 241 (1970).

213 *1965 Hearings, supra* note 72, at 352-53.

courts, police, and officials, they protested being subjected to that scrutiny themselves.

S. 963 also met with the opposition of the Department of the Interior. The Solicitor asserted that many of the complaints of such violations were made to the Department and were already forwarded. The Department wanted to retain its power to screen complaints before they were forwarded to the Justice Department. Indeed, it suggested substitute legislation which would have channeled all complaints pertaining to the tribal councils through the Secretary.[214] The Department's concern over the disposition of Indian complaints of interference or mistreatment appeared to be largely self-interested. Testimony which revealed that of 79 complaints screened and forwarded to the Justice Department since 1962 no convictions had been obtained cast doubt on the Department's sense of follow-up responsibility to the Indian complainants.[215] Of course, it also caused skepticism that giving new investigative and prosecutorial authority to Justice would produce impressive results.

4. S. 964

S. 964 directed the Secretary of the Interior to recommend to Congress a new model code for the courts of Indian offenses, which would serve as a guide for the tribal courts. It also provided for the establishment of special training classes for all tribal judges. The purpose of this measure was unclear. In light of S. 961 and 962, a new model code appeared to be superfluous. And although the further education of tribal judges would be helpful, there seemed little likelihood that it would bring immediate results, since most of the infringements of right in tribal courts seemed to be the result of financial restraints. None of Senator Ervin's bills authorized appropriations to remedy this basic problem.[216]

S. 964's provision for the training of tribal judges won Indian

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214 *Id.* at 318-19.

215 *Id.* at 27.

216 The subsequent creation of the Law Enforcement Assistance Administration has partially alleviated the funding problem, since some assistance grants have been channeled to tribes. *See, e.g.*, COURT REV., Oct., 1971, at 1 (a publication of the North American Judges Association).

support, but the tribes did not agree about its provisions for a model code. Some tribes, such as Pyramid Lake Paiute and Turtle Mountain Chippewa, expressed unqualified support.[217] Many others, however, shared the Department of the Interior's criticism that the bill might effectively impose the model code on the tribes. As long as the code remained a model, cautioned the Hopi and Apache, it would be useful.[218] The Pueblos predictably were opposed, and the Chairman of the All-Pueblo Council requested that the drafting of codes be left to the tribes.[219]

The Department of the Interior objected weakly to the work that proposing the new model code would require. It claimed that the necessary allowance for variations in tribal culture and conditions would render the code meaningless, or the failure to make such an allowance would destroy many tribes as surely as would S. 961 in the form Senator Ervin had proposed. Had the Department been fully convinced of its own argument, it would have resisted S. 964 as vigorously as it resisted S. 961. Instead, the Solicitor remarked, "Let me say I do not feel very strongly about this. In fact, the Department does not take a position that this is any disaster."[220] Moreover, while it was claimed that the tribes would be deprived of valuable drafting experience if they were just handed a model code, the Solicitor expressed his belief that the tribes would use the model much as states use proposed model codes, *i.e.*, as the basis for hearings and debates. In fact, he admitted, the Department had long recommended the old model code to the tribes, and the concept of a model was not unfamiliar to them.[221]

5. S. 965, S. 966, and S. 967

While the first four bills were intended to protect individual rights, Senator Ervin's next three proposals were addressed to the problems of inadequate law enforcement, especially in those states that assumed jurisdiction over Indians in accordance with Public

217 *1965 Hearings*, *supra* note 72, at 348-49.
218 *Id.* at 326, 343.
219 *Id.* at 191.
220 *Id.* at 28.
221 *Id.* at 28-29.

Law 280.[222] In order to eliminate "no man's lands," S. 965 provided for the extension of federal jurisdiction over crimes committed by non-Indians on the reservation, if a state failed to exercise its jurisdiction.[223] Senator Ervin's provision for federal rather than tribal jurisdiction again illustrated his determination to bring the reservations within the federal system. This measure might also have mitigated the extradition problem, since such agreements exist between state and federal authorities. It would not, however, have solved extradition problems among tribes or between tribes and the states.

With S. 966, Senator Ervin went to the heart of the jurisdiction issue. While Public Law 280 had provided for the transfer of complete jurisdiction, testimony had revealed that some states were unwilling to immediately assume the total burden; hence, these states left the tribes in confusion. The result, said Senator Ervin, was "a breakdown in the administration of justice to such a degree that Indians are being denied due process and equal protection of the law."[224] He also expressed the conviction that Public Law 280 violated the principle of government by consent of the governed. Accordingly, S. 966 provided for the repeal of those sections of Public Law 280 which authorized the extension of state jurisdiction without the consent of the tribes involved. It made consent a prerequisite for the extension of jurisdiction, and it authorized the United States to accept the retrocessions of jurisdiction from states who wished to be free of the burdens that they had previously assumed. These revisions of Public Law 280 left the states free to experiment with "piecemeal" extensions of jurisdiction; but they did not authorize the tribes to initiate such agreements or arrangements.[225]

S. 967 filled a gap in the Seven Major Crimes Act by extending

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222 See text between notes 71 and 72, *supra*.

223 The Assimilative Crimes Act of 1948, 18 U.S.C. § 13 (1970), incorporates state law into federal law in areas under exclusive federal jurisdiction. Thus, S. 965 was redundant in all but Public Law 280 states or others in which reservations were not exclusively under federal control.

224 *1965 Hearings*, *supra* note 72, at 4.

225 Similar legislation had been introduced in both houses by the Montana delegation in the previous session, but had died in the Interior Committees. 109 CONG. REC. 192, 568 (1963).

federal jurisdiction to cover "aggravated assault." Senator Ervin's attention apparently had been attracted by the testimony of a Hualapai judge who had told of a case in which one Indian had caused permanent injury to another Indian by pouring five gallons of boiling water on him. Because the crime was not interpreted as "assault with a deadly weapon," the federal government disclaimed jurisdiction. As a result, the offender was convicted in tribal court, which was limited by code to sentences of six months or less.[226]

The bills to alleviate the jurisdictional problems of law enforcement on the reservations received the overwhelming support of the Indians. Not even the Pueblos objected to S. 965 or S. 967. The tribal attorney from Fort Belknap claimed, however, that S. 965 was "not worth the weight of its paper."[227]

S. 966 was also favorably received. Vine Deloria, Jr., then serving as Executive Director of the National Congress of American Indians, voiced the mood of the Indians in support of gradualism and consent: "Not only will we have consent of the governed if we get S. 966 passed, but we can have the opportunity then to be released from this psychological fear on the reservation of having the whole culture run over."[228] The bill's provision for "piecemeal" agreements did, however, receive some criticism. The Mescalero Apache and the Yakima, among others, argued that if difficulties arose tribes should be able to withdraw their consent to such arrangements on reasonable notice to the states. They also asked that the tribes be able to initiate retrocessions of jurisdiction from the states — in effect, to make the consent provision retroactive.[229]

The bills Senator Ervin proposed to deal with the problems of

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226 *1961 Hearings — Part 2, supra* note 130, at 384.

227 *1965 Hearings* at 337.

228 *Id.* at 198. Other testimony demonstrated that there were adequate grounds for this fear. The United Sioux claimed that South Dakota refused to require Indian consent in its 1963 act extending jurisdiction — an act later defeated by referendum after a vigorous Sioux campaign. Said one leader: "We begged the State committee to put in a consent clause. We pointed out that if State law was good, the Indians would take it. The answer was: 'State law is so good for you we are afraid to let you vote on it because you might turn it down.'" *Id.* at 149. Spokesmen for the Seminole of Florida and Nez Perce of Idaho spoke of the better approach of their respective states which extended jurisdiction only after full consultation and tribal consent. *Id.* at 347, 350.

229 *Id.* at 342, 344.

state jurisdiction on reservations posed no troublesome issues to the Department of Interior as its interests were not involved. Accordingly, it agreed with the positions taken by the Department of Justice. The Justice Department predictably opposed the passage of S. 965, since that bill would have thrust upon federal law enforcement authorities the responsibility for monitoring the performance of the states and assuming jurisdiction on reservations whenever the states failed to perform their duties. The Interior Department favored the consent requirement of S. 966 even though it had supported Public Law 280 when it had been adopted; but it aligned itself with the Justice Department, warning that "piecemeal" arrangements might create "unnecessary confusion in the enforcement of criminal statutes and in the administration of Indian affairs."[230] The Department of Interior offered no opinion on S. 967, pending analysis by the Justice Department of a similar bill. The Interior Department's deference to the Justice Department on these measures reinforced the impression that it responded in an accommodating fashion when no commitment of its own was required.

6. S. 968 and S.J. Res. 40

Senator Ervin's last bill and his proposed resolution were intended to halt two troublesome administrative practices of the Department of the Interior. S. 968 provided that any attorney contract submitted by a tribe for BIA approval would automatically be approved at the end of 90 days, unless contrary action were taken prior to that time. Senator Ervin considered that the long delays in the approval of attorney contracts were particularly intolerable because "no group in the United States has more problems requiring expert legal assistance than the American Indians."[231]

For the same reason, Senator Ervin urged the adoption of S.J. Res. 40 which would direct the Secretary of the Interior to revise, update, and consolidate legal materials pertaining to the Indians. The disorganized manner in which treaties, laws, executive orders, regulations, Solicitor's opinions, and other relevant documents had been complied and distributed had impeded research on In-

230 *Id.* at 321.
231 *Id.* at 4.

dian rights. Moreover, testimony in earlier hearings had shown that in many instances, tribal libraries had ben inadequately supplied with such materials.[232]

As expected, S. 968 and S.J. Res. 40 met little resistance from the tribes. Most favored compelling the Department of the Interior to pass on attorney contracts more rapidly,[233] and all of them favored any measure which would help them to maintain more complete law libraries for use by their courts and councils.

The Department of the Interior's reaction to S. 968 and S.J. Res. 40 illustrated its attitude whenever pressed for a concrete commitment of its own resources. The Department opposed S. 968, arguing that the problem of delays in contract review had been solved by delegating approval authority to area directors and that it would feel compelled by any automatic deadline to issue premature notices of disapproval whenever evaluation became protracted. The Department's actual objection probably was to the limiting of its discretionary authority. Questioned by Subcommittee counsel why more than 90 days should be required to review attorney contracts, the Solicitor suggested that if Congress was dissatisfied with Interior's performance it should find another agency to review tribe-attorney contracts.[234] Of course, no other agency would, in fact, have been appropriate. The Department seemed in effect to be saying that it would rather allow contracts to go unreviewed than to commit itself to a deadline requirement.

Finally, the Department had no objection to S.J. Res. 40 insofar as it required its personnel to compile treaties, laws, and executive orders.[235] It objected, however, to having to compile regulations and all the Solicitor's opinions. The Department acknowledged that many opinions were not distributed, yet were cited as authoritative and frequently guided policy throughout the country. Assuring the Subcommittee that a central file of opinions was maintained in Washington, the Department declared, "We believe

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232 See text at note 159, *supra.*

233 A spokesman for the Crow of Montana disagreed, citing an instance in which the tribe was charged a $279,000 fee under its attorney contract, which it felt was too high. He asserted that more complete contract review might have avoided such a situation. *1965 Hearings, supra* note 72, at 236.

234 *Id.* at 45.

235 Treaties had long been compiled, so no additional effort was required in this area. See note 15, *supra.*

that the system makes the opinions readily available to persons who have a need for them."[236] In this instance, the Department appeared willing to risk sheer unbelievability in order to prevent a commitment of personnel time and, perhaps, also to avoid wide circulation of what it had come to regard as "in-house" documents.

7. Summary

In summary, then, Indian reaction to Senator Ervin's bills was of four basic types. The first was no reaction at all. While the records of the hearings indicated that the Subcommittee received some expression of opinion from 70 to 80 tribes, most of the 247 organized tribes did not participate in the hearings, probably through no fault of the Subcommittee. A second type of reaction was that of blanket endorsement of the Subcommittee's work, often accompanied by an expression of surprised delight that so much attention was being paid to Indians.

Most of the tribes testifying exhibited a third pattern of reaction: they were sympathetic to the purposes of the legislation and amenable to the eventual merger of the Indian and non-Indian systems of justice. They were cautious, however, about taking large steps beyond their psychological preparedness or financial capability. Consultation with these tribes usually produced areas of agreement. A fourth reaction was shown principally by the Pueblos, who had always considered themselves different from and in some ways superior to the other tribes.[237] The old, stable, and very traditional Pueblo communities were in no way convinced that the values which their system embodied were inferior to those of white America. They resisted measures which threatened their culture or the structure of their authority. When not threatened, the Pueblos were cooperative; when faced with the possibility of change imposed from the outside, they were obstinate.

Throughout the debate sparked by Senator Ervin's proposals, the attitude of the Department of the Interior and of the BIA remained consistent. When vital organizational interests, such as reputation and control, were not involved, and when a commitment of resources was not required, they proved to be cooperative.

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236 *1965 Hearings*, *supra* note 72, at 323.
237 *Id.* at 352.

But when confronted with the limitation of their responsibilities or influence or when pressed for a commitment to additional tasks, they resisted, even if the interests of the Indian people were compromised.

III. Making Indian Law

A. *The Drafting of S. 1843 and its Companions*

Senator Ervin was not under immediate pressure from an assertive constituency to proceed with Indian rights legislation. It had become a labor of love to which he could allocate his energies as he chose. Some time elapsed before the revised legislation made its appearance. On May 23, 1967, the Senator introduced bills S. 1843 through 1847 and S.J. Res. 87.[238] Although S. 961 through 968 and S.J. Res. 40 had been only tentative legislation, they had largely withstood the scrutiny of the interested parties, and the new bills were generally quite similar to the ones introduced in 1965. S. 1843 revised S. 961 and 962 to provide only enumerated constitutional rights[239] and appeals to the federal courts by writ of habeas corpus instead of by trial de novo.[240] S. 1844 contained the order to draft a model code and the judge training provisions. In S. 1845 Senator Ervin maintained his resolve to repeal section 7 of Public Law 280 and added the requirement that tribal consent had to be demonstrated by referendum. Because it had been felt that "aggravated assault" did not adequately describe the type of conduct Senator Ervin was trying to include, S. 1846 proposed addition of "assault resulting in serious bodily injury" to the Seven Major

238 113 Cong. Rec. 13473-78 (1967).

239 In the main, Senator Ervin had re-drafted S. 961 according to the recommendations of the Interior Department, but on one critical point he deviated from them. Interior originally worded its "equal protection" provision in such a way as to limit its application to *members of the tribe* located within its jurisdiction. Senator Ervin's revision, however, guaranteed equal protection to *any person* within the tribe's jurisdiction. The significance of the altered wording was that it might be construed to extend equal benefits of tribal affiliation to non-Indians residing, leasing, or owning property on reservations, and subject to regulations established by the tribal councils.

240 Senator Ervin apparently was convinced by the arguments of many tribal attorneys and United States attorneys that tiral de novo under S. 962 would put an intolerable strain on the district courts, already suffering from a chronic overload of cases. As incorporated into S. 1843, S. 962 did little more than to confirm *Colliflower*. See discussion in note 201 and in text at note 201, *supra*.

Crimes Act. Apparently unmoved by the explanations of the Interior Department, Senator Ervin's S. 1847 retained the 90-day attorney contract review deadline and his S.J. Res. 87 instructed Interior to compile and update legal materials.

Senator Ervin did, however, retreat on S. 963 which had proposed authorizing the Attorney General to investigate and prosecute cases in which Indian civil rights were involved, and on S. 965, which had suggested providing concurrent federal jurisdiction over certain crimes when the states failed to perform their law enforcement duties. Since S. 963 had met with opposition both from the Department of the Interior and tribal leadership,[241] Senator Ervin let it die quietly. S. 965, which had not provoked a particularly substantial amount of debate,[242] was apparently felt to be largely superfluous. In states not covered by Public Law 280 federal jurisdiction already existed by virtue of the Assimilative Crimes Act.[243] Since S. 1845 provided authority for Public Law 280 states to retrocede jurisdiction to the federal government when convinced that the original extension of jurisdiction had been unwise, S. 965 appeared to be relevant only when a state simply refused either to exercise jurisdiction or to retrocede it. Apparently, Senator Ervin felt that it was more prudent to await such a situation than to anticipate it, and he quietly buried the bill.

Because the Indian rights project raised a broad range of complex constitutional issues and had produced a ponderous volume of information, the only member of the Senate who fully understood it was Sam Ervin. Furthermore, since senators are specialists by committee assignment and must rely upon the understanding and good will of their colleagues, Senator Ervin had virtually full control over the destiny of the bills in the Senate. Indeed as a senatorial courtesy and as a matter of legislative diplomacy, no senator, even if he had entertained an objection, would have sought to prevent Senator Ervin from enjoying the fruit of six years' labor. Objections, if any, would have to be raised in House debate. But Senator Ervin enjoyed the luxury of allowing the bills to rest in subcommittee, able to order them reported to the floor

241 See part II C 3 of this article, *supra*.
242 See part II C 5 of this article, *supra*.
243 See note 223, *supra*.

when the occasion suited him. Meanwhile, to gauge the proper timing, Senator Ervin was closely studying the possibility of mixing red with black in another civil rights storm engulfing Congress.

B. *Tactics of Enactment*

Although it is beyond the scope of this study to examine in detail the machinations in Congress which produced the Civil Rights Act of 1968, some relevant parts of that intriguing story may be sketched. In 1967, as part of a broader civil rights package designed primarily to protect persons exercising rights guaranteed them by previous legislation, President Johnson submitted an open housing measure[244] similar to the one that had failed in 1966.[245] The House Judiciary Committee held hearings on the civil rights bill, H.R. 2516, but ignored the open housing measure. Conservatives and others seeking passage of anti-riot legislation introduced a separate measure, H.R. 421, which also was assigned to the Judiciary Committee. Chairman Emanuel Celler bottled up H.R. 421 until Representative Colmer, a bulwark of the Mississippi Old Guard and Chairman of the House Rules Committee, threatened to hold separate hearings on the anti-riot bill.[246]

Since Chairman Celler hoped to garner borderline votes for the civil rights bill by reporting it out of committee in tandem with the anti-riot legislation, he gave in to Congressman Colmer and lent his qualified support to H.R. 421. Representative Celler then added a series of provisions protecting Negroes and others from force or violence while engaged in lawful civil rights activities,[247] and persuaded Representative Colmer to cooperate in sending the rights bill to the floor.[248] On July 11, Representative Colmer's Rules Committee cleared the anti-riot bill,[249] which the House

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244 S. 1358, 90th Cong., 1st Sess. (1967).

245 In 1966, the House had approved an Administration open housing bill, H.R. 14765, sending it to the Senate by a vote of 259 to 157. 112 CONG. REC. 18740 (1966). Although the House measure had exempted small boarding houses and had allowed home-owners to instruct realtors to discriminate in finding buyers for their dwellings, it could not generate enough support in the Senate to survive an intense filibuster. After two unsuccssful attempts at cloture, the bill died. 23 CONG. Q. ALMANAC 773 (1967).

246 23 CONG. Q. ALMANAC 782 (1967).

247 N.Y. Times, June 23, 1967, at 1, col. 2.

248 *Id.*, June 28, 1967, at 23, col. 2.

249 *Id.*, July 12, 1967, at 23, col. 2.

passed eight days later by a resounding vote of 347 to 70.[250] Keeping faith with Representative Celler, Representative Colmer dutifully forwarded the civil rights bill to the floor where it was overwhelmingly endorsed, 326 to 93.[251]

When the anti-riot bill reached the Senate, Senator Ervin charged that it would compromise rights belonging to the states.[252] Senator James Eastland, Chairman of the Senate Judiciary Committee, apparently was so alarmed at the remarks of his maverick southern colleague that he retained jurisdiction of the bill at the full committee level, fearing that Senator Ervin's subcommittee would hold hearings to delay its passage.[253] However, Senator Eastland allowed the civil rights bill to go to Senator Ervin's subcommittee, but added an open housing provision that he predicted would kill it.[254]

Senator Ervin also was troubled by the House version of the civil rights bill. Although generally in favor of protecting constitutional rights, he had his southern constituency to consider. Moreover, as a southerner, he shared the distaste of many in his region at northern hegemony and northern hypocrisy on questions of civil rights. He complained that H.R. 2516, established a new basis of federal jurisdiction — "diversity of color" — by making interference with the exercise of civil rights by members of minority groups a federal offense. He resented the implication that non-whites could not receive justice outside the North. In subcommittee he offered a substitute to H.R. 2516, grounded on the commerce clause rather than on the fourteenth amendment, eliminating "diversity of color" and making it a federal offense for any person to interfere with the exercise of civil rights.[255] The Ervin measure also extended protection for working men exercising rights under section 7 of the National Labor Relations Act[256] and provided Indians those rights which had been included in S. 1843 through 1847 and in S.J. Res. 87. In short, Senator Ervin's goal

250 *Id.*, July 20, 1967, at 1, col. 6.
251 *Id.*, Aug. 17, 1967, at 1, col. 8,
252 *Id.*, July 21, 1967, at 35, col. 3.
253 *Id.*, July 27, 1967, at 1, col. 7.
254 *Id.*, Aug. 26, 1967, at 23, col. 2.
255 *See, e.g.*, 114 CONG. REC. 329-34 (1968).
256 29 U.S.C. § 158 (1970).

was either to amend the Civil rights bill into defeat or to have it pass with his Indian rights provisions attached.

Senator Ervin's tactic was based on the axiom that in some circumstances clusters of bills may be more difficult to enact than the same bills considered separately. If bill "A" could pass the Senate by a 60 to 40 vote and bills "B" and "C" each by margins of 90 to 10, and if half those opposing "B" and "C" came from the ranks of those supporting "A", then "A" with "B" and "C" appended might fail to win a majority. It was not likely that many senators would oppose Senator Ervin's Indian bill openly, but influential western congressmen in the House could be expected to resist H.R. 2516 if it returned with the Indian rights rider. These congressmen were essential to Senator Ervin's strategy.

The Indian Affairs Subcommittee of the House Interior and Insular Affairs Committee had given birth to Public Law 280 in 1953; and it was this body which had declared its intention "to get out of the Indian business."[257] The Subcommittee's membership then included Representative Aspinall, a Democrat from Colorado, and it had been chaired by Representative Berry, a Republican from South Dakota. In 1967, these two legislators remained senior authorities in their respective parties on Indian affairs legislation. Moreover, by virtue of successive Democratic administrations, Representative Aspinall had ascended to chairmanship of the full committee. Both of these congressmen had deep personal and philosophical stakes in Public Law 280.

Representative Aspinall's policy had been to remain professedly neutral on Indian legislation but far from neutral on land and water resources policy.[258] He had been a strong proponent of private and state ownership of resources currently under federal jurisdiction,[259] and Indian reservations were among the vast acreages of federally controlled land in western states. Public Law 280 had provided a simple means by which to replace federal jurisdiction with state jurisdiction in those areas. Although such a transfer did

257 Statement by Representative Saylor, *supra* note 68.

258 *See* CAHN, *supra* note 80, at 167.

259 Representative Aspinall had used the weight of his chairmanship to oppose the Wilderness Act of 1963 "because he believed the act would 'tie up' portions of federal lands from economic development." Henning, *The Public Land Law Review Commission*, 7 IDAHO L. REV. 77, 78 (1970).

not immediately effect a change in land ownership, it did encourage non-Indians to invest in reservation businesses and to develop reservation resources under lease agreements. In Public Law 280 states, non-Indians were not subject to the regulations of tribal councils or to the decisions of tribal courts; in any disputes, they could protect their interests in the more friendly state legislatures and tribunals.

As subcommittee chairman, Representative Berry had been instrumental in passing Public Law 280. He, too, felt it would open the reservations to economic development. His approach had always been that of the assimilationist — to bring the Indian into the American cultural and economic mainstream. Representative Berry had also played an active part in the termination legislation of 1954. He even claimed to have obtained the Indians' consent to such legislation, although at least some Indians insisted that they had not been consulted.[260] As recently as 1961, when the termination movement was all but dead, Representative Berry continued to call for evaluation and categorization of tribes to ascertain which could be terminated most expeditiously.[261]

Senator Ervin had every reason to be confident a conflict would emerge on the House floor if H.R. 2516 were amended with his Indian rights measures. The Ervin legislation would repeal the section authorizing further extensions of jurisdiction by states without tribal consent and would authorize retrocession of jurisdiction already extended. Representatives Aspinall and Berry, however, regarded Public Law 280 as so essential to the development of reservation resources and to the assimilation of the tribes that they wanted it implemented as soon as the *states* were ready. In Senator Ervin's view, the law was not so needed that it should deprive Indians of due process and fail to receive their consent; rather, he believed it should be implemented when the *tribes* were ready. The split was deep. Thus, even if the civil rights bill were to clear the Senate, resistance in the House to its changed form might force the bill back to committee or into conference.

However, Senator Ervin was not simply exploiting the Indian project to deter black civil rights legislation. Even if the House

260 *See, e.g.*, N.Y. Times, June 19, 1955, at 76, col. 1.
261 107 CONG. REC. 2622 (1961).

failed to approve H.R. 2516 with the Indian rights amendment, the Indian bills would be in no more disadvantageous a position than if they had been passed separately by the Senate and forwarded to the House in routine manner. The bills would go to Representative Aspinall's committee and receive the same opposition they would receive on the floor as part of H.R. 2516. On the other hand, the bleak future of the bills in committee made the amendment tactic especially attractive as a positive way to secure enactment of the Indian rights legislation. If the House were determined to accept the Senate bill in toto, the Indian provisions would bypass committee, becoming law despite the objections of powerful men.

It is quite plausible that Senator Ervin had planned such a move far in advance. Undoubtedly, he was aware of the House Interior Committee's hostility to sections of his legislation amending Public Law 280. Yet he had drafted those provisions at least three years before and had remained loyal to them. They formed essential parts of his legislative package and clearly were expressions of personal conviction. While it is difficult to imagine why Senator Ervin had allowed six years' work to languish, he may have been waiting for the right opportunity to push his Indian bills.

Senator Ervin's substitute for H.R. 2516 moved through his subcommittee with little difficulty.[262] But it failed in the full committee by a single vote.[263] Senator Eastland quietly allowed H.R. 2516 to reach the floor, but only when he became confident that the bill would not be put on the calendar for 1967. Defeat in the full committee forced Senator Ervin to call his substitute to the floor in competition with H.R. 2516. Success along this route seemed unlikely; thus he faced the prospect of having to introduce provisions of the substitute as amendments. Voting on the civil rights bill would almost certainly occur under restriction of cloture rule XXII.[264] If the Parliamentarian ruled that the Indian rights amendments were not germane, the amendments would not be voted — unless supporters could convince the Senate to set aside the ruling.

One argument for the Senate's approving the Indian rights

262 N.Y. Times, Oct. 10, 1967, at 22, col. 1.

263 *See* 114 CONG. REC. 230 (1968) (remarks of Senator Ervin).

264 SENATE MANUAL 24-25 (1971).

amendments was that Indian rights legislation would otherwise die in committee in the House. The past record of the Aspinall committee, which had buried every other bill that inserted a consent clause into Public Law 280, lent weight to this contention.[265] Senator Ervin acted to underscore the Aspinall committee's opposition and allay suspicions of his own motives; he consolidated S. 1843 through 1847 and S.J. Res. 87 into one bill, S. 1843 as amended, and had the Judiciary Committee report the bill. It passed the Senate without opposition and was directed to the Aspinall committee. Each day the committee allowed to pass without action on the bill emphasized the need to pass the Indian rights measure as an amendment to H.R. 2516.

Just prior to the close of the First Session of the Ninetieth Congress, on a sparsely populated senate floor, Majority Leader Mike Mansfield requested and obtained unanimous consent to put H.R. 2516 on the calendar for the next session starting in 1968. Senator Ervin subsequently called up his substitute bill, but Congress encountered new pressure from the President to pass the committee bill. Senate liberals attacked Senator Ervin's measure. The liberals tested their strength when the Senate tabled the Ervin substitute on February 6, 1968, by a vote of 54 to 29.[266]

Gambling that this vote was a bellwether of senate opinion on civil rights generally, Senators Brooke and Mondale introduced an open housing amendment to H.R. 2516. To mollify borderline senators, President Johnson proposed an anti-riot act, directed at those who crossed state lines to incite riots. Events of the summer of 1967 and the action taken in the House had made it clear that Congress would pass such an act, with or without Administration support. The President's statement appeared to authorize Senators Hart, Tydings, and others managing the Administration's civil rights package to use the assurance of tough anti-riot legislation to "firm up" wavering commitments to open housing. However, when Senator Mansfield delivered the first cloture petition on the civil rights bill, some senators remained wary and provided the key votes to defeat cloture by a vote of 55 to 37 on February 20.[267] The cloture vote left the Senate's stand on open housing unclear;

265 See note 73, *supra*.
266 N.Y. Times, Feb. 7, 1968, at 23, col. 1.
267 *Id.*, Feb. 21, 1968, at 1, col. 2.

no one knew how that issue had affected the balloting. But when Senator Mansfield moved to table the Brooke-Mondale amendment, ostensibly because it could endanger the rest of the legislation,[268] the result was a 58 to 34 straw-vote victory for civil rights and open-housing supporters.[269]

Although a second cloture vote failed soon thereafter, the straw vote appeared to move Senator Dirksen[270] to support the Brooke-Mondale amendment with "certain exceptions." A Dirksen compromise bill reached the floor on February 28. The Senate voted that same day to table the Brooke-Mondale amendment.[271] The Dirksen bill, in the form of a substitute, paralleled Brooke-Mondale in its exemption of "Mrs. Murphy;" the Dirksen bill further exempted owners of single-family dwellings selling without a broker's assistance.

After some confusion in a third unsuccessful cloture vote, the Senate finally agreed to limit debate on the civil rights package.[272] Some 80 amendments to the Dirksen substitute had been filed prior to cloture, and each now had to be read, debated, and voted on. Among the amendments rejected were several offered by Senator Ervin.[273] However, Senator Ervin's Indian rights amendment, number 430, a duplicate of the consolidated version of S. 1843 which still languished in Representative Aspinall's committee, fared better.

Amendment 430 caused considerable consternation at the White House and among senate civil rights proponents. As a friend of disadvantaged minorities, President Johnson felt compelled to support Indian rights legislation. The President included an endorse-

268 24 CONG. Q. ALMANAC 158 (1968).

269 N.Y. Times, Feb. 22, 1968, at 1, col. 2.

270 Undoubtedly a prime factor in Senator Dirksen's decision to support some form of open housing legislation, even though he had opposed the 1966 bill on constitutional grounds, was the erosion of Republican resistance to cloture. In 1966, two cloture votes had produced 10 and 12 Republican votes in favor, with 21 and 20 opposed. In 1968, however, the vote was split at 18 each on the first two votes. Fully half of Senator Dirksen's party had voted against him, and even more "yea" votes might have been cast had he not openly opposed cloture. 24 CONG. Q. ALMANAC 157 (1968). Senator Dirksen had taken great pride in being the voice of the party on Capitol Hill and in the party conventions. A change of position was required if he was not to lose his footing as the party shifted under him.

271 N.Y. Times, Feb. 29, 1968, at 20, col. 3.

272 114 CONG. REC. 4960 (1968).

273 *Id.* at 5813, 5822, 5825, 5834.

ment of the amendment in his message to Congress on March 6.[274] The Johnson message may have diminished resistance to the Ervin amendment, since those torn between favoring constitutional rights for Indians and protecting the President's civil rights package could support Senator Ervin without directly opposing the White House.

Issues of Indian law became embroiled in parliamentary maneuvers. Senator Mansfield suggested a quorum was lacking,[275] perhaps in order to provide time for consultation. When the resulting order for a quorum was rescinded, Senator Mansfield assured Senator Ervin that Senator Burdick had been in contact with the House Indian Affairs Subcommittee and had learned that there was no substantial opposition to S. 1843. But pressed by Senator Ervin, Senator Burdick impeached his own sources and suggested that the Subcommittee had taken no action thus far simply because it suffered an overload of proposed legislation. Senator Ervin suggested that if the Subcommittee did not have time to report legislation it favored, the Senate should perform a service by passing the amendment so that the Indian rights bill would circumvent the Subcommittee.[276] Senator Mansfield then "reluctantly" made the point of order on germaneness. Senator Spong, serving as President Pro Tem, acquiesced in the opinion of the Parliamentarian and ruled the amendment out of order. Senator Ervin succeeded, 54 to 28, in overturning the ruling of the chair.[277] Following the vote, Senator Hart rose to support the amendment, which subsequently was approved, 81 to 0. Almost anti-climactically, the Senate then approved the Dirksen substitute, as amended, 61 to 19.[278] Three days later, on March 11, the Senate voted 71 to 20 to send H.R. 2516, as amended back to the House.[279]

On March 13, House Speaker McCormack emerged from a White House conference to announce his intention to ask the House to accept the Senate's version of H.R. 2516 in toto.[280] How-

274 *Id.* at 5520 (1968).
275 *Id.* at 5834.
276 *Id.* at 5837-38.
277 *Id.* at 5838.
278 *Id.* at 5839.
279 *Id.* at 5992.
280 N.Y. Times, Mar. 14, 1968, at 1, col. 7.

ever, when Representative Colmer's Rules Committee convened, it voted to postpone action on the bill until April 9 and to conduct hearings in the interim. That decision provided time for Representative Aspinall to mount a last-minute campaign against the Indian rights provisions.[281] On March 19, in the absence of his subcommittee chairman, Representative Aspinall himself convened a hearing on S. 1843.[282] Eight witnesses testified in opposition to the legislation, and three in favor.

While the one-day hearing raised no new issues and few new facts, it did generate concern that H.R. 2516 should not be passed precipitously. The hearing had provided concrete testimony both on the need to retain Public Law 280 as a tool the states could use to promote urban growth in the Southwest and on the opposition of some Indians to the enumerated rights and model code sections of the legislation. With this evidence Representative Aspinall appealed to the Rules Committee to send the Indian amendment to H.R. 2516 to committee for further study. Representative Reifel of South Dakota, the only American Indian serving in Congress and one of the Indians who supported the Ervin amendment, objected and opposed further delay of the civil rights and open housing provisions of H.R. 2516. Questioned about the Pueblos' opposition, Representative Reifel said, in effect, that he considered their objections to be ill-founded and accorded them little weight.[283]

As the Rules Committee hearings continued, Minority Leader Ford and other senior House Republicans agreed to a conference, pledging to accept the Senate version of H.R. 2516 if the conferees failed to reach agreement within ten days.[284] President Johnson exerted his influence in characteristic fashion, urging Congress to quit "fiddling and piddling" with his civil rights bill.[285]

Then, on the fourth day of April, Martin Luther King was killed.

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281 Representative Colmer's move was also interpreted as an attempt to afford the national real estate lobby time to bring effective pressure against the open housing provisions. *See* 24 CONG. Q. ALMANAC 165 (1968).

282 *Hearings on Rights of Members of Indian Tribes Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 1 (1968).

283 114 CONG. REC. 9110-12 (1968).

284 N.Y. Times, Mar. 21, 1968, at 28, col. 1.

285 24 CONG. Q. ALMANAC 165 (1968).

The President somberly reviewed the legislation with House leaders. Representative Ford hinted that he might be changing his position.[286] As April 9 approached, civil rights forces lobbied intensely for passage of H.R. 2516 as a tribute to their assassinated leader. On the critical day, the Rules Committee defeated by one vote a motion directing H.R. 2516 to conference.[287] A resolution concurring in the Senate amendments was reported to the floor as Chairman Colmer, taking note of the disorders in Washington following the King murder, accused his fellow committeemen of legislating "under the gun."[288]

The debate on the floor on April 10 generally appeared to center on whether H.R. 2516 had been so radically altered by the Senate that its passage without further delay would impugn the integrity of the House as a deliberative body. Discussion of the Indian provisions was more specific, touching on the merits and faults of particular sections of the Ervin legislation. Several congressmen participated, but Representatives Aspinall and Reifel remained the principal figures. Representative Aspinall argued that his hearing had revealed the spectre of treaty rights in jeopardy and that by passing H.R. 2516 Congress might be destroying the rights of one minority (Indians) to aid another (blacks). He charged that certain procedural requirements in title I, such as trial by jury, could destroy the tribal courts. Predictably, he attacked the amendment's alterations of Public Law 280, focusing on the possible confusion caused by states extending or withdrawing jurisdiction over reservations.[289] In rebuttal, Representative Reifel routinely explained the amendment's provisions and assured the House that the Ervin legislation would relieve the oppressiveness of tribal governments and errors of Public Law 280.[290] Representative Reifel's efforts may well have been crucial. The House voted 229 to 195 to consider the resolution to accept H.R. 2516; and by a vote of 250 to 171, the bill was approved. The President signed

286 N.Y. Times, Apr. 7, 1968, at 57, col. 7.

287 The key "nay" vote was cast by Representative Anderson of Illinois who may have been encouraged by the timely adoption of an open housing ordinance by a city in his home district. 24 CONG. Q. ALMANAC 168 (1968).

288 N.Y. Times, Apr. 10, 1968, at 31, col. 4.

289 114 CONG. REC. 9614-15 (1968).

290 *Id.* at 9552-53 (1968).

it the following day.[291] In the angry clash of black and white, North and South, Indian law was made.

IV. The Impact of the 1968 Act on Indian Law

Even after the 1968 Civil Rights Act was passed, the Pueblos sought exemption from its Indian rights provisions. In response to their political agitation, members of the New Mexico congressional delegation introduced bills to that effect,[292] and Senator Ervin returned to New Mexico to hold a special hearing of his subcommittee. In it the Pueblos reiterated a familiar theme:

> Our whole value structure is based on the concept of harmony between the individual, his fellows, and his social institutions. For this reason, we simply do not share your society's regard for the competitive individualist. In your society, an aggressive campaigner is congratulated for his drive and political ability. In Pueblo society, such behavior would be looked down upon and distrusted by his neighbors. Even the offices themselves, now so respected, would be demeaned by subjecting them to political contest. The mutual trust between governors and governed, so much a part of our social life, would be destroyed.[293]

More specifically, the witnesses voiced concern about extending equal protection to non-Indians in their communities and about the bill of attainder problems created in tribal systems where the same body often served as the tribal council and court.

Senator Ervin's response was limited. When he returned to Washington, he introduced S. 2172 and S. 2173.[294] The first of these bills restricted the meaning of "any person" in title II to "American Indians" and provided that non-Indians on the reservations were not entitled to the equal protection of tribal laws. But

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291 On November 21, 1968, President Johnson issued Exec. Order No. 11435, authorizing the Secretary of the Interior to accept states' retrocessions of jurisdiction over Indian country, pursuant to the Act. That order appears with title IV of the Act, at 25 U.S.C.A. § 1321-26. See Appendix for the language of the Ervin legislation as it finally appeared, as Titles II-VII of the Civil Rights Act of 1968.

292 S. 3470 and H.R. 17040, 91st Cong., 1st Sess. (1969).

293 *Hearings on S. 211 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) (reproduced in part in 2 Am. Indian L. Newsletter 94, 95 [1969]).

294 115 Cong. Rec. 12532 (1969).

Senator Ervin qualified his support for the bill by remarking that he introduced it in order "to afford Congress an opportunity to consider the advisability of such an amendment."[295] After being placed under advisement in the Senate, S. 2172 quietly disappeared. The second bill, S. 2173 provided that the model code which the Department of the Interior was instructed to draft under title III would serve as no more than a model and would not be imposed by Congress. Because fear of the title III had diminished as the BIA moved slowly to draft a new code, the bill was really addressed to a less than urgent issue. It did, however, pass the Senate on July 11, 1969;[296] but after being sent to the House of Representatives, it died in the Indian Affairs Subcommittee. The new bills Senator Ervin introduced did not respond effectively to any of the Pueblo problems because no proposal was made on the equal protection controversy or on the problem of the separation of powers. Instead, Pueblo leaders learned that their communities were expected to conform to the 1968 legislation.

That lesson has not been lost on other major tribes, who have begun to make the necessary adjustments, but "to date there has been no dramatic overall change."[297] The factors prolonging the period of transition include the need for funding (which is being met in part by the Law Enforcement Assistance Administration), the high turnover and inadequate training of tribal judges, the blurred separation of executive and judicial powers in a number of tribal governments, and the continued resistance by some tribes to congressional intrusion into their internal affairs.[298] It has been further noted that "as long as the Bureau of Indian Affairs has not changed the Code of Indian Offenses as directed by Congress, the chances are slim that the tribes having their own codes will assume any new burdens."[299]

A questionnaire to which 16 of the largest tribes responded[300]

295 *Id.* at 12555.

296 *Id.* at 19239.

297 Letter from William F. Meredith, Project Director, National American Indian Court Judges Association, to the author, April 29, 1971, on file at the office of the Harvard Legislative Research Bureau.

298 *Id.*

299 Letter from Arthur Lazarus, Jr., general counsel to the Association on American Indian Affairs, to the author, April 5, 1971, on file at the office of the Harvard Legislative Research Bureau.

revealed that while only seven had permitted professional, non-Indian attorneys to represent criminal defendants in tribal courts prior to 1968, 11 tribes now do, while four have expressed no policy. The only tribe which stated that it continued to bar non-Indian attorneys was later compelled to admit them by a federal district court.[301] The tribes reported a difficulty, however, in funding prosecutor's offices. Ten of the 12 tribes which lacked prosecutors prior to 1968 continue to operate without them. This financial inability to formalize tribal court proceedings has led one observer to warn that a disproportionate number of habeas corpus proceedings arising from detention by tribal authorities may require new evidentiary hearings in federal district courts, thus in part creating the system of trial de novo which Senator Ervin originally had intended to establish.[302]

In other areas where reform requires money, little change has occurred. Five of the six tribes which did not protect the defendant's right to silence (apparently in order to compensate for inadequate investigative facilities) still do not do so, or at least have no standing policy of protection. Before 1968 two tribes made no provision for trial by jury, and the same number today continue to refuse as a matter of policy to express the right, although neither tribe actually denies trial by jury to all defendants. Fifteen tribes had institutionalized appellate structures[303] prior to 1968; the number does not appear to have changed.[304]

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300 The tribes responding were the Shoshone-Bannock, Blackfeet, Cheyenne River Sioux, Colorado River tribes, Fort Belknap, Flathead, Hopi, Jicarilla Apache, Navaho, Northern Cheyenne, Pierre (Crow Creek and Lower Brule), Rosebud Sioux, Standing Rock Sioux, Warm Springs Confederation, Wind River, and Yakima. The author mailed the questionnaires in the spring of 1971 and received replies throughout that summer. The questionnaires which support the factual propositions in the text between notes 304 and 308 are on file at the office of the Harvard Legislative Research Bureau. More detailed information on particular tribes has been compiled by the National American Indian Court Judges Association, 1345 Connecticut Avenue, N.W., Washington, D.C. 20036.

301 Towersap v. Fort Hall Indian Tribal Court, Civ. No. 4-70-37 (D. Idaho, Dec. 28, 1971). See text at note 315, *infra*.

302 *See* Note, *Criminal Procedure: Habeas Corpus as an Enforcement Procedure under the Indian Civil Rights Act of 1968*, 46 WASH. L. REV. 541, 547-50 (1971).

303 The existence of a structure does not always signify an *operating* appeals system. Meredith, *supra* note 297.

304 This conclusion necessarily reflects the author's interpretation of the significance of failure in some instances to respond directly to a particular question. This evaluation is based on comments appended to the questionnaires and on earlier testimony in the Ervin hearings.

The federal judiciary may have the most important role in administering change in the tribal justice systems. These courts, especially at the district level, will determine how broadly the 1968 legislation will affect traditional practices. In construing the statute, the federal courts should look closely at the legislative history.

The legislative history of title II appears to reflect Senator Ervin's change from an approach of imposing on the tribes the constitutional limitations applicable to the federal government to an approach (suggested by the Department of the Interior and many of the tribes) of extending certain specified protections to members of the tribes as individuals. This change was the product of a philosophical compromise between Senator Ervin's apparent view that the scope of public authority should be strictly defined by the individual's need for protection and essential services, and the view, expressed in extreme form by the Pueblos, that the scope of individual liberty should be strictly limited by the community's traditional need for harmony. While S. 961 had been rooted in a theory of government with enumerated powers, title II provided members of tribes with enumerated rights.

For the federal courts, the practical meaning of this accommodation is that title II requires a limited construction which takes an informed account of its development. It does not authorize the court to apply broadly such elusive and expanding concepts as due process, equal protection, or unreasonable search and seizure without a sensitive regard for their impact on tribal structures and values. Because this point is fully revealed only by tracing seven years of legislative history, there is a danger that it may be missed and that an unlimited construction of title II will exacerbate the tribes' difficulties adjusting to its requirements.

Three federal district court decisions illustrate this danger. In 1968, an outspoken and reportedly abrasive non-Indian attorney directing the Navaho legal aid agency was ordered expelled from the reservation by the tribal council. In an action to enjoin enforcement of the order, the attorney challenged the power of the council to enter such an order after the enactment of title II. In *Dodge v. Nakai*,[305] the federal district court held that it had pendent jurisdiction to hear the case despite the failure to exhaust a

305 298 F. Supp. 17 (D. Ariz. 1968).

remedy available in the tribal system because not all of the issues or parties involved were cognizable in the tribal courts. It also based jurisdiction to hear the non-Indian's complaint against the tribal council on the language of title II, guaranteeing equal protection of tribal laws to "any person." The court subsequently enjoined enforcement of the order, finding that it not only denied due process but also constituted a bill of attainder.[306]

In 1969, a district court in Montana held that title II did not directly authorize civil actions for damages against individuals who in their official capacities violated enumerated rights. The court did rule, however, that it had pendent jurisdiction to adjudicate such a claim if it was coupled with an action against the tribe for equitable or habeas corpus relief with which it shared a "common nucleus of operative fact."[307]

A federal court in New Mexico expanded the reasoning of these cases in a civil action for personal injuries allegedly inflicted by a Zuni Pueblo police officer upon the plaintiff in his custody.[308] The Court noted that the applicable provisions of title II bore a "striking" resemblance to the fourth and fifth amendments and said:

> The similarity of language and the legislative history of the Act establish that Congress intended these provisions to limit tribal governments as the Fourth and Fifth Amendments limit the federal government. . . . The analogy of the Indian Civil Rights Act to the Amendments is appropriate and the law governing actions against individuals for damages under the Fourth and Fifth Amendments should be applied to the Act.[309]

Thus, in a series of decisions, district courts have built upon notions of pendent jurisdiction and analogies to constitutionally protected right to extend the power of the federal judiciary. The 1968 legislation has been interpreted to empower federal courts to decide cases not previously heard by the tribal courts or brought

306 Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969).

307 Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969). The court relied heavily on an analogous Supreme Court case, United Mine Workers v. Gibbs, 383 U.S. 715 (1966), holding that federal courts exercised pendent jurisdiction in damage claims arising under state law coupled with federal claims sharing a "common nucleus of operative fact."

308 Loncassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971).

309 *Id.* at 374.

to federal courts by habeas corpus, to apply developing fourth and fifth amendment concepts, and to allow damage actions not authorized by the statute. The "legislative history" to which the *Loncassion* court referred and on which the decision was said to have rested, has really received no consideration.

In a recent decision, the Tenth Circuit declined to follow the examples set by these three district courts and affirmed the action of the District Court for Wyoming. The lower court had held that title II did not extend federal jurisdiction to hear complaints of discriminatory practices in admission to tribal membership.[310] On appeal, the court assumed that the application of standards for tribal membership might raise equal protection or due process problems, but held that the pleadings disclosed no such issues.[311] Moreover, it recalled its holding in a previous case[312] that title II did not impose broad due process requirements which conflicted with a statutory system of appointing rather than electing a tribal chief. The Tenth Circuit stressed that "the Indian Bill of Rights was concerned primarily with tribal administration of justice and the imposition of tribal penalties and forfeitures and not with the specifics of tribal structure or office-holding."[313] Had the court fully examined the legislative history of title II, its analysis (more persuasive than that of the three interventionist lower courts) would have found additional support.

This tension between restraint and intervention should not arise, however, when the courts apply the various specific commands and prohibitions of the Act. The express provision for representation by defense attorneys, for example, has been strictly applied by district courts in Montana[314] and Idaho,[315] which have ordered tribal courts to permit non-Indian lawyers to represent

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310 Pinnow v. Shoshone Tribal Council, 314 F. Supp. 1157 (D. Wyo. 1970).

311 Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971).

312 Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971).

313 Slattery, 453 F.2d at 282. *Accord* Lefthand v. Crow Tribal Council, 329 F. Supp. 728 (D. Mont. 1971); *but cf.* Solomon v. LaRose, 335 F. Supp. 715 (D. Neb. 1971).

314 Spotted Eagle v. Blackfeet Tribe, Civ. No. 2780; Rafalsky v. Blackfeet Tribe, Civ. No. 2849; Regan v. Blackfeet Tribal Court, Civ. No. 2850 (D. Mont., July 7, 1969).

315 Towersap v. Fort Hall Indian Tribal Court, Civ. No. 4-70-37 (D. Id., December 28, 1971).

Indian defendants. In the Idaho case, the court rejected the contention of the Shoshone-Bannock that the phrase "assistance of counsel" in title II should be construed to mean only the aid of a friend within the tribe, a practice traditionally permitted by the tribal court. While the policy of allowing professional counsel in tribal courts at the defendant's expense may be subject to criticism, there is little doubt that in adhering to the plain language of the statute the court implemented the intent of the drafter of the provision.

The meaning of title IV language is generally clear and may usually be applied strictly. In *Kennerly v. District Court of the Ninth Judicial District of Montana,*[316] the United States Supreme Court invalidated a Blackfeet tribal ordinance granting Montana courts concurrent jurisdiction over civil actions against members of the tribe on the ground of its failure to conform to express title IV requirements. In so doing, the Court pointed out that Montana had not taken legislative action to extend jurisdiction under Public Law 280 and that the tribe had failed to evidence the consent of its members through referendum.[317] While this decision apparently was in accord with Senator Ervin's strong feelings about the need for consent of the governed through a vote of the members of the tribe, the Court's opinion did not fully examine the legislative history of title IV but relied mainly on surface statutory construction.

Construing merely the words of the statute is proper when they are unambiguous. The necessity for using legislative history, however, was demonstrated by the Nebraska District Court's effort to decide whether title IV required the federal government to accept all jurisdiction retroceded by Nebraska or whether the state could retain part of the jurisdiction assumed under Public Law 280.[318] The extent of the court's historical analysis was to conclude from statutory language itself that title IV was enacted to benefit the

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316 400 U.S. 423 (1971).

317 *Compare* Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971); Martin v. Denver Juvenile Court, 493 P.2d 1093 (Colo. 1972); Crow Tribe of Indians v. Deernose, 487 P.2d 1133 (Mont. 1971) *with* Makah Indian Tribe v. State, 76 Wash. 2d 485, 457 P.2d 590 (1969), *appeal dismissed sub nom.* Makah Indian Tribe v. Washington, 397 U.S. 316 (1970) (the cause of action had arisen prior to 1968).

318 United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971).

Indians.[319] Since the tribe in question had expressed a preference to remain under state jurisdiction after title IV had been enacted, the court held that the federal government could accept a partial retrocession. The legislative history treated in this article reveals that the hearings highlighted the need for piecemeal transfers of jurisdiction by negotiation between state and tribe in order to avoid problems of extradition, "no man's lands," and inadequate law enforcement caused by "lump sum" transfers of jurisdiction.[320] In response, Senator Ervin had introduced S. 966 and maintained its provisions intact until enactment as title IV. S. 966 had authorized piecemeal transfers, but had provided that such transfers could be initiated only by the states. Although the latter provision was criticized by several tribal spokesmen, Senator Ervin retained it, apparently to assure the states that they would be affected by this repeal of section 7 of Public Law 280 only at their own option. Consequently, the language authorizing piecemeal transfers of jurisdiction was not intended solely to benefit the Indians. The partial retrocession approved in *Brown* could have been grounded more firmly in a power reserved to the states, had the legislative history been fully examined.

V. Conclusion

Each of the decisions discussed reveals a need for a closer analysis of legislative history of the Indian rights provisions. In the future the federal courts will again be asked to construe the 1968 Act in manners inconsistent with its plain language or its history. Advocates of further federal intervention into tribal criminal justice systems may seek to broaden the meaning of the due process, equal protection, or search and seizure provisions in title II, converting the enumerated rights section into what Senator Ervin had originally suggested but later rejected in S. 961. Opponents of the philosophical foundations of the legislation may argue for the special construction of particular protections or prohibitions in order to bring them into closer correspondence with tribal practices before 1968. The federal judge should refrain from exer-

319 *Id.* at 541-42.
320 See part II C 1 of this article, *supra*.

cising a broad power to establish policy when plenary power over Indian affairs rests with Congress. The judge may believe that he perceives what is best for the tribes within the court's jurisdiction; but the Indians have suffered from a surfeit of patrons in all branches of government. Given adequate resources, the tribes may best adjust to the new legislation in a judicial milieu of sensitive, restrained construction. In this difficult period of transition, the judge who seizes opportunities to demand more of the tribes than required by the letter and history of the Act might become a contemporary analogue to the BIA agent of an earlier period, who imposed tenets of personal conviction through the power of the white conqueror.

APPENDIX

CIVIL RIGHTS ACT

Public Law 90-284
90th Congress, H.R. 2516
April 11, 1968
AN ACT

To prescribe penalties for certain acts of violence or intimidation, and for other purposes.

* * * * * *

TITLE II — *Rights of Indians*

Definitions

Sec. 201. For purposes of this title, the term —

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, tribes, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Indian Rights

Sec. 202. No Indian tribe in exercising powers of self-government shall —

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers,

and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Habeas Corpus

Sec. 203. The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Title III—*Model Code Governing Courts of Indian Offenses*

Sec. 301. The Secretary of the Interior is authorized and directed to recommend to the Congress, on or before July 1, 1968, a model code to govern the administration of justice by courts of Indian offenses on Indian reservations. Such code shall include provisions which will

(1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense,

(2) assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual,

(3) establish proper qualifications for the office of judge of the court of Indian offenses, and

(4) provide for the establishing of educational classes for the training of judges of courts of Indian offenses. In carrying out the provisions of this title, the Secretary of the Interior shall consult with the Indians, Indian tribes, and interested agencies of the United States.

Sec. 302. There is hereby authorized to be appropriated such sum as may be necessary to carry out the provisions of this title.

Title IV—*Jurisdiction Over Criminal and Civil Actions*

Assumption by State

Sec. 401. (a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all

of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Assumption by State of Civil Jurisdiction

Sec. 402. (a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or person [sic] property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceeding or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State be given full force and effect in the determination of civil causes of action pursuant to this section.

Retrocession of Jurisdiction by State

Sec. 403. (a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction or both, acquired by such State pursuant to the provisions of section 1162 of title 18 of the United States Code, section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Consent to Amend State Laws

Sec. 404. Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State

to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title. The provisions of this title shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Actions Not to Abate

Sec. 405. (a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this title shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this title shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

Special Election

Sec. 406. State jurisdiction acquired pursuant to this title with respect to criminal offenses or civil causes of action or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

TITLE V — *Offenses Within Indian Country*

Amendment

Sec. 501. Section 1153 of title 18 of the United States Code is amended by inserting immediately after "weapon," the following: "assault resulting in serious bodily injury,".

TITLE VI — *Employment of Legal Counsel*

Approval

Sec. 601. Notwithstanding any other provision of law, if any application made by an Indian, Indian Tribe, Indian council, or any band or group of Indians under any law requiring the approval of the Secretary of the Interior or the Commissioner of Indian Affairs of contracts or agreements relating to the employment of legal counsel (including the choice of counsel and the fixing of fees) by any such Indians, tribe, council, band, or group is neither granted nor denied within ninety days following the making of such application, such approval shall be deemed to have been granted.

TITLE VII — *Materials Relating to Constitutional Rights of Indians*

Secretary of Interior to Prepare

Sec. 701. (a) In order that the constitutional rights of Indians might be fully protected, the Secretary of the Interior is authorized and directed to —

(1) have the document entitled "Indian Affairs, Laws, and Treaties" (Senate Document Numbered 319, volumes 1 and 2, Fifty-eighth Congress), revised and extended

to include all treaties, laws, Executive orders, and regulations relating to Indian affairs in force on September 1, 1967, and to have such revised document printed at the Government Printing Office;

(2) have revised and republished the treatise entitled "Federal Indian Law"; and

(3) have prepared, to the extent determined by the Secretary of the Interior to be feasible, an accurate compilation of the official opinions, published and unpublished, of the Solicitor of the Department of the Interior relating to Indian affairs rendered by the Solicitor prior to September 1, 1967, and to have such compilation printed as a Government publication at the Government Printing Office.

(b) With respect to the document entitled "Indian Affairs, Laws and Treaties" as revised and extended in accordance with paragraph (1) of subsection (a), and the compilation prepared in accordance with paragraph (3) of such subsection, the Secretary of the Interior shall take such action as may be necessary to keep such document and compilation current on an annual basis.

(c) There is authorized to be appropriated for carrying out the provisions of this title, with respect to the preparation but not including printing, such sum as may be necessary.

CUMULATIVE VOTING PROBLEMS IN ILLINOIS LEGISLATIVE ELECTIONS

CHARLES W. DUNN*

Introduction

The Illinois cumulative voting system is unique among the legislative electoral mechanisms of the fifty states. Utilized for election of members to the Illinois House of Representatives, this system allows each voter to cast his ballot in one of several ways among the three candidates to be elected from each of fifty-nine districts: three votes for one candidate; one and one-half votes for each of two candidates; one vote apiece for each of three candidates; division of three votes in any manner other than as specified in the first three options.[1]

Cumulative voting has been widely used in business corporations as a technique of assuring minority shareholders a voice on the board of directors.[2] Similarly, the purpose of the Illinois cumulative voting system, adopted in 1870, and recently the subject of renewed evaluation and debate in the 1970 constitutional convention, is to ensure minority party representation in each district. The assumption is that minority party voters will cumulate three votes for one candidate while majority party voters divide their three votes among two or three candidates. The cumulative process thus customarily allows the minority party to elect one representative, and the majority party two representatives per district.

The purpose of this article is to assess briefly the history of cumulative voting in Illinois, to document and analyze the case made for cumulative voting by proponents, and then to suggest that a

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1 Regarding the various ways to vote with cumulative voting in Illinois, *see* ILLINOIS LEGISLATIVE COUNCIL, CONSTITUTIONALITY OF CUMULATIVE VOTING SYSTEM, (1968); ILL. REV. STAT. ch. 46, § 17-13 (West 1969). *See also* note 77, *infra*.

2 H. Ballantine, BALLANTINE ON CORPORATIONS, § 77 (Rev. Ed. 1946).

variety of related problems indicate the system cannot be improved to overcome its weaknesses and limitations. The article concludes that a single-member district system is preferable.

I. History of Cumulative Voting

A. *In General*

Historically, cumulative voting is an outgrowth of nineteenth century reform efforts[3] which focused on the need to protect minor[4] and minority parties.[5] Besides cumulative voting, the other principal representative reforms were proportional representation[6] and limited voting.[7] The purpose of proportional representation is to translate actual votes into proportionate representative strength in a legislative body. Hence, a party which receives twenty percent of the vote cast in a legislative district should have twenty percent of the representatives from that district. Proportional representation generally aids minor parties which could not achieve representation otherwise. The common American institution of "winner-take-all" districts, of course, effectively prevents minor parties from obtaining significant, if any, representation in legislative bodies.

By contrast, limited voting, like cumulative voting, is designed to ensure minority, as distinguished from minor, party representation. Two alternative forms of limited voting can be used to achieve this purpose. First, the number of votes which each voter can cast may be restricted, thus preventing majority party voters from electing every representative. Second, the number of candidates a party may elect may be limited, thus preventing a party from electing every representative. In either instance, the minority party would be assured some representation.

The nineteenth century dialogue on representative reform produced several treatises on the subject as well as scattered imple-

3 B. F. Moore, The History of Cumulative Voting and Minority Representation in Illinois, 1870-1908 (1909) [hereinafter cited as Moore]. R. G. Dixon, Jr., Democratic Representation (1968).

4 A minor party is a "third party" such as the Socialist Party.

5 A minority party is one of the two major parties, e.g., the Republican Party in a majority Democratic Party area.

6 Dixon, *supra* note 3, at 48-50.

7 *Id.* 50.

mentation in the United States and Europe. Among the treatises on representative reform were those by Thomas Gilpin,[8] James Garth Marshall,[9] Thomas Hare,[10] John Stuart Mill,[11] and Walter Bagehot.[12] The principal advocate of cumulative voting in this group was Marshall. Like the other proponents of this system, he hoped to protect minority party representation while discouraging the proliferation of minor parties that might occur under proportional representation. Although the former may in some ways strengthen the two-party system, the latter must necessarily weaken it. Moreover, implementation of proportional representation is generally more cumbersome and confusing because of the need to translate vote totals into precise representative strength.

Experience with both limited voting and proportional representation in the United States has been negligible. Limited voting has been tried in certain local elections in Pennsylvania,[13] Connecticut,[14] and New York.[15] Proportional representation has been utilized in a few American cities, the principal example being New York City where, between 1937 and 1945, four minor parties, including the Communist party, achieved representation on the city council.[16]

Cumulative voting has also had only limited application in the United States. In 1871, Pennsylvania adopted a cumulative voting system for municipal elections but abolished it soon afterwards.[17]

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8 ON THE REPRESENTATION OF MINORITIES OF ELECTORS TO ACT WITH THE MAJORITY IN ELECTED ASSEMBLIES (1844).

9 MAJORITIES AND MINORITIES: THEIR RELATIVE RIGHTS (1854).

10 THE ELECTION OF REPRESENTATIVES, PARLIAMENTARY AND MUNICIPAL (1859).

11 FRAZER'S MAGAZINE (April 1859) contains Mill's popularization of Thomas Hare's work. See also, J. S. MILL, THOUGHTS ON PARLIAMENTARY REFORM (2d ed. 1860); and 4 DISSERTATIONS AND DISCUSSIONS (1874).

12 THE ENGLISH CONSTITUTION (1900).

13 PA. STAT. ANN. tit. 16, § 501 (Purdon 1956) (election of county commissioners).

14 CONN. GEN. STAT. ANN. tit. 9, § 167a (West 1967). *See* Montano v. Lee, 401 F.2d 214 (2d Cir. 1968) (law applies only to local boards, commissions, and committees whose legislative powers, if any, are strictly circumscribed); Blanco v. Gangloff, 28 Conn. Supp. 403, 265 A.2d 502 (Super. Ct. 1969) (use of limited voting for election of purely administrative board does not violate the principle of one-man-one-vote).

15 N.Y. City Charter Ann. § 22 (Williams 1963); *see* Blaikie v. Power, 13 N.Y.2d 134, 243 N.Y.S.2d 185, 193 N.E.2d 55 (1963).

16 Zeller & Bone, *The Repeal of P.R. in New York City — Ten Years in Retrospect*, 42 AM. POL. SCI. REV. 1127 (1948).

17 MOORE, 10-11.

In 1872, Wilmington, North Carolina, utilized cumulative voting for municipal elections, but then repealed the system.[18] In 1873, a charter proposed for New York City contained cumulative voting, but the governor of New York vetoed the measure.[19] In 1891, South Dakota voters rejected a cumulative voting proposal for state legislature elections.[20] At the national level, cumulative voting proposals for election of U.S. representatives were introduced in 1869,[21] 1870,[22] and 1871.[23] Although the subject of some debate, these proposals were never seriously considered.[24]

B. *In Illinois*

Adoption of cumulative voting in Illinois occurred not only because of nineteenth century interest in representatives reform, but also because of the political situation. A state deeply divided during the Civil War period, Illinois had two major parties, each with sectional strength. Since 1854 the Democrats had dominated southern Illinois, and the Republicans, northern Illinois. Legislative representation, reflecting this geographic division, focused attention on what cumulative voting might do to broaden the geographical representation of the two major parties.

Other difficulties helped set the stage for acceptance of a change in the method of electing legislators. The Illinois legislature, like legislatures in many other states during the nineteenth century, had a poor public image. In fact, the Illinois constitutional con-

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18 *Id.*

19 *Id.*

20 *Id.*

21 S. 772, 40th Cong., 3d sess. (1869).

22 Amendment offered to H.R. 1823, 41st Cong., 2d sess. (1870); *see* CONG. GLOBE, 41st Cong., 2d sess., 4735 (1870).

23 Amendment offered to H.R. 243, 42d Cong., 2d sess. (1871); *see* CONG. GLOBE, 42d Cong., 2d sess., 63 (1871).

24 Moore suggested a reason for the flourishing of interest in electoral reform during these years:

> In the United States, during the period of bitter struggle in Congress following the Civil War, the need of representative reform became evident for not only was the Congress then sitting representative of only one section of the country but fresh in the minds of the people was the memory of a great war, hastened, if not brought on, by the action of governing bodies in which the radicals of both sections predominated to the exclusion of a large body of conservatives.

MOORE, 9.

ventions of 1848 and 1862 were held largely because of public dissatisfaction with the legislature, which was charged with corruption and misuse of state credit. In 1870 these complaints were partly responsible for the calling of the state's fourth constitutional convention.

Some of the ablest and most influential members of the 1870 convention served on the Electoral and Representative Reform Committee. Chairing this committee, for example, was Joseph Medill, Editor of the *Chicago Tribune* and a founder of the Republican Party.[25] The representative reform plans submitted to the committee had the advantage of a favorable setting — public receptiveness to change, convention interest in representative reform, and an influential committee and chairman.

Convention records of committee proceedings are incomplete, but it is known that the Electoral and Representative Reform Committee proposed a comprehensive cumulative voting system with an accompanying report to the full convention. The committee proposal applied cumulative voting to both houses of the legislature.[26] However, when the committee proposal came to the convention floor for debate, Committee Chairman Medill substituted an alternative proposal making cumulative voting applicable to the House of Representatives only. The key provision in the Medill proposal called for a statewide system of fifty-one three-member districts:

> In all elections of representatives aforesaid each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates as he may see fit; and the candidates highest in votes shall be declared elected.[27]

The committee report advanced several arguments for the cumulative voting system.[28] The first suggested that most legislative bodies are unrepresentative of the electorate because of majority rule (*i.e.*, winner-take-all) districts. Single-member districts, argued

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25 Blair, CUMULATIVE VOTING: AN EFFECTIVE ELECTORAL DEVICE IN ILLINOIS POLITICS, 4 (1960).

26 *Id.* 5.

27 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION, 1726 (1870).

28 MOORE, at 12-15.

the committee, perpetuate the unrepresentative nature of legislative bodies. On the other hand, two-member districts would afford the minority undue power by enabling them to elect one-half of the representatives per district. The Committee concluded, therefore, that minority representation was only feasible with a minimum of three representatives per district.

The report also suggested that cumulative voting would eliminate the problem of sectional divisiveness in legislative representation. Through cumulative voting, the minority party in each district would have a reasonable opportunity to elect one of the three representatives. The final argument supported cumulative voting on the basis that the individual voter is given greater freedom of choice in voting in a three-member district system and that the vote, cumulative in nature, could be more powerfully and effectively used. By transfering all three votes to one candidate, an individual voter would be able to maximize his influence in an election. This individual action, translated over the entire electorate, the committee argued, would weaken the stranglehold of political parties on legislative elections. Typical of the committee's position was the following comment:

> The adoption of this great reform would do much towards abating the baneful spirit of partisan animosity and removing the temptations and opportunities which now exist for the corrupt use of money at elections. It will also tend powerfully to relieve the voter from the despotism of party caucuses, and at the same time constrain party leaders to exercise more care in selecting candidates for lawmakers. There is nothing which will more effectively put an end to packing conventions than arming the voter with the three-shooter or triple ballot, whereby he may fire 'plumpers' for the candidate of his choice and against those of his aversion. It will increase the usefulness of the legislature by improving the membership. It will enable the virtuous citizens to elect the ablest and purest men in their midst and secure to the legislative councils a large measure of popular confidence and respect.[20]

The convention briefly debated the committee report and then adopted it by a large majority. Cumulative voting, however, was not submitted to the voters as a non-severable part of the proposed

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29 *Id.* 15.

constitution, but as one of several separate provisions. The vote in the referendum was 99,022 for and 70,080 against cumulative voting, the smallest majority among the several constitutional proposals.[30]

With the approval of cumulative voting, Illinois was heralded as the first state to adopt a much needed reform. Even the *London Times*, caught up in the ecstacy of the moment, inaccurately predicted the future of cumulative voting: "[A]nd in Illinois — and what Illinois thinks today the Union will think tomorrow — the discussion is passing from theory to practical approval."[31] One hundred years later, Illinois remains the only state with cumulative voting.

The principal purpose of cumulative voting — protection of minority party representation — was achieved almost immediately, as most districts gave one of their three seats to a minority party representative. Furthermore, it soon became apparent that the new system insured a close relationship between the strength of the two major parties statewide and their strength in the legislature. Because only the most unusual circumstances could prevent the minority party in a district from electing one representative, a statewide sweep of other offices by one party did not necessarily give that party an overwhelming majority in the House of Representatives. The cumulative voting system thus customarily insured a narrow division in representation between the two parties in the House of Representatives.[32]

As will be shown later, these three phenomena — protection of minority party representation, the close relationship between statewide voting strength and representative strength in the House of Representatives, and the narrow division between the representative strength of the two major parties — remain primary arguments for the cumulative voting system.[33]

The Illinois experience soon began to show weaknesses in the cumulative voting system. First, minor parties often garnered sizable numbers of votes but usually gained only a few seats. For example, in 1906, the Prohibitionist, Social, and Labor parties

30 Blair, *supra* note 25, 8-10.
31 The Times (London), January 13, 1870, at 9, col. 1.
32 MOORE, at 16-18.
33 See Part II of this article, *infra*.

obtained 15 percent of the total vote cast for representatives statewide, but elected only three members of the House of Representatives. In Chicago alone, these parties received 183,178 votes without gaining even one seat in the House.[34] As had been predicted, cumulative voting succeeded in protecting minority, but not minor, parties.

A second weakness that soon appeared was overrepresentation of the minority party in the Illinois House of Representatives. Between 1872 and 1906, the minority party was overrepresented twenty-four times based on the number of representatives to which the minority party's statewide strength would be entitled.[35] As a result, the majority party, even with a substantial mandate from the electorate on a statewide basis, often was unable to effect its program in the House of Representatives.

Third, two related problems began to arise — tight party control of nominations and lack of competition in general elections. A principal argument for cumulative voting during the 1870 constitutional convention was that the system would weaken, if not eliminate, the stranglehold of political party leadership on the election of members to the House of Representatives. The contrary proved to be true. The initial adoption of cumulative voting brought a larger number of candidates into the electoral process, but the number began to dwindle as party leaders came to exercise greater control over nominations and elections. An early analyst and supporter of the cumulative voting system noted this increase in party control:

> Such a scheme as minority representation and cumulative voting must automatically increase party control. Several thousand voters coming to the polls each with three votes to distribute as he sees fit, without a certain amount of party supervision, can lead to nothing but confusion, injustice, and misrepresentation.
>
> As the system has worked out in practice, legislative nominations have become practically equivalent to election and the evil is, of course, that these nominations are largely controlled by a limited number of party leaders.[36]

34 MOORE, at 21.

35 *Id.* 25. Statewide party voting strength is determined by a party's vote for President of the United States or state treasurer in the respective years when those offices are filled.

36 *Id.* 32.

The majority party in a district would often nominate two candidates and the minority party just one. By controlling the nomination process, political leaders effectively determined the degree of competition in the general election. Among the reforms proposed to erase this problem were: adoption of the direct primary in lieu of party conventions and caucuses; a mandate that each party nominate a full slate of three candidates; and a requirement that the voters in a direct primary, rather than party leaders, should determine how many candidates each party would nominate. Ultimately the first of these reforms was adopted, but even with the direct primary, strict party control over the nomination process continued. As a result, the level of competition in the general election remained low. The other reforms never were acted upon.[37]

Between 1870 and 1920, opposition to cumulative voting also mounted because of the adverse impact of the system on the internal workings of the political parties. For example, in a district encompassing more than one county (which most districts did), cumulative voting could be used as a weapon in intraparty fights; that is, one county could utilize the cumulative vote for its candidate in order to defeat the candidate of another county. Still another problem was the collusion that often occurred between the parties and between incumbent legislators. Incumbent minority and majority party representatives would often cooperate with each other in order to reduce the threat of a challenger.

Most commentary on the Illinois system before 1920 was critical.[38] Several academic works criticized cumulative voting.[39] In addition, there were several attempts in the early twentieth century to abolish cumulative voting and to institute single-member districts.[40] In addition, prominent Illinois citizens groups issued publications calling for the abolition of cumulative voting.[41]

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37 *Id.* 42, 43.

38 Hyneman and Morgan, *Cumulative Voting in Illinois*, 32 Ill. L. Rev. 12, 13-14 (1937).

39 M. L. Childs, Actual Government in Illinois, at 139, 140 (1914); W. F. Dodd & S. H. Dodd, Government in Illinois at 115-19 (1923); J. W. Garner, Government in the United States, 7-10 (1916); A. M. Kales, Unpopular Government in the United States, 167 (1914); J. M. Matthews, American State Government, 167-69 (1924).

40 *See* Blair, *supra* note 13c, at 114-117.

41 Illinois Constitutional League, Why Illinois Must Have a Constitutional

The 1920-22 Illinois Constitutional Convention, conceived amidst antagonism towards cumulative voting, attempted to give the final death blow to the system. Few delegates to the convention voiced support for cumulative voting. Proposed instead was a system of 153 single-member districts. Whereas the 1870 convention submitted controversial items apart from the main document, the delegates in 1922 submitted their constitution to the voters as a whole. The proposed constitution was defeated, and Illinois retained its 1870 constitution as well as the cumulative voting system.[42]

With the advent of the direct primary, the question arose whether to apply cumulative voting to primary as well as general elections. During the period of caucus and convention nominations, cumulative voting applied only to general elections. Party leaders feared loss of control over the nomination process if cumulative voting were utilized in primary elections. After a major legal struggle between the Illinois General Assembly, which did not want cumulative voting in primary elections, and the Illinois Supreme Court, the court upheld a law which, although applying cumulative voting to primaries, also retained considerable power in the hands of party leaders.[43] This law allowed the district committees of each party to determine prior to the primary how many candidates they would nominate for the general election. Not uncommonly the committees of the minority and majority parties have chosen to nominate one and two candidates, respectively. Thus, party leadership has continued to exercise considerable control over the nomination process and to determine in large measure the degree of general election competition.[44]

Prior to the Sixth Illinois Constitutional Convention in 1970, the only major change[45] in the cumulative voting system had been

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CONVENTION, 4 (1918); ILLINOIS LEGISLATIVE VOTERS LEAGUE, ASSEMBLY BULLETIN, Nos. 1 and 2 (1919).

42 For a full analysis of the 1920-22 Illinois convention and constitutional referendum, see J. CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818-1970 (1972).

43 People *ex. rel.* Espey v. Deneen, 247 Ill. 289, 93 N.E. 437 (1910). Three previous statutes dealing with primary elections were invalidated by the court, one of the reasons being impermissible delegation of power to party nominating committees. Blair, *supra* note 25, 12-22.

44 Blair, *supra* note 25, 12-22.

45 Although it did not affect the cumulative voting process, the 1954 amendment to the Illinois Constitution increased the membership of the House of Representatives from 153 to 177. ILL. CONST. art. 4, § 7 (1954).

its application to primary elections. That change had, of course, been statutory in nature. During the 1970 convention, lack of general election competition (caused in part by the practice of allowing party representatives to limit the number of candidates in primaries) became the principal criticism of cumulative voting. This criticism led the convention to propose the only other major change in the one hundred year history of cumulative voting.[46]

With the adoption of the proposed 1970 constitution, party committees no longer have the statutory right to limit nominations to less than two in each district.[47] The new constitutional language, however, leaves open the possibility of limiting nominations to two. The most immediate impact of this provision will be on the minority party in each district which now cannot arbitrarily limit its nominations to one.

The 1970 Convention, unlike the 1920-22 Convention, did not meet against a background of opposition to cumulative voting. The issue of abolishing cumulative voting was not vigorously joined until well into convention deliberations. Proponents of single-member districts, fighting as underdogs, narrowly obtained adoption of single-member districts on first and second readings of the convention. But with significant pressures from legislators who survive politically through cumulative voting, from the governor and other state officials, from the four principal Chicago newspapers and major interest groups, cumulative voting supporters reversed convention action on first and second readings. Recognizing the controversial nature of this issue, the convention reached a compromise on third reading allowing the issue of cumulative voting to be separately submitted in the referendum. The proposal receiving the majority of votes would become a part of the 1970 constitution, if adopted. The proposal for single-member districts, although carrying in 76 of 102 Illinois counties in the referendum, lost in Cook County, which has approximately one-half of the state's population. The four major newspapers and the political organizations of both major parties in Cook County supported cumulative voting. The principal support for single-

46 *See* C. DUNN, POLITICS OF NON-REFORM: ELITES AND THE ILLINOIS LEGISLATURE, (1972). Information in this article concerning the 1970 Illinois convention is drawn from this book.

47 ILL. CONST. art. IV, § 2(b) (West 1972).

member districts came from the Illinois League of Women Voters and the Chicago Bar Association.[48]

II. The Case for Cumulative Voting

Several scholars[49] have examined the Illinois cumulative voting system during the last fifty years. Among some of them, the reaction has been quite favorable. For example, George S. Blair concluded that cumulative voting is an "effective electoral device."[50] Robert G. Dixon, Jr., suggests, "[I]t is surprising that the Illinois system has not been copied."[51] He also says: "I would favor the export of the cumulative voting idea to other states."[52] Professor Blair has probably stated as well as any modern writer the case for cumulative voting:

> (1) to assure greater stability of membership in the lower chamber; (2) to temper the tendencies for violent shifts to occur in the party composition of the lower assembly from session to session; (3) to make the voice of the minority party a real factor in the lower assembly by preserving the two-party characteristic in the composition of all sessions of this chamber; and (4) to reflect a nearly true proportional distribution of seats in the lower assembly between the two major parties.[53]

Proponents no longer cite one of the most important of the original arguments for cumulative voting: that the system would reduce, if not eliminate, party control over nominations and elections. For reasons already explained, party control must necessarily play a significant role in the cumulative voting system. The purpose here is to examine briefly the arguments still made by proponents of the concept.

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48 Dunn, *supra* note 46.

49 Blair, *supra* note 25; Hyneman and Morgan, *supra* note 38; Sawyer & MacRae, *Game Theory and Cumulative Voting in Illinois: 1902-1954*, 66 Am. Pol. Sci. Rev. 936-46 (1962).

50 Blair, *supra* note 25.

51 Dixon, *supra* note 3, at 524.

52 Sixth Constitutional Convention, Legislative Committee, *Minutes*, February 18, 1970. The citation *Minutes* refers to recorded transcripts of committee meetings, printed testimony, and official committee minutes [hereinafter referred to as Legislative Committee, *Minutes*].

53 Blair, *The Case for Cumulative Voting in Illinois*, 47 Nw. U.L. Rev. 353 (1952).

A. *Legislative Tenure*

Comparative studies of legislative tenure have shown that the Illinois House of Representatives tends to have less turnover than legislative bodies in other states.[54] Proponents of cumulative voting suggest this is an asset in that an experienced legislator can better represent his constituents in the legislative process than an inexperienced legislator. The clear contention in these studies is that the longer legislative tenure resulting from the cumulative voting system makes the Illinois House of Representatives a more experienced legislative body. The study by Hyneman and Morgan states:

> It is [our] thesis . . . that the Illinois House of Representatives possesses at least one important attribute which reflects favorably upon it when compared with the legislative bodies of many other states, and that this quality is in large part contributed by the peculiar system of legislative selection used only in this state. The capacity of a legislature for adequate representation in policymaking is determined in large part by the experience in the legislative process which its members have accumulated.
>
> In so far as this greater stability of personnel is contributed by the cumulative voting device, it stands as an endorsement of that electoral procedure and an argument for its continuance. This article is an argument for the retention of cumulative voting in Illinois.[55]

As suggested later, perhaps the phenomenon of longer tenure in the Illinois House of Representatives results more from lack of competition for incumbent legislators than from any inherent virtue in the cumulative voting system.[56] That is, an electoral system which "freezes in" incumbents and "freezes out" challengers can produce just as poor a legislative body as an electoral system which subjects legislators to a greater degree of electoral compe-

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54 Hyneman and Morgan, *supra* note 38, 27-30; Blair, *supra* note 25, at 87-101. The Hyneman and Morgan study compared legislator tenure in Illinois, Indiana, Iowa, New York, and Washington. The Blair study compared legislator tenure in Indiana, Iowa, Michigan, Wisconsin, and Illinois. Although a bit dated, the conclusions of these studies are probably still valid inasmuch as the principal reason for longer legislator tenure in Illinois is the result of the mechanics of cumulative voting.

55 Hyneman and Morgan, *supra* note 38, at 12.

56 See part III B of this article, *infra*.

tition. The choice may be, therefore, between a legislative body with high tenure because of lack of competition and one with keener competition. In one case, there is experience, and in the other, responsiveness. To illustrate, during the 1970 session of the Illinois General Assembly prior to the general election, the House of Representatives passed a major pay raise for legislators while the Senate did not. Interestingly, over one-half of the members of the House but only one Senator faced no competition in the general election.

Proponents, of course, make two points in rebuttal: first, that although lack of competition exists in the general election, cumulative voting does permit meaningful competition in party primaries; and second, that insuring members of a legislative body greater electoral security allows them to be more independent in their consideration of public issues. A subsequent discussion of these arguments shows that other negative side-effects of longer tenure are overlooked.

B. *Stabilization and Narrow Division of Party Representation*

Customarily in the Illinois House of Representatives, neither party elects a substantial majority of members; rather, the division of representation between the two parties is narrow, as is shown in Table 1. In 1970, for example, the Democratic party in Illinois swept every statewide office and picked up ten seats in the state Senate; but in the House of Representatives, the Democratic party remained the minority party by a narrow three-vote margin, 90 to 87. Proponents of cumulative voting suggest this narrow division makes the minority party more viable in the legislative process by forcing the majority party to take greater cognizance of minority party views.[57]

However, equalizing representation between the major parties also has disadvantages. The majority party lacks a meaningful working majority. It is extremely difficult, for example, for the majority party to maintain party responsibility when its majority consists of only a small number of votes and may be nullified by the defection of only one or two members. Furthermore, inasmuch

57 Hyneman and Morgan, *supra* note 38, at 16.

TABLE 1

Percentage Distribution of Division of Votes Cast and Legislators Elected by Republican and Democratic Parties, 1950-1970*

Election Year	Division of vote cast in Illinois		Illinois House of Representatives		Illinois Senate		Congressional delegation	
	R	*D*	*R*	*D*	*R*	*D*	*R*	*D*
1950(S)**	52.3	44.4	54.9	45.1	60.8	39.2	69.2	30.8
1952(P)	53.8	44.1	56.2	43.8	74.5	25.5	64.0	36.0
1954(S)	45.3	52.2	51.6	48.4	62.7	37.3	52.0	48.0
1956(P)	58.5	39.6	53.1	46.9	65.5	32.8	56.0	44.0
1958(T)	47.8	52.2	48.6	51.4	58.6	41.4	44.0	56.0
1960(P)	49.7	49.9	50.3	49.7	53.4	46.6	44.0	56.0
1962(S)	51.4	45.8	50.8	48.5	60.3	39.7	50.0	50.0
1964(P)	39.7	58.2	33.3	66.7	56.9	43.1	45.8	54.2
1966(S)	53.5	42.7	55.9	44.1	65.5	34.5	50.0	50.0
1968(P)	51.6	48.4	53.7	46.3	63.8	32.8	50.0	50.0
1970(S)	42.4	57.6	50.8	49.2	50.0	50.0	50.0	50.0

*Vote totals for each election year are from presidential, state treasurer or U.S. Senate election.

**(S) designates U.S. Senator; (P) designates United States President; (T) designates state treasurer.

as members of the House of Representatives are relatively more insulated from electoral competition, an individual member may be more inclined to defy his party's leadership, knowing there is little chance of his defeat in an election.

Cumulative voting proponents reply that a single-member district system may also create a narrowly divided legislative body in which a few members obtain a great degree of legislative power. Such was the case with the 1971 session of the Illinois Senate, elected from single-member districts, which was divided 29 to 29. Although cumulative voting proponents rightly argue that the cumulative voting system is more likely than the single-member district system to produce a narrowly divided legislative body, they will not concede that cumulative voting is also more likely to weaken party responsibility. Analysis presented further in this article contests the position taken by cumulative voting proponents.[58]

58 See parts III C and D of this article, *infra*.

C. *Geographic Spread of Party Representation*

As pointed out by Professor Robert Dixon, Jr., "The [cumulative voting] system tends to make each party a statewide party, carrying the Democratic Party into Republican hardcore areas downstate and carrying the Republican Party into hardcore Democratic areas in Chicago."[59] The minority party representative consistently elected from every district in the state attests amply to this phenomenon.

If such representation is meaningful — that is, if a significant minority interest is being represented — then this geographic spread may be of some value. There is reason to doubt, however, that this minority representation is significant and helpful to the growth and vitality of the minority party. As this article shows, cumulative voting often produces minority party representatives who represent miniscule minorities; it may be in the minority party representative's best interest not to build up his party for fear of creating opposition to himself; and the minority party representative is often the tool of the majority party rather than an independent representative of his own party's interests.[60]

D. *Proportional Representation*

Proponents argue that cumulative voting allows the two major parties to achieve a greater degree of proportional representation, based on their statewide strength, than they do in most other legislative bodies. Table 1 shows that this has in fact occurred in Illinois. The proportional representation argument is closely related to two other arguments for cumulative voting: narrow division in representation between the parties, and geographic breadth of party representation. If one of these manifests itself, the other two will also, as has been shown by the Illinois experience.

E. *Gerrymandering Potential Reduced*

Another argument cited for cumulative voting is the limitation on the adverse consequences of gerrymandering. Since cumulative voting customarily guarantees each of the two major parties at least one representative per district, the opportunity for one party

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59 Dixon, *supra* note 3, at 524.

60 See part III C of this article, *infra*.

to gerrymander the other party out of significant representation is reduced.

III. Cumulative Voting: Overlooked and Underestimated Problems

Many of the arguments in favor of cumulative voting simply look at one favorable consequence and conclude that the system is good. The argument concerning tenure is an example. Longer tenure enables representatives to be more effective. Since cumulative voting produces longer tenure, cumulative voting is good. Important negative consequences, however, induced by cumulative voting and longer tenure, are either overlooked or underestimated. Both the logic of the arguments for cumulative voting and research on the system have tended to isolate favorable consequences. Such an approach fails to look at cumulative voting from the broader and more important perspective of the system's total impact on the politics of the Illinois House of Representatives.

The purpose in this section of the article is to suggest that cumulative voting, when viewed from the broader perspective, has significant weaknesses and limitations and that the dysfunctional consequences probably cannot be corrected. The brief examination earlier of proponent's arguments for cumulative voting was designed to serve as a prelude to this fuller analysis of the system's dysfunctions.

A. *Cumulative Voting and Legislative Reform*

In recent years, several national organizations have made recommendations to reform state legislatures. One of the principal reform proposals has been to reduce the ponderous size of many state legislatures.[61] Generally, the reason for this reform proposal is the relationship which seems to exist between other legislative problems and legislative size. Larry Margolis, Executive Director of the Citizens Conference on State Legislatures, testifying on this issue before the Legislative Committee of the Illinois Constitutional Convention, stated:

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61 Citizens Conference on State Legislatures, The Sometime Governments, 155-56 (1971) [hereinafter cited as The Sometime Governments].

> Large legislatures contribute to less visibility, lower stature and diminished significance for members; opportunity for debate is circumscribed; there is a tendency to deal with factions rather than with individuals; there is less likelihood to provide adequate staff, services and compensation when the legislature is large.[62]

The Margolis testimony indicates that excessive legislative size is a primary obstacle for achieving full legislative reform simply because so many other reforms depend first upon resolution of the size question. Margolis is not alone in his view that excessive size rests at the root of other problems like legislator visibility, legislative effectiveness and the legislature's image. The American Assembly Conference on State Legislatures suggests that legislative size vitally affects legislative performance since the amount of thorough debate and legislative efficiency may in many ways be directly related to the number of members serving.

> Legislatures should be of a size to make the position of legislators more important and visible. To permit individual participation, effective deliberation, full staff, and adequate compensation, legislatures should be no larger than fair representation requires. We believe that in many cases in the United States legislatures are larger than desirable.[63]

The Illinois House of Representatives has the fifth largest membership (177) in the nation, ranking behind New Hampshire (400), Massachusetts (240), Georgia (205), and Pennsylvania (203).[64] Among the 177 witnesses appearing before the Legislative Committee of the Illinois Constitutional Convention, a substantial majority advocated a decrease in legislative membership, particularly in the House of Representatives.[65] Even the late House Speaker and Secretary of State Paul Powell openly encouraged membership reduction.[66]

The question of optimum size is rather difficult to answer.

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62 Legislative Committee, *Minutes.* February 13, 1970.

63 AMERICAN ASSEMBLY, STATE LEGISLATURES IN AMERICAN POLITICS: REPORT OF THE TWENTY-NINTH AMERICAN ASSEMBLY (1966) [hereinafter cited as STATE LEGISLATURES IN AMERICAN POLITICS].

64 CITIZENS CONFERENCE ON STATE LEGISLATURES, STATE CONSTITUTIONAL PROVISIONS AFFECTING LEGISLATURES, 55 (1967).

65 Legislative Committee, *Minutes,* Feb. 24, 1970.

66 *Id.*

Who is to say eighty members are better than ninety members, for example? The general conclusion has been reached that the membership of the Illinois House of Representatives should be nearer 100 than 177. The Citizens Conference on State Legislatures, for example, flatly recommends that the Illinois House of Representatives be reduced from 177 to 100.[67] And the Committee for Economic Development states: "The size of most legislatures should be drastically reduced with no more than 100 members in larger states and substantially fewer in smaller ones."[68]

The nature of multi-member districts with cumulative voting dictates a large legislative body, particularly in a geographically large state like Illinois. With multi-member districts and cumulative voting, it is difficult, if not impossible, to reduce the size of the House of Representatives without making so few districts that they become geographically unacceptable.

The largest reduction in House membership proposed during the 1970 convention, with the retention of multi-member districts and cumulative voting, was from 177 to 153 members (59 districts to 51 districts). Using 1970 census data, the population for each of 51 districts would be approximately 217,921, and for 59 districts, 188,372. A membership reduction from 177 to 153 would net a large gain in population per district with a not very significant decline in House membership.

Using 1960 census data, House district 54 consisted of eleven counties and was larger in size than the states of Rhode Island and Delaware combined. To cause district 54 to meet the population test of one man — one vote, as applied to 1970 census data, would necessitate the addition of several more counties since this district has not been the beneficiary of the state's major population expansion. To reduce House membership, of course, would only compound an already adverse situation for House district 54. Even more counties would have to be added to the district to make it conform to the one man — one vote doctrine.

Regarding legislative size, the principal alternative to multi-member districts with cumulative voting is single-member districts. As illustrated in Table 2, single-member districts permit

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67 THE SOMETIME GOVERNMENTS, 208-09.

68 COMMITTEE FOR ECONOMIC DEVELOPMENT, MODERNIZING STATE GOVERNMENTS, 38 (1967) [hereinafter cited as MODERNIZING STATE GOVERNMENTS].

significant and meaningful decreases in legislative membership without unduly increasing population per district. If, for example, it should be desirable to decrease membership in the Illinois House of Representatives to 105 (approximately the figure recommended by the Citizens Conference on State Legislatures), the population per district under multi-member districts would be 317,542, and with single-member districts, 105,847.

Generally, the purpose of proposals to reduce size is to make the legislative body more deliberative as well as to enhance legislator visibility and responsibility. This suggests that meaningful legislative reform may be related to legislative size.

B. *Lack of Competition*

Perhaps the most important indictment of cumulative voting made during the Illinois Convention was lack of competition. Between 1902 and 1970, there were 1,776 district elections for members of the Illinois House of Representatives. In these 1,776 elections no district ever had a full slate of candidates for both major parties (i.e., three Republicans and three Democrats) running for the three available seats; and only 17 districts ever had as many as five candidates (e.g., three Democrats against two Republicans) running for the three available seats.[69]

TABLE 2

Impact of Membership Decrease in House of Representatives on Population Per District

No. of House Members	District Population: Multi-Member Districts*	District Population: Single-Member Districts	Population Difference
177	188,372 (59)*	62,791	125,581
153	217,921 (51)*	72,640	145,281
135	246,977 (45)*	82,326	164,651
105	317,542 (35)*	105,847	211,696

*Calculations based upon three members per district. Numbers of multi-member districts indicated in parentheses.

The statistical conclusion derived from this data is that in over 99 percent of the 1,776 elections, either four or three candidates

69 Data assembled from official election results (1902-1970) printed by the Office of the Secretary of State of Illinois.

have competed for the three available seats. Table 3 shows competition for House seats in the six most recent general elections, 1960 through 1970. Except for the 1964 statewide at-large election and the two succeeding elections, over 50 percent of all candidates for the House of Representatives have run unopposed in general elections. Although a higher competition rate exists in primary elections as shown in Table 4, the real competition rate in primary elections is much lower than data in Table 4 indicate since many primary election candidates are not serious candidates.

Even proponents of cumulative voting concede there is not a high rate of general election competition. Hyneman and Morgan, for example, dismiss the lack of competition as "not of great significance."[70] The proponents argue that meaningful competition is provided in the primary. Data in Table 4 raise serious questions

TABLE 3

Uncontested Candidates and Districts for Illinois House of Representatives in General Elections 1960-1970

Year	No. (and %) Uncontested Districts Out of 59	No. (and %) Uncontested Candidates Out of 177
1960	32 (55.1)	96 (54.2)
1962	32 (55.1)	96 (54.2)
1964	*	*
1966	13 (22.4)	39 (22.0)
1968	23 (39.6)	69 (38.9)
1970	31 (53.4)	93 (52.5)

*In 1964, all House candidates were elected in a statewide, "at large" election.

about this contention. Additionally, it should be noted that primary elections are typically for the "party faithful" and that they are often held many months before the general election. The primary election date in Illinois is in March. Thus, during the last general election for members of the Illinois House of Representatives, over one-half of the members had actually been elected to office eight months before.

70 Hyneman and Morgan, *supra* note 38, at 22.

TABLE 4
Uncontested Candidates for Illinois House of Representatives in Primary Elections 1960-1970

Year	No. of Uncontested Candidates
1960	90 (325)*
1962	93 (325)*
1964	**
1966	75 (395)*
1968	131 (285)*
1970	129 (270)*

*The numbers in parentheses indicate the approximate number of candidates in all districts.
**Statewide "at large" election year.

C. *Collusion and "Sweethearting"*

Considerable testimony before the Legislative Committee of Illinois Constitutional Convention suggested the existence of a collusion or "sweethearting" problem in House elections. For example, Convention delegate John C. Parkhurst (former House Minority Leader and Chairman of the House Appropriations Committee) said:

> 'Sweethearting' regularly occurs in many districts when the two incumbent majority party candidates and the one incumbent minority party candidate 'play down' differences among them in the interest of creating a united front in the district. 'Sweethearting' gives the three incumbents an advantage over any potential challenger since their differences are minimized; in fact, they often speak on each other's behalf.[71]

Collusion of this kind, according to cumulative voting opponents, may help incumbent legislators, but it denies voters a full and fair choice. Not only do voters have a difficult time defeating candidates they do not like, but intra-party factionalism, especially in the minority party, is increased. That is, the minority party in a district, with only a slight hope of winning two of the three seats, may find it has two candidates competing against each other more than against candidates of the majority party.

71 Legislative Committee, *Minutes*, March 10, 1970.

Chicago Sun-Times reporter Tom Littlewood provides an excellent example of how former House Speaker and minority party representative in his district, Paul Powell, openly sought to defeat his Democratic Party running mate in 1958.

> Powell and his Democratic running mate opposed each other from the start, each alleging that the other was interested only in capturing the single likely Democratic spot rather than working to win both seats. In his television appearances Powell illustrated on a blackboard how his Republican friends could cross over to vote for him.
>
> Obviously, great numbers did. In the primary, Powell received 3,361½ more votes than the highest Republican. In the election Powell ran 17,053 votes ahead of the highest Republican, and his Democratic running mate lost out for the third seat by only 1,349 votes. The conclusion is inescapable that if the two Democrats had run together, instead of in opposition, they would probably have both been elected.[72]

Professor Samuel K. Gove suggests the problem is widespread:

> Intra-party friction results when leaders of the minority party in a district decide to run two candidates for representative. The two minority party candidates *often* campaign against each other in the general election for the one seat in the House usually won by their party, and the resulting friction causes the minority party to lose whatever effectiveness it might otherwise have in the general campaign. (Emphasis added.)[73]

D. *Denial of the Majority Will*

In the 1970 general election the Democratic party in Illinois swept to an overwhelming victory — except in the House of Representatives. Following the statewide Democratic party victory, House Democratic leader Clyde Choate remarked, "If you look at the election returns the majority of the people really did give a mandate for a Democratic House. If it wasn't for cumulative voting, we would have had a Democratic House."[74]

The 1970 election illustrates how cumulative voting can either

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72 LITTLEWOOD, BIPARTISAN COALITION IN ILLINOIS, 5-6 (1960).

73 S. Gove, *Inter-Party Competition*, in ILLINOIS POLITICAL PARTIES, 35 (L. M. Pelekoudas ed., 1960).

74 United Press International, November 5, 1970. The wire service story originated in Springfield, Illinois. Regarding 1970 election returns, see Table 1.

deflate or inflate a party's share of representation. For example, in thirteen out of eighteen elections between 1930 and 1970 (excluding 1964 and 1966),[75] the minority party has had its representation inflated; in contrast, of course, the majority party has had its representation deflated the same number of times. The tendency to overrepresent the minority party in House membership dims the prospects of an effective working majority for the majority party. To illustrate, from 1954 to 1970 (again excluding the 1964 and 1966 elections) the average difference between the majority and minority parties in number of representatives was 5.7.[76]

The very narrow divisions between parties in the House of Representatives — when considered in context with the collusion and "sweethearting" problem — may weaken both party leadership and party responsibility. The most visible example of this problem occurred in 1961 when the late Secretary of State Paul Powell was elected Democratic Speaker of the House of Representatives even though his party was in the minority, 89 to 88. Three Repubican House members, minority party beneficiaries of cumulative voting and holders of Cook County Democratic organization patronage positions, absented themselves from the opening organizational session of the House of Representatives, giving Mr. Powell a majority for House Speaker.[77]

Consistently narrow divisions in representation between the two parties often mean that power in the House of Representatives flows to small factions and away from party leadership. Since each bill that passes the House must receive 89 out of 177 potential votes, the power of small factions in a party to thwart the majority and to weaken party leadership is enhanced. This problem was noted fifty years ago: "It has been observed as a serious objection

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75 The results of the 1964 and 1966 elections for the Illinois House of Representatives are abnormal. In 1964, all candidates in the state ran at large, and in 1966, election results reflected higher rates of competition than normally anticipated. The 1966 election then represented the beginning of a return to pre-1964 competition levels.

76 See Table 1.

77 LITTLEWOOD, *supra* note 72 at 31, 32. In addition to the three members mentioned, two other Republican representatives were also part of the betrayal of the Republican candidate for House speaker. One of the two was a minority party beneficiary of cumulative voting from Cook County although not a recipient of Cook County Democratic organization patronage. The other was from the same district as the Democratic candidate for speaker.

to the [cumulative voting] system that 'the assembly chosen under it is apt to be a heterogeneous body in which no political party has a working majority.' "[78]

E. *Forced Minority Party Representation*

What percentage of a district's electorate should be able to elect a legislator? Commonly in the American experience, either a majority or a substantial plurality is necessary. With cumulative voting, however, neither is necessary. Table 5 reveals that a candidate can be elected to the Illinois House of Representatives with only a fraction of the popular vote cast for the office. In 1968, for example, two candidates who received only 6.4 and 6.5 percent of the votes cast for representatives in their districts were elected. This is not an unusual occurence. In 1960, 1962, and 1968, eight, seven, and thirteen candidates, respectively, were elected to the Illinois House with less than 20 percent of their district's popular vote.[79]

Members of Chicago's so-called West Side Bloc, according to Littlewood,[80] obtain legislative office through the beneficence of cumulative voting. Three of the representatives in Table 5 are commonly associated with the West Side Bloc. They are Capuzi, Granata and Karmazyn. Littlewood has pointed out that:

> A side-effect of cumulative voting for the House, with its virtually guaranteed minority representation, is close party balance and, hence, disproportionate representation for small trading blocs. For years, the balance of power in the House had been held by the West Side Bloc.
>
> From these [West Side Chicago] districts Granata [West Side Bloc leader] forged a bloc of about six Republican votes, which could be augmented when necessary with eight to ten Democratic votes.[81]

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78 E. BOGART & J. MATHEWS, THE MODERN COMMONWEALTH, 1893-1918, 296 (1920).

79 *Supra* note 69.

80 Members of the West Side Bloc have been criticized for sacrificing Republican Party loyalty for Cook County Democratic organization interests. *See* LITTLEWOOD, *supra* note 72, at 31, 32. In the 1964 at large election for the Illinois House of Representatives, for example, several West Side Bloc members were purged from the Republican statewide nomination slate. *See* L. E. Hall, The Impact of Electoral Deadlock: New Members and the 1965 Session of the Illinois House, 44, 45, (1969) (unpublished doctoral dissertation, University of Illinois Library).

81 LITTLEWOOD, *supra* note 72, at 14.

Members of the West Side Bloc, generally elected by very small percentages of the total vote in their districts, have built up considerable seniority through the minority representation feature of cumulative voting. The average tenure of six West Side Bloc members is twenty years (ten terms) while the average tenure of other members of the House of Representatives is eight years (four terms). The senior member of the Illinois House of Representatives is the West Side Bloc leader, Peter Granata, who has served thirty-six years (eighteen terms).

F. *Tenure*

Supporters of cumulative voting and multi-member districts argue that this system allows for greater tenure than single-member districts. Thus, House Republican Whip Arthur Telscer maintains: "Illinois has been a leader among other states in retaining its membership (in the House of Representatives)."[82] Without question, tenure may be an asset if properly balanced with an infusion of new representatives. On the other hand, cumulative voting opponents argue that if cumulative voting insulates incumbents from competition, the system is of dubious value.

TABLE 5

Representatives Elected by Less Than Sixteen Per Cent of Their District's Total Vote, 1968

Representative (District)	Per Cent of District Vote for Representative
Capuzi (19)*	13.8
Epton (24)*	15.3
Gardner (26)*	6.5
Graham (29)*	10.1
Granata (20)*	15.4
Karmazyn (21)*	13.0
Washington (22)*	6.4

*Elected without competition.

Traditionally the House of Representatives, with its two year terms, has been thought of as the legislative body more responsive

82 Legislative Committee, *Minutes*, February 24, 1970.

to the will of the people. Although it is arguable that a challenger can organize a small percentage of the electorate through the "plunking" device[83] offered by cumulative voting, the reverse is also true — namely, that an incumbent need only organize a small percentage of the electorate through the "plunking" device to remain in office. The system cuts both ways. What weighs significantly on behalf of the incumbent are all the advantages of incumbency, collusion, and "sweethearting," which make the task of the challenger extremely difficult. Moreover, the challenger faces a mammoth organizational task over a large geographic area, which naturally enhances the incumbent's prospects.

G. *Minority Group Representation*

Not uncommonly, advocates of cumulative voting contend that the system assists minority group candidates. The basis for this contention is that minority groups, like minority political parties, can "plunk" (cumulate) three votes for one candidate and, thus, have a good opportunity of electing that candidate. Available evidence, however, suggests that minority group candidates do not benefit from the system. The Illinois Legislative Council, following a nationwide study, concluded: "It is apparent that a higher average degree of representation is found for Negroes in the States with all single-member districts."[84]

Statements made on the floor of the constitutional convention by black delegates confirm the Legislative Council conclusion. Delegate Sam Patch said that single-member districts "would be an advantage to me, to my people and to my district."[85] Delegate Charles Coleman stated:

> Now I want to echo the words of Delegate Patch, because since first reading both Delegate Patch and most . . . other black delegates know . . . that with single-member districts, all you are doing is just adding another district in the Chicago areas, you are just adding another seat.

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83 See following section.

84 Illinois Legislative Council, Black Members of State Legislatures, March 12, 1970.

85 Proceedings of the Sixth Constitutional Convention, August 13, 1970, at 56, 57 [hereinafter cited as Proceedings, 1969-70]. This reference and all subsequent convention debate references are from the unpublished court reporter's verbatim transcripts.

> All you are doing, as far as I am concerned here, and as far as the black delegates from Chicago [are concerned] . . . is adding another Democratic seat. There is no way to gerrymander around it. You might be adding a few seats for black [representatives] in some of the other towns throughout the state. I'm familiar with Rock Island, I'm told that Peoria, Rockford, several of the other towns throughout the state and cities throughout the state have large black populations, ghettoed together, where it's going to be very hard to gerrymander around it [with single-member districts].[86]

The United States Supreme Court has recognized that multi-member districts without cumulative voting may theoretically have an adverse impact on black legislative representation. But, on the basis of factual evidence, the court has never sustained this contention.[87] The same contention, as it pertains to multi-member districts with cumulative voting, has not been tested in the federal courts.

The U.S. Supreme Court said in 1971: "we agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter."[88] More recently, U.S. District Courts have not only abolished multi-member districts (without cumulative voting) in Alabama[89] and Minnesota,[90] but these courts have also reduced legislative size. In Alabama, the House of Representatives was reduced from 106 to 105; and in Minnesota, the House of Representatives was reduced from 135 to 105 and the Senate from 67 to 35.

One of the principal arguments used by these courts was that multi-member districts adversely affect minority group representation. In the Minnesota case, the U.S. District Court also pointed out that multi-member districts prevent meaningful reduction in legislative size. An appeal to the U.S. Supreme Court in the Minnesota case will probably provide guidance as to how much latitude lower courts have not only in abolishing multi-member districts, but also in reducing legislative size.

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86 *Id.* at 48.

87 *See* Whitcomb v. Chavis, 403 U.S. 124 (1971). *See also* Dixon, *supra* note 3, at 461-63, 470-72, 476-90, and 503-7.

88 Connor v. Johnson, 402 U.S. 690 (1971).

89 Sims v. Amos, 40 U.S. L.W. 2435 (M.D. Ala., Jan. 3, 1972).

90 Beens v. Erdhl, 336 F. Supp. 715 (D. Minn.).

Regardless of how the U.S. Supreme Court should rule, however, it is clear that multi-member districts in whatever form, with or without cumulative voting, prevent meaningful reductions in legislative size and, therefore, prevent the achievement of greater legislator visibility, accountability, and responsibility.

H. *Unwarranted Divisions within Delegations*

Problems of the urban areas have been heatedly debated during the last few decades. Solutions requiring action from state governments have often faced strong opposition in rurally dominated legislatures. In the Illinois House of Representatives, however, another focal point of opposition has existed — one at least partially created by cumulative voting.

Two writers have documented this problem for the Chicago metropolitan legislative delegation in the House of Representatives. They have concluded that the minority party representation allowed by cumulative voting in Chicago weakens that delegation's cohesion on matters of concern to the Chicago metropolitan area; that is, minority party Republicans in Chicago often put party interests ahead of metropolitan interests. One commentator has described the problem in this manner: "The city's bitterest opponents in the legislature are *political enemies from within its own walls,* and those camped in the adjoining suburban areas." (Emphasis added.)[91] Analyzing the situation in a more pithy manner, another has said:

> The unique cumulative voting system in Illinois gives the Chicago delegation in the Illinois House a bipartisan character, *e.g.,* 36 percent of the Chicago seats are held by Republicans — the overwhelming Democracy of Chicago notwithstanding. In short, a Trojan Horse born of a proportional representation scheme tends to split the Chicago delegation on roll calls at Springfield.[92]

I. *Voter Confusion*

Advocates of cumulative voting in the Constitutional Convention had to answer the charge that cumulative voting confuses the

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91 Derge, *Metropolitan and Outstate Alignments in Illinois and Missouri Legislative Delegations,* 52 AM. POL. SCI. REV. 1051-65, esp. 1065 (1958).

92 Frost, *On Derge's Metropolitan and Outstate Legislative Delegations,* 53 AM. POL. SCI. REV. 792-95, esp. 793 (1959).

voters. This charge stems from the complicated nature of cumulative voting ballots. Two delegates advocating cumulative voting engaged in a convention dialogue on the subject of voter confusion. Delegate Reum served as Vice-Chairman of the Legislative Committee, and Delegate Tomei as chairman of the Suffrage and Constitutional Amendments Committee, which drafted the suffrage and elections article of the 1970 constitution.

> Delegate Reum: "I would like to ask Delegate Tomei a question. Has there ever occurred any instances where there were fractions used other than 1, 1½, and 3, or 1 and 2?"
>
> Delegate Tomei: "Yes, there have. I, myself, have seen them written in on voting machines."[93]

During sessions of both the Legislative and Style, Drafting and Submission Committees of the Illinois Constitutional Convention, heated debates took place regarding the number of ways a ballot could be marked under cumulative voting. The argument could not be resolved through historical precedent since precedents differ in various parts of the state. Some delegates admitted to only three ways of marking a cumulative voting ballot; other, four; and still others, five. Discussion during these debates, however, indicated that there have been at least five ways of legally marking cumulative voting ballots:

1) three votes for one candidate;
2) one vote for each of three candidates;
3) one and one half votes for each of two candidates;
4) a straight party vote for one party, while crossing over to mark for a candidate(s) of the other party in the House of Representatives election (this gives all three House votes to the candidate(s) of the party which did not receive the straight party vote, regardless of the voter's intentions); and
5) any percentage distribution of votes desirable (*e.g.*, 2 for candidate A; 1 for candidate B).

Confusion caused by cumulative voting not only applies to the voter, but also to judges and clerks in voting precincts. Figure 1 is a reproduction of the Illinois secretary of state's official instructions for counting and tallying cumulative voting ballots.[94] The direc-

93 Proceedings, 1969-70, August 13, 1970, at 56, 57.

94 Illinois Secretary of State, Counting and Tallying of Ballots, 9-10 (1968).

tions are complex, and the potential for error by election judges and clerks in Illinois's ten thousand election precincts is obvious.

Although no definitive, statistical studies have been conducted on the confusion problem,[95] Clarence A. Berdahl has said:

FIGURE 1

Tallying of Ballots for Illinois House of Representatives Elections

REPRESENTATIVES IN GENERAL ASSEMBLY

If three candidates are voted for—mark 1 tally for each candidate in space A opposite his name.
If two candidates are voted for—mark 1 tally for each candidate in space B opposite his name.
If one candidate is voted for—mark 1 tally in space C opposite his name.
If a straight ballot is cast—mark the total thereof for each candidate of the party in space D opposite his name.

Name of Candidate			Number of Tallies	Multiplication of Tallies	Total Number of Votes
John Smith	A	𝍸	5	times 1	5
	B	𝍸	5	times 1½	7½
	C	𝍸	5	times 3	15
	D	Straight ballots		times 1, 1½ or 3 as the case may be	
		Total vote for John Smith			

The column "multiplication of tallies" shall indicate the correct multiplier. Under such column opposite space D the multiplier for straight ballots (whether 1, 1½, or 3) depends upon the number of candidates of the political party whose ballots are being counted; if a party has 3 candidates, multiply by 1; if 2 candidates, multiply by 1½; if one candidate, multiply by 3. Where voting machines are used, the corresponding return sheet total shall be entered under the column marked "number of tallies," and individual tally marks need not be entered; otherwise, the tally sheet shall be in the above form.

The tally sheet shall provide as above for each candidate whose name appears on the ballot, and similar provision shall be made for write-in candidates. Space D shall be omitted from primary ballots.

Such tally sheets may have printed thereon a number of illustrations of valid and invalid methods of voting for members of the House of Representatives, with directions for the method of counting such ballots.

95 Although no effort was made by the 1970 Constitutional Convention to

> Apparently election officials, if not the voters, have assumed that cumulative voting applies to certain other offices as well as to members of the House, notably University of Illinois trustees and delegates and alternates to the national conventions.
>
> This counting of illegal votes or the illegal computation of the vote may well make the actual result doubtful in close contests, and no doubt should invalidate the election for those offices.
>
> In view of this confusion and misapplication of the cumulative voting system, as well as the fact that the cumulative voting system has long since accomplished its original purpose, it would seem that the system ought now to be abolished.[96]

J. *Myth of Political Polarization*

The purpose of cumulative voting in Illinois is to prevent an all-Republican downstate and an all-Democratic City of Chicago. That is, the cumulative voting system allows a minority party candidate to win regardless of the size of his party following in the district. When cumulative voting was created in 1870, Illinois's partisan division was the reverse of today's — a Democratic downstate and a Republican Cook County. Cumulative voting was designed to overcome this polarization.

Recent studies of Illinois voting patterns indicate that intense political polarization between Chicago and Downstate no longer exists. For example, a recent paper concludes that "[voting] patterns reveal a more complex political picture in Illinois than the commonly accepted split between Democratic Chicago and Cook County and Republican Downstate which includes the other 101 counties.[97]

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specify with constitutional language the permissible ways for casting a cumulative voting ballot, the convention did indicate its intent that only three ways be permitted, namely one vote for each of three candidates; one and one half votes for each two candidates; and three votes for one candidate. The practical questions are whether existing statutory language, which permits at least five ways to cast a ballot, will be changed and, if so, whether the change will be observed in over 10,000 precincts. To date, the Illinois General Assembly has not acted to make the statutory change which would effectuate convention intent. *See* ILL. REV. STAT, ch. 46, § 17-13, (West 1970); ILLINOIS SIXTH CONSTUTIONAL CONVENTION PROPOSED 1970 CONSTUTION FOR THE STATE OF ILLINOIS: OFFICIAL TEXT WITH EXPLANATION, 18 (1970).

96 Clarence A. Berdahl, *Some Problems on the Legal Regulation of Political Parties in Illinois*, in ILLINOIS POLITICAL PARTIES, 22-23 (1960).

97 Smith, *Twentieth Century Voting Patterns for President in Illinois*, ILLINOIS GOVERNMENT, 32 (1970).

Historically, Republicans have controlled the Illinois Senate by large margins, provoking cumulative voting supporters, notably some Democrats, to suggest that abolition of cumulative voting would make the Illinois House of Representatives a "carbon copy" of the Illinois Senate. However, the Illinois Senate has never in this century been elected strictly on the basis of population and will not be until the 1972 Senate elections.[98] As a result, rural Republican constituencies are overrepresented in the Senate. The 1970 elections indicate that as Senate districts are drawn on a population rather than a geographic basis, the Senate will become a much more competitive body.[99] In 1970 the Democratic party was able to take control of the Senate, while the Republicans retained control of the House of Representatives.

In recent Senate elections, Democrats have been successful in downstate Illinois, and Republicans in the City of Chicago. In 1966, for example, Republicans elected six Senators inside the City of Chicago. In 1970, Democrats elected eight downstate Senators. These data indicate, according to cumulative voting opponents, that the historical justification for cumulative voting, to offset geographical polarization of the two major parties, no longer applies.

K. *Savings, Size and Single-Member Districts*

Each member of the Illinois House of Representatives receives $35,000 ($17,500 per year) in salary for each two-year term of the Illinois legislature. The estimated total payroll for each two year term for the 177 members of the Illinois House of Representatives is $6,195,000 (not including salary supplements for House leaders). Utilizing salary costs only, Table 6 reveals the savings which could be realized through a reduction in House of Representatives' membership for each two year term of the legislature.

Table 6 only reveals part of the potential savings, however, which could be realized through membership reduction in the House of Representatives. For the years 1969 and 1970, the total expense of

98 In 1966, members of the Illinois Senate were elected from districts which reflected a population deviation of 7.7 percent for the largest district above the mean and 7.0 percent for the smallest district below the mean. *See* People *ex rel.* Engle v. Kerner, 33 Ill. 2d 11, 210 N.E.2d 165 (1965); People *ex rel.* Engle v. Kerner, 32 Ill. 2d 212, 205 N.E.2d 33 (1965).

99 See Table 1.

TABLE 6

Biennial Estimated Savings, Salary Only, Through Membership Reduction in the Illinois House of Representatives

No. of House Members	Biennial Payroll*	Biennial Savings**
177	$6,195,000	0
153	$5,355,000	$ 840,000
135	$4,725,000	$1,470,000
120	$4,200,000	$1,995,000
100	$3,500,000	$2,695,000

*The biennial payroll is calculated by multiplying the biennial salary, *i.e.*, $35,000, by the number of House members. For example, $35,000 × 177 = $6,195,000.

**The biennial savings is calculated by subtracting from the biennial payroll for 177 members, *i.e.*, $6,195,000, the biennial payroll for each of the other House membership levels given in the Table. For example, $6,195,000 (177 members) — $3,500,000 (100 members) = $2,695,000 in biennial savings.

the state legislature was $10,244,413.18. Of this amount, the 58 member Senate expended $3,018,022.09 while the 177 member House of Representatives expended $7,207,987.38.[100] These figures suggest that a reduction in legislative membership, particularly in the House of Representatives, would provide sizeable savings.

Presently, members of the Illinois legislature do not have adequate supporting services to perform their functions effectively — services such as adequate staff and office space. By contrast, each California legislator is provided with capital and district offices and a personal professional staff. Illinois legislators have neither private office space nor personal professional staff. The California legislature, ranked number one nationally by the Citizens Conference on State Legislatures,[101] has 40 senators and 80 representatives; Illinois, 58 senators (59 under the 1970 Constitution) and 177 representatives.

Providing adequate supporting services for 235 Illinois legislators (236 under the 1970 Constitution) would enormously increase legislative costs. To illustrate, if each of the 177 Illinois House members were provided with one professional staff member at a cost of $20,000 per biennium ($10,000 per year), the total biennial cost would be $3,540,000. The same supporting service

100 ILLINOIS AUDITOR OF PUBLIC ACCOUNTS, STATEMENT OF EXPENSES OF THE SEVENTY-SIXTH ILLINOIS GENERAL ASSEMBLY, 51-52 (1971). Besides expenses for the Senate and House of Representatives, expenses for joint committees totaled $18,404.

101 THE SOMETIMES GOVERNMENTS 49.

for 100 House members could be provided for $2,000,000 — a potential savings of $1,540,000.

With the legislature's very important role in state government, particularly in appropriating and overseeing annual budgets in excess of five billion dollars per year, supporting services become increasingly important, especially if the legislature is to develop sources of information independent of the executive branch. Prominent among the reasons why the executive branch is generally regarded as more powerful than the legislative branch are the superior supporting services possessed by the executive branch. Executive branch staff — better trained, better paid, and more plentiful — enable the executive branch to occupy the preeminent position in state policymaking and problem solving. The legislative branch often simply relies on information provided by the executive branch in support of executive branch appropriation requests. This deferential role of the legislative to the executive branch contradicts the intent of the founding fathers who perceived the legislative branch as the closest branch to the people and, therefore, as the most powerful of the three branches of government.

A reduction in legislative size would allow citizens of Illinois to equip their legislature with the best possible supporting services at much less cost than with the present size. These supporting services would then allow the legislature more effectively to represent the citizens of Illinois. A substantial and meaningful reduction in size is dependent, however, on the adoption of single-member districts.[102]

L. *Difficulties with Recent Refinement of Cumulative Voting*

As noted earlier, the only criticism which carried weight in the 1970 Constitutional Convention was lack of competition. Because of this criticism, the following sentence was added to the 1970 Constitution: "No political party shall limit its nominations to less than two candidates for Representative in any Legislative District."[103] Previously, political parties in each district could limit nominations to either two or one candidates.[104] In over one-half of

102 See Table 2 and related discussion.

103 ILL. CONST., art. IV, § 2(b) (West 1972).

104 ILL. REV. STAT., ch. 46, § 8-13 (West 1970).

all districts, the majority and minority parties have typically nominated two and one candidates, respectively, for three available seats.

The new variation in cumulative voting has commonly been interpreted, as illustrated in the *Chicago Tribune,* to require that "each party *must* nominate not less than two candidates." (Emphasis added.)[105] Convention intent was clearly to the contrary. For example, Delegate George Lewis, legislative committee chairman, said that the provision "does not compel the nominating of two. It says they [the parties] cannot prohibit the nomination of less than two."[106]

The purpose of the new constitutional language is to negate the statutory right of parties to limit nominations to less than two candidates. The proper interpretation, therefore, is that: if only two Democrats and one Republican seek election to the House of Representatives, the Republican party is under no "mandate" to nominate another candidate; and if two Democrats and two Republicans seek election to the House of Representatives, neither party may limit its nominations to less than the two seeking election.

The new cumulative voting provision clearly does not "mandate" competition; rather, its purpose is to prevent parties from denying competition.

According to two convention delegates who supported cumulative voting, Cook County Democrat Paul Elward and Downstate Republican James Perona, the revised cumulative voting system may undermine the purpose of cumulative voting — protection of minority party representation. Delegate Elward said of the new provision:

> [it] would seem to encourage [parties] to nominate three in the top heavy districts, and I can think of seven or eight gorgeous such districts in the City of Chicago where we could elect all three Democrats. [This provision] opens the door to one party domination of legislative districts.[107]

Delegate Perona expressed fear of increased inter-party collusion and intra-party dissension:

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105 Chicago Tribune, December 8, 1970, p.12, Col. 1.

106 Proceedings, 1969-70, August 12, 1970, at 511. *See generally id.,* 500-529 regarding convention intent.

107 *Id.* 506, 507.

> This requirement will effectively in many districts permit the majority party to pick and elect whatever of the minority party's candidates they want to elect. This has happened in districts with which I am familiar, and it has resulted in many problems for the minority party.
>
> It has caused much disagreement and dissension. It has to a great extent destroyed the advantage of cumulative voting which is minority representation, because it has limited and it has subverted the position of the minority party.[108]

These fears may not be unfounded. It has been suggested that allowing parties to limit nominations may be the best way to preserve minority party representation.[109] That is, the ability to limit nominations allows a party to maximize its vote potential in the interest of securing the number of representatives a party thinks it can elect. If, for example, the minority party cannot limit its nominations and two minority party candidates run, the minority party would diffuse its vote potential between two candidates and, perhaps, allow the majority party to elect all three representatives. Professor Robert G. Dixon, Jr., who favors cumulative voting, suggests that this refinement may be counter-productive in another way.

> It might operate like a conventional multi-member district system, with the majority party voters determining which of the minority party candidates would be elected. One might wonder whether this could really keep the minority party independent and viable, and effectively represent a minority viewpoint.[110]

Thus, lack of competition engendered by cumulative voting suggests a remedy which is in the end itself counter productive. As was suggested many times during the Illinois Constitutional Convention, there may be a reason why no other state has adopted cumulative voting.

IV. Conclusion

During the last ten years a rather large body of literature has appeared on the subject of state legislative reform. As noted by one writer:

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108 *Id.* 257.
109 Sawyer and MacRae, *supra* note 49, at 946.
110 Legislative Committee, *Minutes*, February 18, 1970.

> American state legislatures have been objects of attention. The racy episodes, testimonies of chicanery, examples of institutional inefficiency, and citations of declining function that stud the discourse yield to a layman the impression that state legislatures are an archaic jungle of mysterious machinations, and that something ought to be done about it.[111]

Two recommendations stand out: first, that state legislatures play a more active role in the state policymaking process; and second, that the public be better able to understand the work of their legislators.[112] Implicit in these recommendations are the concepts of legislative responsibility and accountability.

Single-member districts would permit a meaningful reduction in the size of the Illinois House of Representatives, thus enhancing the visibility of individual legislators and allowing each legislator to become more important in the policy-making process.[113] In regard to constituent-legislator relationships, single-member districts would improve constituent understanding of electoral and legislative processes. It is difficult for the average citizen to keep abreast of every public official serving on school boards, county boards, city councils, special district boards, the state legislature, and at higher levels of government. It is safe to say that the more public officials a citizen must follow, the less likely he is to know very much about any one of them. Regarding state legislators, the Citizens Conference on State Legislatures has expressed the problem this way:

> Trying to keep track of what one legislator is doing is difficult enough even for an 'inside' observer. It is unreasonable to expect a citizen to keep track, even in the most superficial sense, of what two or three, or six or twelve, legislators who 'represent' him are doing. Moreover, the very idea of democratic government — in which a citizen delegates power to a representative and holds him responsible for the exercise of it — implies a one-to-one relationship, a single, clear connection between representative and constituent. As soon as a constituent must contend with more than one representative, that

111. *Introduction — Old Problems, New Context,* STATE LEGISLATURES IN AMERICAN POLITICS 2.

112 STATE LEGISLATURES IN AMERICAN POLITICS; THE SOMETIME GOVERNMENTS; MODERNIZING STATE GOVERNMENT.

113 See part III A of this article, *supra.*

> connection is weakened, the relationship is blurred. What is true of the citizen's relationship with the individual legislator is also true of his relationship with the legislature as a whole. The individual legislator is the citizen's link to the legislature: to be strong that link must be unique.
>
> Legislatures should be apportioned according to the one legislator one district rule.[114]

A single-member district system would not only simplify electoral voting procedures, but also provide the basis for achieving a meaningful reduction in legislative size and improving legislator-constituent relationships. The intent of a single-member district system is to increase legislator visibility and as a result to enhance legislator accountability and responsibility. The result should be a more viable legislature in the state's policy-making process.

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114 THE SOMETIME GOVERNMENTS, 82, 83.

COMMENT

AMENDING THE CONSTITUTION: THE BOTTLENECK IN THE JUDICIARY COMMITTEES

DONALD P. LACY*
PHILIP L. MARTIN**

Introduction

Article five of the United States Constitution provides that amendments may be proposed either by a two-thirds vote of both houses of Congress or by a national convention requested by two-thirds of the state legislatures. Even though to date only the first method has ever been used for proposing amendments to the Constitution,[1] very little is actually known about the workings of the congressional method of proposal.[2] Therefore, in an effort to better understand the amending clause, this article examines the historical development of the congressional method and the workings of both the House of Representatives and the Senate in introducing, reporting, and voting on proposed amendments.

After a brief history of the congressional method of initiating constitutional amendments, this article discusses the differences in

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1 In addition to the 26 amendments added to the Constitution, five other resolutions submitted to the states have failed to be ratified. These concerned: apportioning the House of Representatives (1789); compensating members of Congress (1789); permitting United States citizens to accept foreign titles of nobility (1810); recognizing slavery where it existed in the states (1861); and regulating child labor (1924).

2 The amending clause itself has not lacked attention. Scores of articles, too numerous for listing here, describe various aspects of its operation. The standard legal treatise on the subject is L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION (1942). A complementary explanation of the mechanics is D. MYERS, THE PROCESS OF CONSTITUTIONAL AMENDMENT, S. Doc. No. 314, 76th Cong., 3d Sess. (1940). For a comparison of article five and the amending provisions of other federal governments, see W. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE (1956).

amendatory activity between the two houses and discovers that the Senate reports significantly more constitutional amendment proposals than does the House. The main part of the article analyzes the membership, make-up, and organization of the two judiciary committees, the hubs of amendatory action, in order to pin-point some of the factors responsible for this difference. The major factors uncovered are the great power possessed by the chairman of the House Judiciary Committee, in comparison with his counterpart in the Senate, and the way that power is wielded.

The article concludes that while some procedural or structural changes might successfully limit the vast personal authority of the House Judiciary Committee chairman, the constitutional amendatory system, just as it is, actually serves a legitimate purpose. Though slow and filled with obstacles, the current process protects the Constitution from hasty, pressured, ill-conceived changes and maintains the Constitution as the fundamental law of the land.

I. The Development of the Congressional Method of Amending the Constitution

A. *The Theory of Article Five*

Even though it is either disregarded in a number of recent texts on American government or relegated to a position of minor significance, one of this country's major contributions to the art and science of government is the concept of constitutional amendment by formal process. It is not surprising that the United States should pioneer such procedures inasmuch as they are implicit in the theory of a written constitution, a concept which was first fully developed in this country. The foundation for the building of these new structures was the idea that the will of the people was the basis of all political power.

Long before the American Revolution, our political ancestors endorsed the thesis that government should be derived from the consent of the governed. Emphasizing this belief, Alexander Hamilton wrote in *The Federalist* that the "fabric of American empire ought to rest on the solid basis of the consent of the people — that pure, original fountain of all legitimate authority,"[3] and James Madison declared that "the express authority of the people alone

3 The Federalist No. 22, at 149 (H. Dawson ed. 1864) (A. Hamilton).

could give due validity to the Constitution."[4] It was further reasoned that if the people created the Constitution, they should also be able to revise it.

Working from the notion that constitutional authority rests upon the sovereignty of the people, Americans divided what had been considered legislative action into two categories, constitution-making and ordinary lawmaking. Unlike ordinary statutes, constitutional amendments are felt to be fundamental in nature; this feeling has been articulated as follows:

> Ordinary laws are enactments and rules for the government of civil conduct, promulgated by the legislative authority of a state, or deduced from long-established usage. It is an important characteristic of such laws that they are tentatory, occasional, and in the nature of temporary expedients. Fundamental laws, on the other hand, in politics, are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation, and the apparatus of checks and balances proper to insure its integrity and continued existence. Fundamental laws are primary, being the commands of the sovereign establishing the governmental machine, and the most general rules for its operation. Ordinary laws are secondary, being commands of the sovereign, having reference to the exigencies of time and place resulting from the ordinary working of the machine. Fundamental laws precede ordinary laws in point of time, and embrace the settled policy of the state. Ordinary laws, are the creatures of the sovereign, acting through a body of functionaries, existing only by virtue of the fundamental laws and express . . . the expedient, or the right viewed as the expedient, under the varying circumstances of time and place.[5]

Consequently, changes in the fundamental law require a special procedure, distinct, although not always completely separate, from the legislative process, which allows for the maximum expression of the popular will. This concept was a radical departure from the practice used in England where constitutional changes could be made then, as today, by Parliament, without regard for distinctions

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4 *Id.* No. 42, at 306 (J. Madison).

5 J. JAMESON, THE CONSTITUTIONAL CONVENTION: ITS HISTORY, POWERS, AND MODES OF PROCEEDING 83 (1873).

between constitutional and statutory actions. Because of the feeling that a constitution was unique, a special amendatory procedure became an important requisite of the United States Constitution.

But political theorizing was not all that lay behind the implementation of an institutionalized amending process. Also influential was the practical realization that, as a general rule, politically organized people resort to revolution for political change when there is no other way to effect it. Expressing such an opinion at the Philadelphia Constitutional Convention of 1787, George Mason of Virginia, in urging the adoption of an amending clause, stated:

> The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence.[6]

By the time the Convention convened, the majority of the delegates agreed as to the necessity of providing for an amendment procedure. The discussion surrounding article five, rather than questioning the underlying premise, primarily concerned establishing its mechanics. Thus, at a time when in the world at large "it was heresy to suggest the possibility of change in governments divinely established and ensured,"[7] the United States pioneered a theory of constitutional government.

B. *The Origin of the Method of Congressional Initiation*

When the Philadelphia Convention assembled in the spring of 1787, the delegates expressed a sharp division as to what method should be incorporated into the new constitution. Advocates of a strong central government favored giving Congress the exclusive power of proposing amendments. Proponents of states' rights endorsed the idea that a national convention, convened at the request of two-thirds of the state legislatures, be able to initiate a constitutional amendment. The question of how to amend the Constitution was first introduced at the Convention on May 29

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6 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 203 (M. Farrand ed. 1923).

7 C. MERRIAM, THE WRITTEN CONSTITUTION AND THE UNWRITTEN ATTITUDE 6 (1931).

when Edmund Randolph presented the Virginia Plan, which recommended an amending clause that did not require congressional participation.[8] After Randolph's suggestion was considered by the Committee of the Whole, the Convention unanimously referred the Virginia Plan to the Committee of Detail on July 23.[9]

When the latter reported on August 6, the amending clause provided for the initiation of constitutional amendments only by a national convention. This provision was approved by the Convention on August 30 with only Gouverneur Morris disagreeing because he believed "the legislature should be left at Liberty to call a Convention whenever they please."[10]

On September 10, however, Elbridge Gerry raised some doubt regarding the amending article; he feared that "two-thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State Constitutions altogether."[11] Alexander Hamilton then advocated an alternative, congressional, mode of summoning a convention by a two-thirds vote of each branch of Congress because "[t]he National Legislature will be the first to perceive and will be most sensible to the necessity of amendments."[12] This argument was the first mention of congressional participation in the amending process at the Convention. It was reinforced by Hamilton's second point that "[t]he State Legislatures will not apply for alterations but with a view to increase their powers."[13] Hamilton also articulated what was a growing feeling at the Constitutional Convention; since the people represented in the Convention would "finally decide in the case," entrusting the national legislature with responsibility in the amending process would not be likely to endanger the constitutional system.[14] By extrapolation, if the Congress could be given the responsibility to call a national convention, there seemed little

8 Commenting on this resolution on July 11, Colonel George Mason seemed to express the opinion of the Convention by agreeing with Randolph's recommendation because a national legislature could conceivably "abuse their power, and refuse their consent on that very account." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 203 (M. Farrand ed. 1923).

9 2 *Id.* at 84.

10 2 *Id.* at 468.

11 *Id.* at 557.

12 *Id.* at 558.

13 *Id.*

14 *Id.*

reason why it could not be equally reliable in proposing amendments which would subsequently be submitted to state conventions or legislatures for ratification.

Madison also supported Gerry's motion for reconsideration, on the ground that several vital questions raised by the amending clause were not clearly answered. Madison asked, "How was a convention to be formed? By what rule decide? What [will be] the force of its acts?"[15] And since he was opposed to cluttering the Constitution with detailed answers to such questions, Madison showed little enthusiasm for allowing initiation of amendments by a national convention.[16]

Rather than pursuing the national convention scheme, Madison offered a substitute which enabled Congress, on its own volition, to propose amendments by a two-thirds vote of each house and which required congressional proposal whenever the legislatures of two-thirds of the states applied for specific changes. Although this article was immediately accepted without comment, some second thoughts subsequently developed. On September 15, when the Committee of Style made its report, Mason assailed the provision as being "exceptionable and dangerous" because of congressional control over the proposal of amendments and alleged that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive" as he pessimistically believed would eventually happen.[17] Since a number of delegates were persuaded by this argument, Gerry and Morris, over Madison's objection, convinced the Convention to also adopt the alternative of calling a national convention to propose amendments upon application by two-thirds of the states.

C. *The Emergence of Congressional Initiation as the Dominant Amendatory Method*

While he may have lost his battle, Madison, in the long run, won his campaign for congressional initiation. In the first and perhaps most important instance of amending the Constitution, to

15 *Id.*

16 Madison, who authored the basic framework of article five, preferred an application clause by which the states could require Congress to propose amendments. *Id.* at 559.

17 *Id.* at 629.

include a bill of rights, Madison used political considerations to persuade Congress to initiate these amendments itself rather than to rely on a national constitutional convention to do so. Congressional initiation of constitutional amendments became more firmly established as the preferred method because of the feeling that the national convention alternative was an extraordinary power to be used only when the times demanded national deliberation of fundamental constitutional conflicts.[18] Congressional initiation was considered proper for amendments making either structural changes or for those, such as the Civil War resolutions, whose issues had already been resolved. Unquestionably, this concept of the amendatory power was reinforced by a fear of the unexpected course a national convention might take, since such a convention theoretically would be representative of the sovereign will and, therefore, unrestrainable. By the turn of this century, however, debate over the alternative ways of initiating amendments had disappeared with congressional initiation accepted as the better method for proposing amendments.

Congressional initiation of amendments, as conceived by James Madison, clearly involved procedures analogous to those used by a constitutional convention. In each house a resolution would be considered by the Committee of the Whole, with reference to select committees only for such purposes as refinement of wording or additional research before final discussion. Every member of each branch of Congress could, therefore, be involved in the main consideration of constitutional amendments. This was the method employed by the early Congresses.

After several decades, however, the House of Representatives found its increasing size necessitated appointment of a select committee, composed usually of members in favor of the measure, to provide initial consideration of a proposal for constitutional change. By the 1820's the Senate was also using select committees instead of the Committee of the Whole procedure. In 1842, the House for the first time referred to its Judiciary Committee a resolution calling for a constitutional amendment to restrict the

18 For the history and theory of the national convention alternative, see Martin, *The Application Clause of Article Five*, 85 POL. SCI. Q. 616 (1970).

President to one term.[19] Evidently, some question arose regarding this break from tradition, because, in the next Congress, it was vigorously argued that a resolution proposing a constitutional amendment could be referred to the Judiciary Committee by a majority vote of the entire House. Although the proposal involved in this controversy was turned over to a select committee, the House thereafter frequently made unchallenged referrals to its Judiciary Committee. The first public notice of the Senate's referring a proposed amendment to its Judiciary Committee is found two years later, but this debate contains a comment indicating that the Senate had previously made other such referrals.[20]

While there were still occasions when other committees were assigned the responsibility of considering changes in the Constitution — for example, in 1887 both the Committee on Elections and the Judiciary Committee of the House reported resolutions calling for the direct election of Senators[21] — both houses grew to rely heavily on their judiciary committees to handle such business. Even though some referrals have been made to other committees, since 1932 only one amending proposition has been reported by another committee.[22] Today, as a result of the Legislative Reorganization Act of 1946,[23] the judiciary committees are given the major responsibility for studying proposed amendments.

In order to more meaningfully compare the activities of the House and the Senate, this study will concern itself with the period during which the judiciary committees have been predominant in considering and proposing amendments. Accordingly, the data used begins with the Third Session of the Seventy-second Congress (December 5, 1932) and ends with the adjournment of the Second Session of the Ninetieth Congress (October 14, 1968) at which point the official compilation of proposed amendments stops.[24]

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19 H.R. JOUR., 27th Cong., 1st Sess. 102 (1842).

20 CONG. GLOBE, 29th Cong., 2d Sess. 61 (1846).

21 H.R.J. Res. 239, 49th Cong., 2d Sess. (1887).

22 In 1947, the Senate Appropriations Committee unsuccessfully supported a politically inspired constitutional amendment requiring automatic balancing of the national budget in time of peace. S.J. Res. 61, 80th Cong., 1st Sess. (1947).

23 Act of Aug. 2, 1946, ch. 753, 60 Stat. 812.

24 PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1926-1963, S. DOC. NO. 163, 87th Cong., 2d Sess. (1962); PROPOSED AMENDMENTS

Analysis will deal with the number of resolutions which have received attention in each house, the attention given these resolutions (committee reports, floor action, and vote), and, in the case of passage, results in the other house.

II. Differences Between House and Senate Participation in the Constitutional Amendment Process

No significant difference can be discerned between the participation of the two houses in the constitutional amendment process from 1789 to 1932,[25] but since 1932 the Senate has been more involved with constitutional amendments than has the House of Representatives. This is indicated by the number of constitutional amendment resolutions which have passed the Senate only to fail in the lower house. By the end of 1968, the Senate had been rejected a total of 29 times compared to its rejection of 18 proposals initiated in the House.[26] Moreover, it is significant that from 1924 to 1968 the Senate was rebuffed 12 times by the House, while only one (of two) House-initiated constitutional propositions failed in the Senate.[27]

According to congressional compilations,[28] a total of 3,021 constitutional amendments were introduced in the House compared with 576 in the Senate during the period under study. These numbers do not accurately reflect concern with constitutional change, however, since they include a few referrals to other com-

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to the Constitution of the United States of America 1963-1969, S. Doc. No. 38, 91st Cong., 1st Sess. (1969) [both above documents hereinafter cited as Proposed Amendments.] The first of these compilations omits H.R.J. Res. 257, 76th, Cong. 3d Sess. (1940).

25 *See* H. Ames, Proposed Amendments to the Constitution of the United States During the First Century of its History, H.R. Doc. No. 353, 54th Cong., 2d Sess., pt. 2 (1897); Ames, *The Amending Provisions of the Federal Constitution in Practice*, 63 Proc. of the Am. Philos. Soc'y 62 (1924); and Ames, *Recent Development of the Amending Power as Applied to the Federal Constitution*, 72 Proc. of the Am. Philos. Soc'y 87 (1933).

26 *See* Proposed Amendments. These figures are somewhat misleading because several resolutions have been passed repeatedly by one chamber in the face of the other's strong opposition. For example, Senator Norris' "lame-duck" proposal failed seven times in the House before it finally became the twentysecond amendment. This experience is reported by Ames, *Recent Development*, *supra* note 25, at 94.

27 *See* Proposed Amendments.

28 *Id.*

mittees for the purpose of pigeonholing a proposal and co-sponsored and duplicate resolutions which, when subtracted, reduce the totals to 952 for the House and 435 for the Senate. While only 14, or 1.47 percent, of the propositions introduced during the period studied were reported in the House, 46, or 10.55 percent, of the propositions submitted to committee made it to the floor in the Senate.[29] The Senate Judiciary Committee, thus, is clearly more active in reporting proposed amendments.

Once a proposed constitutional amendment is brought to the floor for consideration, however, there is little difference in the reaction of each house. The House passed four, or 28.57 percent, of its 14 reported resolutions compared with senatorial passage of 12, or 26.08 percent, of its 46 reported resolutions.[30] On the other hand, after a proposal has passed one house, the two houses differ in their willingness to accept the other's decisions. Seventy-five percent, or three, of the House's resolutions were accepted by the Senate, whereas only 33.33 percent, or four of its propositions were approved by the House.[31]

The data of this study also suggest that if a proposed constitutional amendment can clear the Judiciary Committee in the House, the probability of its being sent to the states for ratification is considerably higher than the probability of one which has passed the Senate. More than twice as many constitutional amendment resolutions initiated in the House (three, or 21.43 percent) have been approved by both houses than Senate-initiated proposals (four, or 9.70 percent).[32] Committee approval in the House may, therefore, be the key hurdle in the amendment process.

The above data clearly indicate that a large part of the responsibility for the difference between the two houses in their participation in the constitutional amendment process lies in the operations of their respective judiciary committees. Since floor response is approximately the same in both houses, the crucial stage in congressional decision making on proposed constitutional amendments is committee consideration. Moreover, in view of the

29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*

Senate committee's record of reporting 10.55 percent of all proposals submitted compared with the House committee's record of reporting only 1.47 percent, committee consideration in the House clearly constitutes more of an obstacle to proposing constitutional amendments than in the Senate. We, therefore, must look to an examination of the differences between the composition, structure, operations, and pre-eminence of those bodies in order to find the reason for the House's reluctance to pass proposed constitutional amendments.

III. The Differences Between the House and Senate Judiciary Committees

A. *Committee Membership*

To try to explain why the two judiciary committees behave differently in the constitutional amendment process, their make-up was analyzed. The variables of age and the percent differential between party memberships were examined to ascertain what effect they might have on the number of amendments introduced and reported.

Average ages were computed for each Congress from the Seventy-second through the Ninetieth. Using Spearman's Rank Correlation procedure to determine tendencies to introduce and report amendments, it was found, first, that the average age of the two houses was not strongly related to the number of resolutions introduced (see Table I). Likewise, for the judiciary committees, the average age of the membership had very little effect on the willingness to report proposed constitutional amendments (see Table I). In fact, there was such a small deviation in the average ages for each House and for each judiciary committee that age does not appear to be a meaningful variable in the congressional process for amending the Constitution.

The data was also analyzed to determine whether the size of a party's majority has any effect on the number of proposed amendments introduced. A cursory glance at Table II, in which each Congress has been ranked according to size of the majority party's plurality over the minority party, demonstrates that there is very little association between the numerical strength of a political

party and attempts to amend the Constitution. The only time a partisan majority sought to exercise its power through the amendment route was in the Eighty-third Congress, one of two Republican-controlled Congresses in the period from 1932 through 1968, in which the Republican majority tried to use the process in order to avoid presidential vetoes. The Senate Judiciary Committee of that Congress reported six amendments, two more than any other Senate committee for the period of this study.[33] However, since there were only two Republican-controlled Congresses during this time, the numbers are too small to use for making meaningful statistical comparisons between the political parties.

The relationship of age, party strength, and party affiliation to the number of resolutions reported and passed, likewise, is of no statistical significance. In each session, the number of resolutions so acted upon is so small, particularly in the House, that statistical techniques reveal nothing which is meaningful.

Thus, finding few correlations of even moderate strength between the make-up of the committees and their response to proposed constitutional amendments, this article considered their organizational structure and the roles they play in the decision-making process of the House and of the Senate. In these factors lie some explanation for the fact that the House Judiciary Committee has been less willing than the Senate Judiciary Committee to report out proposed constitutional amendments.

B. *Organizational Structures and Roles*

In most respects, the procedures followed by Congress in the constitutional amendment process are the same as those used in legislating, except that final approval of proposed constitutional amendments must be by two-thirds of the membership present and voting.[34] Once a resolution has been submitted, the judiciary committees have virtually complete control over it. A resolution may be totally ignored, or it may be thoroughly studied.

While the power of the judiciary committees to control the fate

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33 *Id.*

34 In the absence of constitutional specification, the Supreme Court has ruled that the two-thirds requirement applies only to the members present, when a quorum exists, and not to the entire membership of each house. National Prohibition Cases, 253 U.S. 350 (1920).

TABLE I
Average Age and Number of Amendments Introduced and Reported

A. House of Representatives

Congress	Average Age of House	Rank	Number Introduced in House	Rank	Average Age of Committee	Rank	Number Reported from Committee	Rank
73	52.30	3	29	17	52.16	7	0	15
74	52.34	2	56	8	52.06	4	0	15
75	51.08	13	77	2	53.62	11	1	7
76	50.93	15	39	12	54.50	13	1	7
77	50.91	16	23	18	54.70	14	1	7
78	51.62	10	30	16	55.63	17	2	2.5
79	51.87	9	32	15	57.18	18	3	1
80	51.26	11	36	14	55.29	16	2	2.5
81	51.05	14	38	13	55.25	15	1	7
82	51.89	7	48	11	53.65	12	1	7
83	51.20	12	68	5	53.17	10	0	15
84	51.94	5	59	7	52.15	5.5	0	15
85	53.06	1	72	4	51.31	2	0	15
86	52.13	4	58	9	50.97	1	1	7
87	51.90	6	83	1	52.60	9	0	15
88	51.72	8	60	6	52.15	5.5	1	7
89	50.50	18	50	10	52.37	8	0	15
90	50.80	17	75	3	52.05	3	1	7

Source: Congressional Quarterly's Guide to the Congress of the United States (1971); Congressional Directories, 71st Cong. through 90th Cong.; Biographical Directory of the American Congress, 1774-1961.

B. Senate

Congress	Average Age of Senate	Rank	Number Introduced in Senate	Rank	Average Age of Committee	Rank	Number Reported from Committee	Rank
73	57.93	4	19	15.5	56.82	3	2	12
74	57.63	9	22	9.5	60.42	13	0	17.5
75	57.38	12	35	3	62.25	17	2	12
76	57.65	8	22	9.5	65.06	18	3	6.5
77	57.43	11	20	14	59.85	12	2	12
78	58.15	3	22	9.5	56.57	2	1	15.5
79	58.31	2	21	12.5	57.72	6	3	6.5
80	56.55	16	19	15.5	55.07	1	3	6.5
81	56.35	18	12	18	59.38	11	2	12
82	56.72	15	21	12.5	57.61	5	4	2.5
83	57.49	10	27	5.5	58.66	10	6	1
84	57.75	5	24	7	58.60	9	4	2.5
85	58.53	1	27	5.5	61.53	16	1	15.5
86	57.17	13	36	1.5	61.26	15	3	6.5
87	56.51	17	36	1.5	61.13	14	3	6.5
88	56.80	14	29	4	57.25	4	2	12
89	57.70	6.5	22	9.5	58.37	8	3	6.5
90	57.70	6.5	17	17	58.18	7	0	17.5

Source: Congressional Quarterly's Guide to the Congress of the United States (1971); Congressional Directory, 71st Cong. through 90th Cong. (1931-1970); Biographical Directory of the American Congress, 1774-1961 (1962).

TABLE II

Relationship Between Party Strength and Number of Resolutions Introduced

A. House of Representatives

Congress	% Difference Between Demo. & Rep.	Rank	Number Introduced	Rank
73	45.19	3	29	17
74	51.88	2	56	9
75	58.19	1	77	2
76	21.39	7	39	12
77	24.65	6	23	18
78	3.25	17	30	16
79	12.03	13	32	15
80	13.16	12	36	14
81	21.19	8	38	13
82	8.08	14	48	11
83	2.55	18	68	5
84	6.66	16	59	7
85	7.62	15	72	4
86	29.95	5	58	8
87	20.37	9	83	1
88	17.78	10	60	6
89	35.48	4	50	10
90	13.82	11	75	3

B. Senate

Congress	% Difference Between Demo. & Rep.	Rank	Number Introduced	Rank
73	26.3	10	19	15.5
74	46.8	3	22	9.5
75	64.8	1	35	3
76	50.0	2	22	9.5
77	40.4	4	20	14
78	20.0	11	22	9.5
79	19.1	12	21	12.5
80	62	15	19	15.5
81	12.5	13	12	18
82	2.1	16	21	12.5
83	.01	17.5	27	5.5
84	.01	17.5	24	7
85	8.8	14	27	5.5
86	30.6	7	36	1.5
87	30	8	36	1.5
88	34.0	6	29	4
89	36.0	5	22	9.5
90	28.0	9	17	17

Source: Congressional Quarterly's Guide to the Congress of the United States (1971); Congressional Directory, 71st Cong. through 90th Cong. (1931-1970) Biographical Directory of the American Congress, 1774-1961 (1962).

of constitutional amendment proposals remains strong and pervasive, recently the House has used its discharge procedure and the Senate has invoked rule XXIII to circumvent their judiciary committees. In 1970, the House of Representatives, by a vote of 333 to 22, discharged the equal rights for women amendment from its Judiciary Committee,[35] and the following year similarly discharged the proposed school prayer amendment.[36] In the Senate, the twenty-fourth amendment and one of the Dirksen anti-reapportionment resolutions were also brought to the floor by rule XXIII.[37] Rule XXIII provides that:

> When a bill or resolution is accompanied by a preamble, the question shall first be put on the bill or resolution and then on the preamble, which may be withdrawn by a mover before an amendment of the same, or ordering of the yeas and nays; or it may be laid on the table without prejudice to the bill or resolution, and shall be a final disposition of such preamble.[38]

In the case of the twenty-fourth amendment, Senators Javits and Keating introduced Joint Resolution 29 designating the "former dwelling house of Alexander Hamilton as a national monument."[39] This proposal was referred to the Committee on Interior and Insular Affairs where, by prearrangement, the constitutional amendment was substituted for all but the title of the original resolution.[40] As soon as deliberation began on the floor, the sponsors successfully moved for changing the title to its desired form and for striking the preamble. The anti-poll-tax amendment subsequently was passed by Congress even though the Senate Judiciary Committee had pigeonholed the original resolution. When it became evident that the Judiciary Committee was likely to report a different version of his anti-reapportionment resolution, Senator Dirksen also invoked rule XXIII in order to by-pass committee

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35 116 CONG. REC. 28004. H.R.J. Res. 264, 91st Cong., 2d Sess. (1970).

36 The School Prayer Amendment, H.R.J. Res. 191, 92d Cong., 1st Sess. (1971), was voted down on the floor of the House. 117 CONG. REC. H10657 (daily ed. Nov. 8, 1971).

37 PROPOSED AMENDMENTS.

38 SENATE MANUAL, 92d Cong., 1st Sess. 26 (1971).

39 107 CONG. REC. 671 (1961).

40 S. REP. No. 1227, 87th Cong., 1st Sess. (1961).

consideration.[41] Although the opposition was outmaneuvered, the Dirksen measure was defeated on the floor.[42]

The two judiciary committees differ in their procedures for considering constitutional amendments. The Senate has a permanent Subcommittee on Constitutional Amendments which analyzes a resolution through staff studies and public hearings. The House, in contrast, has no standing subcommittee to handle constitutional amendments, but usually relies on unofficial ad hoc groups composed of members who are interested in the proposal. It is possible, therefore, that the entire House Committee may participate in "subcommittee" activities although often no more than half the membership attends these sessions. When the House Judiciary Committee was considering the twenty-fifth amendment (to clarify the presidential disability clause of article II, section 6), the following attendance of the 35 representatives was recorded: 12 on February 9, nine on February 10, 15 on February 16, and 18 on February 17, 1965.[43] Frequently, when the chairman is not present, the committee practice appears unbecomingly informal; the sessions are rather loosely run, at times almost bordering on disorganization. As a result of this informal structure, the procedures of the House Judiciary Committee have, from 1932 through the present, depended upon the whims of its chairmen, who have most frequently utilized ad hoc committees over other alternatives. Representative Emanuel Celler, the current chairman, is no exception.

The tendency of the Senate Judiciary Committee to report more amendments than the House Judiciary Committee, in fact, became more marked after the formal establishment of the Senate's Subcommittee on Constitutional Amendments by the Legislative Reorganization Act of 1946.[44] During the period between 1932 and 1946, the Senate reported 14 resolutions out of its judiciary com-

41 111 CONG. REC. 17843. S.J. Res. 66, 89th Cong., 1st Sess. (1965).

42 111 CONG. REC. 19373 (1965). For a detailed analysis of the Dirksen strategy, see Keynes, *The Senate Rules and the Dirksen Amendment: A Study in Legislative Strategy and Tactics*, in THE LEGISLATIVE PROCESS IN THE U.S. SENATE 107 (L. Pettit & E. Keynes eds. 1969).

43 *Hearings on S.J. Res. 1 Before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965).

44 See note 23, *supra*.

mittee (or 8.54 percent) of the 164 proposed[45] compared to six reports (or 1.96 percent) of 305 resolutions in the House Judiciary Committee.[46] From 1947 through 1968, the senate committee acted upon 29 of 270 constitutional amendment proposals (10.82 percent),[47] while the house committee acted upon only eight of 647 propositions (1.23 percent).[48] While the Senate has been more active in considering and reporting amendments in both periods, it became 25 percent more active after the creation of its Subcommittee on Constitutional Amendments. Meanwhile, the House's percentage of reports decreased. Thus, there is evidence to support an hypothesis that the existence of a structured subcommittee in the Senate, both before and after it was formally created in 1946, has been responsible, to some degree at least, for the interhouse differences in amendment activity.

While great power is generally vested in a chairman of a congressional committee, the chairman of a judiciary committee, in particular, is afforded many opportunities to effect that power so that, to a great extent, he can determine the outcome of a proposed constitutional amendment. He schedules hearings and meetings and controls their agenda; in addition, the chairman has the power to establish subcommittees and to assign bills and resolutions to the subcommittees of his choice, to employ most of the professional staff, to direct debate on the floor defending a report made by his committee, and so on.[49]

In comparing the House and Senate, observers have noticed that "[a House] chairman who is the acknowledged expert in his field, whose skill in political maneuver is at least as great as that of his colleagues, and who exploits his prerogatives to the fullest

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45 S.J. Res. 1, 75th Cong., 1st Sess. (1937), is not included in this analysis because it was discharged from committee.

46 *See* PROPOSED AMENDMENTS.

47 S.J. Res. 29, 87th Cong., 1st Sess. (1961) and S.J. Res. 2, 89th Cong., 2d Sess. (1966), are not included in this analysis since they were substituted for another pending resolution under rule XXIII which permits the substitution of all but the title.

48 *See* PROPOSED AMENDMENTS.

49 For an analysis of the powers of a committee chairman, see L. MORROW, CONGRESSIONAL COMMITTEES 30-35 (1969).

can dominate his committee or subcommittee."[50] Abetted by the seniority system, a chairman in the House of Representatives can therefore run his committee virtually as autocratically or as democratically as he pleases. The best example of such control over the constitutional amending process involves the suppression of the equal rights for women amendment proposal. From 1948 until 1971, Representative Celler prevented the holding of a hearing on this issue, even when faced with two resolutions which had been referred to his committee after passing the Senate.[51] As noted earlier, the only way the House could overcome his opposition was by ordering the resolution out of the Committee on August 10, 1970.[52] In 1971 Representative Celler tried to outmaneuver his opponents by ramming an amended version of the women's resolution through his committee,[53] thereby creating a conflict which he could manipulate in the floor fight to lessen the chances for the passage of the proposal. However, it cleared the House by a vote of 354 to 23.[54]

While examples of the same power being exercised over the fate of constitutional amendments can be found for the Senate Judiciary Committee, the ways in which the Senate, as a body, differs from the House tend to minimize such opportunities.[55] In relation to one another, members of the Senate are more nearly equal in power and status than are members of the House. As explained by one authority on the legislative process, greater equality exists in the Senate because:

> Almost all senators are in some position of influence: each is a member of at least one important committee; each (except for very junior members) is probably a subcommittee chairman; each may have control over some staff. The rules of comity are also stricter in the Senate than in the House. Senators are not usually denied or cut short in the questioning of committee witnesses, for example. Nor will chairmen

50 Fenno, *The Internal Distribution of Influence: The House*, in THE CONGRESS AND AMERICA'S FUTURE 56 (D. Truman ed. 1965).

51 S.J. Res. 25, 81st Cong., 2d Sess. (1950) and S.J. Res. 49, 83d Cong., 1st Sess. (1953).

52 See note 35, *supra*.

53 H.R.J. Res. 208, 92d Cong., 1st Sess. (1971).

54 117 CONG. REC. H9392 (daily ed. October 12, 1971).

55 *See* L. FROMAN, THE CONGRESSIONAL PROCESS: STRATEGIES, RULES, AND PROCEDURES 5-15 (1967).

> deny recognition to other committee members. They may attempt to delay by scheduling an inordinate number of witnesses, or by postponing and canceling committee hearings and meetings, but a persistent senator, if he is supported by a majority of the committee, can usually get consideration of his measures before the committee.[56]

For example, the extent to which this equality between most senators is derived from their membership on various other committees is illustrated by the membership of the Senate Judiciary Committee in the First Session of the Ninety-second Congress. It included the floor leader and two regional whips of the minority party, and the majority party whip, along with the candidate who was defeated in the election for that office. Also representing the majority party on the Judiciary Committee were the chairman of another committee and two senators who headed several subcommittees other than those of the Judiciary Committee.[57]

Several factors also affect the stature and perspective of the individual senator, making him more likely to be his own man rather than the puppet of the chairman. The Senate because of its smaller size operates more as an open forum, and because statewide constituencies are generally broader in perspective than House districts,[58] the Senate is often more concerned with national and state needs which can be satisfied only by a constitutional amendment, whereas representatives are generally less attuned to these matters.[59] The staggered six-year terms of senators, which puts only one-third of the membership up for re-election every two years, also encourages a greater interest in national issues since senators, unlike representatives, do not have to be constantly concerned with re-election.

Another factor limiting the senate chairman's control is that senate committees are divided into permanent subcommittees[60]

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56 *Id.* at 104.

57 29 CONG. Q. WEEKLY REP. 880 (1971).

58 For an analysis of constituency influences in the legislative process, see L. FROMAN, CONGRESSMEN AND THEIR CONSTITUENCIES (1963).

59 *Id.* at 79.

60 In 1971, there were ten permanent subcommittees of the Senate Judiciary Committee: 1) Administrative Practice and Procedure; 2) Antitrust and Monopoly; 3) Constitutional Amendments; 4) Constitutional Rights; 5) Federal Charters, Holidays and Celebrations; 6) Immigration and Naturalization; 7) Improvements in

whose chairmen, in contrast to subcommittee chairmen in the House, possess power and status analogous to those of the committee chairman. This fact is explained by the seniority system which frequently permits senators to choose their subcommittee appointment, a practice unique to the Senate. Since the same principle of seniority that applies to the full committee also applies to the operation of subcommittees, subcommittee management is relatively free from interference and manipulation by the committee chairman. In addition to this respect for their seniority, subcommittee chairmen use bargaining to produce both consensus on issues and support for subcommittee power and status to reinforce their position within the committee system.[61]

A further factor of particular importance for the Senate Judiciary Committee is the style of leadership employed by chairmen such as Senator James Eastland, who allows subcommittee chairmen to exercise an even greater degree of leadership because he "maintains control over committee membership and rapport among committee members by permitting subcommittees to go their own separate way."[62] Thus, Birch Bayh, even as a freshman senator, assumed an important role when he was appointed chairman of the Constitutional Amendments Subcommittee in 1963. As chairman, Senator Bayh persistently sought a clarification of the presidential disability clause.[63] His first effort passed the Senate in 1965,[64] but the House failed to act before Congress adjourned. Refusing to let the issue be forgotten, as it had faded during the 1950's after President Eisenhower's two heart attacks, Senator Bayh, in the next session, continued his campaign for a constitutional amendment; his strong leadership eventually succeeded, and ratification by the states was completed in 1967.

However, the senate judiciary chairman is not powerless to influence the course of events. At times Senator Eastland has clearly manipulated this system to product the results he desired. The

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Judiciary Machinery; 8) Patents, Trademarks and Copyrights; 9) Penitentiaries; 10) Revision and Codification.

61 For a discussion of how this bargaining process becomes operational, see Fenno, *The House Appropriations Committee as a Political System: The Problem of Integration*, 56 AM. POL. SCI. REV. 310 (1962).

62 L. MORROW, CONGRESSIONAL COMMITTEES 74 (1969).

63 U.S. CONST. art. II, § 6.

64 111 CONG. REC. 3250 (1965).

most recent example occurred after the House passed the equal rights for women amendment in 1970.[65] Despite the earlier hearings conducted in the spring of 1970 by the Subcommittee on Constitutional Amendments and the Subcommittee's recommendation for pasage of an identical resolution,[66] Senator Eastland ordered full committee hearings on the House resolution to be held under the temporary chairmanship of Senator Sam Ervin, an avowed opponent of an unqualified women's rights amendment. Although he failed to persuade the Judiciary Committee not to report the proposed amendment, Senator Ervin did lead a successful floor fight which discouraged bringing the matter to a vote in 1971.[67]

In some instances, senate subcommittee chairmen also find themselves unable, because of external pressure, to vigorously advance their own personal feelings toward a resolution. Consider, for example, the predicament of Senator Bayh in the case of the previously mentioned Dirksen amendments. Opposed in principle to the anti-reapportionment movement, the Indiana senator's influence was, nevertheless, neutralized by his state's support of the movement's measures. Therefore, he could not, without jeopardizing his future back home, take a strong stand against the endorsement of the proposition, first by his subcommitte and then by the full committee.[68] Certainly, senate committee chairmen who are well-versed in legislative strategy know how to take advantage of situations in which their subcommittee leaders are being cross-pressured.

There have been occasions, of course, when the chairman himself has been overruled by the membership. In 1932 and 1933 Senator George Norris of Nebraska was powerless to block repeal of prohibition in the Senate Judiciary Committee.[69] In 1947, Senator Alexander Wiley of Wisconsin was defeated by a coalition of Democrats and fellow Republicans in the Senate Judiciary Committee, which substituted convention for legislative ratifica-

65 116 CONG. REC. 29247 (1970). H.R.J. Res. 264, 91st Cong., 2d Sess. (1970).

66 S.J. Res. 61, 91st Cong., 2d Sess. (1970).

67 116 CONG. REC. 35623-28 (1971).

68 *See* THE LEGISLATIVE PROCESS ON THE U.S. SENATE 134 (L. Pettit & E. Keynes eds. 1969).

69 For Senator Norris' opposition, see, e.g., N.Y. Times, Jan. 1, 1933, at 8, col. 3.

tion of the twenty-second amendment. However, Senator Wiley's power was demonstrated on the floor where he successfully led the fight for reinstatement of the legislative mode.[70] But even if the chairman is overruled by his committee, because of his position in the majority party's hierarchy, he can frequently expect the assistance of the party's power structure in reversing his committee's decision.

The statistics for resolutions reported from 1932 to 1969 support this observation. During this period, the chairman was opposed nine times to the Senate Judiciary Committee's decision recommending passage of a resolution, and his decision was upheld in every instance.[71] Moreover, only two of these measures were debated, with one of them being subsequently recommitted for further consideration. A recommital is usually tantamount to defeat. At the urging of the chairman, two of the proposals were passed over when it was moved that they be discussed on the floor, and he secured an indefinite postponement for the one which was discharged from his committee by a majority of his colleagues.[72] Similarly in the House, the power of the Judiciary Committee chairman in the face of the opposition of a majority of his committee is demonstrated by the fact that none of the three resolutions reported by the Committee but opposed by the chairman from 1932 through 1968 were brought up for debate,[73] and one was even stricken from the Consent Calendar because of the objections of his party.[74]

The evidence also demonstrates that under any circumstance majority party leadership can be a strong decisional determinant particularly in the House of Representatives because of the prerogatives of the Speaker. The most outstanding example of a leader's influence is provided by the twentieth amendment. Before

70 93 CONG. REC. 1800 (1947).

71 *See*, PROPOSED AMENDMENTS. Since committee votes are cast in closed sessions and are not generally reported, the chairmen's attitude toward proposed amendments has been determined by using several sources. First, there are a few recorded votes plus several minority reports written by chairmen. Second, his comments on the floor, or those made by his colleagues indicate preference. And last, newspapers or publications of interested groups, such as the League of Women Voters, give a committee breakdown in categories of opposition and support.

72 *See* PROPOSED AMENDMENTS.

73 *See id.*

74 H.R.J. Res. 49, 79th Cong. 2d Sess. (1946).

it finally passed in 1932 under a different Speaker of the House, this resolution was reported seven times only to be killed by Speaker Nicholas Longworth's opposition.[75] Similar cases cannot be found for the upper house, but it appears from the data that senatorial leadership also has the potential for dominating the constitutional amendment process.[76]

This comparison of the judiciary committees suggests that the main difference between them lies in the extent of the power that accrues to their respective chairmen. The general equality among senators, the institutionalization of the Senate Subcommittee on Constitutional Amendments with its own chairman, the free rein generally given most senate subcommittee chairmen by their committee, and the greater overall authority wielded by house committee chairmen over their subcommittees lead to one inexorable conclusion: Unlike in the Senate, the disposition of the chairman of the House Judiciary Committee towards a proposed amendment is the pivotal factor in determining the fate of that proposal in the House. Hence, if the chairman's philosophy is generally unfriendly to the notion of amending the Constitution, or if he has consistently opposed on their merits the specific proposals which happen to arise for consideration, then clearly the record of the House itself in approving amendments will reflect this. On the other hand, if the chairman is eager for the passage of the proposals introduced, then the House record will likewise reflect his willingness to amend. Under the chairmanship of Representative Celler, the record of the House Judiciary Committee, and consequently the record of the House itself, reflect his apparent disinclination to seek the passage of proposed amendments.

It would be inaccurate, though, to characterize Representative Celler as opposed in principle to the concept of constitutional amendment. In fact, he has recently boasted of sponsoring and cosponsoring the last four amendments added to the Constitution.[77] Yet, Representative Celler regards changing the Constitution as an extremely serious matter which must respect political arrange-

75 *See* PROPOSED AMENDMENTS.

76 *See id.*

77 117 CONG. REC. H1819 (daily ed. Mar. 23, 1971).

ments outlined in that document. In particular, he has expressed concern for preserving the integrity of state governments against unnecessary amendments. Over the years this has been his major complaint against the equal rights for women amendment,[78] and more recently this charge was made in opposition to extending more than the right to vote to 18 year olds.[79] The problems of legal adulthood, he contended, should be settled by the states.

The record of the women's equal rights resolution, among other proposed amendments, leads to the conclusion that the reluctance of the House to accept most Senate-initiated amendments stems from the fact that the particular proposals conflicted with the constitutional philosophy of the House Judiciary Committee Chairman. Among such proposals were two passed by the Senate in 1954. The first proposition was designed to keep Congress functioning in time of undefined emergency and authorized state governors to fill by appointment congressional vacancies caused by undefined disasters.[80] The second resolution, a product of reaction to the 1954 school desegregation decision, proposed constitutional restrictions on the composition and jurisdiction of the Supreme Court.[81] These examples reveal that the difference between the House and Senate in approving resolutions calling for amendments to the Constitution is due, in large measure, to the collision between the thrust of the particular bills proposed and the attitudes of the House Judiciary Committee Chairman.

IV. Alternative Methods Proposed to Limit the Power Vested in the Judiciary Committees and their Chairmen

To increase overall congressional participation in introducing, reporting, and passing proposals for constitutional amendments, therefore, effort must be directed at limiting the power exercised by the judiciary committee chairmen (especially the chairman in the House) over such important matters. Despite the availability of procedures to overcome their opposition,[82] these leaders are still

78 Representative Celler's objections to this amendment are developed in Martin, *Equal Rights Amendment: Legislative Background*, 11 J. of Family L. 369 (1971).
79 117 Cong. Rec. H1854 (daily ed. Mar. 23, 1971).
80 S.J. Res. 39, 83d Cong., 2d Sess. (1954).
81 S.J. Res. 44, 83d Cong., 2d Sess. (1954).
82 The discharge procedure in the House of Representatives requires filing a pe-

able to exercise their prerogatives. Challenging a chairman's authority can result in reprisals against the offending congressman since:

> He will court the enmity of the committee chairman and of others sympathetic with the chairman. This may result in certain things happening to him or not happening to him, such as lack of cooperation and aid on private bills, minor public bills, campaign funds, committee assignments, subcommittee chairmanships, help from other members on bills important to him, ability to logroll with other members, and other actions. Few members are willing to pay these costs.[83]

Even when there is a challenge, it is not likely to be successful unless supported by the leadership.[84] This point is illustrated by the successful discharge and subsequent passage, through strong leadership support, of the equal rights for women amendment as compared to the discharge and failure of the school prayer amendment in the House, when leadership support was lacking.[85]

Perhaps the best practical method for restraining the chairmen's power is a procedure for the dislodging of constitutional amendment proposals from the judiciary committees. Hopefully, such actions will become firm precedent that will encourage members of Congress "to buck" the committee system. But rather than leave matters to chance, one worthwhile reform would be for the House of Representatives to lessen its requirements for discharging a resolution from committee. For example, if the Judiciary Committe is disinclined after 90 days to act upon a resolution, then the rules should permit a representative to make a discharge motion from the floor, with a majority vote of members present necessary for approval. It could also be provided that debate, subject to the rules of the House, would take place one week after a successful discharge. This period of time should be sufficient for

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tition with the Speaker containing 217 signatures. It must lie on his desk for seven legislative days before being brought to a vote. Approval requires at least a vote of 217 members. In contrast, the Senate's procedure is less cumbersome, being initiated by a motion from the floor which, after debate, must be approved by a majority vote.

83 *See* FROMAN, *supra* note 55, at 182.

84 *Id.* at 181, 182.

85 *Supra* notes 53 and 54.

congressmen on both sides of the question to prepare their arguments. While we do not contend that this alternative is the ultimate solution, it is offered as a starting point for bringing about a needed change in the constitutional amendment procedure.

Yet even if the power of the Judiciary Committee chairman can be successfully restricted at times, the question still remains whether or not control over the constitutional amendment process in Congress should be in the hands of committee chairmen in the first place. Should the ideas of one individual have prevented women from receiving consideration of their equal rights amendments for over 20 years, particularly when that one individual in control is a man who has been heard to state that "there is a much difference between a male and a female as between a horse chestnut and a chestnut horse — and as the French say, *vive la difference*"?[86]

Aside from merely reforming the procedures for dislodging constitutional amendment proposals from the House Judiciary Committee, the other possible alternatives for changing the current procedure are neither feasible nor even desirable. One possibility, of course, is to use special committees; but history, as mentioned earlier, has shown that this procedure usually encourages the appointment of members especially interested in the particular proposal under consideration. Their decision, therefore, is virtually a foregone conclusion. Another idea is to use a permanent joint committee of both houses or a permanent committee in each house which would study only proposed constitutional amendments. No matter how the committee system is altered, though, the problem of bias is likely to be an obstacle to any solution. Not even the election of an ad hoc committee in each house will overcome the probability of having a "loaded" committee whose decision is predetermined.

V. Conclusion

In spite of its obvious shortcomings, the current congressional practice, with the proposed addition of procedures for restraining the power of the chairman of the House Judiciary Committee,

86 116 Cong. Rec. 28001 (1970).

seems to serve a legitimate and necessary function. In defense of current procedure, it can be pointed out that through the use of the existing power structure, the Constitution has been protected from hasty, ill-conceived changes. Only once has Congress responded to a groundswell of public opinion by using article five when the changes could more properly have been made by statute — in the elimination of the poll tax by the twenty-fourth amendment. Emphasizing the importance of reserving constitutional amendments for fundamental alterations, one contemporary authority has echoed the philosophy of Madison[87] in concluding that:

> It is of prime importance that the Constitution retain its brevity and be limited to basic structural arrangements and the protection of individual liberties. It would be disastrous if it became, through the amending process, a vehicle by which pressure groups and crackpots could impose their nostrums on the nation.[88]

Indeed, if the Senate is more susceptible to pressure from outside organizations advancing constitutional amendments than the House, then the current organizational set-up of the House may even be needed in order to temper the strong public pressure for changing the Constitution expressed through senate amendatory proposals. Certainly, as illustrated by the passage of prohibition and its repeal 15 years later, Congress, in its use of article five, has only yielded slowly to public opinion. Most likely, the difference in the organization and make-up of the two judiciary committees is responsible for maintaining the Constitution as it was conceived by its framers — the fundamental law of our land.

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87 *Supra* note 16.

88 C. PRITCHETT, THE AMERICAN CONSTITUTION 32 (1959).

NOTE

FEDERAL SERVICE IMPASSES PANEL: PROCEDURAL FLEXIBILITY AND UNCERTAINTY

Introduction

On October 29, 1969, President Nixon signed Executive Order 11491[1] establishing a new framework for labor-management relations between federal government employees and agencies. One of the new bodies created by the Executive Order was the Federal Service Impasses Panel whose function is to consider impasses in negotiation disputes and then "recommend procedures to the parties for resolution of the impasse or settle the impasse by appropriate action."[2] Armed with broad authority to "take any action it considers necessary to settle an impasse,"[3] the Panel was viewed as an alternative to the strike which remained illegal under the Order.[4]

This Note examines the Panel in its initial period of operation. The Note first considers briefly the historical development of federal labor-management relations and the organizational framework for dealing with employee-agency disputes provided by E.O. 11491. The Note then analyzes the Panel's present impasse procedure, discusses the prospects and limitations of factfinding, and suggests alternative procedures for the future.[5] The Note recommends that the Panel adopt diverse and flexible procedures, which would enable the Panel to tailor its methods to the particular dispute and keep the parties uncertain of the consequences of failing to negotiate an agreement.[6]

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1 3 C.F.R. 451 (1971), *as amended* Exec. Order No. 11616, 36 Fed. Reg. 17319 (1971).

2 Exec. Order No. 11491 § 17, 3 C.F.R. 460 (1971).

3 *Id.* § 5(b), 3 C.F.R. 454 (1971).

4 The right to strike is beyond the scope of this note which assumes the strike prohibition. Much of the discussion, however, would have some application to a situation in which a limited right to strike was recognized.

5 The information used in this analysis has been gathered from Panel regulations, case reports, and personal interviews with Panel personnel. Where possible the experience of the several states and Canada with public employee dispute procedures has been drawn upon.

6 Wellington & Winter, *Structuring Collective Bargaining in Public Employ-*

I. Historical Background and Structure of the Federal Labor-Management Relations Program

Unions have existed among federal employees for a long time, but until the last decade they had not generally been encouraged by the government. President Kennedy initiated the new positive approach when he signed Executive Order 10988[7] in 1962, which for the first time established presidential polices concerning the relationships between employee organizations and agency management. This Order gave federal employees the right to bargain collectively, although the scope of the bargaining was very limited and strikes were prohibited. The basic thrust of the Order was to encourage "employee organizations" in the federal government by affirmatively allowing them to exist. In that respect the Order was very successful. During the next few years union membership among federal employees increased dramatically.[8]

This extensive unionization went beyond the scope of E.O. 10988 which neither anticipated the need for greater reliance on the principle of exclusive recognition nor provided adequate procedures for resolving disputes. In 1967, President Johnson appointed a committee chaired by Secretary of Labor Willard Wirtz to study these problems. President Nixon later appointed a second committee headed by George Shultz, then Secretary of Labor, to follow-up the recommendations of the Wirtz Committee. The Shultz Committee noted that several additions to the program should be made, including: a central body to administer the labor-management program and make final decisions on policy questions and disputed matters; third-party processes for resolving disputes on unit and election questions and complaints of unfair labor practices; and procedures for assistance in resolving negotiation

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ment, 79 Yale L. J. 805, 839 (1970). This choice-of-procedures or arsenal-of-weapons approach has long been suggested in the area of emergency disputes in the private sector. *See, e.g.*, Wirtz, *The Choice-of-Procedures Approach to National Emergency Disputes*, in Emergency Disputes and National Policy 149 (I. Bernstein, H. Enarson & R. Fleming, eds. 1955); Shultz, *The Massachusetts Choice-of-Procedures Approach to Emergency Disputes*, 10 Ind. & Lab. Rel. Rev. 359 (1957); A. Cox, Law & the National Labor Policy 55-58 (1960).

7 3 C.F.R. 521 (1959-63 compilation).

8 Interagency Committee on Labor-Management Relations in the Federal Service, Report & Recommendations on Labor-Management Relations in the Federal Service and E.O. 11491 of Oct. 29, 1969 at 31 (1969) [hereinafter cited as Shultz Committee Report].

impasses and grievances.[9] The Shultz Committee recommendations were put into effect by Executive Order 11491. This Order was amended in part by Executive Order 11616 of August 26, 1971, but the basic framework of Executive Order 11491 remained intact.[10]

E.O. 11491, like its predecessor E.O. 10988, affirms the right of employees to form, join, and assist a labor organization or to refrain from such activity. The agencies are directed to apprise employees of these rights, but not to encourage or discourage membership in a labor organization.[11] E.O. 11491 firmly establishes the principle of exclusive recognition: when a majority of the employees in an appropriate unit select a union as their representative, the union is the exclusive representative of all employees in the unit.[12] This union and the agency are then required to meet and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, and E.O. 11491. The union and agency may negotiate an agreement on personnel matters such as grievance resolution, promotion policies, and safety. However, the mandatory scope of bargaining excludes: the agency's mission; its budget organization or personnel complement; the types and grades of employees assigned to an organizational unit, work-project, or tour of duty; the technology of performing the agency's work; or internal security practices.[13] Wages, an important item in private sector negotiations and in most negotiations with state and local government employees, is not within the scope of bar-

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9 *Id.* at 31-32.

10 For an analysis of the changes, see UNITED STATES FEDERAL LABOR RELATIONS COUNCIL, EXECUTIVE ORDER 11491, AS AMENDED BY EXECUTIVE ORDER 11616 OF AUG. 26, 1971, WITH ACCOMPANYING REPORT & RECOMMENDATIONS OF THE FEDERAL LABOR RELATIONS COUNCIL 27 (1971).

11 Exec. Order No. 11491 § 1, 3 C.F.R. 451 (1971).

12 *Id.* § 10, 3 C.F.R. 457 (1971).

13 *Id.* § 11, 3 C.F.R. 458 (1971). E.O. 11491 also provides for "national consultation rights" for unions that represent a substantial number but not a majority of employees in a unit, unless another union already has exclusive recognition. National consultation rights give such union a more limited right to confer and be consulted on proposed changes in personnel policy. *Id.* at § 9.

gaining in the federal government. Thus, the scope of bargaining is, to this extent, extremely limited.

E.O. 11491 as amended by E.O. 11616 provides for five authorities to administer the federal labor-management relations program: the Federal Labor Relations Council, the Assistant Secretary of Labor for Labor-Management Relations, the Federal Mediation and Conciliation Service, the Civil Service Commission, and the Federal Service Impasses Panel.

The Federal Labor Relations Council is the policy-making body. The Council may also consider appeals from decisions of the Assistant Secretary of Labor,[14] appeals in disputes over negotiability,[15] exceptions to grievance arbitration awards, and other matters appropriate to effect the purposes of the Order. The Order specifies that the Council shall be composed of the Chairman of the Civil Service Commission (who is Chairman of the Council), the Secretary of Labor, the Director of the Office of Management and Budget, and other officials of the executive branch designated by the President.[16] To date, the President has not appointed any members other than the three specifically listed in the Order.

The Assistant Secretary of Labor for Labor-Management Relations decides questions concerning appropriate bargaining units, supervises union recognition elections, evaluates complaints of alleged unfair labor practices and violations of the standards of conduct for labor organizations (set out in the Order), and decides whether a grievance is subject to a negotiated grievance procedure or is subject to arbitration under an agreement.[17] Thus, the Assistant Secretary performs functions similar to those performed by the National Labor Relations Board in the private sector. Meanwhile, the Federal Mediation and Conciliation Service (FMCS) provides free mediation services for labor-management disputes.[18]

The Civil Service Commission (CSC) maintains, in conjunction with the Office of Management and Budget (OMB), a manage-

14 See text at note 17, *infra*.

15 The procedures for resolving disputes over negotiability are outlined in Exec. Order No. 11491 § 11(c), 3 C.F.R. 458 (1971).

16 Exec. Order No. 11616 § 4, 36 Fed. Reg. 17319 (1971).

17 *Id.* § 6, 36 Fed. Reg. 17319 (1971).

18 Exec. Order No. 11491 § 16, 3 C.F.R. 460 (1971).

ment-consulting program to assist agencies with the labor-management relations program and to assure adherence to its provisions and merit system requirements. The CSC and the OMB report to the Council from time to time.[19] The CSC is also instructed to "provide administrative support and services to the Council,"[20] such as by supplying research facilities, statistical data, and the like.

Finally, the Federal Service Impasses Panel has the responsibility to consider negotiation impasses. The regulations provide that an impasse is deemed to exist when the parties are "unable to reach full agreement notwithstanding their having made earnest efforts to reach agreement by direct negotiations and by use of mediation or other voluntary arrangements for settlements."[21] This Panel is established as an agency within the Federal Labor Relations Council,[22] and receives "services and staff assistance"[23] and its budget from the Council.

One difficulty with the present structure stems from the close relationship of the Panel and Council to the CSC. The Council (and, in turn, the Panel) receives its budget from the CSC. The Chairman of the CSC acts as Chairman of the Council. In addition, both the Panel and the Council are housed in the CSC building. These ties seem somewhat inconsistent with CSC's function as the federal government's primary personnel agency. As neutral bodies charged with administering the federal government labor-management relations program, the Panel and Council should be completely independent from the CSC. Either the Panel and Council should be established as independent agencies or one independent agency by legislation if necessary, or they should be assigned to another more appropriate existing agency such as the National Labor Relations Board or even the Department of Labor.

To safeguard the independence of the Council and the Panel, changes might also be made in Council membership. The members serve only part time, and two work also with the CSC and

19 Exec. Order No. 11616 § 25, 36 Fed. Reg. 17322 (1971).

20 *Id.* § 4(a), 36 Fed. Reg. 17319 (1971).

21 Federal Service Impasses Panel Regulations, 5 C.F.R. § 2470.2 (1971). See text at note 38 *infra*.

22 Exec. Order No. 11491 § 35, 3 C.F.R. 454 (1971).

23 *Id.* § 5, 3 C.F.R. 454 (1971).

the OMB. Although people are often asked to wear two different hats, frequently the two roles pose an inherent conflict of interest. In a recent speech, Arnold Weber described his own position as OMB representative to the Council as: "The man who is also responsible for the nation's budget, is also responsible for preserving a system which is inherently inconsistent with collective bargaining, and also makes policy in these areas."[24] He then described the CSC Chairman, who chairs the Council, this way:

> He's to be responsive to the President's and the Administration's desire and policy directives, but at the same time he's supposed to be impartial. Now, you know, the last man to do that was the most valuable player of 1492, and it's a very difficult role to play.[25]

The Council should be made up of independent and full-time members, at least those who are in addition to the present high officials who already have departments to run and a stake in the status quo. Canada's Public Service Staff Relations Board established in 1967 with powers similar to that of the Council reflects this suggested approach. Two neutral officers and two representatives each from labor and management make up the Board. One academic observer remarked:

> [i]t can be fairly said that the administration of the act is almost completely free of public employer control of influence. . . . The Canadian arrangement is far more likely to win the confidence of public employees than the typical advisory body in the U.S. Such bodies, often created by executive order, depend for their very existence on the grace and favor of the appointing power, and public employees not surprisingly may sometimes feel that their recommendations are not completely unbiased.[26]

In contrast to that of the Council, the Panel's present membership policy is satisfactory. Although the Schultz Committee recommended a three-man Panel,[27] the Panel now consists of seven

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24 Address by Arnold Weber to 24th Annual Meeting of National Academy of Arbitrators, Los Angeles, Cal., Jan. 28, 1971.

25 *Id.*

26 Arthurs, *Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly?*, 67 MICH. L. REV. 971, 981-82 (1969).

27 SHULTZ COMMITTEE REPORT, *supra* note 8, at 41.

members appointed by the President without fixed term. While it is unlikely that the President would capriciously remove a member, members should be given a fixed term to remove any appearance of bias.[28] The members are required to serve part time. The part-time arrangement facilitates recruitment of qualified personnel and should provide greater operational flexibility and disperse the Panel's rather large power. It will keep members independent of the government bureaucracy with which they will deal. As long as the seven members collectively are able to manage the Panel's work, this should be a satisfactory arrangement.

The seven panel members are also scattered around the country. This dispersion makes communication between members and transportation to meetings more difficult. On the other hand it does have two advantages. First, members are close to the areas where Panel cases will arise.[29] Second, by not requiring members to relocate, the President will be able to attract the most experienced and reputed arbitrators to serve on the Panel.

II. Federal Service Impasses Panel Procedures

Briefly stated, the Panel's procedures for handling an impasse consist of determining whether the Panel has jurisdiction of the case, conducting a formal factfinding hearing, and issuing its findings and recommendations. The parties are not bound by the Panel's recommendations, but must either settle the dispute within 30 days of receipt of the recommendations or report their reasons for not settling. At that point the Panel can take whatever action it deems necessary to settle the dispute.

A. *Jurisdictional Determination*

1. Request for Panel Action

A negotiation dispute may reach the Panel in one of three ways: at the request of either or both parties, at the request of the Fed-

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28 Freilicher, The Resolution of Negotiation Impasses in the Federal Service 21 (1971) (unpublished paper on file at offices of Federal Service Impasses Panel).

29 For example, Panel member James Vodakin located in Miami, Florida, recently conducted a factfinding hearing for nearby Key West Naval Station and Naval Air Station.

eral Mediation and Conciliation Service (FMCS), or at the request of the Executive Secretary of the Panel.[30] The first route, however, has been the most common one, with most requests coming from unions, a few joint requests, and no agency requests.[31] Requests can come from a local union or local facility, although the AFL-CIO has suggested that requests be made only through a national union headquarters or the head of an agency.[32] On the one hand, the AFL-CIO suggestion might lead to more in-house settlements, but on the other, it is the immediate parties who know the dispute best and must live with the resolution. Giving the local participants the right to initiate requests may lead to more diverse approaches to problems. Furthermore, the Panel can reject a request if it feels that the matter has not been referred to higher authorities of the parties (such as an agency or union head) who could help settle it.[33] As long as the Panel has this discretion, the present flexible policy should be retained.

The FMCS has not made and does not anticipate making any requests, leaving it to the parties to request Panel assistance.[34] The mere presence of this provision, however, may throw additional uncertainty into the bargaining situation and may increase the mediator's leverage. Uncertainty on the part of the parties as to what will happen if they do not settle their dispute is generally a positive factor in that it encourages settlement.[35] Obviously some degree of certainty is necessary for the parties to function effectively, and uncertainty should not be created at the risk of harm to the bargaining process. As long as the FMCS uses its request power cautiously, as it appears it will, no harm to mediation or to the bargaining process seems likely to result from the availability of this procedural alternative. There may even be some unusual cases where an FMCS request will be necessary, for

30 Federal Service Impasses Panel Regulations, 5 C.F.R. § 2471.1 (1971).

31 Interview with Howard Solomon, Assistant Executive Secretary to the Federal Service Impasses Panel, in Washington, D.C., April 7, 1971.

32 Comments of the AFL-CIO on Proposed Rules Governing Organizations and Responsibilities of the Federal Service Impasses Panel at 1 (1970) (unpublished memorandum on file at the offices of the Federal Service Impasses Panel).

33 See text at note 49 *infra*.

34 Interview with Kenneth Moffett, Special Assistant to the Director of the Federal Mediation & Conciliation Service, in Washington, D.C., April 6, 1971.

35 The underlying belief that agreements voluntarily arrived at are the best ones was noted in SHULTZ COMMITTEE REPORT, *supra* note 8, at 41.

example, to ward off an impending crisis, such as an illegal strike.

The third request method, not used to date, is for the Panel to enter a dispute on its own motion. The Panel indicates that this power will be used only in disputes with serious implications, such as a potential strike.[36] If the power is not abused, additional uncertainty for the parties will be added at little or no risk, and the Panel will have a means of assisting in critical disputes where neither party would request Panel intervention for fear of signaling weakness or for other reasons.

2. Initial Inquiry by the Panel

A request for Panel action gives a statement of the issues at impasse and the position of the initiating party on those issues. The other party is asked to respond with a written statement of its position on the issues. The initiating party is then given an opportunity to answer the response. The initial inquiry deals with the positions of the parties only in a limited way. Even so, the policy of asking for written instead of oral statements should be watched closely for the possible "stiffening" effect it may have on the parties' positions.

Upon receipt of the request, a Panel staff member informally obtains the following information: names of people at various levels in the agency and union; types of employees and kinds of work in the unit; facts and dates of unit recognition and previous negotiations; number and hours of meetings held and the extent of their focus on the impassed issues; issues resolved; additional information concerning the parties' positions on the unresolved issues; current status of negotiations (whether still bargaining); and other voluntary arrangements used to attempt to resolve the dispute such as mediation, factfinding without recommendations or referral to higher authority. The Panel staff also contacts the Assistant Secretary of Labor to see if any election or unfair labor practice charges have been filed and checks with the Council to see if any negotiability issues or other issues are pending there.[37]

The Panel staff also ascertains from the FMCS national office the number and hours of mediation sessions conducted in the dispute.

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36 Interview with Howard Solomon, *supra* note 31.
37 *Id.*

It also solicits the Service's opinion as to whether further negotiations, with or without mediation, or other voluntary arrangements can be expected to resolve the dispute or whether the matter is "ripe" for factfinding. The same inquiry is directed to the parties as well. Sometimes the FMCS might be asked to confirm the impassed issues if there is some doubt. The Panel is well aware of the problem of party confidence in the mediator and of the fact that extended inquiry with the mediator might undermine this confidence. Therefore, the particular mediator is not consulted and no inquiry with the FMCS is made as to the parties' last positions or specific flexibilities on the issues.[38]

Some mediators have expressed some concern about being asked for an opinion as to the ripeness of the dispute for factfinding. Because they and other mediators will have to deal with the same parties in the future, they do not want the parties to blame them for the case's going or not going to the Panel. It is true that some evaluation of flexibility would be involved implicitly in any recommendation, but the specific details of each party's flexibilities and priorities on the issues need not be revealed in order for the mediator to give his general judgment as to the advisability of factfinding. The mediator will often be in a unique position to offer an intelligent judgment on whether further negotiations or mediation are appropriate before the Panel assumes jurisdiction. To deprive the Panel of this judgment would be unwise, especially since the Panel may have little or no unbiased information on which to make its determination as to the appropriate step to be taken.

The Panel's present policy of seeking FMCS recommendations seems sound as long as it is limited to summary judgments as to the appropriateness of further negotiations and mediation of factfinding without asking the mediator to divulge any specifics regarding the parties' positions or flexibilities. Even these opinions are best channelled through the FMCS national office rather than passing directly from the specific mediator to the Panel. Furthermore, the mediator should be allowed to decline to make any such recommendations if he feels it would be inappropriate because of the facts of the case, for example, where he feels that the animosity

38 *Id.*

of one of the parties that would result from his recommendation would not be worth whatever light he might shed on the situation for the Panel. This prerogative to decline to make recommendations should be exercised only infrequently, but will provide a safety valve for sensitive cases. The Panel should give very considerable, though not conclusive, weight to the mediator's judgment on the question of further mediation as it is his area of expertise.

3. Jurisdictional Determination

The Panel's regulations define impasse as that point "at which the parties are unable to reach full agreement notwithstanding their having made earnest efforts to reach agreement by direct negotiations and by use of mediation or other voluntary arrangements for settlement,"[39] but the Panel has not defined "earnest efforts." While this term should be interpreted to mean something more than a certain number of meetings and hours of bargaining, the authoritative interpretation will emerge only after the Panel has handled many more cases.

The Panel correctly endeavors to limit accessibility to its fact-finding procedure,[40] otherwise the parties will turn to the Panel instead of solving their own problems. The *Shultz Committee Report* warned that the ready availability of third-party procedures can make them a built-in part of the parties' bargaining process.[41]

Except for the use of mediation,[42] the Panel does not require the parties to utilize a specified set of settlement procedures before it accepts the case. Imposing such requirements would run the risk of reducing pre-Panel procedures to mere pro forma steps required to reach the Panel. Furthermore, the absence of fixed requirements keeps the parties uncertain and reserves the Panel's

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39 5 C.F.R. § 2470.2 (1971).

40 The Panel has utilized factfinding in only five of the first 32 requests acted upon. In the others the Panel has either declined jurisdiction (15) or sent the parties back to meditation or negotiations (11). In one case the parties were referred to other voluntary arrangements. Federal Service Impasses Panel Internal Memorandum, Dec. 31, 1971 (unpublished statistics on file at the offices of Federal Service Impasses Panel).

41 SHULTZ COMMITTEE REPORT, *supra* note 8, at 40.

42 See text at note 44 *infra*.

flexibility in taking or refusing cases according to the circumstances and facts of each.

Based on the information gathered in the initial inquiry, the Panel may make one of five determinations: (1) that the Panel does not have jurisdiction; (2) that negotiations should be resumed; (3) that negotiations should be resumed with mediation assistance; (4) that other voluntary arrangements should be utilized; or (5) that the Panel will proceed with its factfinding procedures.[43] The Panel bases its determination on the staff member's report and their questioning of him; there is no hearing, nor are the parties present to assist the Panel. For most cases, a hearing for the jurisdictional decision would be an unnecessary administrative burden on both the Panel and the parties. In addition, bringing the parties together to convince the Panel that there is an impasse might work to harden their positions and destroy any remaining bargaining atmosphere. Nevertheless, the Panel could hold hearings, if necessary, to clarify issues and help it determine whether to accept a case.

The early cases indicate some tentative rules about when the Panel will take a case and how it will operate in relation to the other agencies charged with responsibilities under E.O. 11491. There appears to be a definite requirement that the parties utilize mediation before the Panel will intervene.[44] Indeed the Panel has in eight cases referred the parties back for further mediation where some mediation had been attempted.[45] This policy is consistent with sound labor relations policy generally[46] and with the clear policy of the Order.[47] While some parties may occasionally use mediation pro forma just to get to the Panel, this seems a small risk for ensuring that mediation is attempted in all disputes.

While the Panel has not said it will always require the use of other "voluntary arrangements" before it will take a case, it will

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43 Federal Service Impasses Panel Regulations, 5 C.F.R. § 2471.6 (1971).

44 *See, e.g.*, Army/Air Force Exchange Service, Ft. Benning, Ga., and Chattahoochee & Valley Metal Trades Council (Dec. 18, 1970) Federal Service Impasses Panel Release No. 5, (Case No. 71 FSIP 9).

45 Federal Service Impasses Panel, Internal Memorandum, *supra* note 40.

46 W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 350 (1971).

47 Exec Order No. 11491 § 16, 3 C.F.R. 460 (1971).

consider whether any have been used.[48] For example, the Panel will consider whether the matter has been referred to sufficiently high authorities of the parties.[49] The political structure of both unions and agencies make referral to higher authority a convenient and often effective means for settlement. If referral fails, the local union or facility can still make its own request to the Panel quite apart from the higher authority. A blanket rule like the mediation requirement is not necessarily appropriate, since referral in some cases will only cause unnecessary delay.

Notwithstanding prior attempts by the parties to settle, the Panel seems prepared to reject cases in at least three other situations, and possibly a fourth. First, the Panel will not consider disputes over the application or interpretation of an existing agreement.[50] Such disputes are clearly outside the authority delegated to the Panel and are to be resolved through grievance procedures now required in every negotiated agreement between an agency and employees.[51] If there is a question as to whether a grievance is subject to a negotiated grievance procedure or subject to arbitration under an agreement, the Assistant Secretary of Labor is the proper authority to resolve the dispute.[52]

Second, the Panel will hold a request in abeyance when a petition for an election in the same bargaining unit has been filed with the Assistant Secretary of Labor by a union not a party to the dispute.[53] The Panel reasons that it would be wasteful to work out a settlement with the parties only to discover that the union no longer represents the employees.[54] While a party might be able to file a petition for election simply as a stalling tactic, the Assistant

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48 Federal Service Impasses Panel Regulations, 5 C.F.R. §§ 2470.2, 2471.6 (1971).

49 *See* Wurtsmith Air Force Base, Oscoda, Mich., and Local 2736, American Federation of Government Employees, Federal Service Impasses Panel Release No. 13, (June 18, 1971) (Case No. 71 FSIP 9). In this case, however, the parties had included referral to higher authorities in the impasse procedure agreed to in pre-negotiation sessions.

50 Portsmouth Naval Shipyard, Portsmouth, N. H., and Portsmouth Metal Trades Council, Federal Service Impasses Panel Release No. 3 (Oct. 20, 1970) (Case No. 71 FSIP 2).

51 Exec. Order No. 11616 § 13, 36 Fed. Reg. 17320 (1971).

52 *Id.* § 6(a)(5), 36 Fed. Reg. 17319 (1971).

53 Norfolk Naval Shipyard, Portsmouth, Va., and the Fifth Naval District Metal Trades Council, Federal Service Impasses Panel Release No. 7 (Feb. 3, 1971) (Case No. 70 FSIP 13).

54 Interview with Howard Solomon, *supra* note 36.

Secretary, the Council, and the Panel should be able to work out effective checks and sanctions to prevent this possibility.

Third, there is a suggestion in one case[55] that the Panel may defer action on a case where an unfair labor practice charge involving the parties is pending before the Assistant Secretary of Labor. Since there was also an election pending in that case, however, Panel policy is not clear. A general deferral policy in such a situation would be unwise. An unfair labor practice charge unrelated to the impasse should never be the cause for deferral. Even where there is some connection between the charge and the impasse, the Panel should consider the type and basis of the charge, its status with the Assistant Secretary, the Assistant Secretary's opinion of its merits, and any other relevant information. Only after taking such factors into account should the Panel decide whether simultaneous proceedings will be undesirable. While the Panel's policies should be coordinated with the Assistant Secretary so as to prevent unfair labor practice proceedings from impeding impasse resolution, the Panel should not become involved in these proceedings. The acrimony created by the blame-placing implied in finding an unfair labor practice is not a proper atmosphere for settling a dispute.[56]

Finally, the Panel's regulations state that it will not assume jurisdiction where genuine issues of negotiability are involved.[57] According to section 11(c) of E.O. 11491, such issues are to be resolved within the agency involved or by the Council, not by the Panel.[58] The Panel will, however, look at the merits of the negotiability claim to assure that it is genuine.[59] The precise standards

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55 Dept. of the Army (USDESEA), Izmir, Turkey, and the Overseas Federation of Teachers, Local 1628, Federal Service Impasses Panel Release No. 11 (Apr. 15, 1971) (Case No. 71 FSIP 8).

56 *See* Gould, *Public Employment: Mediation, Factfinding and Arbitration*, 55 A.B.A.J. 835, 838-39 (1969). The same considerations apply to alleged violations of the standards of conduct for labor organizations.

57 Federal Service Impasses Panel Regulations, 5 C.F.R. § 2471.6(b) (1971).

58 3 C.F.R. 458 (1971).

59 Dept. of the Army, Rock Island Arsenal, and Arsenal Lodge 81, I.A.M. Case No. 70 FSIP 6, Panel Report and Recommendations No. 1, at 37 (The agency based its non-negotiability claim on alleged conflict between the union's proposals and CSC and Army regulations). U.S. Merchant Marine Academy, Kings Point, N.Y., and United Federation of College Teachers, Local 1460, Federal Service Impasses Panel Release No. 8 (March 1, 1971) (Case No. 70 FSIP 16) (The agency claim was

for this determination have not yet emerged, but the Panel appears to defer to section 11(c) procedures if the party raising the claim makes any reasonable argument in support of its contention. The Panel should so defer if there is any rational basis for the claim in statutes, regulations, the Order, or other relevant materials. In considering the basis of the claim, however, the Panel should consider the circumstances under which it was brought. For example, a claim of non-negotiability raised for the first time at the Panel stage after negotiations on that subject had been conducted, should be given very close scrutiny.[60] The Panel might also establish a procedure for consulting the Council for preliminary determinations on these matters. Such steps are justified since such claims can be raised by a party at no risk and the long delay involved in section 11(c) procedures can be terribly disruptive of the Panel's proceedings and of good labor-management relations.[61]

Where there are several impassed issues only some of which involve negotiability claims, the Panel should be cautious about going to factfinding on the other issues. The issues which the Panel can consider will often be contingent upon the disposition of the

based on legislative history, directives of the Bureau of the Budget, and language in the contract).

60 *Cf.* Little Rock District, Corps of Engineers and Local 2219, International Brotherhood of Electrical Workers, Federal Service Impasses Panel Release No. 14 (Aug. 19, 1971) (Case No. 71 FSIP 6). The Panel had already held a factfinding hearing in the *Little Rock* case when the agency raised the issue of non-negotiability for the first time in its post-hearing brief. The Panel censored the agency for its belatedness, but found that the non-negotiability claim should be resolved by the Council before the Panel could make any recommendations. In such a case the union might bring an unfair labor practice charge against the agency for failure to negotiate in good faith, or the Council might impose a sanction upon the agency under its general powers clauses of §§ 4(b) and 4(c)(4) of the Order.

61 This potential delay is an example, already evident, of how the Panel's effectiveness depends on the efficiency of other authorities in the labor-management relations scheme. At present the Council's negotiability procedures (section 11(c)) take several months. This time problem is likely to grow as unions extend their influence and bargaining demands into areas bordering on the non-negotiable and as more negotiability claims are raised. It is clear that the Council must either expedite its procedures or delegate the responsibility for negotiability claims to the Panel. The latter course is undesirable since a body making recommendations should not also decide what is or is not a proper subject for negotiation. The party which has already "lost" one dispute on a negotiability issue may not be inclined to accept a recommendation from the same tribunal. Also, mixing the "objective" determination of negotiability with the "subjective" determination of recommendations in the same proceeding or before the same impartial body might add confusion to the process. Finally, Panel determination of negotiability would raise the possibility of appeal to the Council and continued delays.

proposal over which there is an issue as to negotiability.[62] Thus, the Panel might not be able to get a voluntary settlement based on its recommendations until the negotiability point has been resolved and trade-offs and compromises on all the issues can be accomplished. The Panel must rely heavily on the parties in determining whether it is worthwhile to go ahead with factfinding or other procedures on the admittedly negotiable issues. The Panel has already evidenced the proper caution suggested in this area. In the *Ft. McClellan* case[63] the Panel decided it would be inappropriate to consider several remaining issues while other issues were being referred to section 11(c) negotiability procedures.

Other methods of restricting access to Panel procedures have been rejected by the Panel. Many state public employment agencies charge the parties the costs of factfinding.[64] Although the Shultz Committee recommended charging the parties for factfinding,[65] the Panel has chosen to avoid restricting access to their procedures by this method. Several arguments can be advanced for this policy. Since the unions have very limited resources they would not have equal access to the Panel. Since mediation service is free, Panel services arguably should be free as well. However, mediation is and has traditionally been a favored method for settling disputes because it does not inhibit bargaining, whereas third-party methods such as factfinding should be discouraged. The concern over the unions' limited funds is valid but might be resolved by adjusting the portion of the costs charged each party rather than making the procedure entirely costless. That is to say, one might charge for factfinding a cost that would operate as somewhat of a disincentive to its use, but not price it completely out of one party's reach. This would comport with the experience of factfinding for state and local government employee disputes.[66]

62 Freilicher, *supra* note 28, at 30.

63 Army and Air Force Exchange Service, Fort McClellan, Ala., and Local 1333, LIUNA, Federal Service Impasses Panel Release No. 12 (May 26, 1971) (Case No. 71 FSIP 2). *See also* Little Rock District, Corps of Engineers and Local 2219, International Brotherhood of Electrical Workers, Federal Service Impasses Panel Release No. 14 (Aug. 19, 1971) (Case No. 71 FSIP 6).

64 *See, e.g.*, CONN. GEN. STAT. ANN. § 7-473(e) (Supp. 1971); IOWA CODE ANN. § 90.20 (Supp. 1971); ME. REV. STAT. ANN. tit. 26, § 965(5) (Supp. 1971); MINN. STAT. ANN. § 179.57(3) (1966).

65 SHULTZ COMMITTEE REPORT, *supra* note 8, at 41.

66 It has been suggested that the fact that the costs of factfinding are paid by the

The Panel will not necessarily reject a case because the parties have failed to employ a private contractual impasse procedure, nor will the Panel be deterred by such a procedure. Indeed some private procedures, arbitration and private factfinding with recommendations, can be invoked only with Panel approval.[67] The Panel's regulations define the conditions under which approval will be granted to assure acceptability of the outcome.[68] Furthermore, the regulations provide that ". . . any provisions of the parties' labor agreements relating to impasse resolution inconsistent with E.O. 11491 or the procedures of the Panel shall be deemed to be superseded by the order and procedures herein."[69] This provision would seem to free the Panel from attempted restriction by private agreement. As long as the Panel does allow private factfinding when the specified conditions are met, these regulations can be justified because of the public interest in settlement of impasses. Without binding itself, the Panel does and should look to the parties' impasse provisions for guidance as to the proper course of action to pursue.[70]

B. *The Factfinding Procedure*

Having assumed jurisdiction of an impasse, the Panel assigns a factfinder to conduct a formal hearing and report his findings to the Panel. Factfinding is often said to be consistent with a policy of voluntarism. It is of educational value to the parties in collective bargaining as they are required to focus on the issues and their positions and gather objective evidence and arguments to support them. On significant issues the factfinding report and recommendations provide a basis for crystallizing public opinion and news

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state in Michigan and New York may explain the heavy use of factfinding in those states. *See* E. Krinsky, An Analysis of Factfinding as a Procedure for the Settlement of Labor Disputes Involving Public Employees 127 (1969) (unpublished thesis, Dept. of Economics, Univ. of Wisconsin).

67 Exec. Order No. 11491 § 17, 3 C.F.R. 460 (1971).

68 Federal Service Impasses Panel Regulations, 5 C.F.R. § 2471 (1971).

69 *Id.* § 2471.14.

70 Wurtsmith Air Force Base, Oscoda, Mich., and Local 2736, American Federation of Government Employees, Federal Service Impasses Panel Release No. 13 (June 18, 1971) (Case No. 71 FSIP 9). The parties were directed to refer the dispute to higher authorities in accordance with their pre-negotiation agreements.

media comment.[71] Because of the limited scope of bargaining in the federal structure, however, public interest is limited.[72]

1. The Factfinding Hearing

The Panel assigns either a staff member or a Panel member as the factfinder in a case. It has been suggested[73] that the parties should participate in the selection of the factfinder so as to increase their confidence in him. This may not be vital since the Panel's regulations allow the parties to invoke private factfinding or arbitration under prescribed conditions.[74] In this regard, the Panel should compare its own experience with that of several states now using tripartite boards.[75] The Panel should not consider delegating to the parties any control over assignment of Panel personnel, although it should consider an individual's acceptability to the parties, especially where he has dealt with the parties before.[76]

Following selection of the factfinder, a pre-hearing conference is held in which the factfinder informs the parties of Panel procedures, attempts to obtain stipulations of fact, and tries to encourage a final effort at private settlement.[77]

The factfinding hearing itself is an adversary proceeding. The factfinder regulates all procedural matters under rather flexible Panel guidelines. Rules of evidence are not strictly adhered to, and factfinders are instructed to lean toward admissibility of questionable evidence. The factfinder, responsible for developing a full record for the panel, is empowered to call his own witnesses, although he has no subpoena power. Hearings are closed so as to

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71 Report, Governor's Committee on Public Employee Relations 53 (N.Y. March 31, 1966) cited in Gould, *supra* note 56, at 837.

72 See text at note 12 *supra*.

73 Wellington and Winter, *supra* note 5, at 830.

74 See text at note 67 *supra*.

75 *See, e.g.*, ME. REV. STAT. ANN. tit. 26 § 965(3) (Supp. 1971); MINN. STAT. ANN. § 179.57(2) (Supp. 1971); N.D. CENT. CODE § 34-11-02 (1960).

76 *See* p. 703 *supra*.

77 *See, e.g.*, Selfridge Air Force Base and Local No. 2077, American Federation of Government Employees, Federal Service Impasses Panel Release No. 14 (Aug. 19, 1971) (Case No. 71 FSIP 4). The parties settled shortly after the pre-hearing conference.

minimize the extent to which the proceedings are used for publicity.[78]

The scope of inquiry is not fixed but depends on the given case. The Panel regulations require the factfinder's report to include the history and description of the current negotiations and the context within which they have taken place as well as any other matters relevant to the impasse.[79] Some more definite standards are emerging. For example, the Panel wants a party to show a "demonstrated need" for a proposal or position supported by evidence and wants to know the prevailing practice with respect to the impassed issue or comparable issues in other parts of the installation, agency, federal government, public sector, and even the private sector.[80] The Panel also wants the factfinder to develop objective data to determine what is a fair and reasonable settlement acceptable to the parties.[81]

The Panel intends that its factfinders not engage in mediation since E.O. 11491 gives the mediation authority to the FMCS and the effectiveness of the mediator could be undercut if the Panel's factfinder attempts to do so. The Panel also wants to maintain good relations with the FMCS.[82] It is not clear that the two processes can be as cleanly separated as this policy implies. The mediator's purpose is to find a solution acceptable to both parties to a dispute. To the extent the factfinder is looking for what will be acceptable, he may use techniques similar to those of the mediator. In addition, the factfinder may occasionally observe that the parties are not very far apart and may attempt an "in chambers" settlement.[83]

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78 Interview with Howard Solomon, *supra* note 36.

79 Federal Service Impasses Panel Regulations, 5 C.F.R. § 2471.11 (1971).

80 Dept. of the Navy, Philadelphia Naval Shipyard, and Local 3, American Federation of Technical Engineers, Case No. 70 FSIP 9, Panel Report and Recommendations No. 3; Dept. of the Navy, U.S. Naval Station, Key West, Fla., and Local 1566, American Federation of Government Employees, Case No. 71 FSIP 10, Panel Report and Recommendations No. 4.

81 Interview with Howard Solomon, *supra* note 31.

82 *Id.*

83 Gould, *supra* note 56, at 838. This practice has been favorably evaluated in B. YAFFE & H. GOLDBLATT, FACTFINDING IN PUBLIC EMPLOYMENT IN NEW YORK STATE: MORE PROMISE THAN ILLUSION 41 (1971). This study shows that the parties accepted the recommendations in 74 percent of cases where the factfinder mediated versus 58 percent where he did not.

The factfinder should, however, actively mediate only where he is confident of his ability and the parties' receptiveness to his mediation efforts; even in these circumstances, he should mediate only with caution. He should never attempt mediation until he fully understands the issues. He should not hold himself out as a confidential mediator and then use confidential information in his report. If he tries to mediate, he must convince the parties that he keeps mediation and factfinding separate in his mind.[84]

The parties are not precluded from presenting findings of fact from private factfinding proceedings. While the Panel and factfinder should not be bound by these private factfinding proceedings, some weight should be given to them, particularly if the proceeding was approved by the Panel. This will encourage private impasse procedures and voluntary acceptance of the private factfinder's report. However, the Panel should conduct its own investigation before giving weight to private findings.

The practice of not releasing the factfinder's report to the parties raises some difficult problems. Transcripts are often prohibitively expensive for the unions; without the factfinder's report, the union is unable to present effective briefs to the Panel challenging the bases of any of the findings. Even though the findings lead only to recommendations, and not to binding decisions, the recommendations might be the basis for a Panel-imposed settlement later if that becomes necessary. Although the parties could challenge the findings at that time, the recommendations would be more difficult to modify after the Panel had committed itself to them. On the other hand, the strongest reason for not releasing the report is the desire to present a united front to the parties. There is always a danger that a party will seize on discrepancies to support a refusal to accept the recommendations. If the factfinder also made the recommendations issued to the parties, the problem of releasing his findings of fact would be solved since they would accompany the recommendations.[85] However, if the Panel continues to make its own recommendations, it is justified in not releasing the factfinder's report as long as it presents sufficient facts to support its

84 Gould, *supra* note 56, at 838.

85 See text at note 97, *infra*.

recommendations. This conclusion reflects the overriding policy of encouraging the parties to accept the recommendations for settlement.

2. Panel Determination of Recommendations

The factfinder's report is then submitted to the Panel for consideration as its next regular meeting. The Panel studies the report, questions the factfinder, and formulates its recommendations for settling the impasse.

To date only four Panel cases have gone to the recommendation stage,[86] but these few cases give indications as to what the Panel considers significant in formulating its recommendations. The Panel will use private sector labor precedent for guidance, but will not be bound by it.[87] Even though the public sector presents a different context for labor disputes, private sector law embodies considerable experience, and its use for guidance is sound.

The Panel will give weight to prior concessions made by a party on both the issues at impasse and issues resolved. In the *Rock Island Arsenal* case[88] the issue at impasse was the structure of the grievance procedure. The union had asked to speed-up the process by reducing the procedure from four steps to three. The Panel noted, "We are also impressed by the fact that the Employer agreed to a significant reduction in the time limits for processing grievances at each step," and recommended that the four steps be retained, as they were consistent with the size and functioning of the installation.[89] In determining how to resolve the impasse in another case, the Panel considered concessions made by the employer on issues no longer at impasse.[90] If the Panel continues to

86 Rock Island Arsenal, *supra* note 59; Philadelphia Naval Shipyard, *supra* note 80; Federal Aviation Administration, Dulles Airport, Washington, D.C., and Local 2303, American Federation of Government Employees, Case No. 70 FSIP 12, Panel Report & Recommendations No. 2; Dept. of Navy, U.S. Naval Station, Key West, Fla., *supra* note 80.

87 See Rock Island Arsenal, *supra* note 59, at 18. "The Taft-Hartley Act offers some guidance in this area, providing that if grievances are settled by the Employer directly with an employee, the Union should have an opportunity to be present."

88 *Id.*

89 *Id.* at 15-16.

90 Dulles Airport, *supra* note 86.

give weight to prior concessions, parties will have an incentive to negotiate in good faith and not to hold back offers or concessions.

The Panel will attempt to duplicate a successful collective bargaining result. In the *Philadelphia Naval Shipyard* case[91] the Panel made the following observations:

> Moreover, we are aware of no principle which commands that an employer must grant all of a union's demands, even though each one may be meritorious. The bargaining relationship is a continuing one which, normally, will provide the parties with periodic and recurring opportunities to improve, change and modify their contracts. Sometimes, of course, it is difficult to discern where a particular issue falls on the parties' priority scales.[92]

The union had earlier proposed a final contract with a current provision for advisory arbitration providing that it could reopen the agreement if the employer granted binding arbitration to any other union at the shipyard. In recommending the advisory arbitration clause the Panel concluded that:

> The reality of the situation, then was that the union could could afford to continue with the advisory clause, since there was no urgent or pressing need to immediately change it, as long as it did not voluntarily place itself in a bargaining position inferior to that of other labor organizations at the shipyard.[93]

Finally, the Panel appears willing to avoid binding precedents as to recommendations on a given subject. Notwithstanding the *Philadelphia Naval Shipyard* case, the Panel recommended binding arbitration in the *U.S. Naval Station, Key West, Florida* case[94] based on its evaluation of "the nature and content of negotiations, demonstrated need, comparability, and other relevant criteria."[95] It then stated that Panel recommendations would not necessarily be identical on a given subject.[96] This will permit experimentation and innovation in federal labor-management relations.

91 Philadelphia Naval Shipyard, *supra* note 80.
92 *Id.* at 10.
93 *Id.*
94 U.S. Naval Station, Key West, Fla., *supra* note 80.
95 *Id.*
96 *Id.*

Serious consideration should be given to allowing the factfinder to make recommendations in some cases, a procedure favored by the unions in all cases.[97] The factfinder is generally in a better position to make recommendations since he has been closer to the case and knows what will be acceptable to the parties. Since the Panel would then be a reviewing board, its flexibility would be increased and an additional uncertainty would be provided. Of course, it would also give the parties one more person to turn to for another chance, but if, as it should, the Panel gives considerable presumptive weight to the factfinder's recommendations, this process should not be abused. Although the *Shultz Committee Report* gave the authority for making recommendations to the Panel, not to the factfinder,[98] the Panel should experiment with letting the factfinder make recommendations to the parties on some selected cases. The policy favoring prompt settlement of disputes warrants this kind of experimentation.

Upon receipt of the Panel's report and recommendations, the parties have 30 days to accept them, settle on their own terms, or report to the Panel the reasons that the impasse has not been resolved.[99] The FMCS is asked to supervise any negotiations during this period. The FMCS might assign the original mediator or a new one as appropriate. The mediator should be careful not to give the impression that factfinding is just another step in bargaining, otherwise the effectiveness and finality of the recommendations would be weakened.[100]

Panel recommendations are not made public prior to settlement. At present, no useful purpose would be served to publicize them; since the types of issues involved are of minimal interest to the public the pressure of public opinion, useful in other contexts, would be absent. Disclosure does create a danger of causing the parties to harden their positions, however, making settlement more difficult. The Panel might consider public disclosure in unusual cases after the 30-day waiting period to test the effect of public pressure.

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97 Interview with Edward Passman, American Federation of Government Employees, in Washington, D.C., Apr. 8, 1971.

98 SHULTZ COMMITTEE REPORT, *supra* note 8, at 41. In addition, Freilicher, *supra* note 28, at 24-25, argues for this arrangement on due process grounds.

99 Federal Services Impasses Panel Regulations, 5 C.F.R. § 2471.13 (1971).

100 Krinsky, *supra* note 66, at 241.

III. The Merits and Limitations of Factfinding

All four Panel cases that have gone to the recommendation stage have been settled. Thus, the history of factfinding by the Panel has been brief but successful. Additional indications of factfinding's usefulness may be gleaned from other studies of factfinding for public employee disputes.

A comprehensive study of factfinding in Wisconsin summarizes the major criticisms of factfinding as follows:

> [T]he parties know the facts, the public does not generate enough focused pressure to persuade the parties to accept the recommendations, the recommendations represent compromise and not what *ought* to be the terms of settlement based on the facts, the opportunity to use factfinding delays real bargaining which does not proceed until after recommendations have been made and once having used factfinding, the parties resort to it as a matter of course in subsequent negotiations.[101]

The head of New York City's Office of Collective Bargaining noted some additional criticisms of factfinding, including the lack of finality and the built-in employer advantage in the factfinding procedure.[102] Some employees argue that they run a greater risk in factfinding than their employers since the latter may reject recommendations with no adverse consequences. In contrast, if unions reject recommendations they have no agreement protecting their members and they cannot strike. Critics also point out that factfinding does not always prevent strikes.[103]

The criticism that the parties already know the facts may not always be correct. Several union representatives interviewed in one study said they had learned a great deal about the facts in preparation for the factfinding meeting.[104] Wisconsin Employment Relations Commission personnel engaged in mediation or informal investigation have observed that the parties are relatively ignorant of the facts before factfinding.[105] Until the parties are forced to justify their positions with facts, each relies on its bargaining power

101 *Id.* at 57-58.
102 Address by Arvid Anderson, National Academy of Arbitrators, Jan. 31, 1969.
103 *Id.*
104 Krinsky, *supra* note 66, at 59-60.
105 *Id.* at 60.

to achieve a settlement.[106] Wisconsin factfinders agree, however, that their primary role is interpreting, not finding, facts.[107] As one observer noted: "The name [factfinding] is perhaps unfortunate, since it is seldom facts that are in dispute, but rather the standards by which the relevance of various facts are to be judged."[108] Subjectivity and compromise are inevitable in the factfinding process. A factfinder's recommendations will depend on the facts he deems relevant and the relative importance he ascribes to these facts. Wisconsin factfinders have said that their overriding goal was to aid the resolution of disputes.[109] Compromise and subjectivity are necessary to find a solution acceptable to both parties who are not bound by the recommendations. However, the merits and equities of the case cannot be ignored. In impasses, the role of interpretation and recommendation is therefore far more useful than merely finding facts. Furthermore, if the factfinding procedure forces the parties themselves to find the facts it serves an important function.

The experience in Wisconsin tends to confirm the criticism that there is not enough general public pressure to persuade the parties to accept recommendations, although the fear of general public reaction may effect the parties. Organized interest groups and influential individuals may exert greater private pressure on the parties. However, the effect of this pressure is difficult to measure.[110]

There has not been enough long-term experience with factfinding to determine its possible inhibitive effects on bargaining. Initial experience indicates however, that it will not have a disastrous effect. One measure of the effect is the percentage of disputes that generate petitions for factfinding but are resolved before the completion of the factfinding procedure. In Wisconsin, 50 percent of the disputes generating petitions have been resolved even before the appointment of a factfinder.[111] During the first three years of factfinding in Connecticut, almost 45 percent of the disputes generating petitions were settled through mediation prior to the

106 *Id.*
107 *Id.* at 68.
108 A. Rees, The Economics of Trade Unions 39 (1962).
109 Krinsky, *supra* note 66, at 75.
110 *Id.* at 212-14.
111 *Id.* at 95.

appointment of a factfinder, and over one third of the remaining cases were settled by factfinder mediation without a report.[112] In New York State's first year of factfinding, over half of the disputes generating petitions were resolved by mediation without appointment of a factfinder, and 22 percent of the remaining cases were settled by factfinder mediation.[113] In New York City, during the Office of Collective Bargaining's first year, nine of 22 cases were settled before a factfinding hearing.[114] In Michigan, 56 percent of the factfinding cases in 1967 were resolved before recommendations were issued.[115] Finally, in Massachusetts over a two-year period 70 percent of some 200 cases were resolved before recommendations were issued.[116] This evidence indicates that bargaining still works when factfinding is used because parties prefer their own settlements.

A second measure of the effect of factfinding on bargaining is the degree of utilization of the factfinding procedure. During the first three years of factfinding in Wisconsin, requests for factfinding were made in only an estimated 10 percent of potential cases.[117] Furthermore, in only four of the first 50 of these cases did the same employers and employees together re-use factfinding, and these cases involved special circumstances.[118] In New York State 70 percent of the agreements were reached without utilizing the impasse machinery.[119] Comparable data from other states are not available. Yet the material that is available indicates that the institution of factfinding has not eliminated bargaining.

If factfinding has not replaced bargaining it has in some cases become a substitute for strikes. The experience of some states indicates that factfinding reduces the likelihood of strikes even if it does not eliminate them. Only three of the 50 factfinding cases

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112 McKelvey, *Factfinding in Public Employment Disputes: Promise or Illusion?*, 22 IND. & LAB. REL. REV. 535 (1969).

113 *Id.* at 536.

114 Address by Arvid Anderson, *supra* note 102.

115 *Id.*

116 *Id.*

117 Stern, *The Wisconsin Public Employee Fact Finding Procedure*, 20 IND. & LAB. REL. REV. 1, 13-14 (1966).

118 *Id.* at 123.

119 YAFFE, *supra* note 83, at 17-18.

in Wisconsin resulted in strikes.[120] None of 57 cases submitted to factfinding in Connecticut from 1965 to 1968 resulted in strikes.[121] During the first year of factfinding in New York State only three of the 150 cases filed for factfinding resulted in strikes.[122] In Massachusetts, only four of 200 disputes over a two-year period resulted in strikes.[123]

From the state experience analyzed one can tentatively conclude that factfinding does have something to offer to federal government employee relations. Factfinding should be relied upon as long as it works because it, to a greater extent than other more final procedures, encourages collective bargaining and voluntary settlements.[124]

Factfinding is working now, in part, because the scope of bargaining does not cover the matters most crucial to the parties. Panel recommendations have dealt with grievance procedures, safety, and reserve parking privileges, and not with wages, significant fringe benefits, and most management rights. If the scope of bargaining widens, the parties are less likely to accept recommendations. The factfinder now may be able to do what the inexperienced parties cannot do. Through effective presentation and marshalling of the facts, he may help to deflate extreme positions.[125] As factfinding educates the parties about the bargaining process, the factfinder's effectiveness may be reduced. Federal employees have been relatively satisfied with factfinding because it provides them with some collective bargaining protection where they had none before. As the gap between the public and private sector closes, recommendations are less likely to be favorable to employees, and they will be less willing to accept them.

IV. Other Impasse Procedures

Since the parties will not always accept Panel recommendations, the Panel must also develop procedures more final than factfinding.

120 Krinsky, *supra* note 66, at 224.
121 Address by Arvid Anderson, *supra* note 102.
122 *Id.*
123 *Id.*
124 Krinsky, *supra* note 66, at 232.
125 Simkin, *supra* note 46, at 348.

A. *Arbitration*

Arbitration is the most obvious alternative to factfinding. When the parties agree to go to arbitration, they should be permitted to do so as long as they comply with Panel regulations.[126] Indeed, the Panel might even suggest voluntary arbitration in certain situations. For example, if both parties have firm positions on the one unsettled issue in a dispute, arbitration might be more effective than factfinding. Nevertheless, the parties' use of factfinding in early cases should establish a habit of good faith bargaining before arbitration is used. If the parties will not rely on factfinding or follow the path toward voluntary arbitration suggested by the Panel, compulsory arbitration must be considered.

Compulsory arbitration has three basic features: the ability of one party or an outside agency to initiate proceedings compelling the parties to appear before an arbitration tribunal; a decision by the tribunal on all outstanding issues; and the final, binding nature of the award.[127] Compulsory arbitration is not without its critics. The traditional argument against compulsory arbitration is that it undermines direct negotiations between the parties. Fearing the results of bargaining, the weaker party may hold out for arbitration. Both parties may take extreme positions in bargaining and hold their best offers for arbitration. Compulsory arbitration also departs from the concept of voluntarism on which labor-management relations in the United States has been based. Nor can compulsory arbitration guarantee compliance with the award and the prevention of strikes.[128]

To determine the validity of these criticisms, the limited state experience with compulsory arbitrations should be considered. One study of Pennsylvania's experience with compulsory arbitration for police and firefighters reveals that 35 percent of police negotiations and 37.5 percent of firefighters negotiations with major municipalities ended in arbitration awards in 1968. In 1969 the percentages increased to 43.6 percent and 50 percent respec-

126 Federal Service Impasses Panel Regulations, § 5 C.F.R. § 2471.7 (1971).

127 J. Loewenberg, Compulsory Binding Arbitration in the Public Sector 1 (May 4, 1971) (unpublished paper prepared for the International Symposium on Public Employment Labor Relations, New York City).

128 Zack, *Dispute Settlement in the Public Sector*, 14 N.Y. LAW FORUM 254, 258-59 (1968).

tively. Of the 41 negotiations in major municipalities terminating in arbitration awards in 1969, 11 negotiations in 1968 between the same parties had also ended in arbitration awards; at the same time, at least 10 sets of parties with arbitration awards in 1968 negotiated a settlement in 1969.[129]

It is estimated that almost half of the firefighters negotiations in Michigan ended in arbitration awards.[130] In Rhode Island, approximately 20 percent of negotiations with public safety employees ended in arbitration.[131] Since 1965, half of the firefighters agreements in the two Wyoming cities that act as pattern-leaders for the state were reached in arbitration, although the use of arbitration is declining.[132]

This evidence substantiates the suspicion that arbitration may affect bargaining. Some parties are proceeding to arbitration before exhausting the possibilities of negotiations.[133] This may stem from several factors. Some parties may be unfamiliar with collective bargaining; arbitrators should help educate parties about collective bargaining and send them back to the bargaining table if possible. Some parties, however, will use arbitration to escape responsibility for a decision.[134] Public officials, as well as employees, may turn to arbitration more frequently than their counterparts in the private sector, in order to escape responsibility for decisions with political implication.[135] The parties' desire to try out a new device may be a third factor explaining the high percentage of negotiations ending in arbitration awards.

Employees may be able to use arbitration as a substitute for the strike to convince employers to bargain. Authorities in Pennsylvania and Wyoming believe that municipalities may be more willing to bargain when compulsory arbitration is available.[136] Thus far, compulsory arbitration has served its purpose as a substitute for the strike. As of May 1971, wherever compulsory arbi-

129 Loewenberg, *supra* note 127, at 12.
130 *Id.* at 11.
131 *Id.*
132 *Id.* at 10-11.
133 *Id.* at 12-13.
134 *Id.* at 14.
135 Loewenberg, *supra* note 127, at 39.
136 *Id.* at 38-39.

tration had been introduced, strikes have been almost unknown. The one case in Michigan where arbitration failed to prevent a strike was explained by the employer's refusal to accept the award.[137] However, the absence of strikes may be a temporary phenomenon while the parties experiment with the new procedure.

Experience in Canada indicates that compulsory arbitration need not undermine bargaining and may willingly be substituted for strikes. The Canadians have taken a new approach to collective bargaining for public employees. Canadian public employee unions choose in advance between two procedures for resolving contract disputes for a three-year period: arbitration and the right to strike unless a special panel finds a strike would imperil absolutely vital public interests.[138] Of 114 bargaining units involved, 100 selected the arbitration option. Seventy-five percent of the units that selected arbitration, however, reached agreements without any recourse to third party assistance and 17 percent needed only the assistance of conciliation. Of the eight units that applied for arbitration over a three-year period, four were settled before the arbitration tribunal was established and two were settled after the hearing but before the award. Formal awards were made in only two cases.[139]

Two caveats are in order. The Canadian unions that chose the arbitration options and voluntarily gave up their right to strike may have been those unions with the most responsible attitudes to collective bargaining. Furthermore, the government, fearing that disillusionment with arbitration would turn more unions to the strike option, has taken flexible bargaining positions.[140]

The criticisms of arbitration, that it may discourage some bargaining and may not settle all strikes, do not imply that arbitration

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137 *Id.* at 40.

138 Arthurs, *supra* note 26, at 987-88.

139 Address by Arvid Anderson, Compulsory Arbitration in Public Sector Dispute Settlement — An Affirmative View, Industrial Relations Research Association, New York Chapter, April 22, 1971.

140 Arthurs, *supra* note 26, at 990-92. The Panel should watch the experience of the new U.S. Postal Corporation with arbitration. The first round of negotiations was settled without arbitration. This may have been due to the parties' desire to avoid prolonged arbitration and to demonstrate their ability to settle their own contracts, but it is questionable whether this desire will continue.

should be rejected; rather that it should be introduced gradually and not relied upon exclusively. The Panel might start with a "show cause" hearing when the parties reject recommendations. The proceeding would review the recommendations, with each party having the burden to explain why the recommendations should be modified. Eventually, either party might be allowed to invoke the "show cause" proceeding. The party rejecting the recommendation would be forced to pay for further proceedings and possibly for the factfinding procedure itself. If both parties reject the factfinding recommendation, they would share the expenses. The show-cause hearing might provide an effective transition to a system in which the Panel could go straight to arbitration if it felt factfinding would be ineffective. The show-cause hearing also might help create a consensus behind the occasional use of arbitration.

Although arbitration should not become a general substitute for factfinding, it should be available to the Panel as one alternative procedure for dispute resolution. Factfinding and arbitration raise many of the same questions and considerations regarding the selection of the neutral board, the allocation of costs, and the conduct of hearings. Some observers, however, would distinguish the basic approaches of the two proceedings. The goal of factfinding is a set of recommendations acceptable to the parties, while arbitrators purport to measure the "equities" of competing claims. Consistent with this distinction, the factfinders should consider previous negotiations by the parties which may indicate what recommendations will be acceptable. The arbitrators, however, should not know of previous negotiations and of last offers since they will not affect the merits of the issues.

The combination of these two approaches might be the best way to preserve the parties' incentives to negotiate their own settlement. The parties will not benefit from holding extreme positions because the factfinder will give favorable consideration to any concessions made by either party, and the arbitrator will have no knowledge of prior negotiations. However, the Panel should not normally use factfinding and arbitration in the same case because parties would not accept factfinding recommendations if they felt they had a second chance with arbitration.

B. *Final Offer Selection*

Arbitration is not the only alternative to factfinding. One idea recently suggested in the proposed Emergency Public Interest Protection Act of 1971 is called "final offer selection."[141] Under this procedure, each party submits its final offer to a three-member panel. After an informal hearing, the panel chooses the more reasonable offer without any alteration. Parties should be motivated to converge in their offers and, in a sense, settle their own dispute because a party making an extreme offer risks the panel's choice of his opponent's offer. In addition, parties will have to take more responsibility for the outcome in this proceeding and so may be motivated to settle the dispute on their own. The danger of final offer selection is that both parties may cling to extreme positions forcing the panel to choose an unreasonable offer. This objection could be met by giving the panel the power to reject both offers and require both parties to submit new offers. Considering the price of miscalculation, the parties would still have a great incentive to make reasonable offers.

Final offer selection should only be used in special cases. It might be most effective where the parties are already very close or where there are multiple issues for them to trade off. Because of the lack of experience with this method, one cannot clearly say how the parties would behave under final offer selection, but its use should be conceived of as an experiment subject to change as experience is gained in an area that needs new ideas.

C. *Non-stoppage Strikes*

Another idea meriting experimentation is the "non-stoppage strike."[142] Work continues but both employees and employers pay a certain percentage of wages earned to a special fund. The percentage might start at 10 percent of wages earned, with a union option to increase the percentage periodically. The idea is to bring pressure on both sides to settle their dispute. The union's option to raise the percentage would give it the leverage it sacrificed through the ban on strikes. Employees would also avoid the

141 S. 560 § 219, 92d Cong., 1st Sess. (1969).

142 Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 464, 470-72 (1971).

total loss of wages, fringe benefits, and jobs associated with a strike. The risk of inconvenience to the community and violence would be also diminished.

It would be necessary to assure that the employees would comply with the ground rules. For example, no slowdowns or sick calls could be permitted. Expedited unfair labor practice procedures might handle these problems. Sanctions could include retraction of the right to use the non-stoppage strikes. The special fund into which the money was deposited must be beyond the reach of the parties. It might go to some charitable or public purposes unrelated to that of the agency involved.[143] Another variant might be to allow the parties to reclaim their money if they settle by a specified date. This procedure would operate to create a deadline not unlike the normal pressure of contract expirations and strike threats.

D. *Potential Problems*

If the Panel does get involved in the imposition of settlements on the parties, certain problems will arise. How will the Panel secure enforcement? One obvious enforcement sanction would be to bar the recalcitrant party from the use of Panel proceedings. The Assistant Secretary and the Council could also bar the use of their procedures. These methods would be more effective against unions than agencies. The Panel must ultimately depend on the President's support to see that agencies comply with Panel actions.

The question of Council review of Panel decisions has not been adequately clarified. Executive Order 11491 and Panel and Council regulations do not answer this question. The Council presently sees its review of Panel decisions as a possibility only when the Panel decision conflicts with the Order or a statute.[144] When the conflict is with laws over which the Council has no authority, the courts might be a more appropriate forum for review. If Council review of Panel decisions is not severely limited, parties may disregard Panel decisions in the hope of reversal by the Council.

In the event that an illegal strike does occur, the Panel should

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143 *Id.* at 474.

144 Interview with Andrew Wolf, Deputy Director of the Federal Labor Relations Council, in Washington, D.C., April 6-8, 1971.

tread very carefully here. The Panel's deliberate and objective procedures may not be very effective in an emotion-charged situation. The Panel must consider its desire to settle the dispute and its disinclination to condone the illegal strike. Panel involvement should depend on many factors, particularly the attitude of the parties toward Panel participation. In the event of a strike of any significance the President is likely to determine what should be done. The first priority will be getting people back to work. The Panel might then be an appropriate forum to resolve the dispute.

V. Conclusion

The partial answer to impasses in the federal sector is to structure procedures with as much flexibility for the Panel and as much uncertainty for the parties as is workable. These procedures should include factfinding with recommendations, show-cause hearings, arbitration, and experiments with final offer selection and the nonstoppage strike. This approach will allow the Panel to use the particular procedures appropriate for each dispute and will maximize the incentives for the wary parties to negotiate a settlement themselves. The parties' own settlement should be the goal of the federal labor-management relations program. Despite the fact that the Panel may have to settle some disputes itself, this goal of voluntary settlement should be paramount in the Panel's operations.

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