CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.R. 3658, H.R. 8231, and Related Bills

CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

OCTOBER 21, 22, 23, 29, 30, 31; and NOVEMBER 7, 1975

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CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

TUESDAY, OCTOBER 21, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to reces, at 10:15 a.m. in room 2141, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Danielson, Mazzoli, Pattison, Moorhead, and Kindness.

Also present: William P. Shattuck, counsel; Jay T. Turnipseed, assistant counsel; Alan F. Coffey, Jr., associate counsel; and David Minge, consultant to the subcommittee.

Mr. FLOWERS. We will call this meeting to order. The bills scheduled for hearing today would provide authority to the Congress to review rules and regulations promulgated by regulatory agencies. We express our appreciation to our distinguished colleague from Georgia, Mr. Levitas who was one of the primary sponsors of legislation in this field. The other principal sponsor is our colleague from California, Mr. Del Clawson, who will testify later. This legislation has some 150 of our colleagues as cosponsors of either the Levitas bill or the Clawson bill.

This indicates the concern that our constituents across this land have in this area. The pending bills represent efforts to improve the accountability of the administrative agencies to elected representatives and through them to the people of the United States.

It is one of the techniques that might be employed to extend congressional oversight of administrative agencies and regulatory agencies. Presently Congress has no direct review of the multitude of executive branch regulations other than our general power to enact legislation.

This power, as used during the last session of Congress, is exemplified by the instance when the Congress overrode the interlock requirement that had been promulgated by the National Highway Traffic Safety Administration.

Some have objected that this is a cumbersome method. I am advised that there are currently some 125 areas in which the law stipulates some form of special congressional review for a particular program. I intend to raise the question with the sponsors at some point here this morning about whether or not their proposals would be in addition to

or would override the other provisions for congressional oversight that are written into the basic law of some of the agencies.

This hearing represents one of the first hearings in the Congress on the proposal that executive branch rules ought to be subject to legislative reviews as a general mattter.

I am sure the views expressed today and later this week and next week in the hearings that we have scheduled will be very helpful in enabling the subcommittee to act on this very, very important subject.

I know that my colleagues here, Mr. Moorhead and Mr. Danielson, may have comments they would like to make. I will yield to Mr. Moorhead.

Mr. MOORHEAD. Thank you, Mr. Chairman. I am pleased that our subcommittee is holding this series of hearings. As a Member of Congress, we have a responsibility to oversee the bureaucracy and how they administer the laws and programs we enact.

All too often Congress has failed to do a detailed and effective job. Most of us know that administrative regulations published in the Federal Register are far reaching and have a tremendous effect on the American people. Oftentimes they go much further than the Congress has ever expected or wanted them to.

I know that there is hardly a week that goes by that I don't receive a large number of letters from people in my district complaining about overreaching bureaucracies and about the ways the Federal regulations are affecting their businesses and their lives.

The bills we are considering here this morning give us a format for discussing how we can deal with this problem. Some of the individual State legislatures have initiated procedures already for reviewing administrative rules.

Perhaps it is time the Congress did the same thing. As a cosponsor of the legislation offered by my good friend Del Clawson, I am sympathetic to the legislative veto concept. I hope that these hearings will answer that question.

Mr. FLOWERS. Thank you.

[Copies of the bills referred to follow:]

94TH CONGRESS
1ST SESSION

H. R. 3658

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 25, 1975

Mr. LEVITAS introduced the following bill; which was referred to the Committees on the Judiciary and Rules

A BILL

To permit either House of Congress to disapprove certain rules proposed by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Rulemaking Control Act".

SEC. 2. The Congress finds that—

(1) the executive agencies through rulemaking powers have promulgated many rules which contain criminal sanctions;

(2) the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and

(3) the executive agencies in the administration of any law should be more responsive to the intentions of Congress in enacting such law.

Therefore, it is the purpose of this Act to establish a procedure whereby Congress may review certain rulemaking activities of executive agencies, thereby exercising greater control and oversight over the operations of such agencies.

SEC. 3. Section 553 of title 5, United States Code (relating to rulemaking), is amended to read as follows:

"§ 553. Rulemaking and congressional disapproval of proposed rules

"(a) This section applies, according to the provisions thereof, except the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rulemaking shall be published in the Federal Register. The notice shall include—

"(1) a statement of the time, place, and nature of public rulemaking proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) Except where subsections (f) and (g) apply, the required publication or service of a substantive rule shall

be made not less than thirty days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

"(1) with respect to which general notice of a proposed rulemaking is required to be published by this section; and

"(2) the violation of which subjects the person in violation to a criminal penalty.

"(g) (1) (A) Except as provided in subparagraphs (B) and (D), a rule described in subsection (f) may take effect (i) only if published (with an identification number) in the Federal Register, (ii) only after the expiration of the first period of thirty calendar days of continuous session of Congress after the date on which the rule was published, and (iii) only if, between the date of publication and the

end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

"(2) Paragraphs (3) through (8) of this subsection are enacted by Congress—

"(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (3) of this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(3) For the purpose of paragraphs (2) through (8) of this subsection, 'resolution' means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: 'That the does not favor the rule numbered published in the Federal Register on , 19 .', the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one rule.

"(4) Upon introduction of a resolution with respect to a rule, it shall be in order at any time thereafter to move the referral of such resolution to a committee pursuant to paragraph (5) or to move the adoption of such resolution. Each such motion is highly privileged and is not debatable. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. In the case of a motion to adopt a resolution, the procedures set forth in paragraphs (7) (B) and (8) (A) and (B) shall apply.

"(5) After passage by a majority vote of a motion to refer a resolution to a committee, such resolution shall be referred to such committee (and all resolutions with respect to the same rule shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(6) (A) If the committee to which a resolution with respect to a rule has been referred has not reported it at the end of ten calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the rule which has been referred to the committee.

"(B) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (ex-

cept that it may not be made after the committee has reported a resolution with respect to the same rule), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same rule.

"(7) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a rule, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(B) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order,

and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(8) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a rule, and motions to proceed to the consideration of other business, shall be decided without debate.

"(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a rule shall be decided without debate.

"(h) Congressional inaction with respect to, or the rejection without referral to a committee of any resolution disapproving a rule described in subsection (f) of this section shall not be deemed to be an expression of approval of such rule.".

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94TH CONGRESS
1ST SESSION

H. R. 4629

IN THE HOUSE OF REPRESENTATIVES

MARCH 11, 1975

Mr. LEVITAS (for himself, Mr. BAUCUS, Mr. BURGENER, Mr. MILLER of California, Mr. ROE, Mr. HIGHTOWER, Mr. SOLARZ, Mr. CHARLES WILSON of Texas, Mr. DERWINSKI, Mr. DAN DANIEL, Mr. MATHIS, Mr. GUYER, Mrs. HOLT, Mr. COUGHLIN, Mr. RICHMOND, Mr. HOWE, and Mr. GINN) introduced the following bill; which was referred to the Committees on the Judiciary and Rules

A BILL

To permit either House of Congress to disapprove certain rules proposed by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Rulemaking Control Act".

SEC. 2. The Congress finds that—

(1) the executive agencies through rulemaking powers have promulgated many rules which contain criminal sanctions;

(2) the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and

(3) the executive agencies in the administration of any law should be more responsive to the intentions of Congress in enacting such law.

Therefore, it is the purpose of this Act to establish a procedure whereby Congress may review certain rulemaking activities of executive agencies, thereby exercising greater control and oversight over the operations of such agencies.

SEC. 3. Section 553 of title 5, United States Code (relating to rulemaking), is amended to read as follows:

"§ 553. Rulemaking and congressional disapproval of proposed rules

"(a) This section applies, according to the provisions thereof, except the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rulemaking shall be published in the Federal Register. The notice shall include—

"(1) a statement of the time, place, and nature of public rulemaking proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) Except where subsections (f) and (g) apply, the required publication or service of a substantive rule shall

be made not less than thirty days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

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"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

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"(2) the violation of which subjects the person in violation to a criminal penalty.

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end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

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94TH CONGRESS
1ST SESSION

H. R. 4630

IN THE HOUSE OF REPRESENTATIVES

MARCH 11, 1975

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"(2) reference to the legal authority under which the rule is proposed; and

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"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

"(1) with respect to which general notice of a proposed rulemaking is required to be published by this section; and

"(2) the violation of which subjects the person in violation to a criminal penalty.

"(g) (1) (A) Except as provided in subparagraphs (B) and (D), a rule described in subsection (f) may take effect (i) only if published (with an identification number) in the Federal Register, (ii) only after the expiration of the first period of thirty calendar days of continuous session of Congress after the date on which the rule was published, and (iii) only if, between the date of publication and the

end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

"(2) Paragraphs (3) through (8) of this subsection are enacted by Congress—

"(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (3) of this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(3) For the purpose of paragraphs (2) through (8) of this subsection, 'resolution' means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: 'That the does not favor the rule numbered published in the Federal Register on , 19 .', the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one rule.

"(4) Upon introduction of a resolution with respect to a rule, it shall be in order at any time thereafter to move the referral of such resolution to a committee pursuant to paragraph (5) or to move the adoption of such resolution. Each such motion is highly privileged and is not debatable. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. In the case of a motion to adopt a resolution, the procedures set forth in paragraphs (7) (B) and (8) (A) and (B) shall apply.

"(5) After passage by a majority vote of a motion to refer a resolution to a committee, such resolution shall be referred to such committee (and all resolutions with respect to the same rule shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(6) (A) If the committee to which a resolution with respect to a rule has been referred has not reported it at the end of ten calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the rule which has been referred to the committee.

"(B) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (ex-

cept that it may not be made after the committee has reported a resolution with respect to the same rule), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same rule.

"(7) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a rule, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(B) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order,

and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(8) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a rule, and motions to proceed to the consideration of other business, shall be decided without debate.

"(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a rule shall be decided without debate.

"(h) Congressional inaction with respect to, or the rejection without referral to a committee of any resolution disapproving a rule described in subsection (f) of this section shall not be deemed to be an expression of approval of such rule.".

94TH CONGRESS
1ST SESSION

H. R. 6110

IN THE HOUSE OF REPRESENTATIVES

APRIL 17, 1975

Mr. LEVITAS (for himself, Mr. MITCHELL of Maryland, Mr. MANN, Mr. HANNAFORD, Mr. MOORE, Mr. BLANCHARD, Mr. MINETA, Mr. JACOBS, Mr. DON H. CLAUSEN, Mr. GILMAN, Mr. BAUMAN, and Mr. CHAPPELL) introduced the following bill; which was referred to the Committees on the Judiciary and Rules

A BILL

To permit either House of Congress to disapprove certain rules proposed by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Rulemaking Control Act".

SEC. 2. The Congress finds that—

(1) the executive agencies through rulemaking powers have promulgated many rules which contain criminal sanctions;

(2) the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and

(3) the executive agencies in the administration of any law should be more responsive to the intentions of Congress in enacting such law.

Therefore, it is the purpose of this Act to establish a procedure whereby Congress may review certain rulemaking activities of executive agencies, thereby exercising greater control and oversight over the operations of such agencies.

SEC. 3. Section 553 of title 5, United States Code (relating to rulemaking), is amended to read as follows:

"§ 553. Rulemaking and congressional disapproval of proposed rules

"(a) This section applies, according to the provisions thereof, except the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rulemaking shall be published in the Federal Register. The notice shall include—

"(1) a statement of the time, place, and nature of public rulemaking proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) Except where subsections (f) and (g) apply, the required publication or service of a substantive rule shall

be made not less than thirty days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

"(1) with respect to which general notice of a proposed rulemaking is required to be published by this section; and

"(2) the violation of which subjects the person in violation to a criminal penalty.

"(g) (1) (A) Except as provided in subparagraphs (B) and (D), a rule described in subsection (f) may take effect (i) only if published (with an identification number) in the Federal Register, (ii) only after the expiration of the first period of thirty calendar days of continuous session of Congress after the date on which the rule was published, and (iii) only if, between the date of publication and the

end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

"(2) Paragraphs (3) through (8) of this subsection are enacted by Congress—

"(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (3) of this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(3) For the purpose of paragraphs (2) through (8) of this subsection, 'resolution' means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: 'That the does not favor the rule numbered published in the Federal Register on , 19 .', the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one rule.

"(4) Upon introduction of a resolution with respect to a rule, it shall be in order at any time thereafter to move the referral of such resolution to a committee pursuant to paragraph (5) or to move the adoption of such resolution. Each such motion is highly privileged and is not debatable. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. In the case of a motion to adopt a resolution, the procedures set forth in paragraphs (7) (B) and (8) (A) and (B) shall apply.

"(5) After passage by a majority vote of a motion to refer a resolution to a committee, such resolution shall be referred to such committee (and all resolutions with respect to the same rule shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(6) (A) If the committee to which a resolution with respect to a rule has been referred has not reported it at the end of ten calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the rule which has been referred to the committee.

"(B) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (ex-

cept that it may not be made after the committee has reported a resolution with respect to the same rule), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same rule.

"(7) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a rule, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(B) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order,

and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(8) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a rule, and motions to proceed to the consideration of other business, shall be decided without debate.

"(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a rule shall be decided without debate.

"(h) Congressional inaction with respect to, or the rejection without referral to a committee of any resolution disapproving a rule described in subsection (f) of this section shall not be deemed to be an expression of approval of such rule.".

94TH CONGRESS
1ST SESSION

H. R. 7219

IN THE HOUSE OF REPRESENTATIVES

MAY 21, 1975

Mr. DEL CLAWSON introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish a method whereby the Congress may prevent the adoption by the executive branch of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) whenever any officer or agency in the executive branch of the Federal Government (including any independent establishment of the United States) proposes to prescribe or place in effect any rule or regulation to be used in the administration or implementation of any law of the United States or any program established by or under such a law,

or proposes to make or place in effect any change in such a rule or regulation, such officer or agency shall submit the proposed rule, regulation, or change to each House of Congress together with a report containing a full explanation thereof.

(b) Except as provided in section 2, any proposed rule, regulation, or change described in subsection (a) shall become effective sixty legislative days after the date of its submission to the Congress as provided in such subsection, or at such later time as may be provided in the rule, regulation, or change itself or in the report submitted therewith.

SEC. 2. (a) No proposed rule, regulation, or change described in the first section of this Act shall be placed in effect if, within the sixty-day period described in subsection (b) of such section, either House of Congress adopts a resolution in substance disapproving such rule, regulation, or change because it contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

(b) Nothing in this Act shall prevent the Congress, at any time during the sixty-day period described in subsection (b) of the first section of this Act, from adopting a concurrent resolution specifically approving the rule, regulation, or

change involved; and upon the adoption of any such concurrent resolution the rule, regulation, or change may become immediately effective.

(c) The referral, reporting, and consideration under this section of any resolution with respect to a proposed rule, regulation, or change in either House of Congress shall be governed by the rules of that House which are applicable to other resolutions in similar circumstances.

(d) As used in this Act, the term "legislative days" does not include any calendar day on which both Houses of Congress are not in session.

SEC. 3. This Act shall apply with respect to all proposed rules, regulations, and changes therein which (but for the provisions of this Act) would take effect on or after the first day of the first month which begins after the date of the enactment of this Act.

94TH CONGRESS
1ST SESSION

H. R. 7689

IN THE HOUSE OF REPRESENTATIVES

JUNE 6, 1975

Mr. DEL CLAWSON introduced the following bill; which was referred to the Committees on the Judiciary and Rules

A BILL

To establish a method whereby the Congress (acting in accordance with specified procedures) may prevent the adoption by the executive branch of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) whenever any officer or agency in the executive branch of the Federal Government (including any independent establishment of the United States) proposes to prescribe or place in effect any rule or regulation to be used in the administration or implementation of any law of the United States or any program established by or under such a law,

or proposes to make or place in effect any change in such a rule or regulation, such officer or agency shall submit the proposed rule, regulation, or change to each House of Congress together with a report containing a full explanation thereof.

SEC. 2. (a) Except as provided in subsections (b) and (c), any proposed rule, regulation, or change described in the first section of this Act shall become effective sixty legislative days after the date of its submission to the Congress as provided in such section, or at such later time as may be provided in the rule, regulation, or change itself or in the report submitted therewith.

(b) No proposed rule, regulation, or change described in the first section of this Act shall be placed in effect if, within the sixty-day period described in subsection (a) of this section, either House of Congress (in accordance with section 3) adopts a resolution in substance disapproving such rule, regulation, or change because it contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

(c) Nothing in this Act shall prevent the Congress, at any time during the sixty-day period described in subsection (a) of this section, from adopting a concurrent resolution

specifically approving the rule, regulation, or change involved; and upon the adoption of any such concurrent resolution the rule, regulation, or change may become immediately effective.

(d) As used in this Act, the term "legislative days" does not include any calendar day on which both Houses of Congress are not in session.

SEC. 3. (a) This section is enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) (1) Any resolution introduced under section 2 (b) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(2) If and when the committee has reported the resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to)

to move to proceed to the consideration of the resolution. Such motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(4) (A) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

(c) Except to the extent specifically otherwise provided in the preceding provisions of this section, consideration of any resolution with respect to a proposed rule, regulation, or change in either House of Congress shall be governed by the rules of that House which are applicable to other resolutions in similar circumstances.

SEC. 4. This Act shall apply with respect to all proposed rules, regulations, and changes therein which (but

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for the provisions of this Act) would take effect on or after the first day of the first month which begins after the date of the enactment of this Act.

94TH CONGRESS
1ST SESSION

H. R. 7977

IN THE HOUSE OF REPRESENTATIVES

JUNE 17, 1975

Mr. LEVITAS (for himself, Ms. COLLINS of Illinois, Mr. COCHRAN, Mr. ROSE, Mr. STUCKEY, Mr. CARR, Mr. BRODHEAD, Mrs. MEYNER, Mr. HARRIS, Mr. HENDERSON, Mr. HARRINGTON, Mr. GRADISON, Mr. EMERY, Mr. CORNELL, Mr. WHITEHURST, Mr. SIKES, Mr. WEAVER, Mr. SPENCE, Mrs. LLOYD of Tennessee, Mr. HYDE, Mr. KREBS, Mr. HOLLAND, Mr. BEARD of Tennessee, Mr. BEDELL, and Mr. DEVINE) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To permit either House of Congress to disapprove certain rules proposed by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Rulemaking Control Act".

SEC. 2. The Congress finds that—

(1) the executive agencies through rulemaking powers have promulgated many rules which contain criminal sanctions;

(2) the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and

(3) the executive agencies in the administration of any law should be more responsive to the intentions of Congress in enacting such law.

Therefore, it is the purpose of this Act to establish a procedure whereby Congress may review certain rulemaking activities of executive agencies, thereby exercising greater control and oversight over the operations of such agencies.

SEC. 3. Section 553 of title 5, United States Code (relating to rulemaking), is amended to read as follows:

"§ 553. Rulemaking and congressional disapproval of proposed rules

"(a) This section applies, according to the provisions thereof, except the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rulemaking shall be published in the Federal Register. The notice shall include—

"(1) a statement of the time, place, and nature of public rulemaking proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) Except where subsections (f) and (g) apply, the required publication or service of a substantive rule shall

be made not less than thirty days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

"(1) with respect to which general notice of a proposed rulemaking is required to be published by this section; and

"(2) the violation of which subjects the person in violation to a criminal penalty.

"(g) (1) (A) Except as provided in subparagraphs (B) and (D), a rule described in subsection (f) may take effect (i) only if published (with an identification number) in the Federal Register, (ii) only after the expiration of the first period of thirty calendar days of continuous session of Congress after the date on which the rule was published, and (iii) only if, between the date of publication and the

end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

"(2) Paragraphs (3) through (8) of this subsection are enacted by Congress—

"(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (3) of this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(3) For the purpose of paragraphs (2) through (8) of this subsection, 'resolution' means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: 'That the does not favor the rule numbered published in the Federal Register on , 19 .', the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one rule.

"(4) Upon introduction of a resolution with respect to a rule, it shall be in order at any time thereafter to move the referral of such resolution to a committee pursuant to paragraph (5) or to move the adoption of such resolution. Each such motion is highly privileged and is not debatable. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. In the case of a motion to adopt a resolution, the procedures set forth in paragraphs (7) (B) and (8) (A) and (B) shall apply.

"(5) After passage by a majority vote of a motion to refer a resolution to a committee, such resolution shall be referred to such committee (and all resolutions with respect to the same rule shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(6) (A) If the committee to which a resolution with respect to a rule has been referred has not reported it at the end of ten calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the rule which has been referred to the committee.

"(B) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (ex-

cept that it may not be made after the committee has reported a resolution with respect to the same rule), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same rule.

"(7) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a rule, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(B) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order,

and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(8) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a rule, and motions to proceed to the consideration of other business, shall be decided without debate.

"(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a rule shall be decided without debate.

"(h) Congressional inaction with respect to, or the rejection without referral to a committee of any resolution disapproving a rule described in subsection (f) of this section shall not be deemed to be an expression of approval of such rule.".

94TH CONGRESS
1ST SESSION

H. R. 7978

IN THE HOUSE OF REPRESENTATIVES

JUNE 17, 1975

Mr. LEVITAS (for himself, Mr. LONG of Louisiana, Mr. LANDRUM, Mr. YOUNG of Georgia, Mr. WAGGONNER, Mr. HUBBARD, Mr. ALEXANDER, Mr. HAYES of Indiana, Mr. FOUNTAIN, Mr. SIMON, Mr. MONTGOMERY, Mr. PATTERSON of California, Mrs. PETTIS, Mr. WIRTH, Mr. PRESSLER, Mr. KEMP, Mr. D'AMOURS, and Mr. LEHMAN) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To permit either House of Congress to disapprove certain rules proposed by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Rulemaking Control Act".

SEC. 2. The Congress finds that—

(1) the executive agencies through rulemaking powers have promulgated many rules which contain criminal sanctions;

(2) the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and

(3) the executive agencies in the administration of any law should be more responsive to the intentions of Congress in enacting such law.

Therefore, it is the purpose of this Act to establish a procedure whereby Congress may review certain rulemaking activities of executive agencies, thereby exercising greater control and oversight over the operations of such agencies.

SEC. 3. Section 553 of title 5, United States Code (relating to rulemaking), is amended to read as follows:

"§ 553. Rulemaking and congressional disapproval of proposed rules

"(a) This section applies, according to the provisions thereof, except the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rulemaking shall be published in the Federal Register. The notice shall include—

"(1) a statement of the time, place, and nature of public rulemaking proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) Except where subsections (f) and (g) apply, the required publication or service of a substantive rule shall

be made not less than thirty days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

"(1) with respect to which general notice of a proposed rulemaking is required to be published by this section; and

"(2) the violation of which subjects the person in violation to a criminal penalty.

"(g) (1) (A) Except as provided in subparagraphs (B) and (D), a rule described in subsection (f) may take effect (i) only if published (with an identification number) in the Federal Register, (ii) only after the expiration of the first period of thirty calendar days of continuous session of Congress after the date on which the rule was published, and (iii) only if, between the date of publication and the

end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

"(2) Paragraphs (3) through (8) of this subsection are enacted by Congress—

"(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (3) of this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(3) For the purpose of paragraphs (2) through (8) of this subsection, 'resolution' means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: 'That the does not favor the rule numbered published in the Federal Register on , 19 .', the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one rule.

"(4) Upon introduction of a resolution with respect to a rule, it shall be in order at any time thereafter to move the referral of such resolution to a committee pursuant to paragraph (5) or to move the adoption of such resolution. Each such motion is highly privileged and is not debatable. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. In the case of a motion to adopt a resolution, the procedures set forth in paragraphs (7) (B) and (8) (A) and (B) shall apply.

"(5) After passage by a majority vote of a motion to refer a resolution to a committee, such resolution shall be referred to such committee (and all resolutions with respect to the same rule shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(6) (A) If the committee to which a resolution with respect to a rule has been referred has not reported it at the end of ten calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the rule which has been referred to the committee.

"(B) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (ex-

cept that it may not be made after the committee has reported a resolution with respect to the same rule), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same rule.

"(7) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a rule, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(B) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order,

and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(8) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a rule, and motions to proceed to the consideration of other business, shall be decided without debate.

"(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a rule shall be decided without debate.

"(h) Congressional inaction with respect to, or the rejection without referral to a committee of any resolution disapproving a rule described in subsection (f) of this section shall not be deemed to be an expression of approval of such rule.".

94TH CONGRESS
1ST SESSION

H. R. 7979

IN THE HOUSE OF REPRESENTATIVES

JUNE 17, 1975

Mr. LEVITAS (for himself, Mr. WRIGHT, Mr. SISK, Mr. MEZVINSKY, Mr. FITHIAN, Mr. BUTLER, Ms. SCHROEDER, Mr. PRITCHARD, Mr. ANDERSON of California, Mr. DAVIS, Mr. BOWEN, Mr. STEPHENS, Mr. LAFALCE, Mr. KRUEGER, Mr. HEFNER, Mr. BEVILL, Mr. BREAUX, Mr. KASTEN, and Mr. BRECKINRIDGE) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To permit either House of Congress to disapprove certain rules proposed by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Rulemaking Control Act".

SEC. 2. The Congress finds that—

(1) the executive agencies through rulemaking powers have promulgated many rules which contain criminal sanctions;

(2) the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and

(3) the executive agencies in the administration of any law should be more responsive to the intentions of Congress in enacting such law.

Therefore, it is the purpose of this Act to establish a procedure whereby Congress may review certain rulemaking activities of executive agencies, thereby exercising greater control and oversight over the operations of such agencies.

SEC. 3. Section 553 of title 5, United States Code (relating to rulemaking), is amended to read as follows:

"§ 553. Rulemaking and congressional disapproval of proposed rules

"(a) This section applies, according to the provisions thereof, except the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rulemaking shall be published in the Federal Register. The notice shall include—

"(1) a statement of the time, place, and nature of public rulemaking proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) Except where subsections (f) and (g) apply, the required publication or service of a substantive rule shall

be made not less than thirty days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

"(1) with respect to which general notice of a proposed rulemaking is required to be published by this section; and

"(2) the violation of which subjects the person in violation to a criminal penalty.

"(g) (1) (A) Except as provided in subparagraphs (B) and (D), a rule described in subsection (f) may take effect (i) only if published (with an identification number) in the Federal Register, (ii) only after the expiration of the first period of thirty calendar days of continuous session of Congress after the date on which the rule was published, and (iii) only if, between the date of publication and the

end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

"(2) Paragraphs (3) through (8) of this subsection are enacted by Congress—

"(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (3) of this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(3) For the purpose of paragraphs (2) through (8) of this subsection, 'resolution' means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: 'That the does not favor the rule numbered published in the Federal Register on , 19 .', the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one rule.

"(4) Upon introduction of a resolution with respect to a rule, it shall be in order at any time thereafter to move the referral of such resolution to a committee pursuant to paragraph (5) or to move the adoption of such resolution. Each such motion is highly privileged and is not debatable. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. In the case of a motion to adopt a resolution, the procedures set forth in paragraphs (7) (B) and (8) (A) and (B) shall apply.

"(5) After passage by a majority vote of a motion to refer a resolution to a committee, such resolution shall be referred to such committee (and all resolutions with respect to the same rule shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(6) (A) If the committee to which a resolution with respect to a rule has been referred has not reported it at the end of ten calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the rule which has been referred to the committee.

"(B) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (ex-

cept that it may not be made after the committee has reported a resolution with respect to the same rule), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same rule.

"(7) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a rule, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(B) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order,

and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(8) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a rule, and motions to proceed to the consideration of other business, shall be decided without debate.

"(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a rule shall be decided without debate.

"(h) Congressional inaction with respect to, or the rejection without referral to a committee of any resolution disapproving a rule described in subsection (f) of this section shall not be deemed to be an expression of approval of such rule.".

94TH CONGRESS
1ST SESSION

H. R. 8231

IN THE HOUSE OF REPRESENTATIVES

JUNE 25, 1975

Mr. DEL CLAWSON (for himself, Mr. ANDERSON of Illinois, Mr. BUTLER, Mr. HUTCHINSON, Mr. HYDE, Mr. KINDNESS, Mr. LATTA, Mr. LOTT, Mr. MANN, Mr. MATSUNAGA, Mr. MOORHEAD of California, Mr. PEPPER, and Mr. SISK) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To establish a method whereby the Congress (acting in accordance with specified procedures) may prevent the adoption by the executive branch of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) whenever any officer or agency in the executive branch of the Federal Government (including any independent establishment of the United States) proposes to prescribe or place in effect any rule or regulation to be used in the administration or implementation of any law of the

United States or any program established by or under such a law, or proposes to make or place in effect any change in such a rule or regulation, such officer or agency shall submit the proposed rule, regulation, or change to each House of Congress together with a report containing a full explanation thereof.

SEC. 2. (a) Except as provided in subsections (b) and (c), any proposed rule, regulation, or change described in the first section of this Act shall become effective sixty legislative days after the date of its submission to the Congress as provided in such section, or at such later time as may be required by law or specified in the rule, regulation, or change itself or the report submitted therewith.

(b) No proposed rule, regulation, or change described in the first section of this Act shall be placed in effect if, within the sixty-day period described in subsection (a) of this section, either House of Congress (in accordance with section 3) adopts a resolution in substance disapproving such rule, regulation, or change because it contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

(c) Nothing in this Act shall prevent the Congress, at any time during the sixty-day period described in subsection

(a) of this section, from adopting a concurrent resolution specifically approving the rule, regulation, or change involved; and upon the adoption of any such concurrent resolution the rule, regulation, or change may become effective immediately or as soon thereafter as is permitted by law.

(d) As used in this Act, the term "legislative days" does not include any calendar day on which both Houses of Congress are not in session.

SEC. 3. (a) This section is enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) (1) Any resolution introduced under section 2 (b) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(2) If and when the committee has reported the resolution, it shall at any time thereafter be in order (even

though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. Such motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(4) (A) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

(c) Except to the extent specifically otherwise provided in the preceding provisions of this section, consideration of any resolution with respect to a proposed rule, regulation, or change in either House of Congress shall be governed by the Rules of that House which are applicable to other resolutions in similar circumstances.

SEC. 4. This Act shall apply with respect to all proposed rules, regulations, and changes therein which (but for the provisions of this Act) would take effect on or after the first day of the first month which begins after the date of the enactment of this Act.

94TH CONGRESS
1ST SESSION

H. R. 8374

IN THE HOUSE OF REPRESENTATIVES

JULY 8, 1975

Mr. BROOMFIELD introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To permit either House of Congress to disapprove certain rules proposed by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Rulemaking Control Act".

SEC. 2. The Congress finds that—

(1) the executive agencies through rulemaking powers have promulgated many rules which contain criminal sanctions;

(2) the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and

(3) the executive agencies in the administration of any law should be more responsive to the intentions , of Congress in enacting such law.

Therefore, it is the purpose of this Act to establish a procedure whereby Congress may review certain rulemaking activities of executive agencies, thereby exercising greater control and oversight over the operations of such agencies.

SEC. 3. Section 553 of title 5, United States Code (relating to rulemaking), is amended to read as follows:

"§ 553. Rulemaking and congressional disapproval of proposed rules

"(a) This section applies, according to the provisions thereof, except the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rulemaking shall be published in the Federal Register. The notice shall include—

"(1) a statement of the time, place, and nature of public rulemaking proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) Except where subsections (f) and (g) apply, the required publication or service of a substantive rule shall

be made not less than thirty days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

"(1) with respect to which general notice of a proposed rulemaking is required to be published by this section; and

"(2) the violation of which subjects the person in violation to a criminal penalty.

"(g) (1) (A) Except as provided in subparagraphs (B) and (D), a rule described in subsection (f) may take effect (i) only if published (with an identification number) in the Federal Register, (ii) only after the expiration of the first period of thirty calendar days of continuous session of Congress after the date on which the rule was published, and (iii) only if, between the date of publication and the

end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

"(2) Paragraphs (3) through (8) of this subsection are enacted by Congress—

"(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (3) of this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(3) For the purpose of paragraphs (2) through (8) of this subsection, 'resolution' means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: 'That the does not favor the rule numbered published in the Federal Register on , 19 .', the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one rule.

"(4) Upon introduction of a resolution with respect to a rule, it shall be in order at any time thereafter to move the referral of such resolution to a committee pursuant to paragraph (5) or to move the adoption of such resolution. Each such motion is highly privileged and is not debatable. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. In the case of a motion to adopt a resolution, the procedures set forth in paragraphs (7) (B) and (8) (A) and (B) shall apply.

"(5) After passage by a majority vote of a motion to refer a resolution to a committee, such resolution shall be referred to such committee (and all resolutions with respect to the same rule shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(6) (A) If the committee to which a resolution with respect to a rule has been referred has not reported it at the end of ten calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the rule which has been referred to the committee.

"(B) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (ex-

cept that it may not be made after the committee has reported a resolution with respect to the same rule), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same rule.

"(7) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a rule, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(B) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order,

and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(8) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a rule, and motions to proceed to the consideration of other business, shall be decided without debate.

"(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a rule shall be decided without debate.

"(h) Congressional inaction with respect to, or the rejection without referral to a committee of any resolution disapproving a rule described in subsection (f) of this section shall not be deemed to be an expression of approval of such rule.".

94TH CONGRESS
1ST SESSION

H. R. 9235

IN THE HOUSE OF REPRESENTATIVES

AUGUST 1, 1975

Mr. LEVITAS (for himself, Mr. PEPPER, Mr. ICHORD, Mr. EVANS of Indiana, Mr. OBEY, Mr. NEAL, Mr. RISENHOOVER, Mr. NOWAK, Mr. MCHUGH, Mr. DODD, Mr. ENGLISH, Mr. MAGUIRE, Mr. BLOUIN, Mr. SANTINI, Mr. RINALDO, Mr. NOLAN, and Mr. EDGAR) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To permit either House of Congress to disapprove certain rules proposed by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Rulemaking Control Act".

SEC. 2. The Congress finds that--

(1) the executive agencies through rulemaking powers have promulgated many rules which contain criminal sanctions;

(2) the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and

(3) the executive agencies in the administration of any law should be more responsive to the intentions of Congress in enacting such law.

Therefore, it is the purpose of this Act to establish a procedure whereby Congress may review certain rulemaking activities of executive agencies, thereby exercising greater control and oversight over the operations of such agencies.

SEC. 3. Section 553 of title 5, United States Code (relating to rulemaking), is amended to read as follows:

"§ 553. Rulemaking and congressional disapproval of proposed rules

"(a) This section applies, according to the provisions thereof, except the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rulemaking shall be published in the Federal Register. The notice shall include—

"(1) a statement of the time, place, and nature of public rulemaking proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) Except where subsections (f) and (g) apply, the required publication or service of a substantive rule shall

be made not less than thirty days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

"(1) with respect to which general notice of a proposed rulemaking is required to be published by this section; and

"(2) the violation of which subjects the person in violation to a criminal penalty.

"(g) (1) (A) Except as provided in subparagraphs (B) and (D), a rule described in subsection (f) may take effect (i) only if published (with an identification number) in the Federal Register, (ii) only after the expiration of the first period of thirty calendar days of continuous session of Congress after the date on which the rule was published, and (iii) only if, between the date of publication and the

end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

"(2) Paragraphs (3) through (8) of this subsection are enacted by Congress—

"(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (3) of this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(3) For the purpose of paragraphs (2) through (8) of this subsection, 'resolution' means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: 'That the does not favor the rule numbered published in the Federal Register on , 19 .', the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one rule.

"(4) Upon introduction of a resolution with respect to a rule, it shall be in order at any time thereafter to move the referral of such resolution to a committee pursuant to paragraph (5) or to move the adoption of such resolution. Each such motion is highly privileged and is not debatable. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. In the case of a motion to adopt a resolution, the procedures set forth in paragraphs (7) (B) and (8) (A) and (B) shall apply.

"(5) After passage by a majority vote of a motion to refer a resolution to a committee, such resolution shall be referred to such committee (and all resolutions with respect to the same rule shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(6) (A) If the committee to which a resolution with respect to a rule has been referred has not reported it at the end of ten calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the rule which has been referred to the committee.

"(B) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (ex-

cept that it may not be made after the committee has reported a resolution with respect to the same rule), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same rule.

"(7) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a rule, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(B) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order,

and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(8) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a rule, and motions to proceed to the consideration of other business, shall be decided without debate.

"(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a rule shall be decided without debate.

"(h) Congressional inaction with respect to, or the rejection without referral to a committee of any resolution disapproving a rule described in subsection (f) of this section shall not be deemed to be an expression of approval of such rule.".

94TH CONGRESS
1ST SESSION

H. R. 9254

IN THE HOUSE OF REPRESENTATIVES

AUGUST 1, 1975

Mr. OBEY introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To permit either House of Congress to disapprove certain rules proposed by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Rulemaking Control Act".

SEC. 2. The Congress finds that—

(1) the executive agencies through rulemaking powers have promulgated many rules which contain criminal sanctions;

(2) the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and

(3) the executive agencies in the administration of any law should be more responsive to the intentions of Congress in enacting such law.

Therefore, it is the purpose of this Act to establish a procedure whereby Congress may review certain rulemaking activities of executive agencies, thereby exercising greater control and oversight over the operations of such agencies.

SEC. 3. Section 553 of title 5, United States Code (relating to rulemaking), is amended to read as follows:

"**§ 553. Rulemaking and congressional disapproval of proposed rules**

"(a) This section applies, according to the provisions thereof, except the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rulemaking shall be published in the Federal Register. The notice shall include—

"(1) a statement of the time, place, and nature of public rulemaking proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) Except where subsections (f) and (g) apply, the required publication or service of a substantive rule shall

be made not less than thirty days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

"(1) with respect to which general notice of a proposed rulemaking is required to be published by this section; and

"(2) the violation of which subjects the person in violation to a criminal penalty.

"(g) (1) (A) Except as provided in subparagraphs (B) and (D), a rule described in subsection (f) may take effect (i) only if published (with an identification number) in the Federal Register, (ii) only after the expiration of the first period of thirty calendar days of continuous session of Congress after the date on which the rule was published, and (iii) only if, between the date of publication and the

end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

"(2) Paragraphs (3) through (8) of this subsection are enacted by Congress—

"(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (3) of this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(3) For the purpose of paragraphs (2) through (8) of this subsection, 'resolution' means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: 'That the does not favor the rule numbered published in the Federal Register on , 19 .', the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one rule.

"(4) Upon introduction of a resolution with respect to a rule, it shall be in order at any time thereafter to move the referral of such resolution to a committee pursuant to paragraph (5) or to move the adoption of such resolution. Each such motion is highly privileged and is not debatable. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. In the case of a motion to adopt a resolution, the procedures set forth in paragraphs (7) (B) and (8) (A) and (B) shall apply.

"(5) After passage by a majority vote of a motion to refer a resolution to a committee, such resolution shall be referred to such committee (and all resolutions with respect to the same rule shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(6) (A) If the committee to which a resolution with respect to a rule has been referred has not reported it at the end of ten calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the rule which has been referred to the committee.

"(B) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (ex-

cept that it may not be made after the committee has reported a resolution with respect to the same rule), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same rule.

"(7) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a rule, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(B) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order,

and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(8) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a rule, and motions to proceed to the consideration of other business, shall be decided without debate.

"(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a rule shall be decided without debate.

"(h) Congressional inaction with respect to, or the rejection without referral to a committee of any resolution disapproving a rule described in subsection (f) of this section shall not be deemed to be an expression of approval of such rule.".

94TH CONGRESS
1ST SESSION

H. R. 9313

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 3, 1975

Mr. DEL CLAWSON (for himself, Mr. KEMP, Mr. KETCHUM, Mr. MCEWEN, Mr. MADIGAN, Mr. MARTIN, Mr. MILFORD, Mr. MOLLOHAN, Mr. MOORHEAD of Pennsylvania, Mr. MYERS of Indiana, Mr. NEDZI, Mr. O'HARA, Mr. PATMAN, Mr. POAGE, Mr. RISENHOOVER, Mr. ROBINSON, Mr. ROUSSELOT, Mr. SIKES, Mr. STARK, Mr. STEED, Mr. STEIGER of Wisconsin, Mr. STEPHENS, Mr. TALCOTT, Mr. TAYLOR of Missouri, and Mr. THONE) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To establish a method whereby the Congress (acting in accordance with specified procedures) may prevent the adoption by the executive branch of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) whenever any officer or agency in the executive branch of the Federal Government (including any independent establishment of the United States) proposes to prescribe or place in effect any rule or regulation to be used in the administration or implementation of any law of the

United States or any program established by or under such a law, or proposes to make or place in effect any change in such a rule or regulation, such officer or agency shall submit the proposed rule, regulation, or change to each House of Congress together with a report containing a full explanation thereof.

SEC. 2. (a) Except as provided in subsections (b) and (c), any proposed rule, regulation, or change described in the first section of this Act shall become effective sixty legislative days after the date of its submission to the Congress as provided in such section, or at such later time as may be required by law or specified in the rule, regulation, or change itself or the report submitted therewith.

(b) No proposed rule, regulation, or change described in the first section of this Act shall be placed in effect if, within the sixty-day period described in subsection (a) of this section, either House of Congress (in accordance with section 3) adopts a resolution in substance disapproving such rule, regulation, or change because it contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

(c) Nothing in this Act shall prevent the Congress, at any time during the sixty-day period described in subsection

(a) of this section, from adopting a concurrent resolution specifically approving the rule, regulation, or change involved; and upon the adoption of any such concurrent resolution the rule, regulation, or change may become effective immediately or as soon thereafter as is permitted by law.

(d) As used in this Act, the term "legislative days" does not include any calendar day on which both Houses of Congress are not in session.

SEC. 3. (a) This section is enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) (1) Any resolution introduced under section 2 (b) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(2) If and when the committee has reported the resolution, it shall at any time thereafter be in order (even

though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. Such motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(4) (A) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

(c) Except to the extent specifically otherwise provided in the preceding provisions of this section, consideration of any resolution with respect to a proposed rule, regulation, or change in either House of Congress shall be governed by the Rules of that House which are applicable to other resolutions in similar circumstances.

SEC. 4. This Act shall apply with respect to all proposed rules, regulations, and changes therein which (but for the provisions of this Act) would take effect on or after the first day of the first month which begins after the date of the enactment of this Act.

94TH CONGRESS
1ST SESSION

H. R. 9314

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 3, 1975

Mr. DEL CLAWSON (for himself, Mr. WAGGONNER, Mr. WALSH, Mr. BOB WILSON, Mr. CHARLES WILSON of Texas, Mr. WINN, Mr. WRIGHT, and Mr. YATRON) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To establish a method whereby the Congress (acting in accordance with specified procedures) may prevent the adoption by the executive branch of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) whenever any officer or agency in the executive branch of the Federal Government (including any independent establishment of the United States) proposes to prescribe or place in effect any rule or regulation to be used in the administration or implementation of any law of the

United States or any program established by or under such a law, or proposes to make or place in effect any change in such a rule or regulation, such officer or agency shall submit the proposed rule, regulation, or change to each House of Congress together with a report containing a full explanation thereof.

SEC. 2. (a) Except as provided in subsections (b) and (c), any proposed rule, regulation, or change described in the first section of this Act shall become effective sixty legislative days after the date of its submission to the Congress as provided in such section, or at such later time as may be required by law or specified in the rule, regulation, or change itself or the report submitted therewith.

(b) No proposed rule, regulation, or change described in the first section of this Act shall be placed in effect if, within the sixty-day period described in subsection (a) of this section, either House of Congress (in accordance with section 3) adopts a resolution in substance disapproving such rule, regulation, or change because it contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

(c) Nothing in this Act shall prevent the Congress, at any time during the sixty-day period described in subsection

(a) of this section, from adopting a concurrent resolution specifically approving the rule, regulation, or change involved; and upon the adoption of any such concurrent resolution the rule, regulation, or change may become effective immediately or as soon thereafter as is permitted by law.

(d) As used in this Act, the term "legislative days" does not include any calendar day on which both Houses of Congress are not in session.

SEC. 3. (a) This section is enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) (1) Any resolution introduced under section 2 (b) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(2) If and when the committee has reported the resolution, it shall at any time thereafter be in order (even

though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. Such motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(4) (A) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

(c) Except to the extent specifically otherwise provided in the preceding provisions of this section, consideration of any resolution with respect to a proposed rule, regulation, or change in either House of Congress shall be governed by the Rules of that House which are applicable to other resolutions in similar circumstances.

SEC. 4. This Act shall apply with respect to all proposed rules, regulations, and changes therein which (but for the provisions of this Act) would take effect on or after the first day of the first month which begins after the date of the enactment of this Act.

94TH CONGRESS
1ST SESSION

H. R. 9801

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 1975

Mr. DEL CLAWSON (for himself, Mr. ANDREWS of North Dakota, Mr. BROYHILL, Mr. DON H. CLAUSEN, Mr. CLEVELAND, Mr. COCHRAN, Mr. D'AMOURS, Mr. DAN DANIEL, Mr. DU PONT, Mr. EDWARDS of Alabama, Mr. EMERY, Mr. HANLEY, Mr. HANNAFORD, Mr. LAGOMARSINO, Mr. MCCOLLISTER, Mr. MATHIS, Mr. MILLER of Ohio, Mr. PATTERSON of California, Mr. RUPPE, Mr. SHRIVER, Mr. SNYDER, Ms. SPELLMAN, Mr. STEIGER of Arizona, Mr. TREEN, and Mr. CHARLES H. WILSON of California) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To establish a method whereby the Congress (acting in accordance with specified procedures) may prevent the adoption by the executive branch of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) whenever any officer or agency in the executive branch of the Federal Government (including any independent establishment of the United States) proposes to prescribe or place in effect any rule or regulation to be used in the administration or implementation of any law of the

United States or any program established by or under such a law, or proposes to make or place in effect any change in such a rule or regulation, such officer or agency shall submit the proposed rule, regulation, or change to each House of Congress together with a report containing a full explanation thereof.

SEC. 2. (a) Except as provided in subsections (b) and (c), any proposed rule, regulation, or change described in the first section of this Act shall become effective sixty legislative days after the date of its submission to the Congress as provided in such section, or at such later time as may be required by law or specified in the rule, regulation, or change itself or the report submitted therewith.

(b) No proposed rule, regulation, or change described in the first section of this Act shall be placed in effect if, within the sixty-day period described in subsection (a) of this section, either House of Congress (in accordance with section 3) adopts a resolution in substance disapproving such rule, regulation, or change because it contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

(c) Nothing in this Act shall prevent the Congress, at any time during the sixty-day period described in subsection

(a) of this section, from adopting a concurrent resolution specifically approving the rule, regulation, or change involved; and upon the adoption of any such concurrent resolution the rule, regulation, or change may become effective immediately or as soon thereafter as is permitted by law.

(d) As used in this Act, the term "legislative days" does not include any calendar day on which both Houses of Congress are not in session.

SEC. 3. (a) This section is enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) (1) Any resolution introduced under section 2 (b) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(2) If and when the committee has reported the resolution, it shall at any time thereafter be in order (even

though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. Such motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(4) (A) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

(c) Except to the extent specifically otherwise provided in the preceding provisions of this section, consideration of any resolution with respect to a proposed rule, regulation, or change in either House of Congress shall be governed by the Rules of that House which are applicable to other resolutions in similar circumstances.

SEC. 4. This Act shall apply with respect to all proposed rules, regulations, and changes therein which (but for the provisions of this Act) would take effect on or after the first day of the first month which begins after the date of the enactment of this Act.

94TH CONGRESS
1ST SESSION

H. R. 10164

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 9, 1975

Mr. DEL CLAWSON (for himself, Mrs. BURKE of California, Mr. CARTER, Mrs. SULLIVAN, Mr. SYMMS, Mr. WHITE, Mr. WHITEHURST, Mr. WYDLER, Mr. FRENZEL, Mr. GRASSLEY, and Mr. YATES) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To establish a method whereby the Congress (acting in accordance with specified procedures) may prevent the adoption by the executive branch of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) whenever any officer or agency in the executive branch of the Federal Government (including any independent establishment of the United States) proposes to prescribe or place in effect any rule or regulation to be used in the administration or implementation of any law of the

United States or any program established by or under such a law, or proposes to make or place in effect any change in such a rule or regulation, such officer or agency shall submit the proposed rule, regulation, or change to each House of Congress together with a report containing a full explanation thereof.

SEC. 2. (a) Except as provided in subsections (b) and (c), any proposed rule, regulation, or change described in the first section of this Act shall become effective sixty legislative days after the date of its submission to the Congress as provided in such section, or at such later time as may be required by law or specified in the rule, regulation, or change itself or the report submitted therewith.

(b) No proposed rule, regulation, or change described in the first section of this Act shall be placed in effect if, within the sixty-day period described in subsection (a) of this section, either House of Congress (in accordance with section 3) adopts a resolution in substance disapproving such rule, regulation, or change because it contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

(c) Nothing in this Act shall prevent the Congress, at any time during the sixty-day period described in subsection

(a) of this section, from adopting a concurrent resolution specifically approving the rule, regulation, or change involved; and upon the adoption of any such concurrent resolution the rule, regulation, or change may become effective immediately or as soon thereafter as is permitted by law.

(d) As used in this Act, the term "legislative days" does not include any calendar day on which both Houses of Congress are not in session.

SEC. 3. (a) This section is enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) (1) Any resolution introduced under section 2 (b) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(2) If and when the committee has reported the resolution, it shall at any time thereafter be in order (even

though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. Such motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(4) (A) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

(c) Except to the extent specifically otherwise provided in the preceding provisions of this section, consideration of any resolution with respect to a proposed rule, regulation, or change in either House of Congress shall be governed by the Rules of that House which are applicable to other resolutions in similar circumstances.

SEC. 4. This Act shall apply with respect to all proposed rules, regulations, and changes therein which (but for the provisions of this Act) would take effect on or after the first day of the first month which begins after the date of the enactment of this Act.

94TH CONGRESS
1ST SESSION

H. R. 10166

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 9, 1975

Mr. DEL CLAWSON (for himself, Mr. ABDNOR, Mr. CLANCY, Mr. CONLAN, Mr. DERWINSKI, Mr. DOWNEY of New York, Mr. GOLDWATER, Mr. GUYER, Mr. HANSEN, Mrs. HECKLER of Massachusetts, Mr. HEFNER, Mr. HUGHES, Mr. JEFFORDS, Mr. JENRETTE, Mr. JOHNSON of Colorado, Mr. KASTEN, Mr. LANDRUM, Mr. LLOYD of California, Mr. MCKINNEY, Mr. MAZZOLI, Mr. MONTGOMERY, Mr. MOORE, Mr. REGULA, Mr. SANTINI, and Mr. SPENCE) introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To establish a method whereby the Congress (acting in accordance with specified procedures) may prevent the adoption by the executive branch of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) whenever any officer or agency in the executive branch of the Federal Government (including any independent establishment of the United States) proposes to prescribe or place in effect any rule or regulation to be used in the administration or implementation of any law of the

United States or any program established by or under such a law, or proposes to make or place in effect any change in such a rule or regulation, such officer or agency shall submit the proposed rule, regulation, or change to each House of Congress together with a report containing a full explanation thereof.

SEC. 2. (a) Except as provided in subsections (b) and (c), any proposed rule, regulation, or change described in the first section of this Act shall become effective sixty legislative days after the date of its submission to the Congress as provided in such section, or at such later time as may be required by law or specified in the rule, regulation, or change itself or the report submitted therewith.

(b) No proposed rule, regulation, or change described in the first section of this Act shall be placed in effect if, within the sixty-day period described in subsection (a) of this section, either House of Congress (in accordance with section 3) adopts a resolution in substance disapproving such rule, regulation, or change because it contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

(c) Nothing in this Act shall prevent the Congress, at any time during the sixty-day period described in subsection

(a) of this section, from adopting a concurrent resolution specifically approving the rule, regulation, or change involved; and upon the adoption of any such concurrent resolution the rule, regulation, or change may become effective immediately or as soon thereafter as is permitted by law.

(d) As used in this Act, the term "legislative days" does not include any calendar day on which both Houses of Congress are not in session.

SEC. 3. (a) This section is enacted by the Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) (1) Any resolution introduced under section 2 (b) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(2) If and when the committee has reported the resolution, it shall at any time thereafter be in order (even

though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. Such motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3) No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(4) (A) Motions to postpone, made with respect to the consideration of the resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution shall be decided without debate.

(c) Except to the extent specifically otherwise provided in the preceding provisions of this section, consideration of any resolution with respect to a proposed rule, regulation, or change in either House of Congress shall be governed by the Rules of that House which are applicable to other resolutions in similar circumstances.

SEC. 4. This Act shall apply with respect to all proposed rules, regulations, and changes therein which (but for the provisions of this Act) would take effect on or after the first day of the first month which begins after the date of the enactment of this Act.

94TH CONGRESS
1ST SESSION

H. R. 9254

IN THE HOUSE OF REPRESENTATIVES

AUGUST 1, 1975

Mr. OBEY introduced the following bill; which was referred jointly to the Committees on the Judiciary and Rules

A BILL

To permit either House of Congress to disapprove certain rules proposed by executive agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Rulemaking Control Act".

SEC. 2. The Congress finds that—

(1) the executive agencies through rulemaking powers have promulgated many rules which contain criminal sanctions;

(2) the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and

(3) the executive agencies in the administration of any law should be more responsive to the intentions of Congress in enacting such law.

Therefore, it is the purpose of this Act to establish a procedure whereby Congress may review certain rulemaking activities of executive agencies, thereby exercising greater control and oversight over the operations of such agencies.

SEC. 3. Section 553 of title 5, United States Code (relating to rulemaking), is amended to read as follows:

"§ 553. **Rulemaking and congressional disapproval of proposed rules**

"(a) This section applies, according to the provisions thereof, except the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rulemaking shall be published in the Federal Register. The notice shall include—

"(1) a statement of the time, place, and nature of public rulemaking proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise ~~general~~ statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) Except where subsections (f) and (g) apply, the required publication or service of a substantive rule shall

be made not less than thirty days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"(f) A rule shall take effect only in the manner provided in subsection (g) if it is a rule—

"(1) with respect to which general notice of a proposed rulemaking is required to be published by this section; and

"(2) the violation of which subjects the person in violation to a criminal penalty.

"(g) (1) (A) Except as provided in subparagraphs (B) and (D), a rule described in subsection (f) may take effect (i) only if published (with an identification number) in the Federal Register, (ii) only after the expiration of the first period of thirty calendar days of continuous session of Congress after the date on which the rule was published, and (iii) only if, between the date of publication and the

end of the thirty-day period, neither House, without referral of such matter to the appropriate committee, passes a resolution stating in substance that that House does not favor the rule.

"(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, whenever a resolution, stating in substance that a House does not favor a rule described in paragraph (f), is referred to a committee of either House, such rule may take effect (i) only after the expiration of the first period of sixty days of continuous session of Congress after the date on which the rule was published, and (ii) only if, between the date of publication and the end of the sixty-day period, neither House passes such resolution.

"(C) For the purpose of subparagraph (A) of this paragraph—

"(i) continuity of session is broken only by an adjournment of Congress sine die; and

"(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the thirty-day period.

"(D) Under provisions contained in a rule, a provision of the rule may be effective at a time later than the date on which the rule otherwise is effective.

"(2) Paragraphs (3) through (8) of this subsection are enacted by Congress—

"(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions described by paragraph (3) of this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

"(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

"(3) For the purpose of paragraphs (2) through (8) of this subsection, 'resolution' means only a resolution of either House of Congress, the matter after the resolving clause of which is as follows: 'That the does not favor the rule numbered published in the Federal Register on , 19 .', the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one rule.

"(4) Upon introduction of a resolution with respect to a rule, it shall be in order at any time thereafter to move the referral of such resolution to a committee pursuant to paragraph (5) or to move the adoption of such resolution. Each such motion is highly privileged and is not debatable. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. In the case of a motion to adopt a resolution, the procedures set forth in paragraphs (7) (B) and (8) (A) and (B) shall apply.

"(5) After passage by a majority vote of a motion to refer a resolution to a committee, such resolution shall be referred to such committee (and all resolutions with respect to the same rule shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

"(6) (A) If the committee to which a resolution with respect to a rule has been referred has not reported it at the end of ten calendar days after its introduction, it is in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the rule which has been referred to the committee.

"(B) A motion to discharge may be made only by an individual favoring the resolution, is highly privileged (ex-

cept that it may not be made after the committee has reported a resolution with respect to the same rule), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same rule.

"(7) (A) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a rule, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(B) Debate on the resolution shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendment to, or motion to recommit, the resolution is not in order,

and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

"(8) (A) Motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a rule, and motions to proceed to the consideration of other business, shall be decided without debate.

"(B) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a rule shall be decided without debate.

"(h) Congressional inaction with respect to, or the rejection without referral to a committee of any resolution disapproving a rule described in subsection (f) of this section shall not be deemed to be an expression of approval of such rule.".

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Mr. FLOWERS. Mr. Danielson?

Mr. DANIELSON. I have no individual statement. My chairman has expressed very well, I think, the point of view of our committee from the point of view of the majority party. Mr. Moorhead has made it clear that this is ecumenical, politically speaking.

I will participate as carefully as I can.

Mr. FLOWERS. In looking over the list of cosponsors, it certainly is a bipartisan-sponsored effort here. I would observe that there appear to be a wide range of the political spectrum represented in terms of left, right, and center, among its cosponsors.

Mr. DANIELSON. Are the volumes of the Federal Register exhibited on the witness table the chairman's idea?

Mr. FLOWERS. It looks like a bomb shelter to me. A year ago, a fellow went on television with 38 volumes. Do you remember that?

Mr. DANIELSON. I remember that. It had an adverse effect.

Mr. FLOWERS. However, we won't prejudge the performance that is coming up. I welcome our distinguished colleague from Georgia, Elliott Levitas. Mr. Levitas has made a great impression on the few older Members that are remaining in addition to the freshman class. He comes from a neighboring State of mine and an area where I visit quite frequently, en route to my home district. I welcome you to our subcommittee this morning and thank you for bringing this important legislative proposal to our attention.

We will listen attentively to what you have to say on the subject.

TESTIMONY OF HON. ELLIOTT H. LEVITAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. LEVITAS. Thank you very much, Mr. Chairman and members of the subcommittee. It is really quite an honor for me to be here today before this distinguished subcommittee. I especially appreciate the suggestions, the advice, of my colleague, Mr. Danielson, about the use of demonstrative evidence in such a way. I can assure you that unlike the 38 volumes to which the gentleman referred last year on television, these have something in each one of them and more than just one sheet on some occasions.

I think that the point will be made at some juncture concerning what really is in them and the fact that we just don't know in many instances. Mr. Chairman, first I would like to request unanimous consent that my entire statement be made part of the record at this point.

Then I could summarize it rather than go through the entire statement.

Mr. FLOWERS. We will receive the statement and request the reporter to receive it in the record.

[The prepared statement of Hon. Elliott H. Levitas follows:]

STATEMENT OF HON. ELLIOTT H. LEVITAS OF GEORGIA

Mr. Chairman, I would first like to publicly express my deep appreciation for your creating this opportunity to hold hearings on my proposed "Administrative Rulemaking Control Act," H.R. 3658, and the related bills cosponsored by so many of our colleagues. Further, I'm most grateful for the cooperation I have received from you and your staff, as well as for the efforts made to attend today's meeting by your fellow Subcommittee members and those who are also going to testify.

Mr. Chairman, if the founders of our nation could somehow return, 188 years after they wrote our Constitution, to see us engaged in a true, non-violent revolution to get lawmaking power restored to Congress, they would be thunderstruck at the pass to which we have come. They would say, "You're kidding!" They would ask, "How did it happen that the very thing we fought for—control over the executive power by the people through their representatives—should be the object of a revolution, albeit peaceful?" But that is what we are doing and what we must do.

The federal bureaucracy has evolved into a fourth—non-Constitutional—branch of government, with a thick tangle of regulations that carry the force of law without benefit of legislative consideration.

I frankly do not believe that the precepts of a free society are compatible with the situation whereby Congress continues to permit civil servants or appointed officials to conjure up thousands upon thousands of far-reaching laws that can put citizens in jeopardy of liberty or property without having anyone elected by the people involved in the process.

This is an issue which addresses itself to the rights of individual citizens. In the forthcoming discussions of legal and procedural technicalities, we must not forget this fundamental precept.

I am here fresh from a 10-day recess during which I spent many hours on many different occasions listening to what the people in my home District are thinking. I doubt that it differs from yours. I am more convinced than ever that this is an idea whose time has really come. And the people expect us to get on with it.

Mr. Chairman, I submit that we have a really serious situation when a vast number of citizens of a country perceive their own government to be their worst enemy instead of being their protector.

Standing as an eloquent witness to this widespread lack of confidence is an article in last May's issue of Reader's Digest, written by John Barron, titled "Too Much Government by Decree." Reader's Digest is one of the most widely read publications in this country. It has achieved this vast readership, not by dealing in esoterics or high-sounding theories, but by dealing in major issues of the moment. It may not have the scholarshp of the New Republic or Commentary, but it speaks of, and to, the people.

After detailing a number of specific bureaucratic horror stories, the article recalls how, 200 years ago, the American people "started one of history's most important revolutions in the name of freedom. In the years since, millions of Americans have risked their lives to preserve that freedom. It is inconceivable that we will now sit back passively and allow it to be lost to bureaucratic usurpation."

The article, I might add, then points out that "The remedy lies in Congress, which created the problem in the first place."

Look at some of the horrors they relate over what happens when Congress has abandoned legislative power to a bureaucracy that is neither elected by nor responsible to American voters:

If the Environmental Protection Agency had had its way, beginning on March 1st of this year, no one in Boston could have parked on a downtown street between 7 and 10 a.m., and forty percent of all spaces in Boston's parking garages would have had to have been kept empty during the same hours, and employers would have had to eliminate one-fourth of all employee parking spaces. Naturally, a tremendous and outraged howl arose, not only over this incredible imperial decree, but also over the equally astonishing gall displayed by EPA in its intention to enforce its proclamation by making employers liable to a year's imprisonment and a $25,000 fine if they disobeyed. Finally, threatened with Congressional intervention, EPA grudgingly relented and gave Boston longer to prepare for the effects. But as a member of the Boston Chamber of Commerce said, "I hate to think what might have happened if we had not fought like hell."

Late last year, the Equal Employment Opportunities Commission issued an astonishing order to the police department of Houston. Even by EEOC's admission, the department has had, in recent years, a commendable record of employing minority personnel, who presently compose about forty percent of the force. But the Houston police, reasonably enough, require that applicants have a high-school diploma; further, they refuse to hire convicted criminals, people dishonorably discharged from the armed services, and those with a history of debt default. The EEOC asserted, however, that the Houston police department is guilty of

racial discrimination and must cease investigating the backgrounds of prospective officers, on the basis that the ratio of individuals convicted of crimes, or dishonorably discharged from the military, or marked as bad credit risks, is higher among blacks and other minorities than among whites. Believe it or not, EEOC threatened legal action unless the Houston police opened their ranks to convicts, those with dishonorable discharges from the armed services, those who had not completed high school, and those who have repeatedly failed to repay their debts! "If we do not even have the right to ask a man if he has been convicted, we could turn over the department to a bunch of criminals, the very element we're supposed to fight!" exploded Chief Carrol Lynn. "Hire a convicted kidnapper, burglar, rapist, murderer as a policeman? My God!" Houston's leading black newspaper, Forward Times, published a full-page editorial ridiculing EEOC and defending the police. To all protests, the EEOC has so far responded with bureaucratic contempt for common sense.

When an act of Congress contains the pithy section which reads something like this: "The Secretary shall have the power to promulgate regulations to carry out the purposes of this act . . ."—then the citizen is at his peril. Congress has passed the buck, and the citizen must deal with people unaccountable to him and frequently unresponsive to him. Congress has done this far too often and thereby has opened Pandora's box of administrative rules.

A "lawmaking" process follows upon these words quoted above, which process never again permits the Congress effectively to determine whether its intent has been followed.

After going through a series of procedures and hearings—all by civil servants or appointed officials—a rule comes forth. To test the validity of that rule, a citizen must go to court, or at his peril, face prosecution. The standards adopted by the judiciary for review of administrative rules are lax indeed, are rarely effective and never go into the issue of policy contained therein.

The frustrations of going through the administrative process, the feeling that no one listens or cares; and the practical inability of an individual to face up to the faceless bureaucracy is all part of the scene—a scene that needs changing to make the rules and the bureaucracy more responsive to Congress and ultimately, thereby, to the people.

Under my proposal, whenever an administrative rule is adopted by an agency under procedures of the Administrative Procedure Act—section 553 of title V, United States Code—and a violation of the rule could result in a criminal sanction, then either House of Congress would have 30 days in which to pass a resolution disapproving the adopted regulation. Passage of such a resolution by either House will have the effect of preventing the regulation from becoming operative.

My proposal will provide for an expedited procedure for bringing the resolution to the floor of the House or the Senate. Modeled after the procedures for consideration of rescission and deferral messages from the President, it would allow prompt and efficient consideration and action by either body.

My bill would not destroy the administrative process; it will make it more responsible. It does not substitute congressional decision for administrative decision; it assures that those few administrative rules which clearly go beyond Congressional contemplation are never inflicted on the public.

This legislation, Mr. Chairman, commends itself to those who are concerned about the place and plight of an individual in the face of a vast and sometimes unresponsive bureaucracy. It commends itself to those who believe that the basic principles of the Magna Carta, the Declaration of Independence, the Constitution, and its accompanying Bill of Rights are still valid—that no person should be deprived of liberty or property without someone elected by and answerable to the citizen being involved in the adoption of a decree that can place him in jail or impose a fine upon him.

This bill is not the final answer to administrative and bureaucratic problems, but it is a giant first step that must be taken.

By way of background, we've had administrative statutes virtually since the Constitution was ratified in 1788 and the first four Executive departments—State, Treasury, Defense and Justice—were created the following year, along with the first two quasi-regulatory agencies—the Customs Office and the Veterans Administration. However, from that point at the inception of our present form of federal government through the next century or so, the little body of administrative law that was created was the work solely of the Executive branch which, in this context, functioned basically in a regulatory manner and did not utilize the specific rulemaking process as such.

In other words, of the three fundamental methods through which administrative law comes into being—i.e., prosecution, adjudication and rulemaking—only the first two were used by the Executive branch in fulfilling the mandates given to it by Congressional statutes. And as a general rule, such a Congressional directive was usually worded so generally that it required only that the appropriate Executive bodies "act in the public interest" in order to meet the mandate. Accordingly, in most instances, the extent of formulating administrative law was limited to carrying out Congress' delegation of authority through: (1) prosecuting violations of "public interest" in the courts by the agencies, either directly by themselves or indirectly by referring the cases to the Justice Department; or (2) adjudicating the matter, a process whereby the appropriate agency itself tried the alleged violator and reached its own decision without reliance on the Judicial branch.

Gradually, though, the administrative law process expanded from this creation of regulations solely through the slow and unwieldly, individual case-by-case prosecution and adjudication methods which, since they were ex-post-facto, resulted in rules that governed past violations and that were therefore, in effect, retroactive. To quote Dr. Evelyn Sinaiko of the University of California, "As agencies began to regulate a broader spectrum of public affairs, and openly took on planning and policymaking functions, the courts encouraged them to employ rulemaking procedures when dealing with issues of policy. This development reflects the idea that promulgating far-reaching policy decisions in proceedings limited to adversary parties is unfair. . . . It also reflects increasing awareness of the agencies' enormous power to determine the resolution of important social problems with little, if any, guidance from legislatures."

While adjudication and prosecution were judicial procedures, though not necessarily involving the Judiciary, administrative rulemaking is a legislative procedure, though it infrequently involves the Legislature. Specifically, rulemaking is a formal process employed by agencies to develop and articulate policy which it will apply in the future. It thus is prospective, as opposed to the retroactive feature of adjudication and prosecution.

As delineated by Professor Ernest Gellhorn of the University of Virginia, from whom you are scheduled to hear tomorrow, and by Professor Glen O. Robinson of the University of Minnesota, agencies issue three types of rules: procedural, interpretative and substantive (also called legislative or prescriptive). Procedural rules establish an agency's organization, set forth its method of operation, and describe its rulemaking and adjudicative process. Interpretative rules show an agency's staff and the parties it regulates how it will interpret its Congressional mandate. Substantive rules are, in effect, administrative statutes and carry all the weight and authority of laws enacted by Congress.

This expansion of the administrative regulatory process into the legislative area generally coincide with the establishment of the first *independent* regulatory agency, the Interstate Commerce Commission, in 1887—"independent" in that it was not part of the three Executive, Legislative, and Judicial branches of the federal government provided for in our Constitution, and it was thus the first step in the establishment of a fourth branch. Almost 30 years passed before the second such agency, the Federal Trade Commission, was created, but with the coming of the New Deal, the "alphabet" agencies proliferated precipitously and so did Congress' delegation of its legislative authority to them.

Naturally, this wild growth of a fourth branch of the federal government, together with the fact that it exercised the functions of each of the other three, became a national issue of great controversy, leading to the passage in 1940 of a bill which, if the President's veto had not been upheld, would have decimated administrative law. A compromise was finally reached, though, in 1946 with the enactment, by a unanimous vote in both Houses, of the Administrative Procedure Act—the law which would be amended by the bill I propose.

Now that I've briefly reviewed a history of administrative law, I'd like to begin this portion of my remarks on H.R. 3658 by throwing out a rather startling statistic for your consideration: last year alone, 67 federal agencies, departments and bureaus adopted 7,496 new and amended regulations while, during the same period of time, Congress enacted 404 public laws—a ratio of more than 18 to one!

And this brings us to the very heart of the entire administrative rulemaking issue: while Congress may solve a specific problem through delegation of its legislative power, though that is debatable, we thereby create a far more serious and extensive problem than the original one we attempted to redress—namely, the

very real potential for depriving a person of his liberty and/or property without due process of law.

The right to due process of law is, of course, a fundamental principle in our government, being embodied in both our Declaration of Independence and our Constitution (specifically, in Amendments V and XIV). Naturally, though, this is not to imply that the principle originated with our Founding Fathers; on the contrary, it can be traced back almost eight centuries to the Magna Carta and is a basic concept in virtually every democratic government established since the signing of that historic document.

In the context of which I am speaking, the due process principle means that our government may not, without giving notice and an opportunity to the public to be heard, enact laws which could deprive a person of his liberty and/or property without giving that person notice and an opportunity to be heard. Inherent in that definition are the additional prohibitions that our government may neither act arbitrarily nor without a sense of fairness in passing and carrying out its laws.

A pedantic individual could conceivably argue on semantic grounds that, since the public has no right to participate directly in Congressional deliberations, Congress itself falls short of the due-process requirement. However, I think that virtually everyone will concede that Congress does, in fact, meet these criteria inasmuch as it is elected by, representative of, and accountable to, the public. Moreover, the Congressional legislative process provides further safeguards in that before a bill can be enacted, it is subject to committee evaluation and floor consideration (both of which can be exhaustive) in first one House and then the other where the process is duplicated, and, in the vast majority of cases, each step is open to public inspection and, thus, each is subject to public pressure which is heeded as a matter of political reality. Further, any bill which survives that process is still open to a Presidential veto—a simple action that is specifically provided for in the Constitution. One final point about the Congressional legislative process is that it is carried out by a comparatively large number of people, with both process and persons being the subject of extensive and intensive media coverage.

However, the most telling and important characteristic of the Congressional (as opposed to undemocratic) legislative process is that it is engaged in by legislators *elected* by the people they govern, responsible to the people they govern, and subject to rejection by the people they govern. In a nation founded on the concept of "consent of the governed" embodied in a social contract or Constitution, it is unthinkable, really, to countenance a vast system of lawmaking that does not include or involve the elected Congress.

I have gone into this amount of detail on a matter that we're all most intimately acquainted with in order to contrast it with observance of the due-process concept in the administrative rulemaking process. Aside from the President as head of the Executive branch, none of the administrative rulemakers is elected by, representative of, or directly accountable to, the people. On the contrary (to quote again from an article published just three months ago by Dr. Sinaiko), "administrators are chosen for their technical expertise. Selection criteria often emphasize experience gained by occupying positions of power within regulated industries rather than by opposing industry interests. Moreover, the prospect of future employment within regulated industries encourages administrators to give deference to industry interests, rather than vigorously searching out countervailing public considerations. Thus, little effort is made to ensure a broad spectrum of viewpoints or backgrounds on agency staffs, and the selection process itself excludes persons with 'anti-industry' interests, such as environmentalists and consumer advocates, as well as representatives of certain segments of society, particularly the poor."

Nor do the regulatory agencies distinguish themselves in comparison with the multi-faceted and open Congressional legislative process. All too often, administrative rules are drawn up, adopted and promulgated with little or no opportunity for participation by those with a vested interest, much less by the general public. Granted, there are many instances where an agency will publish proposed regulations in the Federal Register and then give the public 30 days or so to comment on them in writing before the agency either amends or promulgates them as they are. However, I have to wonder in just how many of these instances an agency is merely going through the motions and paying lip-service to the concept of public participation: I strongly suspect there's a very significant percentage of such empty and, in fact, rather condescending gestures on the part of

the regulatory bodies. As an illustration, even when the people are given the opportunity to comment in writing on proposed regulations and they somehow find out about this opportunity, what guarantee is there that their comments are actually heeded by those in a decision-making capacity in the agency? Obviously, that was a rhetorical question, although I have no doubt that when some of these agencies testify in the next few days, this Subcommittee will be hearing many solemn assurances that all such comments are given full consideration.

In further contrast, there is no simple, speedy means by which an administrative rule can be vetoed. Congress can pass a bill only if it receives at least 269 votes when all Members are present and voting since a majority in the House is 218 and in the Senate, it's 51. On the other hand, to cite a few examples of the so-called independent regulatory bodies, the Equal Employment Opportunity Commission, the Federal Trade Commission and the Securities & Exchange Commission are each headed by five Commissioners, so a majority vote of only three is sufficient to approve their regulations; of the seven Federal Communications Commissioners, a majority of four suffices; and a majority of the nine Interstate Commerce Commissioners is obviously five. Finally, media coverage of the actions taken by these individuals and their counterparts in other agencies is usually cursory at best, and frequently nonexistent.

When these aspects are coupled with the fact that the agencies generally are not subject to public scrutiny and are therefore insulated from public pressure (which could be ignored in any event due to the lack of political reality that has such a responsive effect upon Congress), it's clearly apparent to me that a sizeable portion of administrative law has been forced upon the American people in flagrant violation of the Constitutional principle of due process of law. And I'm talking about each of the four items comprising due process: the two procedural requirements of notice and opportunity to be heard, as well as the implied prohibitions against arbitrary action and unfairness.

Obviously, the logical question is: What can be done to remedy the situation? In response, I am convinced the answer is up to Congress and, in fact, it is up to Congress alone because neither the Executive nor the Judicial branch is able to act on other than a piecemeal basis. The President cannot veto administrative rules and regulations, and has little authority over the existing agencies beyond appointments and staffing. The courts cannot even initiate action: they have to wait for a suit to be filed and to come before them. And once that is accomplished, judicial review is still confined to ruling on each case one by one, instead of tackling the substantive rulemaking policies which underlie the entire matter.

An individual is even more hamstrung. In order to test the validity of an administrative rule which includes criminal penalties for non-compliance, and which thus could deprive him or someone else of liberty and/or property, he must go to court—a costly, tedious and cumbersome process. If he's not interested in the rule's validity, only in its application to his particular case, he always has the option of requesting a hearing from the very agency which drew up and promulgated the rule in the first place, and then found him guilty of violating it. I don't think most of us would find much to be encouraged about in such a case.

Congress does, of course, already have available such general curbs over regulatory agencies as determining the amount of their appropriations and exercising investigatory authority, plus the Senate's responsibility to vote on those nominated by the President. More specifically, Congress has sought to retain control in some instances by providing that the statute conferring power can be terminated or repealed by a resolution, or that action taken pursuant to the statute may be overridden by a resolution. However, traditional legislative oversight and repeal legislation are not the answer; just like the adjudicatory policymaking process of the regulatory agencies themselves, those methods are ex-post-facto and are not suited to dealing with routine rulemaking excess.

Congress in 1932, though, passed the first of a series of 126 bills (as of June 30th of this year) which contain 183 separate provisions requiring some type of Congressional review of, or consent to, contemplated or pending implementation of specific administrative action generally authorized by those provisions. These requirements for legislative review, approval, or disapproval of proposed administrative actions have run the gamut from those directing that an agency consult with or "come into agreement with" Congressional committees to those mandating resolutions of approval or disapproval which must be passed by appropriate committees or by the House of Representatives and/or the Senate. Nearly all have required notification and submission of data to various committees or to the

entire Congress by the President or some other executive. In many cases, the contemplated administrative activity would have to be deferred for a prescribed number of days (usually 30 or 60), after which the executive would be free to proceed if the designated committees or Congress had not adopted a resolution of disapproval. In other cases, adoption of a committee or Congressional resolution of approval, usually within a fixed time period but sometimes without any time limit, was a required prerequisite for administrative action.

The fact that Congress recognizes the need for curbs on the exercise of legislative authority which it has delegated is pointed up by the steadily increasing number of the review acts passed in the last forty-three years. In the first half of that period since the original review legislation was passed in 1932, only 25 such bills were enacted but, in the second half, 101 were enacted, including 14 in 1974 alone.

My bill, and that of its numerous cosponsors (134), the proposed "Administrative Rulemaking Control Act," is similar to the review provisions contained in those 126 pieces of legislation, but it is much broader in scope. Instead of Congressional review being limited to administrative rules proposed under only 126 acts, H.R. 3658 would give Congress the opportunity to disapprove the proposed administrative rules which it believes would exceed the intent of the legislation that authorized their drafting. The sole limitation in my bill is that it would apply only to those proposed rules which could subject citizens to criminal punishment for non-compliance.

Put another way, the purpose of my bill is to determine whether or not federal agencies are carrying out the legislative intentions of Congress through the review and possible disapproval by Congress of administrative proposals which carry a penalty of fines and/or imprisonment.

Specifically, my bill would provide that: (1) no regulation proposed by any administrative body, the violation of which could directly result in criminal penalties, shall become effective until it has been before Congress for 30 days; (2) exceptions shall be made for regulations declared to be emergency in nature or related to matters of health and safety, but the proposal must still be submitted to Congress for review; (3) during the review period, any member of either House may ask for a vote on the prospective rule or regulation, and a negative vote by either House shall nullify it; (4) the Speaker of the House of Representatives or the President of the Senate may assign the proposed rule to an appropriate committee for consideration; and (5) failure of Congress to reject a proposed regulation or rule shall not be deemed to be an expression of approval, thus avoiding interference with any future litigation which may arise from an adopted regulation or rule.

Naturally, the full procedure I've just outlined would not in most, or even in many, cases have to be followed to its end nor require that the numerous rules promulgated by the bureaucracy be individually considered by Congress. Most rules are not controversial, and most others will clearly be consistent with Congressional purposes and will not, therefore, be challenged. Still others which are challenged will be summarily dealt with and accepted or, infrequently, summarily rejected. Only a few will require close scrutiny by Congress, and in those instances they certainly deserve such close scrutiny.

A logical question is: Why limit the scope of my measure to only those proposed administrative rules which could carry criminal penalties? The answer is that, aside from the review provisions included in the 126 acts I've already mentioned, the proposed "Administrative Rulemaking Control Act", if passed into law, would be Congress' first major step toward exercising continual control—though, admittedly, to just a limited degree—over the use of the legislative authority it has delegated to Executive and independent agencies. Since my bill is essentially a first step, prudence and practicality strongly indicate that it should not try to do too much at once; and since its scope therefore has to be limited, the primary concern should be to apply its controls to those proposed rules which need them the most and, in my opinion, there's no doubt that such rules are the ones which, if implemented, could deprive a person of his liberty and/or property through their criminal penalties for non-compliance—especially since the provision for such a deprivation might well have been drawn up under procedures that violate due process of law.

This is one of those cases where the opportunity to improve and the irrevocably lost opportunity may coincide. If you want to restore to Americans that system of republican government and control over its life that our Founding Fathers and Mothers created as a hope for the world, the chance is now. Your opportunity is here.

President Gerald Ford has repeatedly stated that it was his purpose and intention to regain control over the federal regulatory bureaucracy and to make it simpler and more responsive. This bill will give a test to the degree of dedication to those statements that President Ford and his Administration will really manifest. During these hearings you will receive testimony from representatives of several agencies in the Administration. It will be interesting to see whether they will endorse this concept or whether they will continue to justify the present mess. Watch closely for their rhetoric, apologies and excuses, and, in the final analysis, see where they come out. I would hope that President Ford is sufficiently influential with these regulatory agencies to convince them that he means business in bringing them back under control. These hearings will certainly separate the sheep from the goats, and the sincere from the hypocrite.

Thank you.

Mr. LEVITAS. I would like to express my appreciation for your making this opportunity available to hold hearings on the proposed Administrative Rulemaking Act and the related bill cosponsored by so many of our colleagues.

About 150 Members of the Congress have already cosponsored legislation embodying the concept of congressional control over the rulemaking process. The list of cosponsors is bipartisan. It cuts across all philosophical lines. It embodies the attitudes of people all across America.

That speaks to the gravity of the problem and the need for solution. I am also grateful for the cooperation I have received from you and your staff as well as for the efforts made by your other committee members to attend here today.

Mr. Chairman, if the founders of our Nation could somehow return 188 years after they wrote our Constitution to see us engaged in a true nonviolent revolution to get lawmaking restored to Congress, they would be thunderstruck at the path to which we have come.

They would say you are kidding. They would ask how did it happen that the very thing we fought for—control over the executive power by the people, and the legislature—should be the object of a revolution, albeit peaceful.

But that is what we are doing. That is what we must do. The Federal bureaucracy has evolved into a fourth nonconstitutional branch of government with a thick tangle of regulations that carry the force of law without the benefit of legislative consideration.

I frankly do not believe that the precedents of a free society are compatible with the situation whereby Congress continues to permit civil servants or appointed officials to conjure up thousands upon thousands of far reaching laws that can put citizens in jeopardy of liberty or property without having anyone elected by the people involved in the process.

This is an issue which addresses itself to the rights of individual citizens. In the forthcoming discussion of legal and procedural technicalities, we must not forget this fundamental precept.

I am here fresh from a 10-day recess during which I spent many hours on many different occasions listening to what the people in my home district are thinking. I doubt that it differs from yours. I am more convinced than ever that this is an idea whose time has really come. And the people expect us to get on with it.

Mr. Chairman, I submit that we have a really serious situation when a vast number of citizens of a country perceive their own government to be their worst enemy instead of being their protector.

Under my proposal, whenever an administrative rule is adopted by an agency under procedures of the Administrative Procedures Act—section 553 of title V, United States Code, and a violation of the rule could result in a criminal sanction, then either House of Congress would have 30 days in which to pass a resolution disapproving of the adopted regulation.

Passing of such a resolution by either House will have the effect of preventing the regulation from becoming operative.

My proposal will provide for an expedited procedure for bringing the resolution to the floor of the House or the Senate.

Modeled after the procedures for consideration of rescission and deferral messages from the President, it would allow prompt and efficient consideration and action by either body.

My bill would not destroy the administrative process; it will make it more responsive. It does not substitute congressional decision for administrative decision; it assures that those few administrative rules which clearly go beyond congressional contemplation are never inflicted on the public.

This legislation, Mr. Chairman, commends itself to those who are concerned about the place and plight of the individual in the face of vast and sometimes unresponsive bureaucracy. It commends itself to those who believe that the basic principles of the Magna Carta, the Declaration of Independence, the Constitution, and its accompanying Bill of Rights are still valid—that no person should be deprived of liberty or property without someone elected by and answerable to the citizen being involved in the adoption of a decree that can place him in jail or impose a fine upon him.

This bill is not the final answer to administrative and bureaucratic problems, but it is a giant first step that must be taken.

Now that I have briefly reviewed a history of administrative law, I would like to begin this portion of my remarks on H.R. 3658 by throwing out a rather startling statistic for your consideration. When we talk about the advances of this process, let's illustrate what is contemplated.

Last year alone 67 Federal agencies, departments, and bureaus adopted 7,496 new and amended regulations, while during the same period of time, Congress enacted 404 public laws—a ratio of more than 18 to 1.

And this brings us to the very heart of the entire administrative rulemaking issue: While Congress may solve a specific problem through delegation of its legislative power, though that is debatable, we thereby create a far more serious and extensive problem than the original one we attempted to redress—namely the very real potential for depriving a person of his liberty and/or property without due process of law.

Obviously the logical question is what can be done to remedy the situation. In response I am convinced the answer is up to Congress and, in fact, it is up to Congress alone because neither the executive nor the judicial branch is able to act on other than a piecemeal basis.

The President cannot veto administrative rules and regulations, and has little authority over the existing agencies beyond appointments and staffing. The courts cannot even initiate action; they have to wait for a suit to be filed and to come before them.

And once that is accomplished, judicial review is still confined to ruling on each case and one by one, instead of tackling the substantive rulemaking policies which underlie the entire matter.

An individual is even more hamstrung. In order to test the validity of an administrative rule which includes criminal penalties for noncompliance, and thus could deprive him or someone else of liberty and/or property, he must go to court—a costly, tedious, and cumbersome process.

If he is not interested in the rule's validity only in its application, to his particular case, he always has the option of requesting a hearing from the very agency which drew up and promulgated the rule in the first place, and then found him guilty of violating it.

I have an example of what I am talking about. I have in my hand the public laws adopted by the United States during the 93d Congress.

It makes up approximately two volumes of material. These are the laws of Congress. Before you during the same period of time, you have the product of the Federal bureaucracy. These volumes in front of you, so numerous, are the properties of people not elected by or responsive to the public but whose enactments—and never forget they have the force of law— can result in the same situation that the violation of an act of Congress can bring us to.

Mr. FLOWERS. These are volumes of the Federal Register?

Mr. LEVITAS. The red books in front of you are volumes of the Federal Register which contain the work product of the regulatory processes in its rulemaking activities. I think this illustrates, rather graphically, the situation where we have now found ourselves where the legislative activity of the Government is primarily carried on by people not elected.

Mr. DANIELSON. I would appreciate a clarification as to the period covered. Those maroon-colored volumes are the bound volumes of the Federal Register covering what period?

Mr. LEVITAS. One year, the same period these laws were enacted by Congress.

Mr. DANIELSON. I would like to say this then. I think it is proper to infer that although that is the product of the Federal Register in 1 year, it by no means contains all of the regulations in effect.

Your two volumes of the code are probably—no; they would be more than that. But you are talking about the product in 1 year, and some people might understand that to mean that that is all the regulations in effect.

Many of them promulgated years ago continue to be in effect. There is a backlog before these ever came out.

Mr. LEVITAS. You are absolutely correct. The fact of the matter is there probably would not be enough room on this table to provide all the administrative rules and regulations.

Mr. DANIELSON. There is a set called the Code of Federal Regulations, as you know. It is kept up to date with pocket parts which can be interchanged. It is a rather formidable body of regulations.

Mr. LEVITAS. I have asked the Library of Congress to run a computer printout on those statutes that are on the books today in which there is a criminal penalty provided in the statute and the right of rulemaking has been delegated to some administrator.

I am going to furnish this to your committee staff for its reference. A vast number of laws of the Congress of the United States carry with it not only the delegation of authority to somebody else to make the law but also carry with it a criminal penalty if someone violates that regulation.

Let me make this point because I think it is frequently overlooked. Many laws of Congress carry with it a criminal penalty. If a citizen or a business violates that criminal law, the person can be arrested, they can be brought before Federal district court and tried, and if convicted they can be sentenced to jail, a Federal penitentiary.

By the same token, if someone violates many of these rules and regulations not passed by Congress, they can be arrested by the same person, tried in the same court, and if convicted share a cell with someone who violated an act of Congress. These are not mild consequences.

This brings us to the very heart of the entire administrative rulemaking issue. While Congress may solve a specific problem through delegation of its legislative power, though that is debatable, we thereby create a far more serious and extensive problem than the original one we attempted to redress, the potential for depriving a person of his liberty or property without due process of law.

There is an important difference which all of us in this room and more and more Americans are aware of between the characterization of congressional legislative processes and administrative processes. The congressional process is engaged in by elected people and subject to rejection by the people they govern.

A logical question is why I decided to limit the scope of my measure to only those proposed administrative rules which would carry criminal penalties. The answer is that, aside from the review provisions included in the 126 acts I have already mentioned, the proposed Administrative Rulemaking Control Act, if passed into law, would be Congress first step toward exercising continual control—though admittedly to just a limited degree—over the use of the legislative authority it delegated to executive and independent agencies.

Since my bill is essentially a first step, prudence and practicality strongly indicate that it should not try to do too much at once; and since its scope therefore has to be limited, the primary concern should be to apply its controls to those proposed rules which need them the most, and in my opinion, there is no doubt that such rules are the ones which, if implemented, could deprive a person of his liberty and/or property through their criminal penalties for noncompliance—especially since the provision for such a deprivation might well have been drawn up under procedures that violate due process of law.

If you went out on the street and asked the average citizen do you think that you could be put in jail for violating a law that nobody has been elected by the people has passed on, they would not think you were talking about the United States.

The Harkin amendment was adopted a few days ago. We said we did not want to provide foreign aid to countries with totalitarian regimes. When you start to think about what is a totalitarian regime, one of the hallmarks would be a system in which the laws in the country are made by fiat rather than by elected officials.

I wondered whether under that definition, the United States would qualify for foreign aid for the United States whereby a ratio of 18

to 1 the laws of the United States, those which govern your lives and in many instances can end up in criminal sanctions being imposed, are being made by people not elected by the public.

This is one of those cases where the opportunity to improve and the irrevocably lost opportunity may coincide. If you want to restore to Americans that system of republican government and control over its life that our Founding Fathers and Mothers created as a hope for the world, the chance is now. Your opportunity is here.

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During these hearings you will receive testimony from representatives of several agencies in the administration. It will be interesting to see whether they will endorse this concept or whether they will continue to justify the present mess.

Watch closely for their rhetoric, apologies, and excuses; in the final analysis, see where they come out. I would hope that President Ford is sufficiently influential with these regulatory agencies to convince them that he means business in bringing them back under control. These hearings will certainly separate the sheep from the goats, and the sincere from the hypocrite. Thank you.

Mr. FLOWERS. Thank you for your statement and for your demonstrative evidence and for your work on this legislation and getting it to the point of these hearings today.

I have several areas that I would like to get your comment on. I will try to be very brief because we do have a time problem this morning.

I have a feeling that some of the opponents of this legislation are going to quarrel with the constitutionality of one branch—perhaps infringing on the prerogatives of the other branch. Do you have a comment on that?

Mr. LEVITAS. I think that is an important point this subcommittee needs to consider. I have considered it. I would like to submit for the record an analysis statement that has been prepared on this point by the Emory University School of Law which has researched this question.

[The statement referred to is as follows:]

CONSTITUTIONALITY OF THE PROPOSED "ADMINISTRATIVE RULEMAKING CONTROL ACT"

(By Nathaniel E. Gozansky[1] and Frank P. Samford III[2])

Congressman Elliott Levitas has introduced H.R. 3658, the "Administrative Rulemaking Control Act," which would enable Congress to assume an active role in the administrative rulemaking process. The bill seeks to amend the Administrative Procedure Act to provide that either the House or the Senate could veto proposed agency rules which provided for criminal penalties within sixty days after their publication in the Federal Register. The legislation does not apply to rules dealing with military or foreign affairs or to certain routine matters of agency management but would still cover thousands of regulations every year. Either House of Congress could disapprove a proposed rule outright

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within thirty days of publication or could delay implementation an additional thirty days by referring the matter to committee. An expedited procedure for consideration of any rule on the floor is also provided. Although the stated purpose of the bill is to prevent administrative agencies from violating congressional intent, the vote is on whether the rule in question is favored.

This seems to be a simple proposal for preventing abuses of the administrative process. It does not seek to strip the agencies of their power but, rather, implicitly recognizes that a modern government would find it very difficult to operate without administrative agencies exercising discretionary authority. Instead, it provides for a modest congressional input into the process. A House of Congress could not on its own amend, modify, or mandate administrative rules; it could only veto a rule and, that, only by means of a resolution passed by the full House or Senate. One would not anticipate that this power would be exercised frequently, although the possibility of its exercise would operate to constrain the agencies in certain instances. If one believes that administrators should be subject to some control by elected officials, this influence can only be regarded as salutary.

But we make no attempt, here, to evaluate the wisdom of the bill. That depends on how well it could be expected to work in practice. Perhaps the most serious question is whether it would enable lobbyists to tie up the administrative process by routinely delaying and blocking the implementation of rules they found offensive. Short of this, one could envision administrative personnel spending substantial blocks of time defending their decisions before congressional committees. Congress needs to seriously consider whether it is institutionally capable of doing the task this law would assign it and whether it can, given other priorities, commit the resources necessary to make it operate effectively. These are serious questions of policy, which we do not feel should be confused by the objections to the bill's constitutionality suggested by Assistant Attorney General Scalia in his October 29, 1975 testimony before this Subcommittee.

The argument against this bill's constitutionality comes down to two almost mutually exclusive propositions: (1) that it assigns executive or judicial functions to the legislative branch of government; and (2) that it permits one House of Congress to legislate without the concurrence of the other and without giving the President an opportunity to exercise his Article I, Section 7 veto power. The assumption is that all governmental acts may be classified as executive, legislative, or judicial and may be performed only by the appropriate branch of government and in the manner prescribed by the Constitution. This is an interesting world view and might even command some support if it did not ignore the existence of the very administrative agencies that Congressman Levitas' bill seeks to control. These agencies clearly perform functions that are executive, judicial, and legislative in character. Their development posed a theoretical problem which the courts wrestled with during the latter part of the nineteenth and early part of the twentieth centuries.

I.

There were a number of early state court decisions in which legislative delegations to administrators were invalidated. *See, e.g., O'Neil v. American Fire Insurance Co.*, 166 Pa. 72, 30 A. 943 (1895). But, despite a number of dissents, the United States Supreme Court did not do so until 1935. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the so-called "hot oil case," concerned the President's power under the National Industrial Recovery Act to promulgate rules prohibiting and punishing criminally the transfer of petroleum in interstate commerce in excess of limits imposed by the states. Despite the limited authority conferred, the Court found that it was an unconstitutional delegation of legislative power because no standards for the exercise of the power were set out in the statute and that, even if standards could be implied, the Executive Order in question did not set forth the circumstances justifying its promulgation. 293 U.S. at 431. Justice Cardoza dissented, emphasizing the limited authority conferred and the implied limitations on its exercise contained in Congress' statement of policy in the statute.

The same year the Court unanimously concluded in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) that the authority conferred on the executive under § 3 of the NIRA to approve "codes of fair competition" amounted to an unconstitutional delegation of legislative power. Chief Justice Hughes emphasized in his opinion for the Court that the standards which were supposed to

govern exercise of this delegated power were not very explicit. Acts which had previously been lawful could be made illegal and could subject violators to criminal penalties because their proscription was deemed important to promote economic recovery.

> Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power. 295 U.S. at 541–42.

Four years later the Court sustained the constitutionality of a delegation of power to the Secretary of Agriculture to fix prices of certain agricultural commodities in the companion cases of *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939) and *H. P. Hood & Sons v. United States*, 307 U.S. 588 (1939). Justice Reed's opinions for the Court emphasize that prices were to be fixed for only a few products, that levels were to be set with an eye to restoring pre-World War I parity of purchasing power for farmers, and that elaborate procedures must be followed prior to any action. 307 U.S. at 575–76. Justices Roberts, McReynolds, and Butler dissented strongly on the ground that even if reference to parity prices could have been regarded as having established workable standards, the requirement that the Secretary weigh this goal against the "public interest" had the effect of conferring "uncontrolled discretion." 307 U.S. at 606–07.

In *Yakus v. United States*, 321 U.S. 414 (1944) and *Bowles v. Willingham*, 321 U.S. 503 (1944) the Court upheld the delegation of very broad commodity and rental price fixing authority to the Office of Price Administration. In establishing prices and rents the administrator was required as "far as practicable" to give "due consideration" to prices as they were in early October 1941, but this language was qualified by the requirement that prices be "generally fair and equitable." In his opinion for the Court in *Yakus*, Chief Justice Stone took a very flexible view of the doctrine of "separation of powers."

> The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. . . .
>
> Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices, it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. 321 U.S. at 424–25.

In three later cases the Court went even further. In *Fahey v. Mallonee*, 332 U.S. 245 (1947) the power of the Federal Home Loan Bank Board to appoint conservators for federal savings and loan associations, even though no standards in the act outlined when the Board would be justified in acting, was upheld. The Court found that the Board's promulgation of its own standards by regulation was sufficient, given the general agreement on appropriate guidelines, the fact that only one kind of enterprise was involved, and the regulatory as opposed to penal character of the standards. Similarly, in *Lichter v. United States*, 334 U.S. 742 (1948) the Court unanimously upheld the imposition of an excess profits tax that depended for its operation entirely on an administrative determination of what constituted "excess profits." And in *Zemel v. Rusk*, 381 U.S. 1 (1965) the Court relied on prior administrative action and legislative inaction in upholding the Secretary of State's authority to impose area restrictions on the validation of passports, despite the total absence of any standards in the statute governing his exercise of discretion.

The fact of the matter is that, although the Court has occasionally talked about possible difficulties with standardless delegations of authority to administrators (*e.g.*, *Kent v. Dulles*, 357 U.S. 116 (1958), it has not invalidated a delegation

on constitutional grounds since the *Schechter* decision in 1935. This is true in spite of the fact that administrators have increasingly been delegated broad rulemaking authority with very indefinite standards guiding its exercise. Even where the standards for rulemaking are fairly explicit, its actual exercise frequently involves exactly the kind of fact-finding and exercise of judgment that goes into the typical legislative decision. But most challenges to these kinds of broad delegations are decided by the courts in summary fashion. *See, e.g., DeRieux v. Five Smiths, Inc.*, 499 F. 2d 1321 (Em. Ct. App. 1974), *cert. denied*, 419 U.S. 896 (1975). Many other delegations are not challenged at all, probably because potential plaintiffs recognize that to do so would be an exercise in futility.

II.

This is the judicial backdrop against which any constitutional challenge to this bill must be evaluated. There is no United States Supreme Court case dealing with the kind of procedure contemplated in the "Administrative Rulemaking Control Act." But similar provisions have been included in federal legislation at least 183 times in 126 different acts of Congress in the last forty-three years. Library of Congress Congressional Research Service "Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and an Inventory of Statutory Authority." The mechanisms have ranged from requiring a delay to give Congress an opportunity to act to requiring affirmative approval by both Houses of Congress of proposed administrative action. A veto of administrative action has been permitted by one House, as in Congressman Levitas' bill, by both Houses, or, less frequently, by a commitee of one House. Whatever constitutional objection could be raised to a veto by one House would apply as well to concurrent resolutions, since in both instances the constitutionally prescribed legislative process is being by-passed.

Assistant Attorney General Scalia argues that if the bill is seen as authorizing a House of Congress to veto a regulation because of its view of statutory intent, the result would be to invade the province of the judicial branch of government. This is a very difficult notion to credit for two reasons. First, the bill provides explicitly in subsection (h) that a failure to veto a regulation shall not be regarded as an expression of opinion on its validity. Second, the method selected for vetoing a regulation is not an after-the-fact judicial determination but rather prior rejection of a regulation. We would agree with Mr. Scalia and with the thrust of Judge McGowan's comments from the bench in the *Presidential Papers* case that whether validly promulgated regulations of an agency comply with congressional intent is a judicial question. See pages 10–12 of the transcript of the Testimony of Antonin Scalia before this Subcommittee on October 29, 1975. What this bill envisions, however, is veto of a regulation before it is to take effect.

The argument that this bill would assign to Congress an executive function in violation of the Constitution is also weak. In 1967 Professor Bickel testified before a Senate Subcommittee against the committee veto provision contained in the Watershed Protection and Flood Prevention Act of 1954. While some of his remarks dealt with the nature of the veto, he also took the position that though Congress could impose conditions on the exercise of rulemaking power, it could not, itself, retain control over those conditions without violating the principle of separation of powers. *Hearings Before Subcommittee on Separation of Powers of the Senate Judiciary Committee*, 90th Cong., 1st Sess., Part 1, pp. 245–61 (1967). He relied heavily on a law review article by Robert Ginnane, *The Control of Federal Administration by Congressional Resolution and Committees*, 66 Harv. L. Rev. 569, 605–09 (1953), which had in turn relied on dicta in *Springer v. Philippine Islands*, 277 U.S. 189 (1928) and a 1933 opinion by Attorney General Mitchell advising President Hoover to veto a bill calling for approval of administrative action by a joint congressional committee. 37 Ops. Att'y Gen. 56–67 (1933).

While Attorney General Mitchell and possibly Mr. Ginnane had good reasons to support their opinions at the time, Professor Bickel's views in 1967 can only be characterized as idiosyncratic in view of the Supreme Court's post-1935 decisions on the delegation issue. His colloquy with Professors McCloskey and Kurland, in which he resurrected the *Schechter* and *Panama Refining* cases, demonstrates as much. He was, in effect, rejecting most of the Supreme Court's cases on the point since 1935. As he stated, "I do think a lot of those cases were wrongly decided." *Hearing*, supra, at 253. Congressman Levitas' bill would apply only to rulemaking that would provide for criminal punishment. This is the kind of

administrative action that is most obviously legislative in character. Most of the early delegaton cases dealt with whether any body other than Congress could make such decisions. Having decided that the power can be delegated to administrators, it would be anomolous at the very least if Congress were prevented from instituting an effective control mechanism because of alleged invasion of the executive sphere. The obvious answer is that the greater power includes the lesser. Since Congress could take away rulemaking authority, it can also impose limitations on its exercise.

The final basis on which the constitutionality of this bill could be challenged is that it permits one House of Congress to enact legislation without the majority vote of the other and without providing the President with an opportunity to exercise his Article 1, Section 7 veto power. The theory is that if a particular regulation would have been authorized by an act as originally passed but can be vetoed by one branch of Congress which has either changed its collective mind or changed its composition, the effect is to amend the prior statute. This argument is a bit more troublesome, if only because it is tied to a specific constitutional provision. In a sense, blocking a regulation that would have been authorized at the time the enabling act was passed does amount to amending the statute, but only if a very mechanistic view of the process is taken.

Every time an agency promulgates an important regulation, it is the functional equivalent of amending the original authorizing statute. This is the reason why the Supreme Court was troubled by the delegation problem for so many years. In a world where governmental acts must be regarded as legislative, executive, or judicial, rulemaking with accompanying provisions for criminal penalties clearly falls into the legislative sphere. We do not consider it legislative any more because the Supreme Court has in a long line of cases adopted the view that a rigid line between executive and legislative functions is not required by the Constitution. If we agree that the rulemaking process itself need not be classified as either legislative or executive in nature, then there is no need to so classify a veto by one House of Congress. In fact, the former poses a much more serious Article 1, Section 7 problem, since it permits the administrator to act affirmatively. A legislative veto of administrative rulemaking where criminal sanctions are involved is hardly the kind of power that could enable a House of Congress to unconstitutionally by-pass the usual legislative process.

III.

The foregoing analysis is not meant to suggest that Congress may necessarily impose any kind of restriction on administrative rulemaking that strikes its fancy. In a recent law review article, the author has considered at some length congressional efforts to re-establish control over administrative agencies and has concluded that many of the devices utilized, particularly the various kinds of committee vetoes, are unconstitutional. Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983, 1053 (1975). We find his analysis of the constitutional difficulties with existing legislation unpersuasive but recognize that he does have a possible point. But even he concludes that statutes authorizing disapproval by simple resolution are constitutional and, in fact, regards the procedure as presenting fewer constitutional difficulties than the concurrent resolution. 63 Cal. L. Rev. at 1076.

Constitutional challenges to any kind of legislative veto power would be very difficult to sustain, given the flexible attitude displayed by the Supreme Court on questions of delegation of power over the last thirty-five years. The particular kind of legislative veto included in Congressman Levitas' bill would almost certainly be regarded as constitutional by the Court. Congress should, consequently, decide whether to enact the bill or not on the basis of its merit.

Mr. Flowers. We will include it. We are going to try to go into that with witnesses in the hearings here.

There are many pieces of basic legislation which call for individually the same kind of thing that you are asking in this bill to apply across the board to all rules and regulations, is that not the case?

Mr. Levitas. That is true.

Mr. Flowers. Do you know if there has been any constitutional test of that sort of thing?

Mr. LEVITAS. There have been previously some cases in which this delegated power has been subject to congressional review and litigation on it. This document to which I refer will cover those cases very specifically. I think conceptually there are several arguments which can be made.

The Constitution posits the legislative power in the Congress of the United States. Congress has delegated that power and its delegation has been sustained by the courts. However, the delegation of authority of legislative power certainly can be conditioned and if a delegation of power carries with it the condition that it is subject to congressional review and congressional veto under a procedure of this sort, this is not an attempt of the Congress to reach out and grab something back.

It becomes part of the condition of the delegation itself. As I see it looking prospectively, after the enactment of this piece of legislation, all rules and regulations will be conditioned upon the delegation by Congress subject to a review by either house.

Mr. FLOWERS. Let me ask you this: You have the rules and regulations promulgated in 1974. How would you feel about allowing for more than the 30-day period, perhaps a 90-day period in which past rules and regulations might be vetoed by the Congress?

How would that fit your constitutional method?

Mr. LEVITAS. Well, I would think that after this concept becomes part of our fabric of Government, there is certainly a need to go back and take a look and clean out the house. My bill as you point out really looks to future rules and regulations simply on the theory that the evil of each day is sufficient unto itself.

I think we need to establish this principle. I think we have more difficult problems of practicality to begin with going back through the entire hundreds of thousands of regulations that exist. Constitutional, you would have a different problem, I think.

I believe, Mr. Chairman, that there is a constitutional basis even for going back under general legislation. If Congress were to adopt a law giving it power to review prior delegated rulemaking, the force and effect of that enactment would operate to that extent as a partial repeal of enabling legislation previously adopted and thereby the same procedure could be followed.

Prospectively, I have no qualms whatsoever that it is constitutionally proper. Retrospectively, there is a more difficult problem. The argument could be made that the enactment of a bill by both Houses of Congress and signed by the President and——

Mr. FLOWERS. I am still maintaining an open mind to hear what the experts have to say about it. I would agree with the gentleman. I probably have less difficulty with the ex post facto part of it than you have expressed here.

You say that your proposed legislation would apply only in those areas where the rules promulgated carry a criminal penalty. You have a printout of those in the last year, I presume, and they seem to be rather lengthy. Do you have any idea as to the ratio of rules that carry a criminal penalty as opposed to those that do not?

Mr. LEVITAS. I have tried to quantify this. I have been working with the Library of Congress Congressional Reference Service to do so. It illustrates part of the problem. There are so many of these rules and regulations, that they cannot easily tell me just exactly how many they

are. However, an examination of this list they have furnished me would indicate that most acts of Congress have in them at the end a general criminal provision.

The regulations and rules that are authorized to be made under those acts would likewise trigger that criminal provision. My estimate, based upon what we have been able to handpick out of the material they furnished us is that over half of the laws containing delegation of administrative rulemaking also carry criminal sanctions with them.

Mr. FLOWERS. What I am trying to ascertain is, how many additional situations would be covered by the Clawson bill's approach as opposed to yours? I presume your statement does go into some specifics on this.

I am interested in examples of situations wherein the administrative rulemaking apparently contravenes the intentions of legislative enactment. In the event that we don't get into this in further questioning, I would appreciate and I think it would be helpful to the subcommittee to have specific examples. If we are going to attempt to right a wrong, I think that we owe it to ourselves and to the system to delineate the wrongs.

I yield to the gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. I wish to join Mr. Flowers in commending you for your efforts in this area. I think they are very well taken and your statement has certainly helped us and members of the committee.

I am concerned with the elimination of the rules that do not involve criminal penalties, however. I feel very strongly that constitutional rights, rights of our people can be affected by regulations where there are no criminal penalties and that some of these rulemakers rather than subject their rules to the Congress would try to evade it by going to other forms of penalties which do not involve criminal sanctions.

I would like your comment on that.

Mr. LEVITAS. I think the point is absolutely correct and we both have seen it time and time again where even in the absence of a criminal penalty there has been a clear disregard of congressional intent.

I am not opposed in principle to going beyond the criminal sanctions situation. I think as I stated in my prepared statement that it really addresses itself to the most serious problems where the administrative agency not only has the criminal sanctions but uses the threat of criminal sanctions to gain compliance.

If this committee in its wisdom feels that it will be within the realm of practicality to go beyond it, I am all for that. I would suggest with respect to my particular bill that in addition to specific criminal sanctions, there should be added to it by committee amendment triggering where civil penalties are involved as well, at the very least, and also possibly where there is a cutoff of funds.

I think certainly civil penalties and criminal sanctions ought to be covered by—because from the point of view of the citizen it does not make any difference whether it is a civil penalty or a criminal penalty.

The other point of difference as I understand it, and I am not opposed to the concept that Mr. Clausen has in his bill, if it is practical to do at this time. But if you broaden it, I would like to see the concept of my bill maintained which does not limit the right of Congressional rejection solely to where there has been a determination that the regulation and ruling goes beyond original congressional intent.

My bill is broader than that. It embodies the principle that Congress is the embodiment of legislative power and has the rule to assume at any time that the delegated power has been abused.

Mr. Moorhead. Do you have any idea what the percentage is between those regulations that have criminal sanctions, and those that don't?

Mr. Levitas. As I stated in answer to the chairman's question, because of the morass of volumes of Federal regulations, the Library of Congress itself has not been able to sort out that number.

Based upon our hand counting thus far, I would say that over half of the laws that delegate administrative rulemaking contain criminal penalties. There was an incident up in Boston, Mass., that was reported in the press, for example. The Environmental Protection Agency had made a ruling that in the city of Boston a certain parking regulation would have to be put into effect, a certain number of parking spaces would have to be closed down and there could be no onstreet parking during certain hours of the day.

This directed itself both to the city government and private employers. When it came to the private employers they were repeatedly threatened with 1 year in prison and a $25,000 fine if they did not knuckle under.

Translate that to a mama and papa operation who is facing the Government and they knuckle under. That is why the criminal sanction is so severe.

Mr. Moorhead. Do you know whether your bill would cover agency guidelines for grant-in-aid programs?

Mr. Levitas. That is a very good point. The way this bill is now constituted, it ties on to the specific administrative procedure APA type rule. It does not touch guidelines, raised eyebrows, letters of intent, and the other myriad ways in which the Federal bureaucracy has gotten around the Administrative Procedures Act.

If this committee could come up with a way to get this done, I commend you. When an agency of government says it has got a guideline, that has as much force and effect as when they go through the APA procedure.

Mr. Moorhead. I take it you feel, as I do, that Congress should have some voice in those guidelines?

Mr. Levitas. Congress is elected by the people and we in Congress have abandoned our responsibilities.

I think we have got to regain our responsibilities.

Mr. Moorhead. Under H.R. 3658 an agency may determine that an emergency exists and place a rule into effect immediately. What would constitute an emergency justifying this type of action by the agency?

Mr. Levitas. This is not a novel idea. There are several emergency type situations which can even bypass the regular administrative process at the present time. What I have in mind is if a drug or a food were held to be dangerous to the health and safety of the public or if an airline safety procedure was determined to present an immediate danger to the public where the life and health of people were involved and such a finding were made by the agency, I would not want to see this process delay that particular thing.

If it was abusive, Congress could come back and do something about it. But I would not want to have on the hands of Congress the blood

of people if the agency charged with that responsibility in an infrequent situation says it is life that we are talking about.

We have got to implement this rule.

Mr. MOORHEAD. Both your bill and that of Congressman Clawson would utilize existing committee staffs to oversee the rulemaking regulations. Was any thought given to the creation of a new committee specially designed for this purpose so that we would not clutter up the work of existing committees?

Mr. LEVITAS. I gave consideration to that, Mr. Moorhead. The reason I opted in the direction that I did is that the existing committees to which these veto resolutions will be referred presumably have in their staff and on their membership a certain amount of expertise in the subject matter they are dealing with, whether it is the food and drug area, the labor area, whatever that area is.

They have already been through it. They know or should know what the legislation that is referred to their committee generally deals with and rather than try to bring in people anew, I felt it more appropriate to draw upon existing expertise of the committees.

As you see it, if a veto resolution were introduced dealing with some safety matter, some rule of the Federal Highway Administration, that would in the normal course of action be referred to the Public Works and Transportation Committee where you have a competent, professional staff who knows what it is all about.

That is why I moved in that direction.

Mr. MOORHEAD. I think you are doing just a great job. This is something that is important to all of us.

Mr. FLOWERS. Mr. Danielson?

Mr. DANIELSON. I also want to commend you and the others who put in bills attacking this subject. One thing that concerns me very much is the public disaffection with their Government and I think a great portion of it is founded upon this very problem that people are subjected to regulations that they have never even heard of before, many of which are inconsistent with each other as well as being inconsistent with common sense.

I think we have to face this problem. A graphic illustration took place on the floor of the House yesterday where we are even now confronted with a situation where a rule has been promulgated which will take effect apparently on next Thursday if not stopped.

If that rule does take effect we are in a dilemma in which an individual must apparently violate the law if he complies with the rule and on the other hand would violate the rule if he complies with the law. So no matter what happens, we are going to be in trouble.

I do appreciate the opportunity to get into what I consider to be a very important field.

One point I would like to have you expand on in order that the record be clear. There have been references to regulations and rules which create criminal penalties. I think you really probably mean which invoke or trigger criminal penalties.

Would you expand on that so the record is clear?

Mr. LEVITAS. Yes. The type of rule or regulation I am referring to and would target in this bill is a rule which if violated would trigger

the potentiality of a criminal penalty being imposed. It is not the specific rule but usually within the underlying law itself.

Mr. DANIELSON. The enabling law has a provision that any violation of this law or any rules or regulations made in accordance with it constitute an offense. So when the regulation is promulgated, if you violate that, you are subject at least to prosecution for criminal offense.

Mr. LEVITAS. As I pointed out in one instance and I can recite others and my letters bear it out and I dare say many of your other people in Congress have the same experience where a Federal administrative agency will go into a person concerning a rule or regulation and in telling that person they are going to have to comply even though there may be some question as to applicability or appropriateness, will frequently bring out the threat of criminal prosecution if you don't.

The small person, the person that does not have availability of high-priced counsel and the resources to contest this thing, does not want to stand in a criminal dock charged with a crime and will knuckle under because of the force and intimidation of a criminal sanction.

It has happened time and again.

Mr. FLOWERS. Mr. Mazzoli.

Mr. MAZZOLI. Mr. Chairman, I came in late and was unable to hear the gentleman's testimony. I would congratulate him on the bill. The whole drive and direction here is correct. The specifics I will have to get caught up on later. I thank the gentleman for his time and trouble.

Mr. FLOWERS. Mr. Pattison?

Mr. PATTISON. I won't take the time of the committee to ask questions at this time. I congratulate the gentleman from Georgia for the bill of which I am a cosponsor. I am not sure the problem is solvable in the way that the public would like us to solve it.

I would take note of the fact that if we were to review each of those regulations as they came out, that there is about 40 books there and if we sit for 200 days a year, that would give us something like—you would have to go through a quarter of one of those per day.

That isn't the only thing that we have to read. I am not sure that the problem is totally solvable. I think the gentleman would agree with me that that great pile of books reflects to a great extent the complexity of our modern society.

Unless we decide to go back to the backhouse and candles we are going to have to live with a certain amount of this regulation whether we like it or not. The notion that the bill reflects is one that says let's somehow see if we can get a handle on it.

Mr. LEVITAS. I think that is precisely what I am trying to say. There is obviously no way that Congress could review each of these 7,000-odd regulations that come out a year.

Mr. PATTISON. Some of them are not even odd. Some of them are sensible.

Mr. LEVITAS. Consequently, as I see it Congress will actually have to deal with only those which are the most clearly oppressive, the most clearly arbitrary, and those which obviously exceed Congressional intent.

I think once this bill becomes a law, you are going to see a lot more self-restraint on the part of bureaucracy because now they know that the judicial process is very limited, very slow and most of their work

product is going to be unchallenged but now they will know that Congress will be looking over their shoulders.

Let me point out something for the record that is important. A provision has been written into this bill that says the failure of Congress to adopt a negative resolution creates no presumption of congressional approval. So that the failure of Congress to veto does not give any more authority to a rule or regulation than it would have in the absence of this.

I think that is a very important point. There certainly—we don't want to ratify everything in the Federal Register. Some people have asked can you really afford to do this in terms of the time, in terms of the minimal additional expense and I think this is one of the cases where you have then got to say, can you afford not to do it? Are you prepared to turn over the administrative rulemaking power and abandon the Congressional responsibility?

The answer is it may be an additional burden but it is ours and we have got to fulfill it.

Mr. PATTISON. I agree with the gentleman. I point out however that it is likely that three or four or five of those volumes contain regulations governing the rules by which you have to operate a nuclear powerplant, for instance, which if we all reviewed would not make any sense to us anyway and this body never has had and never will have that kind of expertise.

We are trying to provide a mechanism more than anything else to get at some of the more offensive rules made by people who perhaps are well intentioned but have not used common sense.

Mr. LEVITAS. I have no intention or desire to eliminate the administrative arm of government or administrative rulemaking. But I think we do have to have a mechanism to control it when it becomes abusive.

Mr. PATTISON. Thank you very much. I yield back.

Mr. FLOWERS. I feel the gentleman from Georgia has stated a good point in asserting that there would be more restraint in administrative agencies when they are aware that there would be continuing and better oversight over their rules.

Now one closing query, Elliott. Let's say that the agency promulgated a rule which, in the absence of a congressional veto, went into effect in 30 days. Subsequent to that time, this legislation really would have no control over the situation.

We would fall back on what the law is right now, that is that by affirmative action the Congress could pass legislation which would change the regulation but it would have to be under the terms of a new act of Congress.

It would require both House's concurrence and the signature of the President, is that correct?

Mr. LEVITAS. That is correct. The reason for this legislation being operative during the limited period of time is because it does not require the concurrence of both Houses or the signature of the President but lets either House operate in this fashion.

Mr. FLOWERS. I believe one other situation should be covered and that is if, by action of Congress within the 30-day period, the matter or the proposed rule had been referred to a specific committee of either house of Congress for its study and report back there would be an extension in time, is that correct?

Mr. LEVITAS. That is right. Congress had before it consideration of the Youth Camp Safety Act earlier this year. I offered an amendment to that piece of legislation and in that instance, we went to a 60 legislative-day period of time.

A 30-day period plus 60 days if it is referred to committee is really more appropriate than the 30 days.

Mr. FLOWERS. The 30 calendar days could very well be too short a time to act.

Mr. LEVITAS. Yes. Even though this legislation provides for highly privileged treatment, that it must be reported out within a certain period of time, I think 30 calendar days is too short a period of time.

Mr. FLOWERS. I have no further questions.

Again thank you very much for being with us. Your comments will certainly be considered by the subcommittee.

Mr. LEVITAS. Thank you, Mr. Chairman. As a new Member of Congress, just being in this room which has such historic meaning to the people of America after the event that transpired here last year, it is really significant that the actions and manifestations of legislative control as evidenced by your actions of last year in one part of our responsibility now has this opportunity to again reflect Congressional responsibility and response in another area.

I am very sincerely and deeply grateful to you and the members of your committee for making this possible. Thank you.

Mr. FLOWERS. We thank the gentleman for his excellent and perceptive observations.

We will next hear from our distinguished colleague from Michigan, Mr. Blanchard.

TESTIMONY OF HON. JAMES BLANCHARD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. BLANCHARD. Thank you, Mr. Chairman.

Mr. FLOWERS. Jim Blanchard is a new Member who has made a distinct impression on the entire Congress. I know we are going to have him around for a long time.

Mr. BLANCHARD. Thank you, Mr. Chairman and members of the committee. Let me express my appreciation for being permitted to appear out of turn. I am in the middle of subcommittee hearings on aid to New York.

I hate to be away from it. I do have a brief statement that I would like to submit for the record so that I can——

Mr. FLOWERS. Without objection it will be included.

Mr. BLANCHARD. I concur wholeheartedly with the viewpoint expressed by Congressman Levitas who cosponsored this bill and also the Clawson bill. While it may tactically be more wise to deal with criminal sanctions, I think we ought to reassert congressional power in all areas of rulemaking.

I probably have more experience in rulemaking than most Members of Congress. That may sound surprising to you, but for almost 5 years, I was assistant attorney general of Michigan and my responsibility was to advise and represent a whole host of State agencies.

I represented the Department of Commerce, Agriculture, all kinds of licensing boards from dentistry to horology, which is watchmaking.

Having had constitutional law and legislative law in law school, I was shocked to find out in interpreting the law in and out of court, I was shocked how far rulemaking power can be extended from the intent of the legislature.

In fact I developed a great distrust of legislative bodies in my work because time and time again it appeared to me when I was interpreting laws in courts that when a legislative body could not figure out how to make a law work or how it should be implemented, it would then simply delegate legislative power to an agency, somehow hoping there was someone across town who knew more than they did or had more time.

Mr. FLOWERS. Somebody used to call that passing the buck.

Mr. BLANCHARD. Somehow hoping that an important matter the legislative body itself could not solve would be solved by someone else. I think it was an exhibition of very great faith in the human mind.

I have seen a lot of good ideas—from a lawyer's standpoint, not as a Member of Congress—I have seen an awfully lot of good ideas become law but because the way the law is written or because the idea cannot be made law because that—people who are implementing or enforcing the law are not given careful and adequate direction.

If they are, on the other hand, they don't have enough of a staff to make the law work anyway.

I see the Levitas bill as a great first step in giving us a safety valve, at the very least, on rules and regulations which carry criminal sanctions. I can't think of any reason, as a Member of Congress, why most members would not support it. Incidentally, for the benefit of the subcommittee, I remember writing a brief in court on Federal rulemaking power.

I remember arguing in a particular instance that constitutionally Congress is the only body which can make laws and since rules are treated as having the force of law we could argue in this instance that our power has been usurped.

All the Levitas and the Clawson bills would do would be to reassert power we have had all along in the Constitution and should have been exercising and really should never, never have relinquished.

That is all I have to offer today. If anyone has any questions, I will be happy to answer them.

Mr. FLOWERS. We will include your entire statement in the record and we appreciate your being here. We note that you have cosponsored each version of the legislation. I yield to Mr. Moorhead.

Mr. MOORHEAD. I have no specific questions. I thank you for coming.

Mr. FLOWERS. Mr. Danielson?

Mr. DANIELSON. I have no questions. Thank you.

Mr. FLOWERS. Mr. Kindness?

Mr. KINDNESS. I appreciate your coming.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. I appreciate the gentleman coming. I wonder if the gentleman's attitude has changed since coming to the Congress?

Mr. BLANCHARD. I am delighted to find far more talent in Congress than I expected. The whole seems to be less than some of the parts which is a great frustration to all of us. I am delighted to see that most everyone in Congress agrees with the principle that we need to

reassert our oversight responsibility and we need to harness the bureaucracy.

I would note in concluding that if the Levitas bill and the Clawson bill are adopted it is going to be difficult for all of us because we will not be able to blame the bureaucracy indefinitely when things go wrong.

Mr. MAZZOLI. I was curious, has the gentleman voted yesterday on that Federal Elections Commission rule?

Mr. BLANCHARD. I voted no.

Mr. MAZZOLI. Well, that brings up the precise point that I think we have here. I doubt that there are many members of the committee who argue with the thrust and the direction of this bill and that is to try to make something manageable out of the Federal bureaucracy and to bring back home the ultimate responsibility, but this gentleman has found consistently that the Congress has even when it has a responsibility continues to shuffle it off. Even when it reasserts its authority it finds a way to sneak out from under that onus and burden.

Like yesterday, that was a bad vote, I think. I would wonder if the gentleman has any thoughts on exactly how you protect against that and guard against that?

Mr. BLANCHARD. I don't think there is any legal or constitutional principle which requires people to practice what they preach, if that is what you are saying. But certainly we all have a duty to do our best and try.

Mr. FLOWERS. Mr. Pattison?

Mr. PATTISON. I have no questions.

Mr. FLOWERS. Thank you again for being with us. We appreciate your comments.

[The prepared statement of Hon. James J. Blanchard follows:]

STATEMENT OF HON. JAMES J. BLANCHARD, A REPRESENTATIVE FROM THE STATE OF MICHIGAN

Mr. Chairman and members of the committee, I appreciate the opportunity to comment on H.R. 3658 and other bills dealing with congressional review of administrative rulemaking.

As a former Assistant Attorney General of the State of Michigan, I had the opportunity to familiarize myself to some degree with the rulemaking procedures of state agencies, agencies ranging from the Board of Horologists to the Department of Agriculture.

On the basis of that experience, I must admit to a degree of sympathy for those administrative officials who will be the objects of this legislation.

I know that the vast majority of them perform their duties conscientiously and with a cooperative attitude toward the legislative bodies which oversee them.

The problem we have in government today, which this legislation seeks to address, is a classic case of structure, rather than conscious legislative intent, determining the focus of power.

I support H.R. 3658 not because I believe bureaucrats are evil, but because that broad-ranging grants of rulemaking power, such as Congress has given time and again to executive agencies, must inevitably result in injustice and unresponsiveness on the part of government.

In recent years, as agencies and rules have proliferated, the power Congress has delegated has become so broad, and the probability that administrative rules will stray from the path of legislative intent so great, that basic principles which underlie our system of government are threatened.

The principle of checks and balances is in danger because Congress can no longer serve as an effective check on 67 agencies which are issuing over 6,000 rules and over 45,000 pages of descriptive material yearly.

The principle of representative government is increasingly undermined as rules are promulgated which, if violated, carry civil and criminal penalties, but which have not been enacted by the elected representatives of the American people.

More importantly, the credibility of our federal government can only suffer as the average citizen who runs afoul of a rule searches in vain for a reasonable legislative or judicial remedy.

There is only one answer to this serious and growing problem—structural change, by which Congress can begin to reassert its authority and control.

The bills before this committee are new. But they are really only a natural outgrowth of a process of reform which began a number of years ago, and which has escalated rapidly as more and more Members of Congress have recognized the necessity for increased congressional oversight.

In the last decade, many acts of Congress have contained provisions of one sort or another to require Congressional oversight. But for the most part, those provisions have affected only the legislation in which they are contained.

The legislation before us seeks to begin broad and systematic oversight of administrative rulemaking.

As befits legislation of such sweeping scope, it is appropriately modest in its requirements. That, of course, is a tribute to Mr. Levitas.

It will not disrupt the orderly process of government. Nor, in my opinion, will we be back here again a year from now seeking to undo what we have done.

Instead, we will have gained the power to stop executive rulemakers when the rules they author are clearly beyond Congressional intent. And hopefully, we will have helped to ensure that prospective rules are considered much more carefully.

Mr. Levitas has announced his intention to pursue this question with further proposals to make the administrative process more open and more responsive.

I support those aims. The need is pressing and clear. I do not believe we should wait for gross injustice to spur us to regain some of the powers we have mistakenly given up. The time to act is now—before any more of our citizens are injured by rules having the force of law and enacted by officials who are neither elected by nor answerable to the public.

Mr. Flowers. Next we have our colleague from California, Mr. Don Clausen, not to be confused with Del Clawson. We appreciate your being here.

TESTIMONY OF HON. DON H. CLAUSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Clausen. As I look upon this committee, and I have testified before a few of you in the seven terms I have been here, I like what I see. I see an open-minded group of individuals, and the kind of exchanges that have been taking place indicate to me that you have a genuine desire to want to do something in this direction.

I know most of you personally, and so I want to compliment you, Mr. Chairman and members of this committee, for holding hearings and giving the people of the country through their Representatives an opportunity to be heard on what I think is a most pressing issue of our time, the question of overregulation by Government agencies that have gone beyond what was oftentimes the intent of the Congress.

If you note, I am a cosponsor of the legislation and also the gentleman from Georgia, Mr. Levitas, with whom I have the privilege of serving on the Public Works and Transportation Committee.

I believe that this man is one of the outstanding members of our Public Works and Transportation Committee. He is doing an extraordinary job.

I want to work with him on this and have done so. Should there be any questions, Mr. Chairman, in order to save the committee's

time because I am involved in a markup in another committee, I would be happy to have you submit questions to me later on, and then I would respond to those questions.

But I have a few things that I think might be of interest to you, and so I am going to go through my testimony very quickly because I am going to be speaking to you as an—I leave to you gentlemen to put together the best combination of the legislation pending before you.

I have just returned from my congressional district, and the feelings among the people are very strong in their objections to Government's involvement in their daily lives. They are saying we can't turn around without having Government redtape or regulations hitting us right in the face, and we are getting sick and tired of overregulations by Government.

Therefore, Mr. Chairman, I strongly commend you and your committee members for moving forward on these hearings thus giving the people, through their Representatives, a chance to be heard on the matter of regulations.

Our Federal agencies, under the guise of rulemaking, are making sweeping changes in the intent of laws passed by the Congress. They are building Federal empires out of regulation-authorizing legislation, and clearly overstepping the bounds of their responsibilities.

Congress is increasingly met with the problem of irresponsible and overly burdensome regulations and along with our constituents we must spend too much time undoing the unnecessary redtape, inefficiency, and ineffectiveness of these cumbersome, oftentimes unworkable, administrative rules.

It is quite evident from a look at the Federal Register that our Federal agencies have become a fourth branch of Government. They have promulgated innumerable regulations which have the force of law, and as the size and reach of these regulations have grown the system of checks and balances instituted so wisely by our forefathers has become unbalanced.

A system needs to be developed that curbs the overly zealous administrative lawmaking, and I firmly believe the legislation pending before the committee will provide a responsible and responsive answer.

Once we enact a law which gives a Government agency the authority to promulgate regulations there presently is no comprehensive manner for the Congress to legislatively review those regulations to insure that the intent of the law has been carried out. In short the oversight and review function over Federal agencies has been totally lacking and/or inadequate.

This legislation again would provide a workable means to restore a responsible balance of lawmaking functions to our Government.

Those regulations which are not controversial or are in line with the intent of the law would not require action taken on them by the Congress. It is only in those few instances where a rule so adversely affects society or strays from our intent that Congress will take action, and in so doing, the administrative process which is so vital to the effectiveness of our Government will not be destroyed.

This legislation will only insure a higher degree of responsibility and responsiveness to the American people through their elected representatives in the Congress.

Equally as important is the major impact Federal regulations have had on our job creating business community. The decisions which our businessmen want to make, and should make, are now being made with an alarming frequency, by Government bureaucrats miles away.

These enterprising men and women are being told how to hire people, who to hire, what products to sell, and how to then sell them, how to treat employees and customers, how to run their marketing and financial systems, and in effect how to run their businesses.

Not only do these regulations tread heavily on the businessman's right to free choice in the marketplace, they have placed such an unreasonable burden on our businesses that the time, money, and labor that is spent filling out innumerable Federal forms, and installing proper equipment, has meant that many businesses cannot hire additional help to expand, and that they cannot make ends meet, and that they again may have to join the ranks of the hundreds of businesses that closed their doors last year.

It is this kind of inhibiting influence that is stifling economic growth and causing job losses and/or high unemployment. In short it is inhibiting and totally frustrating their ability to carry forward their business functions and this is particularly repressive to small business who lack the personnel to handle the redtape paperwork required by these regulations.

But even for those who are not in business for themselves the number of Federal regulations has had an impact. Each time anyone of us looks to the Federal Government to solve a problem there are certain tradeoffs. Someone has to pay the bill, and the buck then stops passing at the taxpayer.

The taxpayer pays the salaries of the over 100,000 Federal employees whose job it is, is to create, review, and enforce Federal rules. The taxpayer also must pay the bill now in the form of higher costs passed on by our businesses. And the taxpayer must also pay the bill in ways other than strictly financial.

There is no part of our lives untouched by Federal regulations.

In my district alone the issue which has produced more unrest and more complaints is the ever-presence of Government in people's lives.

As a representative of my people of the Second Congressional District of California. I will attempt to present the kinds of comments, feelings, and attitudes of my very disturbed and frustrated constituency. This is what they are saying:

From the time we get up in the morning to the time we fall asleep that night we can't avoid the Federal Government—and the point is, Government should govern, not dominate. And Government is dominating—to the point that the average citizen, and especially those in small business for themselves, can be brought to court at any time for the action of a nonelected official, a Government regulator, if they violate any one of the thousands of regulations that are issued.

While this unwieldy and unchecked bureaucracy was growing up and usurping the decisionmaking process from every one of us we may well have been caught napping. Perhaps we have been lulled to sleep by the many good regulations which have improved our lives, and we have viewed other regulations as minor irritants along the way.

But these minor irritants have become far too numerous, and reflect a waste, bias, unworkable regulations, concentration on trivia, conflicts

among the regulators and arbitrary and uncontrolled powers. It is the quality of regulations in question, not the mere existence of them.

Irresponsible rulemaking poses an ominous threat to our free enterprise system. But it poses an even greater threat to our basic freedoms and unless constructive action is taken in the near future each of us will see a continued and accelerated erosion of our basic rights.

It was Jefferson who said that it is the nature of history that as government grows, freedoms recede. And before our freedoms recede too much more we must take positive action to stem the tide.

H.R. 9801 and 6110 and the other bills pending before this committee are a step in the right direction.

Mr. FLOWERS. Thank you very much. We appreciate your comments. You obviously have strong feelings on this legislation.

Mr. Danielson?

Mr. DANIELSON. I have no questions. I am delighted we are going to have a chance to work on those bills.

Mr. FLOWERS. Mr. Kindness?

Mr. KINDNESS. No questions. We appreciate your coming.

Mr. FLOWERS. Mr. Pattison?

Mr. PATTISON. I have a comment. I find the same thing that all of us do in dealing with people back home. I find people saying on the one hand why didn't the Government do A, B, C, D, a number of things?

Then at the bottom line it is how come you are regulating our lives? I don't think it is simply a matter of Government and the Congress and the bureaucracy overregulating.

I think that there is a fundamental misunderstanding on the part of people that you can regulate things that particular segments want regulated without affecting all of us. I think there is a demand on the part of people that a variety of things be changed the way they want them changed.

Those things do lead to regulations and all of those books we have sitting on that table. I think there is a great ambivalence on the part of American people about regulations. They are opposed to regulations and specifically in favor of regulations that affect somebody else.

That is one of our basic problems.

Mr. CLAUSEN. First of all, it has been stated before that the Congress as the elected representatives of people, in my view, has a genuine responsibility to make an evaluation of those regulations promulgated and determine whether they have gone beyond the legislative history that we spell out in our committee report, in the language that the managers on both sides of the aisle present; once this is done, we can determine whether or not the promulgators of regulations have gone beyond the intent of Congress.

That is the only way the people are going to have confidence in our elected representatives. They say you pass a law, but when implemented, it goes beyond what the Congress intended.

Mr. FLOWERS. Mr. Danielson?

Mr. DANIELSON. It is appropos of what our witness just said. I think the big need here as to the extent, in proportion I doubt very much if over 1 percent of regulations are offensive, but that is enough. I think the bottom line is that the regulations must be within the parameters of the enabling legislation in the first place.

To the extent they go outside of that scope, we can't tolerate them. No. 2, they must be consistent with the congressional intent. Since most of these regulations will not come to our attention until someone's toe has been stepped on, I am going to try to get an understanding during these hearings as to whether we could conceivably—I like your 60-legislative-day period for the maturity of a regulation, but I think we ought to look into the possibility of being able to go back retroactively and wipe out an offensive regulation once it comes to our attention.

That is a comment, not a question.

Mr. CLAUSEN. I think it is clear that we need to have a forum where the agency and the personnel are going to have to be responsive to—if nothing more occurs from this than a deterrent and for the people promulgating regulations to understand that the Congress is going to back up what they said in their legislative history, that this is the intent of Congress.

If there is nothing more than that, we will serve the public well.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. I know the problem that has been had. Many of us have heard back home about the difficulties of pension plans. We have had nothing but all sorts of horror stories about that infamous form that has 30 days that has to be filled out.

Through some emergency measures, they have that whacked down to 2 pages. One of the comments by the bureaucrats was Congress did not give us the directions. They just gave us an overall idea.

We thought we were following directions. It is not simple enough to say that these represent bureaucracies gone amok. I think it sometimes represents a good faith effort to satisfy the lack of direction that the Congress has somehow failed. I think we have a twofold problem here, not just simply they have not followed directions, but they have somehow endeavored to follow directions, but we have not been giving them directions.

Everything we do here is really after the fact. This is an after-the-fact mopup. I think we really have our work cut out for us.

Mr. FLOWERS. I would agree that we should do a better job in the first instance.

Mr. CLAUSEN. May I state for the record that I think the gentleman from Kentucky has brought up an excellent point, and in all fairness, it is conceivable as we move through this legislative process, we should also take into consideration whether or not the guidelines and the legislative intent are clear enough.

As Mr. Danielson knows full well, the ability to develop and assure legislative intent in the legislatures is lacking because they don't keep the kinds of records we do here. It is incumbent on the Congress to show the way so there will be no ambiguity as far as the intent of Congress and the intent of the act we passed.

Mr. FLOWERS. Next we have Mr. Brinkley. You are one of our most distinguished Members, and we are delighted to hear what you have to say about this pending legislation.

TESTIMONY OF HON. JACK BRINKLEY, A MEMBER OF CONGRESS FROM THE STATE OF GEORGIA

Mr. BRINKLEY. It is a pleasure for me to appear before your subcommittee as a Member of Congress from the State of Georgia. If it

please the chairman, I will submit my statement for the record. I will not read it.

Mr. FLOWERS. All right.

Mr. BRINKLEY. I will refer to specifics. Mr. Gardner, I believe it was, said that if the Government failed, it would be because those who criticized its institutions do so without love and because those who love its institutions do so without criticism.

I am here today to criticize the administrative rulemaking processes which have been seriously abused. First, I want to refer to the occupational—OSHA. A man went into a place in my district and insisted that the man not take incoming calls because he was a judge. He sat in judgment and levied his own fines. In Georgia, we have a constituent who called us about a problem he had with the Occupational Safety and Health Act.

A couple of days later he said don't intervene in my behalf because I am fearful if we go forward with it, they will be on my neck from here on.

So we called it off. The final situation that I would refer to with OSHA deals with a century old firm there in Columbus, Ga., who were fined for nonserious violations and who when approached by us and others were authoritative, unyielding, inflexible as to any modification, notwithstanding the fact that these fines undermine the financial status of that company.

We feel that such examples as this are bad for business, free enterprise, and the country. We think as Mr. Levitas expressed it, it is a function of the Congress to rule. It is the function of us as elected officials to set the rules, to provide the boundaries within which we might live our lives with predictability without having to proceed through all of these lawbooks.

The Federal Communications Commission just on one license renewal for a radio station, we weighed the forms, it takes over 1 pound of forms. In August, I was up in New York on another matter. I wish Bob McEwen from the State of New York were here. In one morning there were seven trucks from Federal agencies in the front of his apple grove. This poor man was out there trying to raise apples. He wanted to be out in his apple orchard, and he was trying to satisfy the various requirements of all of these local, State, and Federal agencies who are in power to make rules and to enforce them under general and blanket authority provided by legislative branches such as those we serve.

The Corps of Engineers in my district, I have been involved with them between the States of Alabama, Georgia, and we have seen the rulemaking authority which they have.

It is a big problem, although they try to do a good job. In another area which is not related at all to this hearing, but it is a spillover to the type of attitude which is pervasive in this country today, I have a letter from a lawyer friend of mine who is writing about the Justice Department and the fact that they operate a set of rules and guidelines which is unknown, unpublicized.

I would like to submit this for the record in spite of the fact that it is not directly relevant. Let me just read the last paragraph. This is about all I have to say:

> The writer has been practicing law for 30 years, and it would seem that the basic elementals of due process and fairness by a Government to its citizens

would indicate an abolition of the policy procedures herein complained hereof. Otherwise, the name of the Department of Justice ought to be changed to the Department of Litigation, and the passage of a law reimbursing a citizen in the event of successful litigation with the U.S. Department of Litigation would be a logical consequence of such a litigious nature.

We seek to provide simplicity in the lives of our people. We seek to let the decided matters stand, to let the rules be known so that we might not live in fear, looking over our shoulders, whether we are dealing with Internal Revenue sharing services or OSHA.

I wish to commend the efforts of Mr. Levitas, Mr. Clawson, and others in this committee. It is an idea whose time has come. I certainly support the position of these two gentlemen.

I thank you so much for your attentiveness to my general statement.

Mr. FLOWERS. I have no questions. Mr. Danielson?

Mr. DANIELSON. I have neither questions not comment. I want to thank Mr. Brinkley.

Mr. FLOWERS. Mr. Kindness?

Mr. KINDNESS. I have no questions, but I was quite interested in the quotation you cited at the beginning of your statement. I believe you have demonstrated a love and concern for the processes by which Government operates, and again I appreciate your participation in this effort.

I look forward to your further support of what the subcommittee might be able to produce.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. No questions.

Mr. FLOWERS. Mr. Pattison?

Mr. PATTISON. No questions.

Mr. FLOWERS. Thank you for being with us.

[The documents referred to follow:]

LAW OFFICES OF KELLY, DENNEY & PEASE, P.C.,
Columbus, Ga., October 17, 1975.

Re policy procedure of Justice, Department re antitrust violation charges.

Congressman JACK BRINKLEY,
Cannon House Office Building,
Washington, D.C.

DEAR SIR: I am writing to call your attention to a policy procedure of the Anti-Trust Division of the Justice Department which we suggest is unreasonable and should be repealed or revised in fairness to the public. That policy procedure is unpublished so far as we know as we were advised of the procedure just yesterday. The procedure is that while a citizen is being investigated for possible anti-trust violations, he can seek to comply with the law if he can find out how to do so; however, once the Justice Department determines that there has been a violation and authorizes suit for injunctive relief, the only way the citizen can avoid litigation is to stipulate to the entry of a consent decree under Title 15 USCA Section 16. Voluntary compliance without the entry of such a consent decree is not permitted. Only if he guesses what will satisfy the Justice Department while being investigated can he avoid litigation, or the adverse publicity of having stipulated to the entry of a consent decree. While the stipulation for the entry of a consent decree does not expressly nor legally admit the violation, the effect of the publicity of the consent is tantamount in effect to such a confession in the minds of the public.

In October 1973 a client of ours was advised that it was being investigated for possible violations of the Sherman Anti-Trust Law with reference to (a) a provision which required the affirmative vote of 85% of existing shareholders as a requisite to membership, and (b) a claim of possible excessive charge for the share of stock which was a requisite for membership. The same letter requested a mass of information.

When our client in January 1974 furnished the information requested, we advised the attorneys for the Justice Department that we did not desire to litigate

with the United States re this matter and would do all reasonable things to avoid litigation. We further advised that we felt that a voting admission requirement was not per se violative of the anti-trust laws and that the rule of reason determined whether such an admission requirement would violate these laws. We also advised that if the Justice Department felt that the charge being made for the one share of stock which was a requisite for membership was deemed by the Justice Department to be unreasonable, we would be receptive to reducing it to a charge which was reasonable under the circumstances. At the time, the attorneys for the Justice Department concurred with the view that the rule of reason applied in determining whether the two items violated the anti-trust laws. Nothing was heard further from the Justice Department until October 1974 when the Justice Department asked for an update of the information requested. We compiled the update information and had a further conference with the attorneys for the Justice Department in January 1975 at which time the Justice Department attorneys took the position for the first time that any voting admission requirement by the present members was per se invalid. At no time until even today has the Justice Department advised what it considered to be a reasonable price for a share of stock which is requisite for membership.

Following the January 1975 conference, our client voluntarily amended its By-Laws reducing the voting admission requirement from 85% of the present members to a simple majority vote of the existing members and reduced the price of the one share of stock requisite for membership to what it considered to be reasonable under the circumstances, and so advised the Justice Department. Following these changes in its By-Laws, approximately 12 real estate brokers were admitted to membership in our client and paid the revised charge for the one share of stock required to be owned as a condition to membership. We also sought the assistance of our Congressman in seeking to arrive at settlement of any possible claims of violation, but were unable to receive from the Justice Department specifically what its recommendations were that our client do so as to avoid the possibility of litigation with it.

On or about August 1, 1975 we received notification for the first time that the Justice Department had authorized the filing of a suit against our client charging an unlawful conspiracy to violate the anti-trust laws in restricting membership to our client by the voting admission requirement and by the charging of an unreasonable amount for a share of stock requisite to membership.

Following the receipt of this notice, we had a conference in early October 1975 with the attorneys for the Justice Department at which we requested that we resolve the matter without the necessity of stipulating to the entry of a consent judgment under Title 15 USCA Section 16. We were advised that the Atlanta Office had been instructed to file suit and procure a consent decree and that settlement without the entry of a consent decree was impossible. We asked for a hearing on this matter before the Deputy Director of Operations of the Anti-Trust Division of the Justice Department in Washington, and on Thursday, October 16, did appear before the Deputy Director for the purpose of requesting that this matter be resolved without the necessity of a consent decree together with all of the attendant adverse publicity resulting from the entry of such a consent decree, and requested reconsideration of the decision to file suit against our client. Specifically, we offered to abolish the voting requirement as a condition for admission and offered to reduce the price per share of stock by way of a partial liquidation. For the first time, we were advised of this policy procedure that after the Justice Department once determines that it will file suit that the only way that the matter can be resolved is by way of a stipulation for a consent judgment enjoining the defendant as prayed. At no time previously had we been advised that such a policy procedure existed nor have we as yet been advised what the Justice Department considers to be a reasonable charge for the share of stock. We were further advised that such a policy procedure had been set by an Assistant Attorney General and that it would be useless to request that an exception be made to the procedure in this case or that consideration be given to the repeal of such a policy procedure.

We stated to the Deputy Director of Operations of the Anti-Trust Division at that time that such a procedure was manifestly unfair to a citizen being investigated for possible violation of the anti-trust laws in that it necessitated adverse publicity whereby the news media would in effect state to the public that the defendant admitted violation of the anti-trust laws. The response we received was that the Justice Department was not concerned with the adverse effect of such publicity and that a consent injunction was necessary in order to

prevent future violations, and it was indicated to us that had our client abolished the voting requirement and reduced its charge for a share of stock to a reasonable charge pending an investigation by the Justice Department and before its decision to file suit that such consent decree probably would not have been required. However, since such a decision had been made by the Justice Department, it was not now possible to resolve the matter without a consent injunction being entered even though the Justice Department and the person charged might be able to agree on the basic changes indicated.

It would seem to the writer that such a policy procedure in effect encourages litigation rather than a non-judicial settlement of the matter. This is so for the reason that a citizen who is willing to comply with reasonable requirements is unwilling to stipulate that he has violated the law in the past which necessarily carries with it the probability of adverse publicity of such a stipulation. Admittedly, under Title 15 USCA Section 16 the final decree entered pursuant to the consent stipulation is not prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant; nevertheless, under this same section, publication of the competitive impact statement is required in the Federal Register and compliance with the other provisions of Section 16 lends itself to the probability that considerable adverse publicity will result. It would seem to the writer that a citizen is entitled to a reasonable period of time after notification by the Justice Department that it considers its prior conduct to be violative of the anti-trust laws within which to attempt to rectify the situation so as to avoid the necessity of consent decrees and stipulations therefor. Also, fairness would dictate that the Justice Department specify its claims of violation and how the claimed violations might be corrected before the decision to sue the defendant is made. The simultaneous determination of the claim of violation and the decision to sue the defendant in effect precludes the defendant from making the necessary changes to avoid the necessity of litigation. The entry of a consent decree pursuant to stipulation is too heavy a price for the citizen to pay in order to buy his peace and he should be allowed to rectify the situation without in effect confessing a violation of the law. Again, while this may not be the legal effect, it is the practical effect of such a procedure.

The need for reform or repeal of this policy procedure is all the more indicated in areas where the law on the subject matter involved is in a stage of development, as indeed the law with reference to multiple listing services as possible restraints of trade is in a stage of development.

We urged the Deputy Director of Operations to make an exception in our case because of the facts (a) the law on the subject is in the early stages of development; (b) because material changes had occurred in the membership of our client since the investigation was commenced in October 1973 such that our client now has practically all the active real estate brokers in the sale of single family residences in Muscogee County, Georgia, whereas at the onset of the investigation it had about 27 members and now has 39 members; (c) that we know of no person who desires to become a member who has not been invited to membership since the change in the By-Laws of our client providing for majority vote rule and a reduced membership fee for the share of stock. In this connection, the competitive multiple listing service existing at the time of the changes in the admission requirements to our client has now been disbanded, and virtually all of the members of the competitive multiple listing service have now joined our client; and (d) even today the Justice Department has not advised our client as to what price it considers to be reasonable under the circumstances for the share of stock requisite to membership. Our efforts to persuade the Justice Department to grant an exception in this case from the necessity of a consent decree fell on deaf ears. Indeed, our trip to Washington was largely a waste of time because the possibility of reconsidering the decision to require a consent decree of our client was already precluded by the policy procedure of which we were advised for the first time yesterday. We think there is ample justification for the making of an exception in our case. However, if this is impossible, we respectfully ask your influence in seeking to obtain a repeal in the present policy procedure so that citizens in future cases of charges of violation of the anti-trust laws will be able to effect voluntary compliance without enduring the pain of a consent decree. The stated purpose by the Justice Department of consent decrees is "to make examples of the defendant". Citizens who seek voluntary compliance with the law in a vague field of the law ought not to be the subject matter of "an example" by his government.

The writer has been practicing law for thirty years and it would seem that the basic elementals of due process and fairness by a government to its citizens

would indicate an abolition of the policy procedure herein complained hereof. Otherwise, the name of the Department of Justice ought to be changed to the Department of Litigation, and the passage of a law reimbursing a citizen in the event of successful litigation with the United States Department of Litigation would be a logical consequence of such a litigious nature.

Sincerely,

FORREST L. CHAMPION, JR.

STATEMENT BY HON. JACK BRINKLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. Chairman, I am grateful for the opportunity to make some observations for the record of these important hearings relating to Congressional review of administrative rulemaking. Few matters addressing the Congress have been receiving so much attention these past few months in our constituent mail, the news media and in other avenues of public opinion.

Hardly a day passes any more in which we don't hear from businesses or private citizens regarding the adverse effects of various federal regulations. Those in business are particularly distressed that many of the regulations result in substantial cost increases, which naturally are passed through to those who purchase goods or services.

Mr. Chairman, I represent a part of the nation where people are naturally trusting of others, and especially look in good faith to the government for guidance and direction—though not dictation. It is discouraging to hear from a conscientious businessman who, in good faith, has tried to comply with strict guidelines and government standards, only to find there is little compassion, much less good faith, on the other side.

Very recently, a century-old business firm in my district, a firm traditionally operated with pride and integrity, wrote to me to appeal for relief from a heavy fine imposed on it by the Occupational Safety and Health Administration (OSHA), even though the firm had complied with OSHA directives to correct a number of "non-serious" violations. My inquiry to OSHA on the firm's behalf was met with unyielding resistance by OSHA officials, who gave the firm little, if any, credit for its diligent good faith efforts—and who absolutely ignored the fact that the firm had a near-perfect safety record of a century's standing. Not to mention the fact that having to pay the fines at that particular time would adversely impact on the firm's already-uncertain fiscal position.

On another occasion, a constituent business contacted my office about an OSHA matter, and contacted us again scarcely two days later to urge that we drop the matter altogether. The businessman was actually fearful, perhaps without justification, but fearful nonetheless, that if OSHA learned of his inquiry, the agency might never leave him alone!

Mr. Chairman, I am afraid this is typical of the reaction numerous business firms and individual citizens have toward federal regulation. They, the people who keep the free enterprise system running, are most concerned that the regulatory system as currently set up is threatening the very fiber of free enterprise and competition.

I commend this distinguished subcommittee, as I do my colleagues in the House who have joined me in proposing legislation which would begin the painstaking process of remedying the existing situation. We must start somewhere, and I concur with the types of bills currently before this committee—which would begin to bring some perspective to the entire matter of federal regulation. Later, we can refine this legislation as the need arises, and perhaps go so far as establishing a condition beyond which regulatory agencies would be curtailed or cease to exist.

No one will deny that in some respects, regulation is desirable, necessary, or both, because of the public safety factor or the need to assure equity in certain areas. That is the price of prosperity and a promise of opportunity for all citizens.

But that is where we must draw the line, and the time has come to regulate the regulators. I urge you, as the first members of the House to tackle this issue head-on, to work diligently to achieve that purpose.

Mr. FLOWERS. Our next witness will be our distinguished colleague on this committee, the ranking minority member, Mr. Edward Hutchinson.

TESTIMONY OF HON. EDWARD HUTCHINSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. HUTCHINSON. I am happy to appear before you today in support of these bills. Of the two of them the one by Mr. Clawson appears to be broader in scope. I favor it over the other, the Levitas bill. Mr. Levitas' bill concerns itself only with those rules which carry with them criminal sanctions.

I think that is a step in the right direction but I favor a broader approach. Mr. Chairman, I served in the legislature at the time of the formulation of the system of legislative review of administrative rules in Michigan.

We had a number of years of experience under that system while I was in the legislature. I sat on the Joint Committee on Administrative Rules which the law had set up. I would make this comment only with regard to it and that is, I think, out of our experience in Michigan, we learned that it is necessary that the statute respect the doctrine of separation of powers.

We have a constitutional problem here, as you know, in that the courts might hold that any law of Congress which attempts to subject administrative rules to congressional veto would be in violation of that doctrine of separation of powers.

I think therefore that it is important that whatever bill we write on the subject we make it very clear that the whole purpose of legislative oversight is to make sure that these rules and regulations do not go beyond the intent of the legislative branch in writing the law.

I think all of us know that there are great numbers of rules which, when we read them, we say we never intended any such thing. Upon a close examination, probably we conclude that it was within—if anybody wanted to interpret the language broadly enough—that the rule probably was based on the statute but it certainly went beyond our intent.

I can urge only that in drafting the bill, that we base it primarily upon—not upon whether it is legal or not because the courts will say whether or not a thing is legal. That is a judicial question. But we should base it upon did it go beyond our intent, in other words, within our legitimate rules of legislative oversight?

Another thing I would like to suggest is that in writing legislation on this subject, we do not carelessly cast aside the system which I believe the Administrative Procedure Act already requires. That is, that when these rules are published in the Federal Register, that the system of permitting public comment and requesting time for public comment with regard to these rules, be continued.

I think it is important that while we ask all of these rules to be submitted to us for purposes of legislative oversight we at the same time permit the public to comment pursuant to notice published in the Federal Register, because the regulations do affect the public.

They affect each and every one of us. In fact I think we have all said—I have said many times that the law which actually regulates you and me, governs you and me is not the law that Congress writes but the rules and regulations which bureaucracy writes to implement those laws.

I think as Mr. Mazzoli mentioned earlier when there was another witness in the chair, we are guilty now in the Congress of very loose wording. So often our statutes are—we feel we have satisfied the legislative function if we set forth a purpose and then authorize some department or other to establish a program to carry out the purpose and then authorize a certain amount of money to be appropriated to carry out the program.

We think we have done it while as a matter of fact it is the bureaucracy that established a program and largely defines it. We have simply in effect set forth a purpose and said you set up a program to carry out lofty purposes and goals. We have done it without too much guidance as to precisely what we had in mind. It is true that we think a lot about legislative history and we get up on the floor of the House and we make legislative history. But I think all of us who are lawyers know that courts never look to legislative history so long as the law appears to be clear on its face.

If the statute is clear on its face, they don't look to legislative history. It is doubtful whether the bureaucracy does either.

Mr. Chairman, I have a prepared statement which I submit for the record.

Mr. FLOWERS. Without objection, it will be entered in the record. We appreciate your being here. I have no specific questions.

Mr. Danielson?

Mr. DANIELSON. I have no questions.

Mr. FLOWERS. Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman. I appreciate your helpful experience and the statement based on that experience. We look forward to working with you further on the development of this idea.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. I welcome our colleague and thank him for his consideration.

Mr. FLOWERS. Mr. Pattison?

Mr. PATTISON. No questions.

[The prepared statement of Hon. Edward Hutchinson follows:]

STATEMENT OF HON. EDWARD HUTCHINSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, I appreciate the opportunity to appear before your Subcommittee this morning to express my views concerning legislation to establish a procedure by which Congress could review and disapprove Administratively-issued rules and regulations.

This is a subject about which I feel very strongly. Based upon the considerable support that these so-called "legislative veto" bills have attracted, I would conclude that there are many others in Congress who share my strong feelings. The broadly-based support received by these measures represents a growing sense on the part of the members of Congress that something has to be done to insure bureaucratic compliance with legislative intent. For too long, we have passed the laws and then looked the other way, or merely viewed with alarm, while implementing regulations thwarted, misinterpreted, or even distorted our intentions.

My commitment to a procedure of this type dates to the period in which it was my privilege to serve in the Michigan Legislature. Since 1947, my state has had some form of procedures in effect permitting legislative review of administrative rulemaking. The current law reads: "The legislature reserves the right to approve, alter, suspend or abrogate" administrative rules. Mich. Stat. Ann §§ 3.569 (7)–(18).

Under the current procedure, proposed rules are sent to the Joint Committee on Administrative Rules. After consultation, review, and hearings, if necessary, the Joint Committee makes a recommendation to the Legislature. If the conclusion is that a proposed rule deviates from or is not in compliance with legislative intent, a concurrent resolution can be introduced expressing the "determination of the legislature" that such a rule be revoked or altered.

The point to be made is that the legislative veto is not a new idea. Variations on the concept have been utilized in a number of our states, including: Alaska, Connecticut, Nebraska, Kansas, Wisconsin, Virginia, Oregon and, as I already mentioned, my own state of Michigan. There also are a number of foreign countries which use the legislative veto, including: Great Britain, Australia, New Zealand and Canada.

What is needed in Congress is a regularized review of the manner in which executive departments and regulatory agencies interpret the statutes we enact. We have a right and responsibility to protect our legislative prerogative. Specifically, I urge the Subcommittee to closely consider the legislation authored by my good friend and colleague, Del Clawson, of which I am proud to be a co-sponsor (H.R. 8231).

This measure is broadest in scope of any pending before this Subcommittee. Under this measure all proposed rules and regulations are sent to Congress with a full explanation of their impact. Then, either House of Congress would be able to disapprove by passage of a simple resolution any rule or regulation, within sixty legislative days after its submission. If either House fails to act in the negative within sixty legislative days, then the rule goes into effect. Of course, the bill also recognizes that Congress can assertively approve the regulation or rule, prior to the sixty day time period and, thus, accelerate its effective date.

The generalized criteria which Congress is directed to apply in vetoing administrative rules are directed toward insuring compliance with legislative intent. The bill sets down the criteria as follows:

1. Does the rule or regulation contain provisions which are contrary to law?
2. Is the rule or regulation inconsistent with the intention of Congress?
3. Does it go beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used?

It is important to point out that the Clawson bill does not limit itself solely to those rules or regulations imposing criminal sanctions, as the other major proposal pending before you. Rather, it recognizes that the entire rulemaking process ought to be made subject to a standard of compliance with legislative intent. Rules, which carry no criminal penalties, still can be inconsistent with the will and intention of Congress. Rules without criminal penalties still can be arbitrary, unfair and violative of the Constitutional rights of individual citizens. It seems to me that if Congress is going to undertake a genuine oversight effort in this area, it would be somewhat hypocritical to limit the review only to criminal rules. Such a restriction could only be interpreted as an admission that we have neither the will nor the ability to undertake this job.

A number of arguments have been leveled against the "legislative veto" concept. First, it is charged that it violates the separation of powers doctrine—that in this review Congress is really exercising a quasi-judicial function or a purely executive function. Frankly, I do not share that point of view. Administrative regulations and rules are issued pursuant to laws enacted by the Congress. Rulemaking has consistently been recognized as an extension of the legislative process. If Congress chooses to delegate that function to a regulatory body, it certainly can choose to participate in the process itself by overseeing it.

Another charge is that Congress does not have the expertise or time to undertake this continuous review. Both of the major proposals you are considering presume that the existing staffs of the standing committees could oversee the rules and regulations issued in their areas of jurisdiction. Certainly, this form of oversight should be done and, in some cases, it is already being done. Some legislative procedures, such as those in Michigan and the one exercised by the Parliament in Great Britain, utilize a standing Committee. Congress may determine, at a later date, that such an approach is necessary. But in the beginning, I would urge that we try to utilize the existing committee structure.

While the scope of rulemaking is impressive, there are a number of interested parties and interest groups which closely follow the process. Certainly Congress can also rely upon private citizens and interest groups to point out potentially harmful rules, as well as our own professional staff persons.

Others have charged that the legislative veto procedure would be too time-

consuming and would unduly delay the administrative regulations. I feel that it is important that Congress have at its disposal a procedure like this one to react when necessary. This does not mean that the procedure would be utilized with respect to all rules and regulations issued—only those that members find to be objectionable would be considered.

The Clawson bill uses the time frame—sixty legislative days. I do not feel that this is an unreasonable delay, given the potential impact of some administrative rules and the built-in delays, already present in the rulemaking process under the APA.

One final point. Increasingly, in recent years, Congress has been adding legislative disapproval provisions to specific measures, such has been done with the Budget and Impoundment Control Act and the new Campaign Spending law. Later this week we will be considering a similar amendment to the Consumer Product Safety Commission Improvement Act (H.R. 6844).

While I have often supported these individual efforts, aimed at retaining Congressional control, I feel that a bill-by-bill, hit-and-miss approach is not the best method. Obviously, the enactment of a general procedure for Congressional review is a more practical and efficient way to proceed.

In conclusion, I again want to commend this Subcommittee for holding these important hearings. I strongly urge your favorable consideration of a comprehensive legislative review procedure. Action on such a bill would be yet another symbol of Congress seeking to fulfill its true Constitutional role.

Mr. FLOWERS. We now have another distinguished colleague on the full committee, the gentleman from Virginia, Mr. Butler.

TESTIMONY OF HON. M. CALDWELL BUTLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. BUTLER. I appreciate the opportunity to appear before the committee. I would also ask leave to file a formal statement.

Mr. FLOWERS. It will be received.

[The prepared statement of Hon. M. Caldwell Butler follows:]

STATEMENT OF HON. M. CALDWELL BUTLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, I appreciate this opportunity to express my strong support for the concept of Congressional review of federal agency regulations, as expressed in the legislation sponsored by our colleagues Del Clawson and Elliott Levitas. While the bills differ somewhat in approach, the guiding principle is clear, and I am hopeful that the subcommittee will be able to bring a bill to the full Committee which incorporates the best features of both.

The federal regulatory establishment has grown at an unprecedented rate in recent years. The number of federal employees engaged in regulatory activities is estimated to have increased from 55,000 to 63,000 in the last 3 years, and expenses for regulatory activities have climbed from $1.3 billion to $2.1 billion in the same period. However, the indirect costs of regulation are far higher than this, and are really my primary concern.

Business Week magazine estimates that the nation's businesses spent $3 billion in efforts to comply with OSHA safety regulations in 1973 and will have to spend $13 billion to comply with noise standards now in effect. If stricter standards under consideration are adopted, the cost will rise to over $30 billion. Compliance with existing pollution control laws and regulations, according to estimates by the Council on Environmental Quality, will cost over $100 billion by 1981. The Office of Management and Budget estimates that business reporting requirements have increased 50 percent since 1967, with accompanying costs.

These burdens on industry have arisen in large part from legislation we have passed to accomplish things we all agree must be done, such as improving our environment, assuring equal rights for our citizens and providing safer working conditions, and I do not advocate their repeal. My concern is that we have delegated the power to enforce these laws, often with little in the way of guidance, to the unelected bureaucracy. Here we are largely dealing with well-meaning, hard-working individuals, and I am not here to castigate them unnecessarily. The problem is that because they are not really accountable for the

manner in which they administer the laws under their jurisdiction, because the regulatory process does not operate in a unified manner, and because there is too often little advance concern over the economic impact of regulations, we have forced the diversion of an incredible amount of capital which otherwise could be used for industrial expansion and more jobs into the basically nonproductive area of compliance with federal regulations. While Congress is partly to blame, we are still faced with a situation where the government, largely through the actions of unelected and unaccountable persons, is directing the use of a considerable part of our economic resources. Legislation such as you are now considering is essential if the Congress is to establish any control over these decisions.

There is a considerable justification for the use of legislative veto powers based on past legislation, beginning with the Northwest Territories Ordinance of 1787 and continuing down through the Youth Camp Safety Act passed by this House April 17. The Library of Congress advises that there are over 180 provisions for one type or another of Congressional veto of administrative actions in over 120 separate laws.

Historically, there have been 3 types of Congressional action in this area—the Committee veto or approval, such as is presently in effect under the Consumer Product Safety Act requiring the Commerce Committees of each House to approve construction plans of the agency prior to expenditure of funds; legislative authority to terminate executive actions after they have become effective, such as the authority contained in the War Powers Act for Congress to terminate American involvement in a conflict; and a legislative veto over administrative actions which become effective unless vetoed by either House, such as presently exists under the Budget Control and Impoundment Act, the various government reorganization acts, the federal employees salary law, the Presidential Recordings and Materials Preservation Act of 1974, the Federal Election Campaign Act Amendments of 1974, and the Federal Rules of Evidence approved last year, to name a few. It is this latter provision that you are being asked to extend to all regulations.

This legislation is not a panacea for all the problems that have arisen from the growth of the federal government. It will not enable us to deal with a poor interpretation of a good regulation by an individual federal employee; it probably will not give us firm control over paperwork requirements, although other actions are being taken along this line; it will not enable us to easily dispose of a regulation whose adverse impact is not readily apparent; and it will not protect us from the consequences of poorly written or ill-conceived legislation.

What it would do is provide some protection for the average citizen or small businessman from overly broad or erroneous interpretations of the law by federal agencies without requiring him to bear the costs of an expensive lawsuit; it should promote the issuance of regulations written so as to be understandable by the average citizen; and it should promote a greater attention by the bureaucracy to the intent of the Congress and to ordinary common sense, which has been sadly lacking in far too many regulations.

I strongly urge the Subcommittee's favorable action on this legislation.

Mr. BUTLER. I am not sure the members of this committee have followed my own career as closely as I have, but I am in my second term. I found it very useful in my first term to respond to many of the complaints that came to me about various agencies of the Government by saying that this sort of activity came under statutes passed before I got here. The time has run out on that and I am increasingly involved in those situations in which we are passing the legislation which creates a problem toward which this legislation is addressed.

I was pleased when Mr. Levitas and Mr. Clawson came forward with these suggestions. I think it is entirely appropriate. I have had many conversations with them on it. The time has come when we have to develop a relationship with the executive branch which does in fact carry forward not permissive observations as to what the legislation would permit, but truly in fact what our intention was.

The only way you can do this is to have a legislative oversight on the regulations as they are promulgated. This is the appropriate way

to do it, and I am entirely in sympathy with it, and I am here principally to let it be known to the subcommittee how important I think it is to move in this direction and to ask your speedy but careful consideration of this legislation.

Mr. FLOWERS. You and I probably agree that if such legislation as this were passed it would make our job tougher because we would be more accountable for these rules and regulations whereas now we can point the finger at somebody else.

Mr. BUTLER. We have abdicated this responsibility and we hide behind our lack of control over it because that is the easy way out. In the long run, the details of legislation which ultimately result in regulations probably require a review as well.

Mr. FLOWERS. Thank you. Mr. Danielson?

Mr. DANIELSON. No questions.

Mr FLOWERS. Mr. Kindness?

Mr. KINDNESS. No questions, Mr. Chairman.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. Mr. Chairman, I would like to just talk to the gentleman about the problem that I wrestle with on this. This is the fact that nobody argues with the thought of trying to trim Government back and getting us back to the proper scope of our legislation and having a bureaucracy or an executive branch carry out our directions.

What happens if after passing OSHA which the previous gentleman addressed some comments to or passing a pension reform bill and in finding some quite remarkable and obviously some aberrational ruling issued from the Department and that is taken to the floor under the Levitas bill.

What do you think would be the outcome of that?

Mr. BUTLER. Well, I have wrestled with the same problem. Basically what it amounts to is that the wisdom of what the agency is doing would be apparent to you on a very careful examination. But in the absence of that, the legislative body itself quickly finds a whipping boy which we can shoot down in the name of protecting our constituency.

How do we act responsibly under that situation? Basically I think if we are going to do this thing right there has got to be legislative review at the staff and committee level to acquaint ourselves with it.

You have got to find the courage to do it. You have either to rely on staff or do your own investigation, and find the courage to do what is right, even though it is difficult. That is the basic legislative problem we have. If as we go along we will pay more attention to what we are doing, and the pension bill is a classic example of that, and we will avoid regulations being returned to us for review because of inadequate investigation at the legislative level.

This gives us caution when we pass legislation—that is progress.

Mr. MAZZOLI. If we do nothing else here we may provide a deterrent to the executive branch. Would you agree if we pass this thing we might provide a deterrent for the legislative branch of Government?

Mr. BUTLER. I would consider that salutary. [Laughter.]

Mr. FLOWERS. Mr. Pattison?

Mr. PATTISON. We have been addressing ourselves this morning primarily to a mechanism that would enable the Congress to keep an

agency within the intent of Congress. But don't, in fact, we have to go further than that?

For instance, getting to our favorite subject of OSHA, we pass a law that says the intent of that law is to make safe places to walk. That is the intent. A regulation then turns up that requires a farmer to put rubber padding on his scythe. That intent is still—we know what the intent is, to make it safe.

The scythe is clearly a safer piece of equipment than it was before. The problem is you can't cut hay with it anymore. It isn't always a matter of intent, but a question of wisdom, isn't it?

It was not our intent that they so regulate farms or small businesses so they can't perform their functions. You can argue that many times all we have is our intent. All we can legislate is our intent. It is our intent that nuclear power facilities be safe and they not explode and not pollute the environment. We really can't say an awfully lot more than that in our legislation.

We can't legislate the size or the manner of operation or the number of people they are going to have watching a screen or a variety of other things.

These have to be done by regulation. We are saying we want to take a look at those regulations and when they come up with a damn fool regulation, say no, you have gone too far. Don't we have to address ourselves to more than congressional intent?

Mr. BUTLER. We can admit here in the bosom of the family that legislative intent is an elusive thing. When you have only 24 people on the floor and you have revisions and you may have legislative intent as to a particular matter, but it does not exist beyond the express purpose of the statute.

You can set out to draw your statute to anticipate every contingency that is going to arise. If you set out to do that, it begins to look like a Federal regulation and you get in trouble. Therefore, what your statutes are are guidelines, and acknowledgement of a problem and guidelines for administrative action to solve that problem.

You implement that through the regulations. The issuance of regulations is a delegation of legislative responsibility to an administrative agency.

When that delegation gets beyond what the legislative body would consider wisdom I think it is appropriate that our judgment be brought to bear upon what they are doing and this device which has been suggested by these gentlemen seems to be an appropriate way to do it.

It is like so many things. There will probably be a different adjustment for administrative agencies to develop wisdom and judgment. It is going to come hard but I think this device if properly used would work. I don't think you can set aside regulations which are in derogation of the legislation without new legislation.

That may very well produce some fruitful litigation. But all of us are lawyers and we recognize we have to do what we can for the lawyers. This is going to create legal problems and they have to resolve these problems. I see no way to harness the executive branch in the administration of our laws without some device of this nature.

Mr. PATTISON. I recall the Queen in Alice In Wonderland saying that when she stated "When I use a word it means precisely what I intend it to mean, nothing more, nothing less * * *" Sometimes that is what legislative intent boils down to.

Mr. BUTLER. She is a constituent of mine. [Laughter.]

Mr. FLOWERS. Mr. Danielson?

Mr. DANIELSON. I would like to make a comment which adds to Mr. Pattison's and Mr. Butler's as to whether these regulations can be construed as falling within intent. When Mr. Levitas was before us this morning and in his statement he brought forth the example of the EPA which had proposed a regulation which would have shut down 40 percent of the parking spaces in Boston.

This was for the purpose of cutting down on air pollution, obviously. That is an excellent example. In my own community, the Los Angeles, Calif. area, they made a similar proposal which we had to beat down.

I think they were going to cut back on 60 percent of our parking places. That would have absolutely paralyzed our economy. We would have been shattered like an atomic bomb. Nothing would have been left. We were able to stop it through pressure.

But it is a simplistic approach to problems which many regulatory agencies have. I am reminded of the joke that the real solution to the divorce problem was simply to abolish marriage. That is really what the EPA was doing.

Mr. FLOWERS. Thank you very much for being with us. I note that our distinguished colleague from Louisiana has just walked in, Mr. Gillis Long.

Gillis, we would be delighted to hear from you in the short time remaining before one of our other colleagues calls a quorum over there.

[The prepared statement of Hon. Gillis Long follows:]

STATEMENT OF HON. GILLIS LONG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. Chairman, I appreciate very much the opportunity to testify today on HR 3558 and HR 7689, bills to permit Congressional review of rules and regulations proposed by Executive agencies. You and your Subcommittee deserve much commendation for opening the public record on this matter, as I think it certainly cries out for attention.

As a member of the Rules Committee, which also has original jurisdiction over this matter because of the probable need for changes in the rules of the House of Representatives, I urge you to continue active consideration of this legislation. I have noticed that several of us on the Rules Committee are co-sponsors of this legislation—and one of our members is the author of one of these bills. I intend to press for action on this by the Rules Committee, and so I urge you to continue your work also.

REASONS FOR ACTION

Mr. Chairman, these hearings could not be more timely. People in and out of government, of both political parties, and of all political persuasions are becoming more and more concerned that the Federal government is promulgating too many rules and regulations with no effective checks or reviews.

As Congressman Levitas already has noted, in earlier times when the bureaucracy was not so large, there was no real need for this kind of legislation. But today, with the size and scope of the bureaucracy, and with the number and extent of the rules it promulgates in the *Federal Register*, I am convinced that some kind of check or review is needed.

The Library of Congress' Congressional Research Service reports that in the last 43 years 188 separate provisions in 126 different acts of Congress contain some type of Congressional review or consent for proposed Executive branch implementations of law. Some require specific action, while others simply provide a procedure which Congress can use at its own discretion.

In other words, we have done this many times in the past *on a selective basis*, and I believe the time has come to establish a permanent mechanism for the pur-

poses of conformity and continuity. In December of 1974 we took the first step in that direction by requiring nearly every committee of the House of Representatives to establish an oversight subcommittee, and the thrust of the legislation we are discussing today is a natural and logical extension of what we did last December.

Another compelling reason to act on this legislation is that there are far too many instances where administrative excess and zeal have resulted in regulations that do not reflect the intent of Congress. I am sure that all of us have encountered this problem at one time or another, and what is worse is that violations of these regulations often carry criminal penalties resulting in imprisonment or fines or both—all without the benefit or authority of specific Congressional consideration of the regulations themselves.

As an example, many of you will recall that in early May of this year the Corps of Engineers printed proposed regulations in the *Federal Register* to implement Section 404 of the Federal Water Pollution Control Act concerning the disposal of dredged or fill material into navigable waters of the United States. What was intended by Congress to be a relatively simple permit system became an all-encompassing land use management program under the Corps' regulations. Here was a situation in which Congress had not even passed land use *planning* legislation—and yet the bureaucracy *by regulation* was instituting massive land use *management and control*. A violation of those rules carried a fine of up to $10,000 a day and the possibility of imprisonment for up to 6 months. To me, this was absolutely ridiculous.

After a number of us introduced legislation to correct the problem, the appropriate subcommittee held hearings 2 full months after the first regulations were published. Subsequently, new regulations were published—and even those new regulations, though substantially better than the first ones, did not fully remedy the situation. Now it is October—over 5 months after the initial regulations were proposed—and the matter is still being debated between the bureaucracy, the Congress, and the public with no real resolution of the problem in sight. With a mechanism such as that suggested in HR 3658 and HR 7689, we would have been in a better position to deal with and correct this problem—and it would have been resolved in a much more timely fashion.

Also, as you all know, these rules and regulations often become the basis for lawsuits where one party will either challenge the regulations as not reflecting Congressional intent or claim that they are not being properly enforced or administered. Possibly, a formal review procedure with opportunities for Congressional approval, disapproval, or both might reduce the need for so many of these court cases. I believe we should make a special effort in that regard.

In the example I just discussed concerning the dredge and fill permits, the new regulations were prompted by a Federal court decision which declared that the previous rules (which had been in place for several decades) were not correct and that new rules had to be written. Considering the already overburdened state of our court systems, I think Congress should make every effort to provide a procedure for clarification which might reduce the necessity for some of these law suits.

ISSUES FOR CONSIDERATION

Mr. Chairman, as your Committee—and hopefully my Committee—consider this legislation, I think that there are several problem areas that will need special attention—some specifically by your Committee as they concern the administrative procedures involved—and some specifically by my Committee as they concern changes in the rules of the House of Representatives. I do not at this time have any specific views that I want to impose on the Subcommittee, but I do want to outline what I see to be areas of special emphasis.

First, which regulations should require Congressional review? The 2 bills being considered today take 2 different approaches. The Clawson bill, HR 7689, would apply the review procedure to *all* rules and regulations—while the Levitas bill, HR 3658, would apply the review only to those rules and regulations that carry criminal penalties. Obviously, there is a lot of territory in between these 2 approaches, and we may want to include those rules which carry fines over a certain amount, for example.

Second, there is a potential problem with committee and even subcommittee jurisdictions. Earlier, I implied that this would be a natural responsibility for our new *oversight subcommittees;* however, it may be just as feasible to place this responsibility with the *legislative subcommittee* that has jurisdiction. Of course, there also is a potential problem with several different committees claiming jurisdiction over the same subject, something we heard a great deal about in

the 93d Congress. Should resolutions be referred only to one committee, or to several sequentially, or to several jointly? While I personally favor the oversight subcommittee approach, I have no concrete views on the question of committee jurisdictions. Undoubtedly, this always will be a problem in the House of Representatives until we substantially realign our committee jurisdictions to reduce duplicated efforts and competing interests.

Third, we need to decide what kind of review mechanism should be adopted. Over the years Congress has devised a variety of devices designed to permit Congressional review, and the Library of Congress has grouped these into four basic categories: (1) those providing for potential legislative action by either the Senate, the House of Representatives, or both—(2) those providing for potential action by the appropriate committees of either the Senate, the House of Representatives, or both—(3) those stipulating a specific period of time during which Congress or the appropriate committees could act—and (4) those requiring a vote in Congress different from the regular House and Senate rules. Only after a thorough analysis of the kinds of regulations affected, the potential number of times Congress might have to use this mechanism, and the current rules of both chambers, can this decision on the type of mechanism be made with any significant degree of confidence.

Fourth, the question of consultation between Congress and the Executive branch should be considered. Since we really are trying to assure that the laws we pass are properly implemented, our ultimate goal should be for Federal agencies to prepare rules and regulations in direct consultation with committee and/or subcommittee staffs. I'm a firm believer in the old adage "An ounce of prevention is worth a pound of cure," and advance consultation between Congress and the administration undoubtedly would clear up many *potential problems* before they become *actual problems*. In this regard, we may want to consider a mandatory requirement of consultation before regulations are published in what is called the "proposed" stage, although I am fully aware of the potential constitutional tensions between the Legislative and Executive branches on this.

We might even require—and here I am letting my imagination run—that a statement by the House and Senate committees of original jurisdiction be printed in the *Federal Register* along with the *proposed rules*. This would give the public an opportunity to have both Congressional and Executive views on the rules at the time they are initially proposed for public comment.

Fifth, a decision on an appropriate discharge mechanism must be made. The Clawson bill contains no special discharge provisions, while the Levitas bill does allow any Member favoring the resolution (i.e., opposing the regulations) to make a highly privileged motion to discharge the committee if the committee has not reported the resolution within 10 days of introduction. I think this discharge question is particularly important. In the example I cited earlier, I was not a member of the committee with original jurisdiction over the dredge and fill provisions—and as a result I had only limited means at my disposal to obtain a proper hearing of the matter.

In the case of laws already passed by Congress—where the issue is whether or not regulations will properly implement the law in terms of the intent expressed by a *majority of all Members* of the House of Representatives (or the other body)—we may want to consider a somewhat less stringent discharge requirement than is normally used in legislative matters. In that regard, I would suggest that both the Rules Committee and the Judiciary Committee study the discharge procedure set forth in Section 1017(b) of the Congressional Budget & Impoundment Control Act of 1974. I make this reference because I, as a member of the Rules Committee, helped write that particular law in the 93d Congress.

Sixth, there is what I call a question of "balance" that must be considered. What I mean by this is that the review and approval/disapproval mechanism could prove to be a perfect means for a small minority in either chamber who opposed the original legislation to hold up its implementation. This is especially possible if less stringent discharge requirements are adopted. I think we really should consider both the balance question and the discharge question in tandem as they are very closely related. We must continue to preserve the committee system in Congress without disenfranchising individual Members or small issue-oriented minorities.

Seventh, and finally, we must consider exactly what approval, disapproval, or no action really mean. The Levitas bill requires only that a resolution of disapproval be introduced, while the Clawson bill provides for resolutions of approval or disapproval—and both bills stipulate that if Congress fails to adopt a

resolution such inaction will not be considered an expression of approval. This is to avoid interference with any possible future litigation that could arise, because our function only would be to specify what the actual legislative *intent* was.

These varying approaches deserve much consideration. If Congress passed a resolution *approving* certain rules and regulations then presumably *good* regulations would have an even firmer basis in law, and Congress would share the responsibility for those regulations with the Executive banch. After all, when the people back home write in about these rules and regulations, we in Congress get the blame for them regardless of who actually wrote them. I recognize that this is a complex jungle, and I mention these only as items that should be evaluated in any further consideration of these bills.

However, Mr. Chairman, I strongly support the direction and thrust of these 2 bills being considered today. I think the need for this kind of mechanism is compelling, and with all of the present emphasis on regulatory reform the timing certainly seems right. I urge your Subcommittee to continue to pursue this matter actively, and as I mentioned earlier, I will continue to press for action on this by the Rules Committee. I am confident that after proper study, analysis, and hearings, together we can come up with an appropriate mechanism to remedy this situation.

Again, thank you for the invitation to testify on this.

TESTIMONY OF HON. GILLIS LONG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. LONG. I appreciate the opportunity to testify today. With the likelihood of a quorum call, I would like to proceed with my statement in the regular manner rather than trying to summarize it and then in turn, if we do get a quorum call, perhaps——

Mr. FLOWERS. When the bells ring, the subcommittee is going to go over and adjourn for the day. We will be delighted to hear you.

Mr. LONG. I can make more of a contribution to the committee by reading this than by summarizing it.

Mr. FLOWERS. Go forward, please, Mr. Long.

Mr. LONG. Mr. Chairman, I appreciate very much the opportunity to testify today on H.R. 3658 and H.R. 7689, bills to permit congressional review of rules and regulations proposed by executive agencies. You and your subcommittee deserve much commendation for opening the public record on this matter, as I think it certainly cries out for attention.

As a member of the Rules Commitee, which also has original jurisdiction over this matter because of the probable need for change in the rules of the House of Representatives, I urge you to continue active consideration of this legislation.

I have noticed that several of us on the Rules Committee are cosponsors of this legislation—and one of our members is the author of one of these bills.

I intend to press for action on this by the Rules Committee and I urge you to continue your work also.

Mr. Chairman, these hearings could not be more timely. People in and out of Government, both political parties, and of all political persuasions are becoming more and more concerned that the Federal Government is promulgating too many rules and regulations with no effective checks or review.

As Congressman Levitas already has noted, in earlier times when the bureaucracy was not so large, there was no real need for this kind of legislation. But today with the size and scope of the bureaucracy, and with the number and extent of the rules it promulgates in the Federal

Register, I am convinced that some kind of check or review is needed.

The Library of Congress Congressional Research Service reports that in the last 43 years 183 separate provisions in 126 different acts of Congress contain some type of congressional review or consent for proposed executive branch implementations of law.

Some require specific action while others simply provide a procedure which Congress can use at its own discretion.

In other words, we have done this many times in the past on a selective basis and I believe that the time has come to establish a permanent mechanism for the purposes of conformity and continuity. In December of 1973 we took the first step in that direction by requiring nearly every committee of the House of Representatives to establish an oversight subcommittee, and the thrust of the legislation we are discussing today is a natural and logical extension of what we did last December.

Another compelling reason to act on this legislation is that there are far too many instances where administrative excess and zeal have resulted in regulations that do not reflect the intent of Congress.

I am sure that all of us have encountered this problem at one time or another, and what is worse is that violations of these regulations often carry criminal penalties resulting in imprisonment or fines or both—all without the benefit or authority of specific congressional consideration of the regulations themselves.

As an example many of you will recall that in early May of this year the Corps of Engineers printed proposed regulations in the Federal Register to implement section 404 of the Federal Water Pollution Control Act concerning the disposal of dredged or fill material into navigable waters of the United States.

What was intended by Congress to be a relatively simple permit system was to become an all-encompassing land use management program under the corps' regulations. Here was a situation in which Congress had not even passed land use planning legislation—and yet the bureaucracy by regulation was instituting massive land use management and control. A violation of these rules carried a fine of up to $10,000 a day and the possibility of imprisonment for up to 6 months. To me such bureaucratic action was absolutely ridiculous.

After a number of us introduced legislation to correct the problem, the appropriate subcommittee held hearings 2 full months after the first regulations were published. Subsequently new regulations were published—and even those new regulations, though substantially better than the first ones, did not fully remedy the situation.

Now it is October—over 5 months after the initial regulations were proposed—and the matter is still being debated between the bureaucracy, the Congress, and the public with no real resolution of the problem in sight.

With a mechanism such as that suggested in H.R. 3658 and H.R. 7689, we would have been in a better position to deal with it affirmatively and it would have been resolved in a much more timely fashion.

Also, as you all know, these rules and regulations often become the basis for lawsuits where one party will either challenge the regulations as not reflecting congressional intent or claim that they are not being properly enforced or administered.

Possibly, a formal review procedure with opportunities for congressional approval, disapproval, or both might reduce the need for so

many of these court cases. I believe that we should make a special effort in that regard.

In the example I just discussed, concerning the dredge and fill permits, the new regulations were prompted by a Federal court decision which declared that the previous rules—which had been in place for several decades—were not correct and that new rules had to be written.

Considering the already overburdened state of our court systems, I think Congress should make every effort to provide a procedure for clarification which might reduce the necessity for some of these lawsuits.

Mr. Chairman, as your committee—and hopefully my committee—consider this legislation, I think that there are several problem areas that will need special attention—some specifically by your committee as they concern the administrative procedures involved—and some specifically by my committee as they concern changes in the Rules of the House of Representatives.

I do not at this time have any specific views that I want to impose on the subcommittee, but I do want to outline what I see to be areas of special emphasis.

First, which regulations should require congressional review? The two bills being considered today take two different approaches. The Clawson bill, H.R. 7689, would apply the review to all rules and regulations while the Levitas bill, H.R. 3658, would apply the review only to those rules and regulations that carry criminal penalties.

Obviously, there is a lot of territory in between these two approaches, and we may want to include those rules which carry fines over a certain amount, for example.

Second, there is a potential problem with committee and even subcommittee jurisdictions. Earlier, I implied that this would be a natural responsibility for our new Oversight Subcommittees; however, it may be just as feasible to place this responsibility with the legislative subcommittee that has jurisdiction.

Of course, there also is a potential problem with several different committees claiming jurisdiction over the same subject, something we heard a great deal about in the 93d Congress. Should resolutions be referred only to one committee, or to several sequentially, or to several jointly?

While I personally favor the oversight subcommittee approach, I have no concrete views on the question of committee jurisdictions.

Undoubtedly this always will be a problem in the House of Representatives until we substantially realine our committee jurisdictions to reduce duplication of efforts and competing interests.

Third, we need to decide what kind of review mechanism should be adopted. Over the years Congress has devised a variety of devices designed to permit congressional review, and the Library of Congress has grouped these into four basic categories:

1. Those providing for potential legislative action by either the Senate or the House of Representatives or both;

2. Those providing for potential action by the appropriate committees of either the Senate, the House of Representatives, or both;

3. Those stipulating a specific period of time during which Congress or the appropriate committee could act; and

4. Those requiring a vote in Congress different from the regular House and Senate rules.

Only after a thorough analysis of the kinds of regulations affected, the potential number of times Congress may have to use this mechanism, and the current rules of both chambers, can this decision on the type of mechanism be made with any significant degree of confidence.

Fourth, the question of consultation between Congress and the executive branch should be considered. Since we really are trying to assure that the laws we pass are properly implemented, our ultimate goal should be for Federal agencies to prepare rules and regulations in direct consultation with committee or subcommittee staffs.

I am a firm believer in the old adage, "An ounce of prevention is worth a pound of cure." And advance consultation between Congress and the administration undoubtedly would clear up many potential problems before they become actual problems.

In this regard, we may want to consider a mandatory requirement of consulatation before regulations are published in what is called the proposed stage, although I am fully aware of the potential constitutional tensions between the legislative and executive branches on this.

We might even require—and here I am letting my imagination run—that a statement by the House and Senate committees of original jurisdiction be printed in the Federal Register along with the proposed rules.

This would give the public an opportunity to have both congressional and executive views on the rules at the time they are initially proposed for public comment.

Fifth, a decision on an appropriate discharge mechanism must be made. The Clawson bill contains no special discharge provisions, while the Levitas bill does allow any member favoring the resolution, that is, opposing the regulation, to make a highly privileged motion to discharge the committee if the committee has not reported the resolution within 10 days of introduction.

I think this discharge question is particularly important. In the example I cited earlier, I was not a member of the committee with original jurisdiction over the dredge and fill provisions—and as a result I had only limited means at my disposal to obtain a proper hearing of the matter.

In the case of laws already passed by Congress—where the issue is whether or not the regulations will properly implement the law in terms of the intent expressed by a majority of all members of the House of Representatives or the other body—we may want to consider a somewhat less stringent discharge requirement than is normally used in legislative matters.

In that regard I would suggest that both the Rules Committee and the Judiciary Committee study the discharge procedure set forth in section 1017(b) of the Congressional Budget and Impoundment Control Act of 1974. I make this reference because I, as a member of the Rules Committee, am familiar with the provision and helped write that particular law in the 93d Congress.

Sixth, there is what I call a question of balance that must be considered. What I mean by this is that the review and approval/disapproval mechanism could prove to be a perfect means for a small

minority in either chamber who opposed the original legislation to hold up its implementation.

This is especially possible if less stringent discharge requirements are adopted. I think we really should consider both the balance questions and the discharge question in tandem as they are very closely related.

We must continue to preserve the committee system in Congress without disenfranchising individual members or small issue-oriented minorities.

Seventh, and finally, we must consider exactly what approval, disapproval, or no action really mean. The Levitas bill requires only that a resolution of disapproval be introduced, while the Clawson bill provides for resolutions of approval or disapproval—and both bills stipulate that if Congress fails to adopt a resolution such inaction will not be considered an expression of approval.

This is to avoid interference with any possible future litigation that could arise, because our function only would be to specify what the actual legislative intent was.

These varying approaches deserve much consideration. If Congress passed a resolution approving certain rules and regulations then presumably good regulations would have an even firmer basis in law, and Congress would share the responsibility for those regulations with the executive branch.

After all, when the people back home write in about one of these rules and regulations, we in Congress get the blame for them regardless of who actually wrote them.

I recognize that this is a complex jungle, and I mention these only as items that should be evaluated in any further consideration of these bills.

However, Mr. Chairman, I strongly support the direction and thrust of these two bills being considered today.

I think the need for this kind of mechanism is compelling, and with all of the present emphasis on regulatory reform the timing certainly seems right. I urge your committee to continue to pursue this matter actively, and as I mentioned earlier, I will continue to press for action on this by the Rules Committee.

I am confident that after proper study, analysis, and hearings, together we can come up with an appropriate mechanism to remedy this situation.

Again, thank you for the invitation to testify on this.

Mr. FLOWERS. I thank the gentleman for coming today.

Mr. LONG. I recognize it is a complex jungle and I mention these things only as items that should be evaluated in any further consideration of the bill. I do think that the need of legislation of this type is compelling and with all the present emphasis on regulatory reform the timing certainly seems right.

Mr. FLOWERS. Thank you very much. We appreciate your comments and your offer of assistance.

I have no questions. If any of the members have questions, I ask them to direct them to the witness.

If not, we adjourn until tomorrow morning at 10 o'clock immediately upon conclusion of the Democratic Caucus. We have an interesting array of witnesses.

I have a number of documents to be included in the record at this point and I will now adjourn this meeting until 10 o'clock tomorrow morning.

[The documents referred to follow:]

STATEMENT OF HON. JAMES R. MANN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman, as a cosponsor of both bills being considered today, I want to go on record as strongly supporting legislation which would bring a measure of congressional review over administrative rulemaking.

By writing laws which pass along substantive legislative authority to non-elected, unaccountable bureaucrats, we have created a monster which has grown to the point where it may actually threaten the individual freedom and liberty upon which this country was founded. With civil servants or appointed officials responsible for writing hosts or regulations that carry the force of law, due process is seriously jeopardized.

It is not necessary to expound here on the kinds of bureaucratic excesses which have led to the introduction of these bills with widespread support and their consideration by this subcommittee. Suffice it to allude to EPA, FDA, OSHA—the alphabet agencies that wield more and more power on our day-to-day lives. Suffice it to examine the Federal Registers that appear in our offices daily containing page after page of practically undecipherable bureaucratic jargon. Suffice it to try to deal with the problems arising out of 6000 regulations a year which our small business constituents constantly present to us.

On that last point particularly, Mr. Chairman, I am not satisfied to tell my people that Congress has no mechanism for reviewing administrative rules. I am not willing to sit still and admit that even though Congress wrote the enabling legislation, Congress has no effective means to see that the intent of that legislation is carried out without excesses and within the spirit of the law.

The bills being considered today are reasonable responses to those problems. They generally approach the rulemaking problem from a disapproval standpoint: that is, Congress could, if circumstances dictated, disapprove any rule that exceeds congressional intent, but it would not be called on to take action on every one of the thousands of rules promulgated every year. It seems to me that this is the only realistic approach.

From that basic premise, the bills take slightly divergent paths, but each have certain provisions which I feel are important. For instance, H.R. 7689 requires that an explanatory report be filed along with proposed rules. That bill also provides automatic referral of submitted rules to the appropriate committees. And it applies to all administrative rules rather than only to those which could result in criminal sanction. On the other hand, H.R. 3658 stipulates that certain military, foreign affairs and agency management type rules will be exempt from the terms of the legislation, and I am inclined to believe that such categories should properly be exempt. Finally, I believe that the safeguard provided in H.R. 3658 that if Congress fails to adopt a negative resolution, such inaction will not be deemed to be an expression of approval in an absolutely necessary provision in the light of possible future litigation on a rule.

Mr. Chairman, I share the view of my colleague, Mr. Levitas, lead sponsor of H.R. 3658, that these proposals will not provide the final answer to administrative and bureaucratic problems. But enactment of legislation in this area will put us on the right road. It will help protect citizens from over-zealous bureaucrats who are unaccountable, unapproachable and frequently unresponsive to a private individual by providing recourse to elected officials.

STATEMENT OF HON. G. WILLIAM WHITEHURST, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman and members of the Subcommittee, I want to thank you for this opportunity to testify in favor of H.R. 7977. As I will explain in the remarks that follow, I believe Mr. Levitas is performing an important service in attempting to increase Congressional control over rulemaking by federal agencies. These agencies consistently promulgate regulations which fail to match the directives of Congress. It is my feeling that these agencies should respond

more closely to the intentions of Congress and to the needs of the citizens for whose sake they exist. Mr. Levitas' proposed legislation will help to make the federal bureaucracy more responsive to the Congress and to the people.

Presently, federal agencies are responsible neither to Congress nor to any other external authority for the rules they make. That is, no one outside the agency reviews the agency's regulations in order to judge their desirability. H.R. 7977 would alter existing circumstances by permitting either House of Congress to disapprove rules that federal agencies have proposed. Congress will have thirty days subsequent to the promulgation of the rule and prior to the date on which it will take effect during which it may review and strike provisions which it feels do not conform to the intentions of the legislation that these provisions execute. In addition, H.R. 7977 will enable interested parties to participate in drafting the rules that will bind them, and may thereby reduce the volume of conflict that might otherwise arise.

I would like to demonstrate the need for such legislation by citing a few examples of the abuses that the present system allows. Consider for instance the regulation put forward by the Equal Employment Opportunity Commission (EEOC) which forbids employers to inquire into the criminal or military discharge record of applicants for employment. EEOC contends that such investigation leads employers not to hire convicted criminals, and thereby to discriminate unfairly aginst minority groups, since members of minority groups figure disproportionately in the ranks of criminals. That contention led EEOC to order the Houston Police Department to cease investigation into the backgrounds of prospective officers. For the same reason EEOC requires moving companies not to ask job applicants whether or not they have ever been convicted of a crime. The question is one of whether or not refusal to hire convicted criminals constitutes racial discrimination. EEOC argues that it does. The courts have not supported them. While the judiciary has ruled that refusal to hire applicants who have been arrested but not convicted does amount to racial discrimination, it has specifically refrained from extending that judgment to applicants who have been arrested and then convicted of a crime (Gregory v. Litton, 215 F Supp. 52, D.C. Cal. 1970). It appears to me that EEOC has failed to observe the difference between arrest and conviction, and after equating the latter with the former has moved beyond the authority granted to it by law. EEOC has issued regulations that it has no authority to issue; H.R. 7977 will allow Congress to disapprove such regulation before it harasses the American public.

This action of EEOC's is typical of the actions of other agencies in that it requires of the public what the Congress never intended such agencies to require. EEOC is not alone in perpetrating such abuses. Perhaps you are familiar with the recent hearings conducted by our colleagues on the Commerce Committee concerning excessive Consumer Product Safety Commission flammable fabric regulations, or with the Occupational Safety and Health Administration's persecution of Continental Can Company, or with the Environmental Protection Agency's arrogant directives to the citizens of Boston, which effectively prohibited the use of automobiles during the morning hours. I will not detail these incidents here, since Mr. Levitas has described the situation amply in other places.

When agency regulation abuse is discussed it is often in the context of business activity. However, the agencies have not limited themselves and are even attempting to regulate against statutes protecting outdoor recreation.

One of the most recent actions by an agency in direct conflict with the law is a proposed regulation, published in the FEDERAL REGISTER for comment by the Interior Department's National Park Service, which bans motorless aircraft from all national parks. Title 16 of the United States Code, Section 7a-e provides for the construction and operation of airports and aviation activity in national parks, and does not allow discrimination against aviation activities. There is no requirement in the law that an aircraft have a motor to fly in the national parks. The intent of Congress and the law is clear. The Park Service is attempting to justify the regulation by publishing three indistinct reasons which have little bearing on the need for the regulation and fail to justify the noncompliance with the law.

In my mind they are apparently planning to institute an illegal act and force the expulsion of several forms of aviation and outdoor recreation from the parks. The period for public comment ended yesterday, Monday, October 20, 1975. I understand the public response was negative, agency personnel esti-

mating a nine to one ratio against the regulation. Also several leading aviation organizations, such as the National Aeronautic Association, have indicated they have written to the Park Service against the action.

There is no indication however that the agency will not reject the comments and institute the proposal. There is no law requiring that they abide by the public's voice. There is a law that says they cannot do what they are proposing, but it hasn't stopped them yet, and indeed may not stop them instituting it.

This situation has all the indications of an agency out of control. The unfortunate part is that it is not just limited to the National Park Service. From my mail, and the comments of my colleagues, it appears the problem exists in many Federal agencies.

All of this points to the same conclusion: it is essential for Congress to regain control over the administration of the laws Congress passes. The present situation, in which bureaucrats accountable to no electorate make unreasonable rules and regulations, violates the fundamental condition of democracy; that citizens make the law through officials whom they elect and whom they can recall at the next election.

The Bill we are considering today will aid in correcting the imbalance that is changing the nature of our democratic system. I hope you will consider it earnestly and act on it.

Thank you Mr. Chairman and members of the Subcommittee for the opportunity to share my thoughts with you.

STATEMENT OF HON. ROBERT A. ROE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. Chairman, as a sponsor of H.R. 4629, to permit either House of Congress to disapprove certain rules proposed by executive agencies, I am pleased and privileged to join with my distinguished colleague from Georgia, Congressman Elliott H. Levitas, and other sponsors of this measure in support of this legislation which is the subject of your hearings today.

I firmly believe that the Congress should have, in fact is constitutionally entitled to, some review methodology on the rulemaking of administrative agencies as well as the establishment of a period of time in which this review would take place in the Congress. The immediate need here is to halt the writing of rules and/or to prevent the interpretations of laws by the agencies which go beyond the original intent of the Congress as mandated in a particular law. The bill I have sponsored, H.R. 4629, provides for this realization.

I am certain that the members of this Committee are fully aware that each day brings more objections and hostile complaints from all those, consumer and producer, who believe they have suffered unfairly and arbitrarily at the hands of administrators of regulatory agencies. These administrators exercise broad, too broad, powers over almost all aspects of life in this nation not by consensus of the electorate (as in Congress) but rather by personal perception and dictatory implementation of the laws. Surely this is a perversion of the intent of the Congress and it is up to Congress to put matters back into proper perspective and to once again exercise its rightful responsibility in assuring that its intent via its legislative acts is consistently and correctly achieved.

Recently, columnist Jack Anderson in a *Washington Post* article noted that thirty years ago Supreme Court Justice William O. Douglas, then Chairman of the Securities and Exchange Commission, said that every regulatory agency should be abolished ten years after its creation. While I would not agree in toto with this recommendation—I believe the agencies serve an essential purpose and deserve support in general—I would agree with Mr. Anderson that the spirit of Douglas' statement "should be at the heart of regulatory reform." I do not advocate throwing out the baby with the bath water; the word we are talking about here is reform, not elimination. The time has arrived for realizing that it is incumbent upon the Congress to act as the proverbial "watchdog" in this area and to put the regulatory extravaganza currently in vogue back into its mandated margins.

What has happened is no secret. Federal agencies time and again over-regulate to the point of counter-productivity. This thwarting of national productivity becomes all the more crucial when it is placed in the context of an economy such as ours, an economy which, at present, dictates stimulation and growth, not

strangulation and stagnation. I firmly believe that the overzealous regulating which takes place daily in the administrative agencies is at times unwarranted and outside the jurisdiction given those agencies by Congress. I would cite here the example of the Environmental Protection Agency as prime evidence for my accusations. While it is justifiably true that some safeguards against those who will abuse and wantonly waste our natural resources for the sake of their personal monetary gain are necessary, I really think that some of the regulations of EPA e.g. in the case of the 1972 Water Pollution Control Act Amendments (and other federal agencies) have been highly irrational and, quite frankly, do not make sense. If we must legislate in greater detail through revised language or repeal federal agency authority in the legislative process, so be it.

I willingly concede that our bureaucratic governmental structure necessitates considerable fragmentation of rulemaking responsibility among the agencies Congress has created but surely such a situation should not obscure or undermine the very intent of Congress in creating a specific agency. The purpose here should be facilitation of Congressional intent *within* in the law not frustration or revision beyond it by the individual administrators who view themselves as dictatory gods controlling *all* aspects of life in this representative democracy we, in the Congress, are rightfully charged with implementing.

I think the time for reform is overdue and was never more necessary. I strongly urge your favorable consideration of H.R. 4629 and other measures before you which seek to include the Congress, by necessity, in the rulemaking processes which flow from the very laws it has enacted. The integrity of the intent of Congress must be maintained and if the survival of this mandated intent means ongoing revision and review by the Congress, then it must be done, and done now.

STATEMENT OF HON. WILLIS D. GRADISON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Chairman and members of this subcommittee, I am pleased to be here to testify on behalf of tightening Congressional control over Executive Agency rulemaking.

The rulemaking authority of federal agencies has served as an operative extension of the legislation passed by Congress. The rules promulgated by the agencies incorporate the broad principles of law enacted by Congress into guidelines for the people of our nation to live and work by.

The great majority of these rules and regulations conscientiously comply with the spirit of the law and need not be questioned. Not infrequently, however, an agency official oversteps his authority and writes a rule that violates the intent of Congress. Since an infraction of many regulations can result in criminal penalties and fines, they have the effect of law.

Over the years the agencies have promulgated thousands and thousands of rules that regulate virtually every facet of our lives. As a result, a fourth branch of government has evolved that is comprised totally of unelected officials.

This pseudo-legislative form of government certainly does not represent the will of the public which is subject to its influence. Agency regulatory power should and must be closely monitored to protect against new abuse.

Seven states have already passed laws that permit legislative review of administrative agency rules and regulations.

Realizing the need to safeguard itself from agency overregulation, Congress has reserved the right to veto regulations published by the Federal Election Commission. Since Congress has this ability to protect itself from regulatory abuse, it must also insure that it is capable of guarding its constituency against unreasonable federal rulemaking.

I would like to note just a few of the many examples of agency rules or proposed rules that clearly are questionable.

EPA requested that OSHA tighten its proposed noise abatement standard for general industry. The new EPA proposal didn't contain sufficient evidence to justify its $32 billion increase over the OSHA standard.

The Consumer Product Safety Commission proposed stricter standards for power lawn mowers. The Standard Research Institute estimated the standard would increase the costs of walk-behind mowers as much as 74% and would reduce sales by one third during the first year. Evidence has shown that the benefits received in terms of injury reduction are not sufficient to justify the costs imposed on consumers.

The National Highway Traffic Safety Administration proposal that air bags be required on passenger vehicles has been questioned by the Council on Wage and Price Stability. The Council concluded that "there was excessive uncertainty both technological and economic about the cost effectiveness of devices the proposed standard would mandate."

The Transportation Control Laws published by the EPA have caused considerable controversy regarding their effectiveness. Last year Congress barred EPA from administering any program to regulate parking facilities. Currently Congress is considering legislation that would remove EPA's authority to require states and localities to review plans for construction of indirect sources of air pollution caused by large aggregations of automobiles such as shopping centers, stadiums, and highways.

Obviously, if Congress has the capacity to overrule agency proposals before they are implemented, the consumer would be spared the burden of ultimately paying for the cost of injudicious regulations.

The Inflation Impact Statement Program established by Executive Order in November 1974, requires federal agencies to evaluate the economic impact of major new rules and regulations. The Council on Wage and Price Stability which has been assigned the responsibility of implementing this program could assist Congress in its review of agency rulemaking.

In closing Mr. Chairman, it is the right of the American people to be governed by their duly elected officials. I strongly urge that this committee recommend that measures be enacted to provide Congressional oversight of Executive Agency rulemaking and insure that this right is restored to the people.

STATEMENT OF HON. ROBERT W. KASTEN, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Mr. Chairman and members of the Subcommittee on Administrative Law and Governmental Relations, I thank you for the opportunity to testify in support of two bills which I have co-sponsored—H.R. 3658, the Administrative Rulemaking Control Act, and H.R. 7689, which establishes a method for congressionl review of administrative rulemaking. The Chairman and Subcommittee are to be commended for taking the initiative in holding hearings on this vital legislation, which attempts to redress a portion of the imbalance between the Executive and Legislative Branches of Government. In announcing these hearings, the distinguished Chairman of this Subcommittee emphasized the purpose of these legislative proposals, saying:

"How many times have we all heard our constitutents complain about the runaway, rulemaking of Federal agencies? How many times, Mr. Speaker, have we in this House individually and collectively voiced our own frustration and disapproval of various agencies seemingly thwarting the will of Congress through their promulgated rules and regulations?

"It seems to me that our people deserve accountability in their National Government, and not only in the legislative branch. These proposed bills to be considered by my subcommittee offer some promise of achieving a greater degree of accountability and responsibility in administrative rulemaking by the vast Federal bureaucracy. (121 Cong. Rec. H 10024, Oct. 9, 1975.)"

Broadly summarized, the bills before you today provide clearer and more direct Congressional controls over the rules promulgated by Executive agencies, rules which have the force and effect of law and which are applicable to virtually every citizen of the United States. Not only will this legislation provide a means by which the Congress can directly influence agency rulemaking, i.e. the administrative discretion of Executive units, but also these proposals establish procedures whereby the Congress can review proposed administrative rules to assess their compliance with the intent of Congress and to determine whether the agencies have exceeded the authority granted by the Congress.

Although the objectives of the two bills before the Subcommittee are the same, the methods and procedures prescribed in each differ as does the extent of control of each. H.R. 3658, the Administrative Rulemaking Control Act, limits Congressional review of administrative rulemaking to rules other than those in which "there is—(1) a military or foreign affairs function of the United States, or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." H.R. 7689 contains no such qualification and applies . . .

"Whenever any officer or agency in the executive branch of the Federal Government (including any independent establishment of the United States) proposes to prescribe or place in effect any rule or regulation to be used in administration or implementation of any law of the United States or any program established by or under such a law . . ."

The broader scope of H.R. 7689 is complemented by a more exacting requirement on the part of the Federal agencies which propose a change in regulations or new rule—that "such officer or agency shall submit the proposed rule, regulation, or change to each House of Congress together with a report containing a full explanation thereof." H.R. 3658, the Administrative Rulemaking Control Act, contains no such provision for such a full explanation by the Executive agency nor, in fact, any explanation whatsoever.

Another difference between the two proposals relates to the time in which the Congress must act. H.R. 3658, the narrower legislation, provides only a thirty-day period for congressional deliberation, if the proposed resolution to disapprove the new rule has not been referred to an appropriate committee. Sixty days of deliberation is permitted only if the resolution is submitted to a committee for analysis. The more comprehensive bill, H.R. 7689, provides a sixty-day period for congressional deliberation with automatic referral to an appropriate committee, thus requiring a more lengthy and specialized congressional inquiry into the proposed rule change or new rule.

I strongly favor the more encompassing and comprehensive legislation, H.R. 7689, because of its provisions for more thorough congressional scrutiny of administrative rulemaking. Congress must act to remedy the abuses inherent in the rulemaking discretion of Executive agencies and, therefore, I support H.R. 3658, a less comprehensive but essential first-step.

It is gratifying that the sponsorship of the bills before the Subcommittee, and similar proposals, numbers nearly one-hundred Members of Congress, is bi-partisan, and is manifested in both the House of Representatives and the Senate. In fact, three members of the Subcommittee on Administrative Law and Governmental Relations have co-sponsored bills which are identical to H.R. 7689—Mr. Mazzoli (H.R. 10166) and Mr. Moorhead (California) and Mr. Kindness (H.R. 8231). This extensive support for the bills demonstrates the awareness that greater legislative control of administrative discretion is a necessary ingredient of contemporary democracy and that such a concern knows no ideological or partisan boundaries.

It is in the interest of the public and the Congress to pursue these objectives because of the growth of the Executive Branch of the Government since the Great Depression era and the extensive delegation of administrative discretion by the Congress to Executive departments and independent agencies. In my remarks to the House in support of this legislation, I reviewed this development, saying:

"The Constitution of the United States vests 'all legislative powers . . . in a Congress' but also requires that the President 'take care that the laws be faithfully executed.' From the earliest days of the Republic, the President and the principal officers of the executive branch have utilized various orders, directives, and regulations to implement or 'faithfully execute' the statutes enacted by the Congress. This process has, in two centuries of Government operations, undergone only two major procedural changes. Prior to 1935 most of these types of instruments were fugitive in nature. There was no centralized arrangement for their publication, retrieval, or identification. The growth of the Federal Government during World War I accelerated and compounded difficulties in this area and, with the advent of the New Deal, the situation became chaotic. In late 1934 the Executive was found to be pressing a case before the Supreme Court—United States against Smith—based upon an agency regulation that did not actually exist. A few months later the Government was again embarrassed when it was discovered that prosecution was being pursued under a revoked Executive order—Panama Refining Co. against Ryan. To bring order out of such confusion, Congress established the Federal Register in 1935 (49 Stat. 500) and created the Code of Federal Regulations in 1937 (50 Stat. 304).

"It was also realized at about this same time that there was no standardized or uniform procedure whereby agencies established their rules and regulations pertaining to the implementation of statutes. After a number of years of study interrupted by the demands of World War II, Congress enacted the Administrative Procedure Act in 1946 (60 Stat. 237) which still provides the basic authority for the manner in which rules and regulations are promulgated.

"The necessity for these laws is reflective of the fact that after World War I, and especially after the administration of Franklin D. Roosevelt, the executive branch was being granted greater and broader administrative discretion than ever before in faithfully executing the law. Congress, of course, may not abdicate its legislative function by delegating legislative power to the Executive. What has been provided, in varying degrees of latitude, is administrative discretion which, with but one exception—the National Industrial Recovery Act of 1933, 48 Stat. 195—the Supreme Court has approved, diligently refraining from conceding that the discretion conferred partakes of the lawmaking function. On two occasions—Panama Refining Co. against Ryan 1936; Schechter Poultry Corp. against United States, 1935—involving the same statute, the Court has expressed that an improper grant of legislative power was involved in such a delegation." [1]

This discretionary authority, granted by the Congress to Executive agencies and which was intended to expedite governmental decision-making and improve economy and efficiency of operation, has had unanticipated consequences. On occasion agency rulemakers either have disregarded or misunderstood the intent of Congress or have exceeded the authority which Congress granted them. The results have been far-reaching and occasionally disastrous. A number of articles have reported on the impact of Federal regulations which appear to circumvent or abuse the Congressionally sanctioned authority of the agency. Murray L. Weidenbaum, an author of regulatory studies published by the American Enterprise Institute and director for the Center for the Study of Business at Washington University, has described an agreement between the National Institute for Occupational Safety and Health (NIOSH), the agency which does basic research underlying new Occupational Safety and Health Administration (OSHA) regulations, and the Amalgamated Clothing Workers.[2] According to Weidenbaum, "under the agreement, the official federal study of safety and health hazards in the clothing industry is being conducted by a union." [3] The article continues, citing the "arbitrary power" [4] which agencies might exert. A case in point is the statement of a member of the Consumer Product Safety Commission (CPSC), who insisted that "'any time that consumer safety is threatened, we're going to go for the company's throat.'" [5] Weidenbaum suggested that the metaphor became reality in at least one case, as a firm was forced out of business due to suspected defective items. However, the CPSC ruling classifying the item as defective was based upon an out-of-date Food and Drug Administration listing.

Other illustrations of arbitrary administrative rulings are available. John Barron,[6] writing in the May, 1975 *Reader's Digest*, reported about several OHSA rulings, one of which was dismissed in Federal court as "arbitrary to the point of capriciousness" by Federal Judge Robert Burchmore.[7] A second incident, reported by Barron involves the Equal Employment Opportunities Commission (EEOC). The EEOC, according to this article, had charged the Houston Police Department with discrimination in hiring practices and, in order to rectify the situation, required the Department to cease investigating the backgrounds of prospective officers on the grounds that certain types of criminal misconduct are proportionally higher among blacks and other minorities, resulting in potential "discrimination" in hiring practices. A final example by Barron deals with the Environmental Protection Agency (EPA) and quotes Professor Irving Kristol of New York University approvingly: "'If the EPA's conception of its mission is permitted to stand, it will be the single most powerful branch of government, having far greater direct control over our individual lives than Congress or the Executive or state and local government.'" [8]

Still another series of criticisms of the rulemaking of administrative agencies is found in an article by William Hoffer,[9] examining the *Federal Register* and its inclusions. Hoffer details a case in which two Government agencies promulgated inconsistent and contradictory rulings, with the solution being that one of the agencies exempted itself from the ruling of the other. Apparently, the

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[1] 121 Cong. Rec. E3570, June 27, 1975.
[2] Murray L. Weidenbaum, "Big Mother" has her eye on little business. Baltimore Sun, July 20, 1975.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] John Barron, Too Much Government by Decree: Reader's Digest, May 1975.
[7] Ibid.
[8] Ibid.
[9] William Hoffer, Smoke screen for bureaucrats, Prism, December 1974.

Food and Drug Administration (FDA) had proposed a ban on household paint with a lead content of more than 0.5 percent. A short while later, the Department of Housing and Urban Development (HUD) circulated a directive banning from federally owned or federally assisted housing any paint with a lead content of more than 1.0 percent, twice the level allowed by FDA, but did not publish the proposed rule in the *Federal Register*. It was not until nine months after the initial FDA ban that HUD published a statement in the *Federal Register* that it was banning in Federal housing paint with a lead content higher than 1.0 percent, still twice the FDA standard.

These examples signify actual abuses of administrative rulemaking authority. Since the volume of rules promulgated by administrative agencies is staggering (e.g. the *Federal Register* accounted for 45,422 pages in 1974.), the potential for circumventing Congressional intent or for abuse of authority is equally abundant.

The discretionary authority of Federal agencies, which rulemaking represents, has evolved into "executive-entered government," according to some political analysts.[10] The implication is that the agencies and departments have developed an independence that qualifies them as a fourth branch of government, fully accountable to neither the Congress nor the President. The limited recourse available to the public to challenge agency rules, except through the courts, the secrecy surrounding much af administrative decisionmaking, and the possibility of special interest opinion dominating the agencies reinforces the independent, unaccountable nature of some agencies. The bills before this Subcommittee attempt to ensure some degree of accountability of bureaucratic agencies to the elected representatives in the Congress, at least in the rulemaking phase of their operations. The need for regular and systematic oversight, which this legislation would stimulate, is evident in all phases of government activity, especially in light of the rapid growth in the size and discretionary authority of Executive agencies. James Madison, arguing for the ratification of the Constitution in the Federalist Papers, offered advice that has relevance for the issue at hand:

"In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself." (Federalist Papers, No. 51)

Not only would this legislation help to ensure the accountability of executive agencies, it would also effect a degree of legislative control over their rulemaking function. As well, these bills might promote more efficient and less wasteful practices. Rather than being an imposition on the Executive agencies, legislation of this nature should encourage the agencies to draft their regulations in consultation with the committees of Congress, thus alleviating confrontation between the two branches and expediting the codification of regulations. Federal Court responsibilities regarding Executive agency rules which were made under the process proposed here should be eased as well. There would be a public record from both committee hearings and floor debate as to the intent of the Congress and the relationship of a specific administrative rule to that intent. The consultation between agencies and the Congress and the subsequent formal record on which the Federal judiciary relies for determining Congressional intent should effect a reduction of Federal court suits challenging specific administration rules and procedures.

Although, in the short run these bills, if adopted by the Congress, would increase the workload of Congressional committee members and staff, the long-run advantage might be to reduce the workload of these units. Consultation between Executive agency and relevant Congressional committee prior to the promulgation of a rule or review of a proposed administrative rule by the Congress before it takes effect should alleviate future confrontations between the agency and respective committees. At the optimum, the bills would provide a mechanism for the termination of potentially abusive and arbitrary rules, which would likely generate controversy and conflict in the future. This, in turn, would make unnecessary later ad hoc reviews of administrative rules by the Congress and, thereby, lessen the time devoted to ad hoc oversight and to the constituent service demands generated by faulty or abusive agency rulings. Finally, such a procedure would thoroughly acquaint the membership and staff of a particular com-

[10] Theodore Levi (ed.) Legislative Politics U.S.A. Boston, Little, Brown and Co., 3d edition, 1974.

mittee with the voluminous agency rules under their jurisdiction, effectively improving the professional caliber of the staff and facilitating the development of future legislation affecting the agency, the programs under its direction, and additional agency rules.

By way of conclusion, I wish to reiterate my emphatic support for H.R. 7689, the more comprehensive of the two proposals, and for H.R. 3658, the Administrative Rulemaking Control Act, the less encompassing but minimum congressional response to arbitrary and excessive discretionary authority of administrative agencies. Both proposals involve the Congress in the rulemaking process and provide necessary constraints on agencies which may have misunderstood or ignored congressional intent. These proposals in turn improve Congressional oversight of the Executive by encouraging regular and systematic review of agency rules.

Again I wish to thank the Chairman and members of the Subcommittee on Administrative Law and Governmental Relations for providing the opportunity for me and others to testify on behalf of these proposals. I am confident that these important hearings will be the initial stage in promoting more responsible, accountable government for the citizens of this country, as the principles embodied in these bills become the law of the land.

Statement of Hon. B. F. Sisk, a Representative in Congress From the State of California

Mr. Chairman, Members of the Subcommittee, may I thank you for the opportunity to submit my views on H.R. 3658 and H.R. 7689. I have co-sponsored H.R. 7979, a bill identical to H.R. 3658, and H.R. 8231, identical to H.R. 7689.

These two bills represent slightly different approaches to the problem of Congressional review of administrative rulemaking. This concept is of vital importance to all of us, especially at a time when many of our citizens believe that the Federal government for which they pay so dearly does little to address their needs. This legislation would provide a means for the elected representatives of the people to review the rules and regulations set up by Federal Agencies to administer the laws passed by the Congress. These rules and regulations touch all facets of the average citizen's life from the price he pays for hamburger at the supermarket to his likelihood of acquiring Federally guaranteed insurance for a home loan.

Although the need for such legislation may be more acute at this time, the concept is not new. The Congress has provided by statute for Congressional review, deferral, and disapproval of executive actions since 1932. In the past 43 years, Congress has passed 126 acts containing 183 separate provisions mandating some type of Congressional review over their implementation. The number of laws passed with these types of provisions has steadily increased during the last fifteen years or so, and especially since 1970. In 1974 alone, 14 laws containing 26 provisions for Congressional review were enacted. The complexity of the legislative review and consent requirement has also increased.

A variety of devices has been used for Congressional review ranging from simple directives commanding an agency to consult with or to "come into agreement with" Congressional committees to resolutions of approval or disapproval passed by appropriate committees or by either or both Houses of Congress. Nearly all have required notification of committees or of Congress and submission of data to them by the President or some agency. In many instances, executive action is deferred for a specified period of time unless disapproved by a committee or either or both Houses of Congress. Other laws require specific approval for executive action to occur. Time frames have been unspecified for 23 provisions and have ranged from five days to three years for others. The vote required to approve or disapprove executive actions is in some instances a majority of those present and voting, in others a majority of the authorized membership, and in still others a two-thirds vote of members present. The vehicle used for approval or disapproval is generally a simple or concurrent resolution, but, in one instance, the law specified disapproval by a joint resolution which in effect nullified Congressional authority to disapprove.

Clearly, the Congress has indicated it is willing and able to provide for Congressional review of executive implementation of laws. The bills which are before you today provide further direction in this area. They would standardize the procedure by which Congress approves or disapproves executive rulemaking pursuant to the administration and implementation of the laws.

In very brief form, I would like to discuss the types of rulemaking which each bill covers and the procedure each bill proposes for Congressional review of that rulemaking process.

H.R. 3658 establishes "a procedure whereby Congress may review certain rulemaking activities of executive agencies . . . except (to) the extent that there is involved—(1) a military or foreign affairs functions of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

H.R. 7689 provides that "any rule or regulation to be used in the administration or implementation of any law of the United States or any program established by or under such a law" would be subject to Congressional review.

H.R. 7689 would require a significant proportion of all proposed rules and regulations which might be promulgated by executive agencies to be submitted to Congress for review. Such blanket coverage might prove unwieldy for both the Congress and the executive agencies. On the other hand, H.R. 3658 attempts to deal with such a possibility by exempting rules and regulations in certain categories. While I might agree that such an effort should be made, I would ask that further study be given to an exemption for matters relating "to public property, loans, grants, benefits, or contracts." If certain categories of rules and regulations are to be exempted from the provisions of Congressional review, very careful consideration must be made by both the Judiciary and the Rules Committees as to what these might be so that the intent of the legislation is fully served.

The methods employed by the bills to obtain Congressional review of rulemaking is also somewhat different.

H.R. 3658 requires that "general notice of proposed rulemaking shall be published in the *Federal Register*," including the time, place and nature of public rulemaking proceedings. Except as required by statute, public procedure is not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice," or when the agency determines public procedure is impracticable or unnecessary. However, interested parties must be given an opportunity to submit written data or views. If a rule is subject to public rulemaking procedure or carries criminal penalties, it may not go into effect for 30 legislative days after it is published in the *Federal Register* provided that neither House of Congress passes a resolution of disapproval. If a resolution of disapproval is introduced in either House and is referred to a committee, the proposed rule may not go into effect for 60 legislative days.

H.R. 7689 requires that "whenever any officer or agency in the executive branch of the Federal government (including any independent establishment of the United States) . . . proposes to make or place in effect any change" of a rule or regulation affecting the implementation of a law or program thereof that such officer or agency shall submit the proposed rule or change to each House of Congress together with a report containing a full explanation. If after 60 legislative days neither House of Congress has adopted a resolution disapproving the proposal, the rule or regulation goes into effect. Resolutions introduced to disapprove the proposed rule or regulation shall be referred to the appropriate committee. However, the rule may be approved by concurrent resolution at any time during the sixty-day period.

The procedure as provided by H.R. 3658 is admirable in that it seeks to allow more public access to the rulemaking process. However, the procedural requirements of H.R. 7689 follow more closely the precedents established by prior laws providing for Congressional review of executive implementation of the laws. Furthermore, it seems that such procedure has more direct impact on legislative-executive relationships. The fact that executive agencies must submit their proposed rules and regulations directly to the Congress for approval or disapproval must, if perhaps only psychologically, reinforce the concept that Congress does have oversight responsibility for implementation of the laws it passes and that ultimate authority for regulation of the governed must rest in the elected representatives of the people.

As I said earlier in my statement, I have co-sponsored identical versions of both of these measures and have found considerable merit in each of them. Such comments as I might have as to the effects of the language of the bills on the rules of procedure of the House, I will reserve for hearings before the Rules Committee.

Again, let me say that I support this legislation and recommend its adoption to the Members of the Subcommittee who, I am sure, will give it their careful consideration.

STATEMENT OF HON. LUCIEN N. NEDZI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman and members of the Subcommittee on Administrative Law and Governmental Relations, I appreciate very much the opportunity to offer my support for this measure and I would like to thank the Subcommittee for calling these hearings into a growing problem which touches all Americans today.

Under the provisions of the Constitution, Article I, Section 8, the Congress of the United States is empowered to write the laws of the land. Similarly, under the Constitution, the Executive is given the duty of enforcing the laws which the Congress has made. Historically, under the separation of powers doctrine, the Congress alone has had the responsibility of providing the legislation necessary for the governing the country. However, over the last four decades, the American people have seen this well defined and fundamental difference in the roles of the Congress and the Executive become increasingly distorted and blurred. No longer is the Executive branch satisfied with carrying out the law as written by the Congress. Now we have Executive branch agencies over-stepping their mandate and becoming the law maker as well as the law enforcer.

Guided by what they perceive as their duty to implement the law, or even more questionable motives, these agency bureaucrats now spend considerable time dreaming up ways in which they can change the law, rearrange the priorities established by the Congress, and generally make the law so difficult to understand and carry out that society cannot enjoy the benefit which the law originally sought to achieve.

A recent study shows that the bureaucrats of the Executive branch now produce something on the order of 25,000 new regulations in an average year. These regulations, coupled with the over 5,000 forms required by these agencies, from the private sector, result in a government swollen in size and choked with conflict and confusion. American citizens are thus faced with a mass of rules with which they are helpless to deal. Faced with this maze of contrived regulations, the average person becomes cynical and questions whether "the system" still can be made to work.

Increasingly, the Congress finds itself in the position of, having written a law, being forced to develop additional legislation which will prevent agency rules affecting the law from taking effect. This "after the fact" procedure for checking the excesses of an agency's rule makers is neither rational nor in keeping with the separate roles for the Congress and the Executive which the Founding Fathers envisioned.

Mr. Chairman, this legislation, H.R. 9313, seeks to give the Congress the ability to prevent an agency from adopting rules and regulations which are contrary to the intent of the law which the Congress has enacted. For the first time, the Congress will be able to stop an agency from making a rule before the fact, rather than, as in the past, enacting the legislation, being confronted with a contrary or inconsistent agency regulation, and then having to go back through the legislative process in order to block the implementation of the regulation.

Under this proposal, whenever an agency seeks to develop or implement an administrative rule or regulation which will deal with the administration of any law of the United States, the agency will first submit the rule or regulation to each House of the Congress, together with a thorough explanation of the rule. Similarly, if the agency seeks to change an existing rule or regulation the change must first be submitted to the Congress.

The rule or regulation will become effective upon the passage of sixty legislative days from the date that it is presented to Congress, unless either House first adopts a resolution of disapproval, based on a finding that the rule or regulation contains a provision which is contrary to law or inconsistent with Congressional intent, or because it "goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used".

The structure of our government is such that the people act freely to elect their representatives and give these representatives the power to make laws for the common good. Since no citizen acts to elect a bureaucrat in an Executive agency, it is obvious that a bureaucrat should not be able to issue rules or guidelines which have the force of law but which are contrary to the intent of the laws passed by the Congress. No one will argue with the premise that there is a need for agency rulemaking to interpret the broad principles which

acts of Congress often set forth. However, this can not be asserted to justify the authority of civil servants and appointed officials to develop countless rules which often place a citizen in jeopardy of his liberty or property.

H.R. 9313, and similar bills, are not intended to limit the valid exercise of the Executive branch's enforcement powers. This bill only seeks to make the rulemaker responsive to the intentions of the Congress and in that way, prevent the rulemaker from inflicting on the public those administrative regulations which are clearly contrary to Congressional intent.

While I recognize that this measure will not be a final solution to the problems which I have outlined, I see it as a start from which the Congress can demonstrate that it is concerned with the unintended harassment of our citizens by a nonelected and unresponsive band of bureaucrats.

STATEMENT OF HON. JAMES C. CLEVELAND, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

Mr. Chairman, I am pleased to be able to add my support to that of many others for H.R. 15 and its identical companion bills whose chief sponsor is my colleague from Illinois, Mr. Railsback.

My co-sponsorship of these measures is in line with my longstanding efforts to insure that the public's business is conducted in the open. I have long been an advocate of open sessions of the House Republican Conference and Congressional committee and conference meetings. I am delighted to see that my Democratic colleagues have followed the Republican lead and have opened up meetings of their Caucus. I have worked hard for reform of the House rules so that Members can have their votes on important issues recorded and so that substantive votes cannot be avoided by procedural maneuvering. I have called for and co-authored legislation providing for television and radio coverage of House sessions so that the public will be able to see how our legislative process functions on a nationwide basis.

These measures to regulate lobbying are quite in line with my past activities. To require disclosure of lobbying activities is to insure that the public's legislative business is conducted in public view and that important matters are not decided by a few well-funded special interests operating in near secrecy. This bill is not aimed at discouraging legitimate lobbying activity, an important part of our constitutional process and a fundamental right. Rather, its goal is to open up this whole process and to inform and educate the public on legislative matters.

STATEMENT OF HON. TOM BEVILL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Mr. Chairman. In talking with my constituents in Alabama and in reading mail I have received from businessmen and public officials alike, it isn't hard to figure out that the American people are fed up with the ever-increasing amount of red tape and bureaucratic directives which are constantly being imposed by various federal agencies.

I strongly share this feeling.

With that in mind, I urge this committee to give favorable attention to H.R. 3658, the Administrative Rulemaking Control Act of which I am a co-sponsor.

As you know, this bill proposes to give Congress the authority to review rules and regulations adopted by federal agencies that carry criminal penalties for violation.

While this bill will not by any means eliminate administrative and bureaucratic problems in our government, I feel it can be a significant first step toward that end. I think everyone here today shares the belief that something must be done to impede the rapid increase of bureaucracy in our government, especially in our federal agencies.

Businessmen are constantly being forced to confront new bureaucratic directives which, for the most part, seems useless.

Allow me to use a letter from one of my constituent-businessmen as an example.

He wrote concerning a Federal Trade Commission proposal which would require every retailer to keep notebooks of all warranties for warranted products in every department of a store.

You can imagine what such a rule would do to the bookkeeping department of any retail merchandiser. The retailer would find himself running a library instead of a business.

My constituent wrote, and I quote, "We have to keep more books now than we can handle and only about one out of every 50 customers register any warranties they get."

This illustration is only one of many I have received. But the point should be clear—something must be done to alleviate pointless bureaucratic constraints.

Once again, let me take the opportunity to urge your committee to lend a favorable report to this legislation which seeks to make our administrative process a more responsive one by the reduction of needless and useless impediments to the conduct of our everyday life.

STATEMENT OF HON. J. KENNETH ROBINSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, as a co-sponsor of H.R. 9313, which is identical with H.R. 8231, I am glad to have the opportunity to urge favorable consideration by this distinguished Subcommittee of any of the bills before it which would provide for a Congressional review of administrative rulemaking.

I should like to emphasize at the outset, Mr. Chairman—and I believe this is a realization shared by all of the sponsors of the bills under hearing—that what is sought by this legislation is not preemption by the Congress of the rulemaking process. It would be not only improper, but also entirely impractical, for the Congress to undertake to draft and promulgate each and every administrative rule necessary to carry out the lawmaking intent. The objective, rather, is to safeguard that intent—to insure that lawmaking continues to reside in the Congress, as prescribed by the Constitution, and that lawmaking by bureaucrats is curbed.

Each of us serving in the House has been confronted with numerous instances in which departments and agencies of the Executive Branch, in issuing regulations under authority of a general provision of a statute, have gone far beyond the intent of the Congress, as expressed in the language of committee reports and in the expositions, during floor debate, by the proponents of the legislation which became the laws from which these departments and agencies have drawn their color of authority.

In my own experience, Mr. Chairman, I have had occasion to view with particular concern some of the rulemaking exercises of the Department of Labor's Occupational Safety and Health Administration, the Department of Health, Education, and Welfare, and the Environmental Protection Agency.

What I believe to be a classic example of the lawmaking by bureaucrats to which I have referred—and which I believe the Congress has a Constitutional obligation to deter—is a directive of the Office of Civil Rights of the Department of Health, Education and Welfare in the matter of reports required of every public school system in the United States with respect to every disciplinary action taken against students within these many school systems. The stated purpose of the unbelievably-detailed record keeping by racial/ethnic groups is to insure that no such group be subjected to a disproportionate number of disciplinary actions.

The stark implication of these requirements is that punishment of students found to have committed infractions of the rules of a school system is to be meted out not on a basis of individual case judgments, but with a specific concern for racial/ethnic quotas.

Nowhere in the civil rights or education statutes cited as authority for this regulatory action is to be found any language remotely suggesting that the Congressional intent to insure equal educational opportunity was to be extended to the establishment of disciplinary quotas of this kind.

Because I believe this example would be of particular interest to the Subcommittee, Mr. Chairman, I will append a copy of the directive to this statement, with the hope that you may accept it for inclusion in the record of these hearings.

The bill, H.R. 9313, of which I am a co-sponsor, would not establish a precedent. It merely would extend a requirement included by the Congress in a number of statutes, whereby specific clearance by the responsible committees of the Congress must be obtained before a department or agency does certain things

for which basic authority has been established by statute. The Committees on Public Works, for example, pass upon specific projects proposed to be built by the Army Corps of Engineers in certain categories authorized by law. Another example is the clearance which must be obtained by the Department of the Interior before undertaking to acquire certain lands by condemnation, even though the Department has statutory authority to condemn. In the Committee on Appropriations, on which I am privileged to serve, we give transfer authority for reprograming of funds already appropriated on request of the departments or agencies concerned.

Admittedly, the pending legislation is substantially broader than the requirements I have cited. I recognize the legitimacy of the suggestion that Congress might be swamped by the work of sifting the tremendous regulatory production of the Executive Branch. However, on the basis of our experience over the years with the requirements we have made for Congressional review of various administrative determinations, I think it fair to assume that the great majority of regulatory actions would clear committee scrutiny quickly. The very fact that this clearance was required would prompt the bureaucracy to much greater care in identifying Congressional intent prior to the promulgation of a rule, regulation or "guideline".

Wholesale vetoing of proposed administrative directives would not be a reasonable expectation, but the Congress would have provided itself with a means to protect its lawmaking powers, and to protect the states and localities—and the general public—from bureaucratic tyranny by halting regulatory excesses, contrary to Congressional intent, before they have opportunity to take their improper effect.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
OFFICE OF THE SECRETARY.
Washington, D.C., August 1975.

Memorandum: For chief State school officers.

Subject: Recordkeeping on student-discipline procedures and actions in school districts.

The Office for Civil Rights has recently reviewed and analyzed certain data on student discipline actions, which have been submitted on the Annual Civil Rights Survey Forms OS/CR 101 and 102 by recipient school districts. This data shows that, in many hundreds of school systems throughout the Nation, minority children are receiving a disproportionate number of discipline actions in the form of expulsions and suspensions and are being suspended for longer periods than nonminority children.

The Elementary and Secondary Education Division of the Office is now undertaking a program to ascertain compliance with civil rights statutes in school systems where there appear to be possible violations in the administration of student-discipline actions. In the course of the program, this Office will require school districts to furnish a number of documents relating to student discipline actions and procedures to serve as a basis for a preliminary determination of possible violations of these statutes.

Title VI of the Civil Rights Act of 1964 and the Department Regulation 45 CFR (Part 80) promulgated thereunder require that there be no discrimination on the basis of race, color, or national origin in the operation of any federally assisted programs. Section 80.6(b) of this Regulation provides:

"Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs.

Similarly, Title IX of the Education Amendments of 1972 states in Section 901(a):

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."

The purpose of this memorandum is to request Chief State School Officers and their staff to inform their constituent school systems of the necessity to keep and retain complete records of student disciplinary actions and procedures. Although most school systems keep records on these matters already, we believe it would be

of benefit to all school administrators to learn of the nature of the information this Office expects school systems to maintain. School districts are expected to retain all records regarding student disciplinary actions for at least the past two school years. Beginning with the 1975–76 school year, the Office for Civil Rights requests that all school systems receiving Federal financial assistance maintain the following kinds of documents:

State statutes pertaining to student discipline, including regulations or by-laws issued by the State Board of Education.

Written statements issued by the Board of Education, the Superintendent of Schools, school principals, teachers, or other agents of the Board regarding school policies, standards, practices, and procedures for the discipline of students including, but not limited to, by-laws, handbooks, notices, memoranda or logs. The criteria and procedures used to develop these written statements should be explained, as well as the means by which they were communicated or disseminated to school staff, parents, and/or students.

An accounting of the numbers of students subject to disciplinary actions as described below starting with the school year 1975–76. This accounting should contain an entry for each student subject to disciplinary action as described below, the racial/ethnic designation and sex of the student, the school attended, a description of the offense or offenses for which disciplined, the title of the person or persons reporting the offense, the title of the person or persons imposing the action or actions, and a concise procedural history leading to the disciplinary action or actions from the initial reporting of the offense through final disposition of the case. The accounting should indicate which alternatives to the disciplinary action, if any, were considered prior to the imposition of the disciplinary action.

A log or logs of any formal or informal hearing related to disciplinary actions by the Board of Education, the superintendent of schools, school principals or other designees of the superintendent. Entries should include, but not be limited to, the racial/ethnic designation and sex of the student, the school attended, the nature of the offense or offenses, the form of notice given to the student, the hearing authorities, whether or not the hearing preceded removal from school prior to hearing and the time elapsed, a description of the testimony offered, the findings, and the disposition of the case.

The kinds of disciplinary actions for which entries should be kept would include, but not be limited to, (1) expulsion, (2) suspension reported by number of school days, (3) corporal punishment, (4) referral to special classes or schools for behavioral modification, and (5) transfer to another class or school.

An accounting of student withdrawals from school (dropouts), containing an entry for each student who withdraws, the school attended, the ethnic designation and sex of the student, and the reason for withdrawal.

A log of referrals of discipline cases to courts or to juvenile authorities. Entries should include a description of the offense or offenses, the ethnic designation and sex of the student, the school attended, and the disposition of the case.

For the purposes of these records, ethnic designation should include these groups:

American Indian—Persons considered by themselves, by the school, or by the community to be of American Indian origin.

Black American—Persons considered by themselves, by the school, or by the community to be black or of African or Negro origin.

Asian American—Persons considered by themselves, by the school, or by the community to be of Chinese, Japanese, or other Asian origin.

Spanish Surnamed American—Persons considered by themselves, by the school, or by the community to be of Mexican, Puerto Rican, Central-American, Cuban, Latin-American, or other Spanish origin.

Other—All individuals not included in the foregoing categories.

This Office appreciates the cooperation of the Chief State School Officer in advising their constituent school systems of these requirements under law. As a supplementary action to advise constituent school systems of these record-keeping requirements, this Office will provide local education agencies with a copy of this memorandum. Questions regarding the keeping of records on student disciplinary action should be addressed to: Dr. Lloyd R. Henderson, Director, Elementary and Secondary Education Division, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C.

MARTIN H. GERRY,
Acting Director, Office for Civil Rights.

STATEMENT OF HON. RICHARD H. ICHORD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Mr. Chairman and Members of this Subcommittee, I appreciate you affording me the opportunity to submit comment on H.R. 3658 which would provide greater congressional control over the administrative rulemaking process. As the members of this Subcommittee know, I am a co-sponsor of H.R. 9235, a bill identical to H.R. 3658, which provides that whenever an administrative rule is adopted by an agency under procedures of the Administrative Procedure Act—section 553 of title V, U.S.C.—and a violation of the rule could result in a criminal sanction, then either House of Congress would have 30 days in which to pass a resolution disapproving of the adopted regulation. I co-sponsored this legislation due to my increasing concern that Congress is abrogating its legislative function to the whims and interpretations of the federal agencies. Last year in 1974 Congress enacted 404 laws. At the same time the staffs of 67 federal agencies promulgated 7,496 new regulations to serve to implement the broad mandates set forth by Congress in these laws.

While I am of the general belief that we need fewer rather than more federal regulations, I am in a practical sense well aware that the trend toward increasing federal involvement is not likely to soon be reversed. Therefore, I feel bills such as H.R. 3658 are necessary to insure that the American public has some control over the numerous administrative rules and regulations which spew forth from the bureaucracies each year and to assure some avenue of accountability to the public through their elected representatives for the host of regulations which carry the force of law.

Regrettably Congress has increasingly allowed the federal agencies to be the technical interpreters of their will. I am deeply disturbed by the lack of technical expertise which is available to Congress and the subsequent result that Congress is frequently relying on legislation which only spells out broad mandates. This is a question, however, whose solution only lies in a long, hard look at Congressional organization and resources. In the interim a very serious problem exists in that the agencies can virtually promulgate rules in which elected officials have had no practical participation. This situation is directly counter to the governmental form which was established by our Constitution and clearly a remedy to the problem is demanded. I believe H.R. 9235 offers a responsible remedy and I hope this Subcommittee will take favorable action on same.

Clearly we do not want to create a situation in which Members of Congress at the behest of one affected group or another are constantly challenging administrative rules. I believe extreme care should be taken to protect against such an eventuality. But just as clearly, there must be a simple and direct means by which to nullify any rule or regulation which is inconsistent with Congressional intent or purposes. The current avenue of remedial legislation is neither simple nor direct and hence the merit of the disapproval resolution procedures of H.R. 9235. Congress must take greater responsibility for the laws that it passes; we must exercise greater oversight over the legislation we enact. It is high time that Congress stop the irresponsible practice of passing laws which sound great on paper and then keep no tabs on their implementation. This practice has only led to unfortunate results such as the seat belt interlock devices which had to be specifically banned by another act of Congress; or piles of paperwork burdens never even envisioned by Congress when drafting their legislative provisions; or result in costly devices such as the possible vapor recovery systems which the EPA may require at retail service stations. Congress must keep tabs on the laws that it passes, and it can only do so if it takes responsibility for the actual implementation as well as enactment of the laws of this land.

Thank you, Mr. Chairman, for allowing testimony to be heard on this matter. I believe this is a subject which has long needed to be explored and I hope that remedial legislation will be the result of these hearings today.

STATEMENT OF HON. JOHN B. BRECKINRIDGE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY

Mr. Chairman, I wish to thank you and the Committee for the opportunity to present this testimony on behalf of H.R. 3658 and related bills that would afford Congress increasing control over administrative rulemaking. I should like to place

my remarks in the general context of Congressional oversight—both the need to prohibit the promulgation of administrative regulations which are contrary to Congressional intent, and the corollary need for administrative agencies to promulgate and enforce those rules necessary to a proper implementation of statutes in accordance with Congressional intent.

Federal agencies, departments, and bureaus annually promulgate approximately 6,000 administrative rules. A number of these rules go beyond the mandate of the legislation which they are supposed to implement or are contrary to Congressional intent. Several examples of rules that are inconsistent with either the language of the statute on which they are based or with the intent of Congress in enacting the statute can be cited.

The Food, Drug, and Cosmetic Act requires that the ingredients of most food products must be listed on package labels. However, the Food and Drug Administration has established 284 standardized food product categories that are exempted from full compliance with the requirements of the Act. The FDA also allows spices, colorings, flavorings, and vegetable oils to be listed simply in general terms rather than by specific names. Products which are exempted by FDA regulations from full compliance with the Act or which provide only a general list of ingredients do not give consumers the type of information that Congress intended them to have. A random selection of 1,000 food products in the Detroit area by the General Accounting Office revealed that labels for 129 products listed none or only some of their ingredients, and 64% of the labels listed spices, colorings, flavorings, and vegetable oils only in general terms. (GAO Report MWD–75–19, January 29, 1975.)

The Department of Labor is required by the Davis-Bacon Act of 1931 to set minimum wage rates for federally funded or federally assisted projects at the level prevailing in the area of the project. A study done by the General Accounting Office in 1970 indicated that Congress had intended the Labor Department to set the rates in accordance with local rates for residential construction. However, in fixing minimum wage rates for the construction of federally financed housing projects, the Department had adopted the prevailing local rates for commercial construction, which were significantly higher than the rates for residential construction. The erroneous determination by the Department resulted in extra costs of at least $1.4 million in the District of Columbia during 1965 to 1967, and in extra costs of over $2 million in seven housing projects in four states. (GAO Reports B–164427, September 13, 1969, and B–146841, August 12, 1970.)

The Small Business Administration, after the Alaska earthquake of March, 1964, waived or revised many of its rules and regulations so as to encourage victims of the disaster to rebuild their properties. A study conducted by the General Accounting Office indicates that as a result of some of the waivers and revisions of rules, the SBA acted contrary to the Congressional intent. For example, the SBA waived the well-established policy of denying low-interest disaster loans to persons able to obtain other financing to repair or replace their property. The SBA also waived regulations that prohibited disaster loans for purposes of enlargement of property. (GAO Report B–163451, May 28, 1969.)

These examples of administrative regulations that are contrary to Congressional intent demonstrate the need for legislation such as H.R. 3658 and H.R. 7689. Under the provisions of H.R. 7689, no rule proposed by an administrative agency would become effective if within a period of sixty days after it was submitted by the agency to Congress, either House adopted a resolution that in substance disapproved the rule. H.R. 3658 is similar to H.R. 7689, but it applies only to rules which contain criminal sanctions. As Representative Levitas, the sponsor of H.R. 3658, has indicated (Congressional Record, February 25, 1975, pp. H1077–1078), the procedures prescribed by this type of legislation would not have to be followed to their end in most cases. Most regulations promulgated by the agencies are consistent with Congressional intent. Of those rules which are challenged under the procedures set forth in this kind of legislation, some can be summarily accepted or rejected. Only a few administrative regulations will require close scrutiny by the Congress.

Legislation such as H.R. 3658 and H.R. 7689 is not the first step on a path leading to destruction of the administrative process. Congress does not have the time to spell out in statutory form all the details that are necessary to implement all the complex legislation that is enacted every year. That is why Congress has delegated the task of promulgating detailed regulations to the administrative agencies. However, Congress has a responsibility to see that the functions dele-

gated to the agencies are carried out in a manner that is consistent with the Congressional intent. H.R. 3658 and H.R. 7689 are a means of making the administrative agencies more responsive to Congress. Legislative oversight and repeal legislation are not an effective way of making the agencies promulgate rules in accordance with Congressional intent since they are after the fact. Legislation such as H.R. 3658 and H.R. 7689 has the advantage of permitting either House of Congress to disapprove rules before they become effective.

H.R. 3658 and H.R. 7689 deal with only one aspect of the general problem of administrative agencies in their rulemaking not being responsive to Congressional intent. These bills permit Congress to disapprove rules that have been proposed by the agencies. However, agencies sometimes fail to adopt rules which they are required to adopt by statute. Several examples can be cited.

A number of agencies were tardy in implementing the Federal Claims Collection Act of 1966, which gave the agencies broad authority to compromise and terminate collection action on outstanding claims in order to ease the workload of the Justice Department and the courts. Several agencies took more than the six month period specified by the statute to issue regulations. In some cases the agencies failed to provide in their regulations for the collection procedures required by the statute. (GAO Report B–117604, July 23, 1970.)

The Federal Disaster Relief Administration of the Department of Housing and Urban Development and the Economic Development Administration of the Department of Commerce failed for more than a year to propose rules and regulations to implement Title V of the Disaster Relief Act of 1974. The act provides for a new, long-range program of economic recovery assistance and coordination in major disaster areas.

More than a year after enactment of P.L. 92–603, the Department of Health, Education, and Welfare had issued only 28 of the 87 regulations necessary to implement the provisions of that act that are related to health. (Senate Committee on Finance, *Legislative Review Activity*, Report 94–60, 94th Cong., 1st Sess., March 26, 1975.)

The failure by administrative agencies to promulgate rules to implement statutes is a problem as deserving of Congressional attention as is the adoption by agencies of rules which are inconsistent with Congressional intent. There is one additional problem related to administrative regulations that should be dealt with by the Congress. Agencies sometimes promulgate regulations to implement a statute, and then fail to enforce the regulations. Such conduct by agencies frustrates Congressional intent just as surely as the adoption of rules that are inconsistent with Congressional intent or the failure to adopt rules to implement a statute. Several examples are worthy of mention.

An audit conducted in 1973 of the Office of Audit of the Department of Agriculture of the grain inspection and testing services of the Department during the 1972–73 period showed certain deficiencies in administration. The Grain Inspection Branch, according to the audit, had not implemented certain regulations and instructions, and had not revised others that were in need of change. (Audit Report 60202–1–T, Department of Agriculture, Office of Audit, Southwest Region, May 18, 1973.)

Recent hearings in the House Agriculture Committee, of which I am a member, have brought forth evidence of widespread corruption in grain inspection procedures that reach the proportions of a major scandal. The evidence involves cheating as to quality and weight of grain and constitutes a serious disservice both to foreign customers and U.S. producers. The hearings have raised serious questions about administrative deficiencies in the Department of Agriculture and about the standards themselves.

The New England Division of the Federal Energy Administration, according to the testimony given by one FEA auditor before the Senate Subcommittee on Administrative Practice and Procedure on June 20, 1975, had not collected penalties against firms violating FEA regulations because the national office had not given instructions on how the penalties were to be assessed. And another auditor said that his Texas office had decided not to penalize small producers for violations since FEA officials in Washington had not indicated that they intended to penalize large refineries. (Testimony of Paul Maloy and Donald Mitchell before the Senate Subcommittee on Administrative Practice and Procedure, June 20, 1975; see also Washington Post, June 21, 1975.)

According to a 1972 study by the Genreal Accounting Office, the enforcement program of the Federal Communications Commission was not effective in achieving compliance with FCC rules and regulations concerning the range of radio

frequencies available for communication purposes. The GAO found that the FCC's 19 fixed monitoring stations did not have the capability of checking on 90% of the extant radio stations. Also, the GAO study found that the failure by the FCC to take strong action against repeated violations of its rules and regulations, and the practice of reducing or cancelling fines did not discourage future violations. (GAO Report B–159895, November 3, 1972.)

H.R. 3658 and H.R. 7689 are important first steps in making administrative agencies in their rulemaking activities more responsive to Congressional intent. However, another of these bills deals with the problems discussed above of agencies failing to adopt rules to implement a statute, or failing to enforce rules that have been adopted. These problems must also be faced by the Congress if it is to effectively control the exercise of rulemaking power by the agencies to which it has delegated that power.

Thank you, Mr. Chairman and Members of the Committee for allowing me to present this testimony on behalf of a subject which I believe strikes at the heart of the legislative function.

Nearly 100 years ago, we in America embarked upon a new experiment in self-government and, in recognition of the growing complexity and magnitude of the problems confronting a rapidly industrialized society increasingly corporate in its structure, we started creating both independent and executive agencies with delegated rule or lawmaking powers. It is now appropriate, after nearly a century of both good and bad experiences with this governmental development, that we realistically review our product and refine its workings, rendering it more responsive to the will of the people, i.e., congressional intent.

In this same context of Congressional oversight, I am introducing legislation establishing an Office of General Counsel to represent the Congress. As one element of this measure, I am proposing that the General Counsel review all administrative rules and regulations, as to their form and legality, for the purpose of ensuring the timely implementation of congressional intent.

Unless we ensure that Congressionally approved measures—the law of the land—are indeed and in fact implemented in accordance with Congressional intent, then we shall be overlooking what we should be overseeing. I thank you again for your consideration.

STATEMENT OF HAROLD E. FORD, EXECUTIVE DIRECTOR, SOUTHEASTERN POULTRY & EGG ASSOCIATION

Mr. Chairman and Committee Members: Your Committee is to be commended for recognizing the need to review the responsibilities of Congress in relationship to the authority which has been given to federal agencies and the authority which has been assumed by federal agencies over the administrative process.

I am Harold E. Ford, Executive Director for the Southeastern Poultry & Egg Association, a non-profit trade association, whose membership is engaged in the producing, processing, and marketing of frying chickens, commercial eggs and turkeys.

In carrying out the duties for the Association, we are constantly involved in governmental affairs. We have had many experiences with conflicting regulations between two or more government agencies and rules promulgated by agencies that are debatable as to being within the original intent of Congress when the legislation was passed. We continue to experience this type decision-making by agencies, often on legislation that was passed several years earlier. Such regulations often add financial stress to a company and must carry a share of the inflationary problems facing consumers today.

We support the objectives of H.R. 3658, the "Administrative Rulemaking Control Act." For Congress to fail to correct the problems will be a disservice to the citizens of this nation. To enact legislation that gives an Agency the power to promulgate regulations as the Agency deems necessary to carry out the purposes of the Act is like taking a bridle off of a mule . . . you no longer have a means to control the direction or speed at which the mule travels.

We acknowledge the needs for some flexibility to be given in the rulemaking process. However, we believe such flexibility should be monitored to make sure that the regulations do conform to the intent of Congress. As we understand H.R. 3658 the intent is to provide a system for such monitoring.

The most flagrant rules enforced by an Agency over the industries it has jurisdiction are those which are made to support a request from a second Agency. An excellent example is the boycott in effect today by the Department of Agriculture against any poultry company that does not comply with the regulations

that have been proposed by the Environmental Protection Agency. We do not believe it was the intent of Congress when it passed the Federal Water Pollution Act and the Clean Air Act for the Environmental Protection Agency to require the Department of Agriculture to boycott private industries that had not met EPA regulations. We refer specifically to the announcement in the Federal Register, Wednesday, August 20, 1975, page 36339 which states the policies for Federal Procurements.

It states that no executive agency shall enter into any contract for the procurement of goods with a facility which is listed by the Environmental Protection Agency as a violating facility under either the Air Act or the Water Act. (See Exhibit AA). The Agriculture Department has taken such action by its announcement PY–68, July 1975, by the Agricultural Marketing Service wherein poultry companies were advised that they must issue a certification with each bid for school lunch chicken sales. (See Exhibit BB, Copy of Notice.)

In our judgment the Environmental Protection Agency has asked the U.S. Department of Agriculture to boycott against poultry companies. The EPA requirements are also being enforced by other government agencies such as Military Subsistence Center, that purchase poultry products.

Is it possible that Congress did intend to give inter-agency powers to boycott private industry?

There are conflicts of power given to the Labor Department, through the Occupational Health and Safety Act, with the Environmental Protection Agency. One that is currently causing great concern is over the noise levels permitted. EPA proposal calls for a maximum of 85 decibels and OSHA regulates at 90 decibels. We do not believe that Congress intended to duplicate such authority or at least not create two separate and conflicting regulations.

Another excellent example of an agency deciding on regulations that are not in keeping with the intent of Congress is a recent announcement in the Federal Register, Friday, October 3, 1975, by the Animal and Plant Health Inspection Service, USDA. The Poultry Inspection Act was passed August 28, 1957, and it is interesting that it has taken the Department 18 years to decide that it was the intent of Congress for the labor unions to decide which days of a week a poultry company can operate and the work shift hours.

The Agriculture Department states in the Federal Register, Friday, October 3, 1975, that the National Joint Council of Food Inspection Locals and the American Federation of Government Employees have the right to set the daily work schedule and work week schedule for a processing plant. (See Exhibit CC.) The Department in effect has ruled that the ownership of the company does not have the authority to set its running time.

We contend that the Poultry Products Inspection Act was passed for the inspection for wholesomeness of the products and that it was not the intent of Congress to give the Department authority to force the companies to yield to the demands of unions.

The Food and Drug Administration, through its rulemaking process, has recently published a revoluntionary proposal concerning statements filed by trade associations. It proposed to require trade associations when making a presentation in an administrative proceeding to provide a list of all members of the association and to identify any members who should be specifically excluded from statement.

We contend that it was not the intent of Congress to give powers to FDA to distinguish between trade associations and other legal entities in establishing rules for participating in administrative proceedings.

Such regulations are impractical and will represent a major cost to an association for polling its members on every issue. To deny the elected officials of a governing Board the right to relate policy positions to a federal agency would be like requiring members of Congress to submit a list of the voting constituents in his state each time he voted on legislation, plus identifying the constituents whose names should be excluded from supporting his position.

The proposal by Food and Drug is heavily weighted with bureaucratic domination. There are many many illustrations that can be provided, however, we have elected to use only four which have been made within the last 90 days.

The legislation under consideration by your Committee is a step in the right direction and we cannot over-emphasize the need for affirmative action by your Committee.

Thank you.

Effluent characteristic	Effluent limitations: Maximum for any 1 day	Effluent limitations: Average of daily values for 30 consecutive days shall not exceed—
(Metric units) kg/kkg of product:		
Ammonia (as N)	0.1	0.05
Organic nitrogen (as N)	1.37	0.67
pH	Within the range 6 to 9	
(English units) lb/1,000 lb of product:		
Ammonia (as N)	0.1	0.5
Organic nitrogen (as N)	1.37	.67
pH	Within the range 6 to 9	

§ 418.33 [Suspended]

2. § 418.33 is suspended until further notice.

3. In § 418.35, paragraphs (a) and (b) are amended to read as follows:

§ 418.35 Standards of performance for new sources.

* * * * * * *

(a) Suspended until further notice.

(b) The following limitations constitute the maximum permissible discharge for urea manufacturing operations in which urea is prilled.

Effluent characteristic	Effluent limitations: Maximum for any 1 day	Effluent limitations: Average of daily values for 30 consecutive days shall not exceed—
(Metric units) kg/kkg of product:		
Ammonia (as N)	0.1	0.06
Organic nitrogen (as N)	1.37	0.67
pH	Within the range 6 to 9	
(English units) lb/1,000 lb of product:		
Ammonia (as N)	0.1	.05
Organic nitrogen (as N)	1.37	.67
pH	Within the range 6 to 9	

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Title 41—Public Contracts and Property Management

Chapter I—Federal Procurement Regulations

[FPR Amdt. 151]

Clean Air Act and Federal Water Pollution Control Act

Policies and Procedures for Implementation

This amendment of the Federal Procurement Regulations adds a new Subpart 1-1.23, Environmental Protection, presenting policies and procedures for implementing the Clean Air Act and the Federal Water Pollution Control Act, Executive Order 11738, September 10, 1973, and the related regulations of the Environmental Protection Agency. The amendment prescribes solicitation provisions, an appropriate contract clause, and supporting policies and procedures. With the approval of EPA, small purchases are totally exempt from the requirements of the amendment. Since the EPA regulations were effective on July 1, 1975, regarding Government procurement, an instruction (TWX) was forwarded on July 2, 1975, to all Government agencies which provided for the inclusion of the referenced solicitation provision and contract clause in all solicitations issued and contracts awarded on or after July 15, 1975. This amendment makes permanent the requirements in that instruction. Due to the lack of sufficient time to solicit comments from Government agencies and other interested parties, comments are

invited during the 60-day period which follows the issuance of this amendment. On the basis of the comments received, the need to revise the amendment will be considered.

PART 1–1—GENERAL

The table of contents for Part 1–1, General, is amended to prescribe new entries, as follows:

SUBPART 1–1.19—[RESERVED]

SUBPART 1–1.20—[RESERVED]

SUBPART 1–1.21—[RESERVED]

SUBPART 1–1.22—[RESERVED]

SUBPART 1–1.23—ENVIRONMENTAL PROTECTION

Sec.

1–1.2300 Scope of subpart.
1–1.2301 Policy.
1–1.2302 Administration and enforcement.
1–1.2302–1 Solicitation provision.
1–1.2302–2 Contract clause.
1–1.2302–3 Compliance responsibilities.
1–1.2302–4 Exemptions.
1–1.2302–5 Withholding award.

AUTHORITY: Sec. 205(c), 63 Stat. 390; (40 U.S.C. 486(c))

Subpart 1–1.23, Environmental Protection, is added as follows:

SUBPART 1–1.23—ENVIRONMENTAL PROTECTION

§ 1–1.2300 Scope of subpart.

This subpart prescribes policies and procedures regarding the requirements of the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Pub. L. 91–604, December 31, 1970), the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq., as amended by Pub. L. 92–500, October 18, 1972), Executive Order 11738, September 10, 1973, and the related regulations of the Environmental Protection Agency (EPA) (40 CFR Part 15).

§ 1–1.2301 Policy.

(a) Executive Order 11738 provides in section 1 that "It is the policy of the Federal Government to improve and enhance environmental quality. In furtherance of that policy, the program prescribed in this Order is instituted to assure that each Federal agency empowered to enter into contracts for the procurement of goods, materials, or services, and each Federal agency empowered to extend Federal assistance by way of grant, loan, or contract shall undertake such procurement and assistance activities in a manner that will result in effective enforcement of the Clean Air Act (hereinafter referred to as the Air Act) and the Federal Water Pollution Control Act (hereinafter referred to as the 'Water Act')."

(b) Except as provided in § 1–1.2302–4, no executive agency shall enter into, renew, or extend any contract for the procurement of goods, materials or services to a firm proposing to use in the performance thereof a facility which is listed by the Director, Office of Federal Activities, Environmental Protection Agency (EPA), pursuant to 40 CFR 15.20, as a violating facility under either the Air Act or the Water Act.

§ 1–1.2302 Administration and enforcement.

§ 1–1.2302–1 Solicitation provision.

The provisions set forth below shall be included in each solicitation and resulting contract, (except those involving small purchases (see Subpart 1–3.6)) and contracts awarded without reference to a solicitation.

CLEAN AIR AND WATER CERTIFICATION

(Applicable if the bid or offer exceeds $100,000, or the contracting officer has determined that orders under an indefinite quantity contract in any year will

exceed $100,000, or a facility to be used has been the subject of a conviction under the Clean Air Act (42 U.S.C. 1857c–8(c)(1)) or the Federal Water Pollution Control Act (33 U.S.C. 1319(c)) and is listed by EPA, or is not otherwise exempt.)

The bidder or offeror certifies as follows:

(a) Any facility to be utilized in the performance of this proposed contract has ☐, has not ☐, been listed on the Environmental Protection Agency List of Violating Facilities.

(b) He will promptly notify the contracting officer, prior to award, of the receipt of any communication from the Director, Office of Federal Activities, Environmental Protection Agency, indicating that any facility which he proposes to use for the performance of the contract is under consideration to be listed on the EPA List of Violating Facilities.

(c) He will include substantially this certification, including this paragraph (c), in every nonexempt subcontract.

§ 1–1.2302–2 Contract clause.

The following clause shall be included in all contracts except those involving small purchases:

CLEAN AIR AND WATER

(Applicable only if the contract exceeds $100,000, or the contracting officer has determined that orders under an indefinite quantity contract in any one year will exceed $100,000, or a facility to be used has been the subject of a conviction under the Clean Air Act (42 U.S.C. 1957c–8(c)(1)) or the Federal Water Pollution Control Act (33 U.S.C. 1319(c)) and is listed by EPA, or the contract is not otherwise exempt.)

(a) The Contractor agrees as follows:

(1) To comply with all the requirements of section 114 of the Clean Air Act, as amended (42 U.S.C. 1857, et seq., as amended by Pub. L. 91–604) and section 308 of the Federal Water Pollution Control Act (38 U.S.C. 1251 et seq., as amended by Pub. L. 92–500), respectively, relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Air Act and the Water Act, respectively, and all regulations and guidelines issued thereunder before the award of this contract.

(2) That no portion of the work required by this prime contract will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date when this contract was awarded unless and until the EPA eliminates the name of such facility or facilities from such listing.

(3) To use his best efforts to comply with clean air standards and clean water standards at the facility in which the contract is being performed.

(4) To insert the substance of the provisions of this clause into any nonexempt subcontract, including this paragraph (a)(4).

(b) The terms used in this clause have the following meanings:

(1) The term "Air Act" means the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Pub. L. 91–604).

(2) The term "Water Act" means Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Pub. L. 92–500).

(3) The term "clean air standards" means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Air Act or Executive Order 11738, an applicable implementation plan as described in section 110(d) of the Clean Air Act (42 U.S.C. 1857c–5(d)), an approved implementation procedure or plan under section 111(c) or section 111(d), respectively, of the Air Act (42 U.S.C. 1857c–6 (c) or (d)), or an approved implementation procedure under section 112(d) of the Air Act (42 U.S.C. 1857c–7(d)).

(4) The term "clean water standards" means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated pursuant to the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by section 402 of the Water Act (33 U.S.C. 1342), or by local government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act (33 U.S.C. 1317).

(5) The term "compliance" means compliance with clean air or water standards. Compliance shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction the Environmental Protection Agency or an air or water pollution control agency in accordance with the requirements of the Air Act or Water Act and regulations issued pursuant thereto.

(6) The term "facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location, or site of operations, owned, leased, or supervised by a contractor or subcontractor, to be utilized in the performance of a contract or subcontract. Where a location or site of operations contains or includes more than one building plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are collocated in one geographical area.

§ 1–1.2302–3 Compliance responsibilities.

The primary responsibility for ensuring compliance with Federal, State, or local environmental control laws and any rules, regulations, standards, or guidelines issued pursuant thereto rests with those agencies, such as the Environmental Protection Agency, charged with this responsibility under the various laws concerned. However, if the contracting officer, in the performance of his regular duties, becomes aware of any condition which involves noncompliance with clean air or water standards in any facility being used in the performance of a nonexempt agency contract, he shall notify the agency head or his designee in accordance with agency procedures. The agency head or his designee shall promptly transmit such reports to the Director, Office of Federal Activities, EPA, Washington, DC, 20460.

§ 1–1.2302–4 Exemptions.

Contracts and subcontracts are exempt from the requirement of this subpart and 40 CFR Part 15 in accordance with the provisions of this section (see exclusion in paragraph (c)).

(a) *Transactions $100,000 and under.*

Contracts and subcontracts not exceeding $100,000 are exempt.

(b) *Contracts and subcontracts for indefinite quantities.* Contracts and subcontracts for indefinite quantities are exempt if the contracting officer has reason to believe that the amount ordered in any year under such contract will not exceed $100,000.

(c) *Exclusion.* Except for small purchases, the foregoing exemptions shall not apply to a proposed contract under which the facility to be used is listed on the EPA List of Violating Facilities on the basis of a conviction either under the Air Act (42 U.S.C. 1857c–8(c)(1)) or the Water Act (33 U.S.C. 1319(c)).

(d) *Facilities located outside the United States.* This subpart and 40 CFR Part 15 do not apply to the use of facilities located outside the United States. The term "United States", as used herein, includes the States, District of Columbia, Commonwealth of Puerto Rico, Virgin Islands, Guam and American Samoa, and Trust Territory of the Pacific Islands.

(e) *Authority of head of an agency.* Where a head of an agency, as defined in § 1–1.204, determines that the paramount interest of the United States so requires, he may exempt from the provisions of this subpart any individual or class of contracts or subcontracts, for a period of one year. Class exemptions shall follow consultation with the Director, Officer of Federal Activities, EPA, Washington, DC, 20460. In the case of an individual exemption, the agency head granting the exemption shall notify the Director as soon after granting the exemption as practicable. Such notification shall describe the purpose of the contract and shall indicate the manner in which the paramount interest of the United States required that the exemption be made.

§ 1–1.2302–5 Withholding award.

If, pursuant to the certification in § 1–1.2302–1, the otherwise successful offeror informs the contracting officer that the EPA is considering listing a facility proposed to be used for contract performance, the contracting officer shall promptly notify the Director, Office of Federal Activities, EPA, Washington, DC, 20460, according to agency procedures, that the offeror is under consideration for award. The Director, Office of Federal Activities, EPA, after consultation with the agency involved, may request the contracting officer to delay award for a period not to exceed 15 working days. The 15 working days shall begin on the date the Director is notified by the agency that such award is under consideration. Awards shall be withheld except when such delay is likely to prejudice the agency's programs or otherwise seriously disadvantage the Government. Prompt notice shall be given to the Director in any case where such determination to award has been made.

PART 1–4—SPECIAL TYPES AND METHODS OF PROCUREMENT

SUBPART 1–4.4—PUBLIC UTILITIES

Section 1–4.410 is amended by adding and reserving paragraphs (a)(11)–(a)(16), and by adding paragraph (a)(17), a reference to the Clean Air and Water clause, as follows:

§ 1–4.410–5 Uniform clauses for utility service contracts.

(a) * * *

(11) [Reserved]
(12) [Reserved]
(13) [Reserved]
(14) [Reserved]
(15) [Reserved]
(16) [Reserved]
(17) *Clean Air and Water.* Section 1–2302–2.

* * * * * * *

PART 1–7—CONTRACT CLAUSES

The table of contents for Part 1–7 is amended to add new entries as follows:

Sec.
1–7.102–23 Clean air and water.
1–7.202–38 Clean air and water.
1–7.302–34 Clean air and water.
1–7.402–37 Clean air and water.
1–7.601–5 Clean air and water.
1–7.703–23 Clean air and water.

UNITED STATES DEPARTMENT OF AGRICULTURE,
AGRICULTURAL MARKETING SERVICE,
POULTRY DIVISION,
Washington, D.C., July 1975.

PURCHASE OF CUT-UP, YOUNG CHICKENS

Amendment No. 2.—September 1975

The purpose of this Amendment is to incorporate the requirements of the Environmental Protection Agency (EPA) pertaining to Government contracts.

1. On page 4, section II. C. is amended by adding the following new item 10 and changing the last item to read "11":

"10. Offeror certifies as follows: (a) Any facility to be utilized in the performance of this proposed contract (has) (has not) been listed on the Environmental Protection Agency List of Violating Facilities. (b) He (will) promptly notify the contracting officer, prior to award, of the receipt of any communication from the Director, Office of Federal Activities, U.S. Environmental Protection Agency, indicating that any facility which he proposes to use for the performance of the contract is under consideration to be listed on the EPA List of Violating Facilities. (c) He (will) include substantially this certification in every subcontract not exempt under 41 CFR § 1–1.2302–4. (See section XIV.)"

2. On page 14, the following new section is added to read:

"XIV. CLEAN AIR AND WATER CLAUSE

(Applicable only if the contract exceeds $100,000, or a facility to be used has been the subject of a conviction under the Clean Air Act (42 U.S.C. 1857c–8(c)(1)) or the Federal Water Pollution Control Act (33 U.S.C. 1319(c)) and is listed by EPA, or the contract is not otherwise exempt under 41 CFR § 1–1.2302–4.)

A. Contractor agrees as follows:

1. To comply with all the requirements of section 114 of the Clean Air Act, as amended (42 U.S.C. 1857 et seq., as amended by Public Law 91–604) and section 308 of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq., as amended by Public Law 92–500), respectively, relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Air Act and the Water Act, respectively, and all

regulations and guidelines issued thereunder before the award of this contract.

2. That no portion of the work required by this prime contract will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date when this contract was awarded unless and until the EPA eliminates the name of such facility or facilities from such listing.

3. To use his best efforts to comply with Clean Air Standards and Clean Water Standards at the facilities in which the contract is being performed.

4. To insert the substance of the provisions of this clause in any subcontract not exempt under 41 CFR § 1–1.2302–4, including this paragraph 4.

B. The terms used in this clause have the following meanings:

1. The term "Air Act" means the Clean Air Act, as amended (42 U.S.C. 1857 et seq. as amended by Public Law 91–604).

2. The term "Water Act" means Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq., as amended by Public Law 92–500).

3. The term "clean air standards" means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Air Act or Executive Order 11738, an applicable implementation plan as described in section 110(d) of the Clean Air Act (42 U.S.C. 1857c–5(d)), an approved implementation procedure or plan under section 111(c) or section 11(d), respectively, of the Air Act (42 U.S.C. 857c–6(c) or (d)), or an approved implementation procedure under section 112(d) of the Air Act (42 U.S.C. 1857c–7(d)).

4. The term "clean water standards" means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated pursuant to the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by section 402 of the Water Act (33 U.S.C. 1342), or by a local Government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act (33 U.S.C. 1317).

5. The term "compliance" means compliance with clean air or water standards. Compliance shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the Environmental Protection Agency, or an air or water pollution control agency in accordance with the requirements of the Air Act or Water Act and regulations issued pursuant thereto.

6. The term "facility" means any building, plant, installation, structure, mine, vessel or other floating craft, location, or site of operations, owned, leased, or supervised by a Contractor or subcontractor to be utilized in the performance of a contract or subcontract. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are collocated in one geographical area."

Effective date.—This Amendment is effective with offers due by 1 p.m., local time, Friday, October 3, 1975, and on all subsequent offers.

Each offer shall state that the offer is made subject to Announcement PY–6S and Amendments No. 1 and No. 2 and Invitation No. —.

All other terms and conditions of Announcement PY–6S as amended by Amendment No. 1 remain unchanged.

H. C. KENNETT, Jr., *Director.*

[Federal Register, Vol. 40, No. 193—Friday, October 3, 1975]

CHAPTER III—ANIMAL AND PLANT HEALTH INSPECTION SERVICE (MEAT AND POULTRY PRODUCTS INSPECTION) DEPARTMENT OF AGRICULTURE

PART 307—FACILITIES FOR INSPECTION

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

Overtime or Holiday Inspection Service Schedules of Operations, Billing

On December 12, 1972, there was published in the FEDERAL REGISTER (37 F.R. 26429–26430) a proposal to amend the Federal meat inspection regulations and poultry products inspection regulations to provide uniform requirements and procedures in establishments operating under Federal inspection relative to schedules of operation, overtime and holiday inspection services, and uniform

billing procedures. Interested persons were given 60 days to submit data, views, and arguments on the proposed amendments.

One hundred seventy-four letters of comment were received as a result of the proposal. Although the majority of the comments did not support the proposed amendments in their entirety, many supported certain aspects of the proposed amendments while voicing opposition to others. A number of comments indicated misinterpretation of the proposed regulations and caused the Department to modify the wording of certain sections to clarify their intent.

Food inspectors, their local labor organizations and regional councils objected to the section providing inspection service without charge for 8 hours on any five consecutive days—Monday through Saturday. This was a departure from present meat inspection regulations which require overtime payments for any inspection work on Saturdays, Sundays, and holidays. The existing poultry inspection regulations agree with the proposed regulations on this point.

The National Joint Council of Food Inspection Locals, American Federation of Government Employees, claimed that the setting of a basic workweek is a matter subject to negotiation by their organization and the Animal and Plant Health Inspection Service (APHIS). On December 27, 1973, the Federal Labor Relations Council issued a ruling supporting this contention. As a result of this ruling, APHIS negotiated with representatives of the National Joint Council on March 11 and 12, 1974, and subsequently concluded an agreement. The negotiated agreement specified that: (1) The workweek shall consist of five consecutive eight-hour days, Monday through Friday. A limited exception was granted for those plants currently working Tuesday through Saturday, and for plants in newly designated States, where otherwise the Program would be seriously handicapped. (2) Single-shift plants shall use a schedule after 6 p.m. Once a starting time is approved, the schedule cannot be changed more than one hour without 2 weeks notice before the affected pay period. Changes less than one hour must not be frequent and must be approved by the inspector-in-charge. (3) In multiple-shift plants, the first shift must conform to single-shift requirements. The second shift shall follow the first with no more than a three-hour break, and also may not start after 6 p.m. (4) Assignments from one plant to another for relief purposes involving a change from a night shift to a day or single shift, or vice versa, shall be effected only in emergencies, and then only with the approval of the Office of the Regional Director. (5) One lunch period is the only authorized interruption in the inspector's tour of duty. It may last 30 minutes, 45 minutes, or one hour. It must be provided at least four hours after the beginning of scheduled operations, and not more than five hours after, except that, if the company schedules at least a one-half hour rest break, approximately midpoint between the start of operations and the lunch break, the lunch period may be scheduled as long as 5½ hours after the beginning of scheduled operations. Before the regulations could be implemented, however, industry representatives on April 24, 1974, secured a decision in the U.S. District Court for the Eastern Division of Virginia. The Court thereby held that the Federal Labor Relations Council had failed to consider the economic impact on the industry, and reversed and remanded the decision to the Council for reconsideration. On June 10, 1975, the Council did reconsider, including the economic impact factor, and reached the same decision.

In the 174 comments on the proposal, the most frequent comment from the meat and poultry industries involved the requirement that changes in work schedules be submitted and approved at least 2 weeks in advance. Industry spokesmen stated that it would be impossible to schedule hours of operations on an inflexible basis, because of the unpredictability of livestock supplies, demand for meat and poultry and other factors. It is the Department's intention that changes in work schedules be submitted at least 2 weeks in advance, only when a shift is to be changed, added, or eliminated, or when there is a deviation from the approved starting time of more than one hour in slaughter plants. Two weeks' advance notice is not required for scheduling overtime or holiday work, or making minor adjustments in the day-to-day operating schedule. The final regulations have been adjusted to clarify this point.

Some segments of the meat and poultry industries objected to the authority of the Administrator to designate operating periods for establishmens with limited operations. Such authority is necessary to make the most efficient use of available inspection personnel, and thus keep the cost of providing inspection within reasonable bounds. This has been a longstanding policy in the meat inspection program, and is so expressed in the existing meat inspection regulations.

A few objections were raised to limiting post-mortem inspection duty to 10 clock hours per shift. Such limitation is necessary to minimize the fatigue factor inherent in this exacting work and lessen the loss of efficiency of inspectors. There were also some requests to delete the requirement that inspectors be off duty 12 consecutive clock hours between shifts. Again, this requirement was kept, because of the hazard of lessening inspection efficiency due to fatigue. This is also in line with existing departmental policy.

The definition of a shift has been changed from "all or a substantial part of an 8-hour period" to "regularly scheduled operating period" for greater legal specificity. Similarly, the "designated program official" who may approve a work schedule has been changed to "area supervisor." The workweek has been omitted from the items the establishment schedule must specify, because it is now specified by the regulations. The segment of the day in which shifts may slaughter is also specified. This negotiated matter is in accord with longstanding Program policy. The cost per employee for overtime service has been changed from the proposal to $11.00 to reflect recent rises in the overtime rate as already reflected in the regulations. The charge to the poultry industry for export certificates issued during normal duty hours has been dropped to make the costs of inspection more similar to that for meat inspection.

After consideration of these and other comments the regulations are being issued with the previously mentioned changes. Certain editorial changes have been made to clarify intent where the language appeared to be subject to misinterpretation. Minor codification changes are also made in the affected sections of Part 381 to permit better use of the reserved sections in the future.

Therefore, Part 307 of the meat inspection regulations and Part 381, Subpart G, of the poultry products inspection regulations are amended as set forth below.

1. The Table of Contents is amended to reflect the following changes, and the headings and texts of §§ 307.4, 307.5, and 307.6 are revised to read as follows:

§ 307.4 Schedule of operations.

(a) No operations requiring inspection shall be conducted except under the supervision of a Program employee. All slaughtering of animals and preparation of products shall be done with reasonable speed, considering the official establishment's facilities.

(b) A shift is a regularly scheduled operating period, exclusive of mealtime. One lunch period is the only official authorized interruption in the inspector's tour of duty once it begins. Lunch periods may be 30 minutes, 45 minutes, or in any case may not exceed one hour in duration. Once established, the lunch period must remain relatively constant as to time and duration. Lunch periods for inspectors shall not, except as provided herein, occur prior to 4 hours after the beginning of scheduled operations nor later than 5 hours after operations begin. In plants where a company rest break of not less than 30 minutes is regularly observed, approximately midpoint between start of work and the lunch period, and the inspector is allowed this time to meet his personal needs, the lunch period may be scheduled as long as 5½ hours after the beginning of scheduled operations.

(c) Official establishments, importers, and exporters shall be provided inspection service, without charge, up to 8 consecutive hours per shift during the basic workweek subject to the provisions of § 307.5: *Provided*, That any additional shifts meet requirements as determined by the Administrator or his designee. The basic workweek shall consist of five consecutive 8-hour days Monday through Friday, excluding the lunch period; except those plants presently operating on an approved Tuesday through Saturday schedule shall continue on this schedule until such time as a change in ownership occurs, or they request and are granted a Monday through Friday work schedule; and further, except in the designation of State programs, the Department may depart from the Monday to Friday workweek in those cases where it would seriously handicap the Department in carrying out its function.

(d) (1) Each official establishment shall submit a work schedule to the area supervisor for approval. In consideration of whether the approval of an establishment work schedule shall be given, the area supervisor shall take into account the efficient and effective use of inspection personnel. The work schedule must specify daily clock hours of operation and lunch periods for all departments of the establishment requiring inspection.

(2) For single-shift slaughter plants, the plant operating schedules shall not begin earlier than 4 a.m. nor terminate later than 6 p.m. Any deviation from the

approved starting time in excess of one hour shall be in the form of an application for a revised schedule, submitted at least 2 weeks in advance of the beginning of the affected pay period. Deviations not exceeding one hour may be approved by the inspector in charge, with written notice to the designated local representatives of the Federal inspectors. Frequent deviations from the normal starting time shall not be approved.

(3) For multiple-shift slaughter plants, the plant operating schedule for the first shift shall conform to the requirements for a single-shift plant. Second shifts shall follow first shifts, with no more than a 3-hour break. However, in no case shall the second shift start after 6 p.m. Assignments of Program employees from one plant to another involving a change from a night shift to a day or single shift, or vice versa, for relief purposes shall be effected only in emergencies, and then only with the approval of the Regional Director or one acting in that capacity.

(4) Establishments shall maintain consistent work schedules. Any request by an establishment for a change in its work schedule involving an addition or elimination of shifts shall be submitted to the area supervisor at least 2 weeks in advance of the proposed change. Frequent requests for change shall not be approved: *Provided,* however, minor deviations from a daily operating schedule may be approved by the inspector in charge, if such request is received on the day preceding the day of change.

(5) Requests for inspection service outside an approved work schedule shall be made as early in the day as possible for overtime work to be performed within that same workday; or made prior to the end of the day's operation when such a request will result in overtime service at the start of the following day: *Provided,* That an inspector may be recalled to his assignment after completion of his daily tour of duty under the provisions of § 307.6(b).

(e) Ante-mortem and post-mortem inspectors shall be limited to 10 hours post-mortem inspection duty per shift, including company breaks and short emergencies, usually of less than one-half hour duration, where the employee remains on or near their duty stations. The ten hours do not include meal times or long emergencies, usually greater than one-half hour, where the inspectors are released from their duty stations. In addition, all Program inspectors, including ante-mortem and post-mortem inspectors, shall be limited to 12 clock hours total duty per shift, including mealtime, "housebreaks," and emergencies. Program employees shall be off duty 12 consecutive clock hours between shifts.

(f) When one Program employee is assigned to conduct inspection at an establishment where few livestock are slaughtered, or a small quantity of product is processed or certified (as determined by the Administrator), the Administrator may designate the hours of the day and the days of the week during which those operations requiring inspection may be conducted.

§ 307.5 Overtime and holiday inspection service.

(a) The management of an official establishment, an importer, or an exporter shall pay the Animal and Plant Health Inspection Service $11.00 per hour per Program employee to reimburse the Program for the cost of the inspection service furnished for time outside the scheduled tour of duty: on days outside the basic workweek; or on any holiday specified in paragraph (b) of this section.

(b) Holidays for Federal employees shall be New Year's Day, January 1; Washington's Birthday, the third Monday in February; Memorial Day, the last Monday in May; Independence Day, July 4; Labor Day, the first Monday in September; Columbus Day, the second Monday in October; Veterans' Day, the fourth Monday in October; Thanksgiving Day, the fourth Thursday in November; Christmas Day, December 25. When any of the above-listed holidays falls outside the basic workweek, the nearest workday within that week shall become a holiday.

§ 307.6 Basis of billing for overtime and holiday services.

(a) Each recipient of overtime or holiday inspection service, or both, shall be billed, at the rate established in § 307.5 (a), in increments of quarter hours. For billing purposes, 8 or more minutes shall be considered a full quarter hour. Billing will be for each quarter hour service rendered by each Program employee.

(b) Official establishments, importers, or exporters requesting and receiving the services of a Program employee after he has completed his day's assignment and left the premises, or called back to duty during any overtime or holiday period, shall be billed for a minimum of 2 hours overtime or holiday inspection service at the established rate.

(c) Bills are payable upon receipt and become delinquent 30 days from the date of the bill. Overtime or holiday inspection will not be performed for anyone having a delinquent account.

2. The provisions of §§ 381.40, 381.41, and 381.42 are revoked, and the sections are reserved. The Table of Contents is amended to reflect the following change, and the headings and texts of §§ 381.37, 381.38 and 381.39 are revised to read as follows:

§ 381.37 Schedule of operations.

(a) No operations requiring inspection shall be conducted except under the supervision of an Inspection Service employee. All eviscerating of poultry and further processing shall be done with reasonable speed, considering the official establishment's facilities.

(b) A shift is a regularly scheduled operating period, exclusive of mealtime. One lunch period is the only official authorized interruption in the inspector's tour of duty once it begins. Lunch periods may be 30 minutes, 45 minutes, or in any case may not exceed one hour in duration. Once established, the lunch period must remain relatively constant as to time and duration. Lunch periods for inspectors shall not, except as provided herein, occur prior to 4 hours after the beginning of scheduled operations nor later than 5 hours after operations begin. In plants where a company rest break of not less than 30 minutes is regularly observed, approximately midpoint between start of work and the lunch period, and the inspector is allowed this time to meet his personal needs, the lunch period may be scheduled as long as 5½ hours after the beginning of scheduled operations.

(c) Official establishments, importers, and exporters shall be provided inspection service, without charge, up to 8 consecutive hours per shift during the basic workweek subject to the provisions of § 381.38: *Provided*, That any additional shifts meet requirements as determined by the Administrator or his designee. The basic workweek shall consist of five consecutive 8-hour days Monday through Friday, excluding the lunch period; except those plants presently operating on an approved Tuesday through Saturday schedule shall continue on this schedule until such time as a change in ownership occurs, or they request and are granted a Monday through Friday work schedule; and further, except in the designation of State programs, the Department may depart from the Monday to Friday workweek in those cases where it would seriously handicap the Department in carrying out its function.

(d) (1) Each official establishment shall submit a work schedule to the area supervisor for approval. In consideration of whether the approval of an establishment work schedule shall be given, the area supervisor shall take in account the efficient and effective use of inspection personnel. The work schedule must specify the workweek, daily clock hours of operation, and lunch periods for all departments of the establishment requiring inspection.

(2) For single-shift slaughter plants, the plant operating schedules shall not begin earlier than 4 a.m. nor terminate later than 6 p.m. Any deviation from the approved starting time in excess of one hour shall be in the form of an application for a revised schedule, submitted at least 2 weeks in advance of the beginning of the affected pay period. Deviations not exceeding one hour may be approved by the inspector in charge, with written notice to the designated local representative of the Federal inspectors. Frequent deviations from the normal starting time shall not be approved.

(3) For multiple-shift slaughter plants, the plant operating schedule for the first shift shall conform to the requirements for a single-shift plant. Second shifts shall follow first shifts, with no more than a 3-hour break. However, in no case shall the second shift start after 6 p.m. Assignments of Inspection Service employees from one plant to another involving a change from a night shift to a day or single shift, or vice versa, for relief purposes shall be effected only in emergencies, and then only with the approval of the Regional Director or one acting in that capacity.

(4) Establishments shall maintain consistent work schedules. Any request by an establishment for a change in its work schedule involving changes in the workweek or an addition or elimination of shifts shall be submitted to the area supervisor at least 2 weeks in advance of the proposed changes. Frequent requests for change shall not be approved: *Provided*, however, minor deviations from a daily operating schedule may be approved by the inspector in charge if such request is received on the day preceding the day of change.

(5) Requests for inspection service outside an approved work schedule shall be made as early in the day as possible for overtime work to be performed within that same workday; or made prior to the end of the day's operation when such a request will result in overtime service at the start of the following day: *Provided*, That an inspector may be recalled to his assignment after the completion of this daily tour of duty under the provisions of § 381.39(b).

(e) Ante-mortem and post-mortem inspectors shall be limited to 10 hours post-mortem inspection duty per shift, including company breaks and short emergencies, usually of less than one-half hour duration, where the employee remains on or near their duty stations. The 10 hours do not include meal times or long emergencies, usually greater than one-half hour, where employees are released from their duty stations. In addition, all Inspection Service inspectors, including ante-mortem and post-mortem inspectors shall be limited to 12 clock hours total duty per shift, including mealtime, "housebreaks," and emergencies. Inspection Service employees shall be off duty 12 consecutive clock hours between shifts.

(f) When one Inspection Service employee is assigned to conduct inspection at an establishment where few poultry are eviscerated or a small quantity of product is further processed or certified (as determined by the Administrator), the Administrator may designate the hours of the day and the days of the week during which those operations requiring inspection may be conducted.

§ 381.38 Overtime and holiday inspection service.

(a) The management of an official establishment, an importer, or an exporter shall pay the Animal and Plant Health Inspection Service $11.00 per hour per Inspection Service employee to reimburse the Inspection Service for the cost of the inspection service furnished for time outside the schedule tour of duty; on any day outside the basic workweek; or on any holiday specified in paragraph (b) of this section.

(b) Holidays for Federal employees shall be New Year's Day, January 1; Washington's Birthday, the third Monday in February; Memorial Day, the last Monday in May; Independence Day, July 4; Labor Day, the first Monday in September; Columbus Day, the second Monday in October; Veteran's Day, the fourth Monday in October; Thanksgiving Day, the fourth Thursday in November; Christmas Day, December 25. When any of the above-listed holidays falls outside the basic workweek, the nearest workday within that week shall be the holiday.

§ 381.39 Basis of billing for overtime and holiday services.

(a) Each recipient of overtime or holiday inspection service, or both, shall be billed at the rate established in § 381.38(a), in increments of quarter hours. For billing purposes, 8 or more minutes shall be considered a full quarter hour. Billing will be for each quarter hour service rendered by each Inspection Service employee.

(b) Official establishments, importers, or exporters requesting and receiving the services of an Inspection Service employee after he has completed his day's assignment and left the premises, or called back to duty during any overtime or holiday period, shall be billed for a minimum of 2 hours overtime or holiday inspection service at the established rate.

(c) Bills are payable upon receipt and become delinquent 30 days from the date of the bill. Overtime or holiday inspection will not be performed for anyone having a delinquent account.

§ 381.42 [Reserved]

(Sec. 21, 34 Stat. 1260, as amended, 21 U.S.C. 621; Sec. 14, 71 Stat. 441, as amended, 21 U.S.C 463; 37 FR 28464–28477)

The amendments differ in some respects from the notice of proposed rulemaking. The differences are as a result of comments received or administrative decisions by the Department relating to those officials having responsibility for administering various provisions of the amendments. It does not appear that further public participation in this proceeding would make additional information available to the Department which would warrant alteration of these amendments. Therefore, under the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that notice and other public procedure concerning the amendments are impracticable and unnecessary.

The foregoing amendments shall become effective November 3, 1975.

Done at Washington, D.C., on: September 29, 1975.

F. J. MULHERN,
Administrator, Animal and Plant Health Inspection Service.

STATEMENT OF HON. CHARLES THONE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEBRASKA

Mr. Chairman and Members of the subcommittee, I appreciate the opportunity to share with you my views on the desirability of Congressional review of administrative rulemaking. I will be brief and to the point. The frustration of seeing apparently concise, explicit legislation turned into inexplicable, chaotic regulations bedeviling the very existence of the public it was designed to serve, is known to each of us. The problem is often compounded by parallel regulations of coexistent agencies setting conflicting and irreconcilable requirements. My constituency has pointed out numerous examples of agencies taking legislation, misconstruing or expanding Congressional intent to suit their needs, conveniently forgetting their obligation to serve the public in an economical, efficient manner and rather evidently further developing the art of self-perpetuation. As one of our colleagues has written, "Under the guise of 'implementation,' they can wreak changes, build empires, soar to heights of imaginative mismanagement of the public weal undreamed of in the halls of Congress when the original legislation was written and enacted."

This compulsive, reflexive regurgitation of ofttimes conflicting, irrelevant, irreverent and, at times, just plain unworkable regulations, appears to be the product of a bureaucratic psychology which regards the individual for formulating endless rules while avoiding the use of judgment, responsibility and the burden of using his wits and common sense. It is time to make these individuals responsible for their actions. It is time to formalize Congressional reassertion of the responsibility to write the law and to insure the executive branch implements the law as written. It is not without precedent. Since 1933, more than 180 different provisions for legislative review of administrative decisions have been written into 126 different laws. Forty-seven have been since 1970.

This legislation would clearly and, without equivocation, state Congressional intent. It puts the executive branch on notice. It is reasonable. Its action words are disapproval if, "it(the proposed regulation) contains provisions which are contrary to law or inconsistent with the intent of Congress, or because it goes beyond the mandate of the legislation it is designed to implement or in the administration of which it is designed to be used."

Clearly this will allow reasonable, proper implementation to be expeditiously carried forward. Clearly it will flag borderline, questionable implementation for further discussion. And, just as clearly, it will give us a vehicle to put a stop to the myriad abuses of executive branch implementation.

Mr. Chairman, should this legislation be carefully nurtured to maturity, there is a real possibility it will have a far greater impact on individual members of the public than some of the long complex legislation this Congress has passed. The need is clear. The proposed legislation appropriate. I am proud to be a cosponsor of it and respectfully urge the subcommittee to consider it carefully and affirmatively.

STATEMENT OF HON. JACK KEMP, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman and Members of the Subcommittee: This Subcommittee is to be commended for holding these important hearings on legislation to reform the way in which Congress addresses itself to reviewing the rulemaking of the administrative agencies.

These hearings will help both Members and the people in whose trust we exercise our responsibilities to understand more fully the existing and possible impacts of the making and enforcing of rules governing virtually every aspect of our way of life by instrumentalities of government insulated from direct accountability to the people.

This, then, is the central issue to which these hearings must be addressed. There is no effective means through the ballot box for the people to pass judgment upon the acceptability or lack thereof of how the bureaucracy attempts to govern their lives and then to exert collective influence over the bureaucracy. That frustration can then be released only by the people voting against those few upon which they can have any influence through the ballot box—a Congressman, a Senator, a Presidential candidate—no matter how much those few might have disagreed with and actually fought the decisions of the bureaucracy giving rise to those frustrations.

This lack of any existing institutional means for holding the bureaucracy accountable to the people requires us to now put into place a process requiring that no rules made by, or to be enforced by, the bureaucracy go into effect until action has been taken by the elected Representatives of the people. This is no casual responsibility, for our own Declaration of Independence exhorts us to remember always that to secure the rights of life, liberty, property, and the pursuit of happiness governments are instituted among men which derive their just powers "from the consent of the governed."

I believe there is here a serious flaw in the institutional mechanics of how the Nation is governed, and my nearly 140 Colleagues, under the prime sponsorship of Mr. Levitas of Georgia, are to be commended for insisting this issue be addressed. I am pleased to be one of the cosponsors of this measure.

GOVERNMENT REGULATION AND THE DECLINE IN FREEDOM

There has been, in my opinion, an erosion of freedom within the Western democracies, including the United States, during the past half-century, and I believe that decline has been directly related to the growth in government regulation.

This erosion—because it has worked and is working almost imperceptibly, yet relentlessly in the longer view—is freedom's most effective enemy. Freedom is not generally lost by the forces of violent attack, for those specific incidents when revolution and upheavel did quickly destroy freedom were preceded by an intellectual evolution which made those acts both possible and allowable.

Our former House colleague, now Senator, Robert P. Griffin of Michigan, recently addressed himself to this phenomenon:

> In the long course of history, freedom has died in various ways. Freedom has died on the battlefield; freedom has died because of ignorance and greed. But I should like to suggest that the most ignominious death of all is when freedom dies in its sleep.

These more subtle threats must, therefore, be a cause of great concern among all who cherish freedom and the enjoyment of life, liberty, property and happiness which freedom engenders. The nature of the remainder of our natural lives and those of future generations will be governed in great degree by our present ability to perceive these threats and to undertake successfully those efforts required to restrain them.

There are many views on the process through which freedom is lost, but I believe its particular decline during the past half-century has been directly proportional to the growth of government in the lives of the people. The greater the burdens, the greater the degree of regulatory control, the greater the share of human conduct governed by statute, the less freedom there is.

We must remember that when government intervention is sought, freedom runs a very high risk of further declining. And, inasmuch as those within government—elected or appointed—too often regard their roles as, and measure their successes through, the promulgation of government initiatives, the results should be obvious. More and more government; less and less freedom. That is why two hundred years ago Jefferson observed: "That it is the nature of human history that as government grows freedom recedes."

This loss of liberty, of freedom comes through the narrowing of the range of alternative choices of action available to people. The examples are endless, and these restrictions on the exercise of choice are not now without penalties: prison terms, fines, loss of license, and that silent intimidation which accompanies an awareness of burgeoning government control.

Through the enactment of a multitude of program activities, government has taken unto itself the exercise of functions once regarded as the province of private conduct. And, whether one regards a specific government intervention or influence as good or bad, one still ought to weigh the impact of the totality of extensive and still growing government regulation over the exercise of personal freedom.

It is almost impossible to itemize the areas of conduct now subject to Federal regulation because there are so many, but a cursory examination of any government organizational chart shows us the areas of our lives now subject to that regulation: health, education, welfare, labor, commerce, housing, transportation, finance, agriculture, environment, communications, wages and prices, energy, labor-management relations, trade, alcohol, tobacco, firearms, savings, community relations, civil affairs, land use, natural resource use, recreation, commodities,

securities, insurance, marketing, consumer affairs, productivity, nutrition, travel, economic development, shipping, vocational and career opportunities, employment standards, occupational safety, child development, retirement, rehabilitation, interest rates, credit availability, land sales, aviation, railroads, highways, safety, institutionalized voluntarism, arts and humanities, equal employment opportunity, export-import terms, trucking, small business, veterans, postal service, ad infinitum.

The point is this: as government assumed each of the many components within each of these subject areas, it removed decision making from the people, a process inherently antithetical to the exercise of free choice. Some of these are, indeed, necessary and are clearly in the interest of the people. But taken all together, government as a cure-all is diminishing freedom.

A guest editorial in *The New York Times* of this past May, authored by Russell Baker, outlined the author's encounters with government control in but one day's time—control by Federal statute, Federal regulation, State statute, State regulation, local ordinance. Because it is so graphic of the pervasiveness of the issue before the Subcommittee today, it bears repeating, and I quote from my Floor Remarks of Thursday, June 12:

The author recalled awakening that morning with a woman whom the government had licensed him to marry, rolling over on bedding materials which had been certified by a Federal agency, to turn on the radio to listen to a station which broadcasts only with Government permission. Of course, the electricity which powered that radio and lit the mirror at which he shaved was priced at rates established by the Government and brought to him by a Government-created monopoly.

Outside stood his car—licensed by the government and registered by the government. It had been built to specifications set forth by the Government. Each year the Government taxes it. He can drive it only by carrying a permit issued by Government. And, only recently, the Government told him he could only obtain 10 gallons of gasoline at any one time, and now with the lifting of that imposition, has told him that they will tax him more heavily for his future gas consumption. If he wishes to park his car, he cannot park it near fire plugs, within 20 feet of a stop sign, or in places reserved for Government officials, or anywhere else without putting money into a Government meter.

Of course, he could have taken a bus, subway, or train to work, but those would have been either owned by or subsidized by the Government, running on schedules approved by the Government along routes specified by the Government at fares established by the Government.

If he had a business or pleasure trip that day, he could have flown on airplanes operating under Government license along Government authorized routes, flying in and out of airports along paths dictated by Government controllers, paying for all this at Government-set fares.

The clothes he wore would carry labels prescribed by Government, made from imported cloth whose entry was regulated by Government tariff or from subsidized domestic cotton, for the purchase of which he would have paid a sales tax.

After dressing, he had breakfast comprised of foods whose quality and packaging had been regulated by Government on dishes washed by water bought from Government, water heated by oil the price of which is determined partly by Government policy. He had coffee that morning imported under Government license, with cream priced by Government through milk price supports, and then sat down to read his newspaper made from pulp whose harvesting was regulated by a myriad of Government agencies.

After breakfast his children are required by the Government to report at fixed hours to a building owned by the Government where persons hired by the Government instruct them in such matters as the Government sees fit.

Before leaving the house, he placed his garbage in a trash can for the Government to pick up, ran his garbage disposal to enter residue into the Government's sewage system, and placed a Government stamp on an envelope to place it into a Government-approved home mail box.

Then, he started his work day, where even more extensive Government regulations controlled his and his company's actions.

The United States Code Annotated, the basic compilation of Congressionally enacted statutes, now totals more than 55,000 pages. The Internal Revenue Code alone is now nearly 1,900 pages long, and the regulations which carry those tax laws into effect constitute another 4,500 plus pages. And, the Code of Federal Regulations—consisting of the regulations which carry our laws into effect and

which also have the full force of law—totals hundreds of thousands of pages, and as the Director of the Federal Register, Fred J. Emery, testified before this Subcommittee on October 23, the Federal Register carried 10,981 pages of rules in 1974 and through September 30 had carried 10,245 pages of rules this year—a growth of 24 percent in but one year's time. We have, indeed, come a long way since Moses brought the Ten Commandments down from the Mount—only 10 rules to govern our lives.

CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

The Congress is now faced with the issue of what to do about the mechanics and growth of Federal administrative rulemaking. It is within our power to do so—clearly.

Article I, section 8, clause 18 of the Constitution sets forth the basic power:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Congress, thus, has the power to make laws, including those laws which give to the administrative agencies the authority to issue rules deemed appropriate to carry out the law and consistent with the intent thereof. For example, Congress has the power to issue licenses for the operation of television stations, but it has expressly delegated that power to the Federal Communications Commission. Congress has, in short, given its powers to an administrative agency.

Inherent in this process is the continuing, Constitutional power of Congress to make further laws, through which some or all of that power is returned to the Congress. The basic theory of the Constitution would be violated by restrictions on Congress retrieving its own powers. There are clear precedents for Congress exercising such authority, ranging from the Constitutional argument successfully advanced by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316 (1819) to Congress exercise of that authority in recent decades.

In *McCulloch* v. *Maryland*, Chief Justice Marshall asserted that all that was required to establish the validity of an action under clause 18 was as follows:

> . . . all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.

The Congressional Research Service of the Library of Congress reports that in the last 43 years 183 separate provisions in 126 acts of Congress contain some type of Congressional review or consent for proposed administrative agency implementations of law. Some require specific action. Others simply provide a procedure which Congress can use at its discretion. In other words, the former requires Congress to do something before the rule becomes operative, whereas the latter does not require Congress to do something.

We have done, therefore, on a selective basis in the past that which is proposed to be done in H.R. 3658, H.R. 7689, and related measures on a uniform, consistent basis.

We must establish this system for review at the Congressional level. The courts cannot do it—exercise oversight of the consistency of administrative rules with Congressional intent and agency authority; it would be piecemeal, potentially inconsistent, time consuming, and costly, and it would produce unimaginable frustrations of carrying out the laws—statutes and/or regulations—such as temporary restraining orders, permanent injunctions, etc.

In light of the vast volume of administrative rulemaking going on today, one problem is how to separate the trivial rules from the major, substantive ones. Not all rules really require Congressional oversight, and if we insist on acting with respect to each and every one of this year's nearly 15,000 projected Federal Register pages of rules, for example, we will become either a rubber-stamp for the agencies or our priorities will become governed by reaction to theirs. That is the first question to address.

Another question is whether to separate the rules which carry criminal penalties from those which do not, requiring action only on the former. This is what the present Levitas bills would do, and upon reflection I cannot agree with that dichotomy, that distinction. A $10,000 civil penalty will cause just as much harm to a small business as a $10,000 criminal penalty, the only difference being jeopardy of the person. A civil restraint can have the same impact as a restraint enforced through criminal sanctions. The examples are endless. I invite the Subcommittee's and my Colleagues' careful attention to this question, and I suggest we would be better advised to find another dichotomy.

Another question is the nature of the Congressional review and action we seek to put into place. There are two routes—a tough one and an easy one—and we must make the choice here at the Subcommittee level first. We can require the proposed rule be laid before the Congress and referred to the appropriate committee and if no action is taken within a specified period of time to prohibit the rule from becoming operational by either one or both Houses, it will go into effect automatically. That is the easy route. Or, we can require an affirmative action by either or both Houses before the rule becomes operational. That is the tougher route. I personally prefer the tougher stance, not because it is tougher, but rather because I think we must all admit it is far too easy for something like this, even if it is a controversial rule, to become lost in the maze of legislative process or to simply not be acted upon within the specified period of time.

Even if we should decide to go the easier route, I believe strongly that we should require it to rest with the Congress for longer than a very short 30 days. I would prefer at least 60 days, perhaps 90.

We simply must guard against the perfunctory look; we must insist upon a thorough examination of all the conceivable implications of the rule taking effect, realizing all the time, as we must do even with respect to statutes, that rules will always have unforeseen secondary and tertiary consequences.

I assume the administrative agencies will oppose the enactment of this bill. I understand that is the position being taken within the Department of Justice. They will argue that it is an interference in the exercise of the administrative function—an executive function under the Constitution—by the legislative function—a Congressional one. I think we should examine those reactions carefully, for I think that no matter how the arguments are disguised the bureaucracy will be protecting itself and its own powers. The arrogance, the elitism, the "we administrative agencies know better for the people than they know for themselves or even their Representatives know for them" attitude which permeates such posturing should be readily apparent. Again, as I said at the outset, the principle of accountability must govern in a free society; to make it second-place to bureaucratic interests is blatantly anti-democratic in character.

Mr. Chairman, again, let me commend the Subcommittee for having the foresight to move into this subject area, to be willing to advance the people's interest even when it conflicts with those of the bureaucracy.

STATEMENT OF HON. ROBERT L. F. SIKES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman: It is a fundamental principle of our system of government that the laws are to be made by the elected representatives of the people. However, as a matter of actual practice, the conduct of the people is governed more by rules and regulations that are promulgated by the administrative agencies than by laws passed by the Congress. Last year alone approximately 6,000 administrative rules were adopted by 67 Federal agencies, departments, and bureaus. In 1973, the Federal Register ran to over 35,000 pages, and last year it exceeded 45,000 pages. Congress only passes about 600 acts annually.

Numbers alone do not reflect the extent to which the life of the average person is controlled by administrative rules and regulations. The point is perhaps best made by reference to some of the examples of administrative excess that were cited in an article entitled "Too Much Government by Decree" by John Barron in the May, 1975, issue of Reader's Digest. The article was reprinted in the Congressional Record on June 3, 1975. According to Barron's article, one administrative rule regulates how many oranges may be shipped from counties in Arizona and California during a certain one-week period. The Environmental Protection Agency, in an effort to reduce air pollution in Boston, promulgated a series of regulations designed to encourage Bostonians not to drive their cars to work. EPA prohibited parking on downtown Boston streets between 7 and 10 o'clock in the morning, and required that forty percent of all spaces in Boston parking garages be kept empty during the same hours. Furthermore, employers were required to eliminate one-fourth of all employees parking spaces. EPA modified these regulations when threatened with Congressional intervention.

A solution to administrative excesses such as these is greater Congressional control of the rulemaking process, which would be made possible by passage of

H.R. 3658 and H.R. 7689. Under the provisions of H.R. 7689, no proposed rule would become effective if within sixty days after it was submitted by the agency to Congress, either House adopted a resolution disapproving the rule. H.R. 3658 is similar to H.R. 7689, but is limited in application to rules which subject the violators thereof to criminal sanctions.

Both H.R. 3658 and H.R. 7689 are the type of legislation which is often referred to as providing for a legislative or Congressional veto. Seven states (Alaska, Connecticut, Kansas, Michigan, Nebraska, Oregon, and Virginia) have statutes providing for some form of legislative review of administrative agency rules and regulations. It is common practice for statutes in Great Britain that delegate power to make regulations to require that the regulations be submitted to Parliament for affirmative or negative action. Furthermore, from 1948 to 1973 all executive reorganization plans were required to be reviewed by Congress, and either House was authorized to disapprove within a certain period of time. Also, the Budget and Impoundment Control Act of 1974 established similar procedures for proposed budget adjustments by the President.

Passage of H.R. 3658 and H.R. 7689 should not be impeded by arguments concerning the constitutionality of the Congressional veto. The constitutionality of Congressional veto provisions has never been directly tested in court. The argument that the Congressional veto violates the doctrine of separation of powers can readily be refuted. The Congressional veto does not place Congress in the position of interfering with functions of the executive. Rather, the Congressional veto merely permits Congress to place limits on power that it delegated to executive agencies, power which Congress could have chosen to keep for itself. By serving as a check on the delegation of powers, the Congressional veto serves to strengthen rather than weaken the traditional separation of powers.

In summary, Mr. Chairman, legislation of the type that is embodied in H.R. 3658 and H.R. 7689 is desirable, constitutional, and not without precedent.

Mr. Chairman, I appreciate the opportunity of appearing before your distinguished subcommittee today and I urge that you favorably report this legislation.

STATEMENT OF SENATOR BILL BROCK, STATE OF TENNESSEE

Thank you, Mr. Chairman.

Today, I am here to testify in favor of my rulemaking bill, S. 2258, and Mr. Del Clawson's companion bill, H.R. 8231, which has been introduced in the House of Representatives. I ask that S. 2258 and H.R. 8231 be printed at the end of my testimony.

My bill, S. 2258, has been referred to the Senate Government Operations Committee and in turn to my Subcommittee on Reports, Accounting, and Management. Del Clawson's bill has been referred jointly to the House Rules Committee and the Committee on the Judiciary. The House bill now has over 130 co-sponsors and I would like to announce that my bill has broad bi-partisan support for instance, Senators Muskie, Helms, Huddleston, Young, Eastland, Fong, etc.

Let me quote from an article by Meg Greenfield which originally appeared in *Newsweek* and was reprinted in the Washington Post. I found the article very interesting and well considered. It clearly points out correctly the dilemma which Congress and the President face today. "President Ford has been saying he intends to cut back the entangled growth of federal rules and regulations that are choking so many enterprises in American life. I wish him well. I do not think he has a hope of succeeding."

We must give the President some help and at the same time help ourselves—the Congress. My bill will assist in this effort.

In June of this year the *New York Times* in an Editorial noted that "*The Federal Register*, with its daily avalanche of new rules and regulations, is the highest authority in American medicine, instructing physicians increasingly as to whom they may treat, how they may treat, how long they may treat the patients in hospitals, what drugs they may prescribe, and what fees they may charge. This historic autonomy of the medical profession is fast disappearing; and as controls proliferate so does anger among physicians who rightly or wrongly, see themselves reduced in status and usefulness to their patients."

This type of overregulation must end. We all recognize that regulation is necessary, but we must strike the proper balance. Congressional review of rules and regulations will in my opinion be a giant step towards more responsible rulemaking.

Let me quote from a recent compilation by the Tennessee Hospital Association of congressional dissatisfaction with HEW regulatory actions and "blatant ignoring of congressional intent."

"The Subcommittee on Health of the House Committee on Ways and Means, chaired by Representative Dan Rostenkowski (D-Illinois), on June 12 held public hearings on proposed or final regulations promulgated by DHEW in connection with (1) utilization and review of procedures, (2) termination of the inpatient routine nursing salary cost differential, (3) recognition of prevailing charge increases for physicians and certain other services tied to economic indices, and (4) revision in the schedule of limits on hospital inpatient general routine service cost. The Subcommittee on Health intends to examine these policies and their implementation in the light of Congressional intent relative to the conduct of the Medicare Program, the Subcommittee stated.

"Senator Herman Talmadge (D-Georgia), Chairman of the Senate Finance Health Subcommittee, in a major speech in April, alluded to possible creation through legislation of stronger administrative controls on the new subbureaucracy within DHEW charged with administration of Professional Standards Review. In the administrative area, we seem to have people running off in all directions making different decisions affecting the same doctor or hospital, or nursing home.

"In the Congressional Record of June 19 (No. 97, Page S11032), Senator Henry Bellmon (R-Oklahoma) criticized DHEW regulations on intermediate care facilities as unjustified, unrealistic and not in accord with the intent of an amendment he originally sponsored.

"In the same issue of the Congressional Record, Representative Peter A. Peyser (R-New York) urges DHEW to modify new HEW regulations which arbitrarily impose a three day limit on home visits by Medicaid beneficiaries in long term care facilities."

It is time to end government by bureaucratic edict! We are becoming a government of regulation, rather than a government of law.

Far too often agencies and departments of the Federal government have imposed rules and regulations which are contrary to legislative intent. My bill would require each rule or regulation to be presented to the Houses of Congress before they go into effect. It is the Constitutional responsibility of Congress to enact law, but in recent years, Congress has allowed the bureaucrats to create their own laws which may in no way mirror the intent of Congress.

Nobody elects anybody in HUD, HEW, SEC, ICC, or any other agency. They elect congressmen or women or a senator who is their voice in Washington. What has been happening is that the Congress writes a law, passes it, the President signs it and hands that law to an agency. The agency starts writing regulations that go beyond what was in that law. Either direct or implied, the agencies have taken upon themselves power that the Congress did not give them. And people are losing their rights under the Constitution because of some of these regulations. They are suffering a lack of due process of Constitutional protection. My bill would require that at the same time they published the regulation in *The Federal Register* for public comment; they (the agency or department) would send it to the Congress; and the Congress will automatically be given an opportunity to say no if that regulation does not reflect the true intent of the law. In other words, it would give us a right, those who write the laws, to be sure that laws are being enforced as we wrote them.

There is no wonder that most Americans feel they have lost control of their government. It appears to many that more laws are being created by the bureaucrats than Congress. I happen to share those beliefs.

The Federal Register, the "rule book" of the government in which all new laws, rules and regulations are printed is daily becoming impossible to read. Each day, dozens of new rules are made, or changes are made in old ones, or some agency tells the world that it has decided to do something else with an existing rule or regulation. The net effect of this is that by reading *The Federal Register* we can discover how government has come into control of daily lives and how the bureaucracy has come to rule the country.

What can be done about it? Several things. One is a measure S. 2258 which I have introduced in the Senate which will put an end to the "law-making" practices of governmental agencies and departments. This measure would allow disapproval by Congress of rules and regulations or changes which would be submitted to Congress with a report from the agency or department detailing a full explanation of the proposal. Either House of Congress then would have sixty days in which to pass a resolution disapproving in whole, or in part the proposal.

For too many years Congress has abdicated its lawmaking authority to the bureaucracy. Congress passes legislation almost daily which instructs the agencies to make their own rules, in effect, interpreting the intent of Congress. Far too many times the intent of Congress is entirely changed by the bureaucratic rules. It is time to halt the procedure.

Power still rests with the people. No one elects a bureaucrat. Government agencies still have their responsibilities to carry through the intent of Congress. If Congress is not willing to accept that responsibility on the rules and regulations written by the bureaucrats as I propose.

Let me give a few examples of the problems that the people—poor people, health care people, business people—of this country are faced with.

For instance, the National Advisory Council on Economic Opportunity note in their *Eighth Annual Report* (June 30, 1975) that "the Congressional intent for poverty programs sometimes has been thwarted by federal policy makers who have arbitrarily set rules and regulations of their own design. The most glaring example occurred several years ago when Congress enacted provisions calculated to insure the involvement of local government with Community Action Agencies. However, OEO headquarters issued regulations that contained so many technical and difficult-to-fulfill regulations that it was virtually impossible for communities to set in motion the machinery that would accomplish the intent of the provision.

"Several members of the Congress reported to the Council that they were aware of and deplored a number of regulations deliberately designed to circumvent legislative intent.

"The Advisory Council respectfully urges that those charged with Congressional review carefully monitor the rules and regulations promulgated by agencies administering programs for the poor to insure that they comply with legislative intent."

In a letter to me, dated August 15, 1975, the marketing director of a health products company for the animal industry (Masti-Kure Product Company) presents a particularly illustrative example of a situation that my bill would help correct.

"This company has been victimized almost beyond belief by the practice you seek to halt. For a viable, respected and growing small business with around 125 employees, we were reduced to the edge of bankruptcy and forced into a 38% lay-off by FDA action based on illegally promulgated regulations contrary to the intent expressed by Congress in the 1968 amendments to the F.D. and C. Act. Ample documentation exist for this allegation—even a public statement to this affect by the former General Counsel of F.D.A.

"In fact, our position has been upheld in three recent successive court decisions—once before the District Court for the District of Columbia and twice before the U.S. Court of Appeals. Other phases of the incredible effect on this company of FDA's illegal actions are still pending before the courts. We fully expect to prevail.

"Yet, the cost to us is staggering. We were forced deeply into debt to finance our struggle before the courts. Gratefully, because of the favorable decisions we are on the road to recovery. Nevertheless, harassment by FDA continues unabated and we continue to sustain overwhelming legal fees to protect our rights. Our management personnel has continued to be diverted from their proper goals of providing the public with safe, quality products.

"You are quoted as aptly stating;

" 'Rule by bureaucratic edict has got to end. This is one way in which the people can again gain control of their government.' "

In my own state of Tennessee, Mid-Tenn Aviation through their operator, Melvin Romine of Dickson, Tennessee, makes note of a problem that often accompanies improper or over-regulation—increased record keeping and paperwork.

"Already many hours are put into keeping records for VA. Our tickets must be written in such a way that a VA representative can understand it. That our tickets must also show information that involves State and Local taxes, Federal Taxes, and insurance information, information that is important to our business does not interest the VA officials. We must not only keep up with the total number of hours and money used by each Veteran, but also separate the hours spent in each aircraft by each Veteran and also if it was dual or solo and total for each area. We have to keep a running monthly average of instruction and a running 30 day (not monthly) percent of VA time compared to nonVA students above private pilot and not Part 61. This program is so extensive and involved that the

last time our records were checked by the VA Federal Representative, I had to help him investigate my own records. (He reached the point that he could not figure flight time and cost.) To make this program available to our community already involves too much of our time and paperwork that should be applied to other areas of our business."

Finally, the American Hospital Association lends support to Mr. Clawson's and my efforts in a recent publication.

"The American Hospital Association, representing some 7,000 health care institutions across the nation, is deeply concerned over the increasingly heavy burden imposed on our health care delivery system through administrative rule making procedures. In the health field alone there are a multiplicity of federal agencies and departments which issue regulations directly impacting upon the operations of our nation's hospitals. In our view, the system of federal rule making is largely uncoordinated and often arbitrary, and as a result, it creates a substantial cost and administrative burden which can have a deleterious effect on the capacity of health care institutions to provide high quality care to all citizens.

"We strongly believe that a formal mechanism of Congressional review of administrative rule making is a necesary and overdue reform of current procedures. We recognize the need to provide the executive agencies with the authority to implement our laws, but at the same time we see an equally compelling need to insure that administrative rule making does not exceed or subvert the intention of the Congress or impose burdens which are counter productive to the provision of adequate health care."

These case examples present just an introduction to the problem. I believe that Congress must face up to its responsibilities of Congressional oversight and enact a bill that will mandate Congressional review of bureaucratic rule making.

A detailed analysis, section by section, of my bill, S. 2258, follows:

Introductory language in Section 1 of my proposal stipulates that Executive Branch agencies must submit copies of any rule or regulation to be used in the administration or implementation of any law of the United States or any program established by or under such a law, or which otherwise proposes to make or replace any change in such a rule or regulation, to Congress together with a report containing an explanation of the instrument in question. The proposed rule, regulation, or change will become effective in sixty legislative days after it is submitted unless disapproved by either house of Congress.

The effect of this section is to provide the Legislative Branch the opportunity to guide administrative discretion deriving from legislative action. Congress, of course, may not abdicate its legislative function by delegating legislative power to the Executive Branch. What has been provided, in varying degrees of latitude, is administrative discretion which with one exception (The National Industrial Recovery Act of 1933, 48, Stat. 195), the Supreme Court has approved, diligently refraining from conceding that the discretion conferred partakes of the law making function.

Section 2 of my proposal stipulates that Executive Branch rules and regulations would automatically go into effect sixty days after issuance unless (1) a resolution of disapproval were ratified in either House of Congress or (2) a concurrent resolution was adopted specifying an earlier effective date.

Section 2(c) of the proposal stipulates that (1) the action authorized is an exercise of Congressional rule making power and as such shall be considered as part of the rules of each house, and (2) sets forth procedure to be followed in the Congress for acting on a resolution introduced in conjunction with the provisions of the measure.

This section constitutes no impediment to good administration in that an action of disapproval—not approval—is necessary to alter the course of executive implementation. There is no delay or debate unless there is, indeed, some questionable aspects to the instruction at hand. Furthermore, in its disapproval action, Congress engages in a valid legislative action—voting on a resolution or concurrent resolution—rather than issuing some quasi-judicial advisory opinion or commentary.

Historical and legal precedence for the procedure followed in Section 2(c) may be found in over thirty measures that have been signed into law. I ask that these precedents be printed at the end of my testimony as they appear in *The Jefferson's Manual*.

Various questions have been raised about my rulemaking bill and its companion measure, Del Clawson's bill, in the House. For example, do the commit-

tees have the time and the resources to study the proposed rule and regulation? I feel that the answer to this question is yes! I took the total number of pages projected to be in *The Federal Register*, this year, 55,000 up from 45,422 last year, and divided it by the number of professional committee staff in the Congress (1,000 +). The answer was 55 pages per year for each professional committee staff member, less than two-tenths (.2) of a page per day or around a page a week. I admit that this is an estimate, but my point is that Congress *can* and *should* be on top of rule making by executive departments and regulatory agencies.

I strongly feel that it is part of our oversight responsibility to keep up with executive and regulatory agency promulgation of our laws. If we do not review these regulations, then we are abdicating our constitutional powers.

There is a general recognition that Congress is not doing enough oversight. Congress is now in a position where it must increase its oversight activity, if it wishes to retain a significant policy making role in our society.

In recent months, we have seen great strives being made in Congressional oversight. The establishment of the Joint Study Commission on Budget Control along with the reporting of the Budget bills by the House Rules and the Senate Government Operations and Rules and Administration Committees followed by the passage of the Congressional Budget Bill by each House is an indication that the Congress is on the way to establishing additional vehicles for oversight. These new vehicles include the Congressional Budget Office, oversight subcommittees on each authorized committee in the House and an Office of Program Analysis within the General Accounting Office. My bill offers the next logical step in our efforts to regain the lost authority.

The particular technique of congressional oversight that my bill, S. 2258, uses is the congressional veto. As I have mentioned earlier this is a well established oversight technique. There are over 30 instances where this technique has been enacted into law.

I do not pretend that all the answers are currently known about the manner in which this legislation should be implemented. S. 2258 and its companion House bill contain the basic structural components for the needed reforms. But what we must do is study such issues as: the definition of rules, procedures and regulations; should prompt judicial action be mandated in challenges to the congressional veto under this bill, as we have done in the Federal Election Commission's legislation; and what time frame should we use for counting the days for executive, regulatory, congressional formulation and review of these rules and procedures? This is an especially knotty issue—we do not want to slow down the rule making process, but speed it up!

These and many other questions must be resolved by careful but prompt study.

I am hopeful that we will see this legislation enacted into law before the end of the Congress. The time has come for the Congress to stand up to the bureaucrats and say "We are back in the game. We want to make sure that our legislative intentions are implemented. And by working with us the people are going to be a lot better off!"

STATEMENT OF HON. JOE D. WAGGONNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. Chairman, I would like to thank the Subcommittee for holding this hearing on H.R. 3658 and related bills to establish Congressional review over administrative rulemaking procedures.

Without a doubt, this is an area of great concern to a wide segment of citizens throughout the country. Small businessmen, education administrators, State officials and concerned citizens from any district over the years have contacted me objecting to rules and policies set down by various bureaus and agencies. What can we do about this or that new regulation, is a question we all hear. In handling their cases, I have discovered that specific rules in question often have gone far beyond the original intent of Congress in passing the law. It is difficult to explain to a constituent, who is wrapped up in a new layer of bureaucratic red tape, how civil servants can establish and implement far-reaching new regulations with nothing to back them up but a vague passage in some law passed by Congress. But this happens often.

I am pleased that this Subcommittee will address this important matter, and I am confident that some public relief from excesses in administrative rulemaking will be forthcoming.

Mr. Chairman, this is an issue which has attracted the attention and support of people of diverse political persuasions. On the one hand we hear charges of overzealous Federal regulators applying arbitrary and capricious regulations harmful to business or education; while on the other, we hear allegations that industry and the various agencies responsible for regulating them have become too cozy. Obviously, sound arguments can be presented for both sides. But somewhere in between there is a meeting of both opinions, and that is, something has to be done to effectively oversee the making of rules and regulations by the Federal agencies.

In my opinion, it is wrong for Congress to think that once a new law is passed, our responsibility as legislators has ended. In delegating the rulemaking powers to an agency, we have an obligation to exercise thoughtful control over the employment of that enormous power. It is not enough to leave the final decisions of Congressional intent up to the Judicial Branch when these regulations are questioned. The judicial process as a recourse for private citizens and businesses alike is a slow and expensive one.

Congressional oversight committees have the responsibilities as watchdogs of how the agencies spend the tax money we appropriate. But too often, they are unable to deal with regulations promulgated by the agencies, unless there is enough controversy to merit their attention. And even then it is sometimes too late to correct mistakes made by the agencies without resorting to Congressional action in the form of legislation.

There is no better place to prevent overregulation and abuse of the rulemaking authority than *before* the proposed rules are adopted as official policy and carry the force of law. At this stage of the process, Congress is able to correct misinterpretations of its original intent and prevent costly miscarriages of the rulemaking authority. And this is the area addressed by this legislation.

Government regulation by bureaucratic directive has clearly mushroomed. Last year, for instance, more than 6,000 regulations were adopted by 67 administrative agencies, bureaus and departments. During the same period of time, there were only about 600 legislative acts passed by Congress. Government keeps growing larger to take over authority delegated by Congress to a swelling bureaucracy.

By way of example, let me cite the Privacy Act of 1974, which went into implementation last month. I am sure there are members of this Subcommittee who have had some of the same exasperating experiences with the operation of this law that I have had. What began as a small 14-page law, P.L. 93-579, was interpreted and regulations proposed in 80 pages of the Federal Register in July by the Office of Management and Budget. This was followed by more than 3,000 pages in the Federal Register announcing implementation by various agencies, commissions and departments.

One of the problems I have experienced, and other Members have too, is in OMB's interpretation of one small section of the privacy legislation. OMB declared that it would be against the law for Congressmen to receive personal information concerning individual constituents from the Federal agencies which have the files, without first obtaining written permission from the constituent seeking help. In short, we, as elected officials, were told that we would henceforth not be able to get necessary facts and information to assist the people we were elected to represent. This is outrageous and clearly not the original intent of Congress in passing the law. I am sure that a careful reading of the legislative history will bear this out.

How many Congressmen who voted for the worthy intention of protecting individual privacy thought that it could be interpreted as prohibiting them from helping their people? But it has.

The usual reason constituents seek help from their Congressmen in the first place is because they have become so entangled in the mass of bureaucratic red tape that they see no other way out. We are supposed to be able to cut through the red tape, but now we also find ourselves entangled with bureaucratic edicts.

After an outcry from angry Congressional offices and the threat of legislation to correct the regulations, OMB has reissued new directives to correct the situation, which should not have arisen in the first place. But even with new regulations, an OMB official informed me that it would probably take months before the word filters down to lower level bureaus. Hopefully this problem can be worked out administratively. But what of all the thousands of other regulations which have caused untold problems for people who either have to learn to live with them or go to court?

Mr. Chairman, I will not belabor the point. There are many examples of rulemaking gone overboard, and of people not being able to get relief without going bankrupt fighting for their rights in court.

My main reason for offering this short statement is to make this point: We have an opportunity with this legislation to bring the Federal regulation making process back under the watchful eye of Congressmen who made the laws in the first place. This would be a step toward reasserting our rightful authority in the legislative process to oversee the disposition of the laws we make. We owe this to the people who have entrusted us to represent them.

This is good legislation, and I hope the Subcommittee will act favorably upon it.

Thank you.

STATEMENT OF HON. W. HENSON MOORE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. Chairman and members of the Subcommittee, H.R. 10166 sponsored by Congressman Del Clawson and others including myself addresses one of the most frequent complaints I receive from my constituents; far-reaching regulations that have been promulgated by federal departments and agencies. This bill would simply allow either the House or the Senate to reject any proposed rulemaking change by a federal bureaucracy 30 days prior to implementation of that change. Some have called this procedure a legislative veto, but I prefer to call it a restoration of proper Congressional checks over the vast expanse of government by regulation rather than by law. As we all know, the only way the Congress can currently rescind or annul bureaucratic decision-making that is inconsistent with legislation passed by Congress and signed into law by the President is to pass a new bill, subject it to the elaborate network of House and Senate subcommittee hearings and legislative markup followed by the same procedure on the part of a full committee, and then wait until a gap opens in the long line of bills waiting for floor action. This procedure is standard in both the House and the Senate, and is followed by appointment of conferees, approval of a conference report, and so forth until the measure is finally signed by the President. Due to the intense competition for floor consideration among supporters of bills that have been acted upon in committee, it is understandable that Congress would be unable to clear a measure to rescind or alter a proposed rulemaking action before its implementation. The present machinery of Congress cannot cope with confining timetables and H.R. 10166 corrects this flaw. Moreover, it puts the bureaucracies on notice that Congress can say "no" within the time allowed.

A prime example of the need for H.R. 10166 is embodied in the legislative history of Congressional action to postpone HEW regulations outlining new and stringent child-staff ratios for day care centers. HEW's proposed rulemaking change could have forced nearly 250 private day care centers in Louisiana out of business simply because they could not afford to hire more staff as required in the new regulation. Moreover, ample evidence exists that Louisiana day care centers are meeting the needs of our children adequately and on a cost-effective basis. The new regulations were implemented October 1.

The House Ways and Means Committee expressed its disapproval of the proposed child-staff ratios when it reported H.R. 9803 out of Committee on September 24. The Committee language of H.R. 9803 would delay implementation of the new regulations for six months. The measure passed the House on September 29 by voice vote. If H.R. 10166 had been operative, House rejection of the proposed regulation would have been sufficient to put it to rest and notify HEW that it must go back to the drawing board to come up with a more workable and practical policy. As this was not the case, the Senate Finance Committee received H.R. 9803 on September 30, one day before the new regulations were scheduled to go into effect. It could not meet the October 1 deadline and the Senate's inaction left many private day care center operators wondering if the HEW regulations or the House rejection of them should be followed. On October 9, the measure was approved in final form and under a new bill number (H.R. 7706). It became Public Law 94–120 on October 21, three weeks after the new regulations had been on the books without any binding word of Congressional objection or delay.

This is only one example as to the desperate need for additional Congressional review and oversight with respect to department and agency rulemaking activity.

Other instances can be cited where the provisions of H.R. 10166 are just as important. With this in mind, I fully support and request prompt action upon H.R. 10166 by this Subcommittee.

AMERICAN OSTEOPATHIC HOSPITAL ASSOCIATION,
Park Ridge, Ill., October 21, 1975.

HON. WALTER FLOWERS,
Chairman, Subcommittee on Administrative Law and Governmental Regulations, U.S. House of Representatives, Washington, D.C.

DEAR MR. FLOWERS: The American Osteopathic Hospital Association wishes to go on record expressing its concern over the increasingly heavy burden imposed on hospitals and the health delivery system due to administrative rule making processes and procedures.

The American Osteopathic Hospital Association represents 210 osteopathic hospitals throughout this country. In 1975 these 210 hospitals, which include approximately 25,000 beds, will spend in excess of $900 million as they treat in excess of 10 million patients.

The osteopathic hospitals, as community hospitals serving the health care needs of millions of Americans throughout this country, are concerned with the multiplicity of federal agencies and departments which issue regulations directly impacting on the operations of our hospitals. We share a similar view with the American Hospital Association and other groups that view the system of federal rule making as largely uncoordinated and often arbitrary—oftentimes creating substantial costs and administrative burdens which can have a deleterious effect on the capacity of health care institutions to provide quality health care to citizens.

We are aware of several legislative proposals which would provide for a continuing oversight of administrative rule making by the Congress:

(1) H.R. 3658/S. 1678—introduced by Rep. Elliott Levitas (D–Ga.) and Sen. James Abourezk (D–S.D.) would provide that *certain* rules published in the *Federal Register* could not take effect for 30 days, during which time either House or Senate could disapprove the rules by simple resolution. In the absence of such negative action, the rules would go into force without any inference of congressional approval.

It should be noted that the Levitas/Abourezk bills which provided the initial focus on this problem have two limitations which would substantially restrict their application. First, regulations which relate to loans, grants, benefits or contracts are excluded from the provisions of the bills. Second, regulations covered by these bills would carry "criminal penalties" for violations. Most regulations related to health programs impose the sanction of non-participation or loss of funds on violators rather than criminal liability. The authors of each of these bills understand our concerns and have evidenced flexibility in consideration of this problem. In view of these limitations, however, the American Osteopathic Hospital Association supports appropriate amendments to H.R. 3658/S. 1678 in order to eliminate these exclusions.

(2) H.R. 8231/S. 2258—introduced by Rep. Del Clawson (R–Calif.) and Sen. Bill Brock (R–Tenn.) would provide that regulations be placed before Congress for 60 days during which time either body could disapprove them by simple resolution. In the absence of negative action, the rules would become effective. We support these bills as introduced.

In summary, the American Osteopathic Hospital Association strongly believes that a formal mechanism for Congressional review of administrative rule making is necessary and an overdue reform of current procedures. We view this as only one step of many which must be taken to bring about a more rational, logical, economical process by which administrative rule making is developed to implement the laws enacted by Congress.

We appreciate the fact that your Subcommittee is considering this issue in hearings later this month, and we respectfully request that this letter be made a part of that record.

Sincerely,

MICHAEL F. DOODY,
Executive Director.

OCTOBER 28, 1975.

Memorandum to: Subcommittee on Administrative Law and Governmental Relations, The House Judiciary Committee.

From: Prof. Arthur S. Miller, National Law Center, The George Washington University.

Re: H.R. 3658, 94th Congress, 1st Session.

1. This memorandum analyzes H.R. 3658 from two perspectives: first, its constitutionality; and second, its wisdom.

2. At the outset, I should like to state my qualifications for making this statement to the Subcommittee. I have been a professor of constitutional law and of administrative law since 1953; until 1961, I was on the faculty of Emory University Law School; since 1961, I have been on the faculty of the National Law Center of The George Washington University. I have written four books on constitutional law and co-authored a book on the Department of Justice. In addition, I have published more than 70 articles dealing with public law generally and constitutional law and administrative law specifically. For five years I was a Consultant to Senator Sam J. Ervin's Subcommittee on Separation of Powers, Senate Committee on the Judiciary, and was Chief Consultant to the Senate Select Committee on Presidential Campaign Activities (the Watergate Committee).

3. *Constitutionality of H.R. 3658:* Whether the bill is lawful under the Constitution is essentially a question of separation of powers. Although the Constitution contains no express provision setting out in detail the relationships between Congress and the Executive, it is clearly within the spirit of the fundamental law that law-making is a shared power. All the national government, for that matter, involves shared powers, for "separation of powers" is really a misnomer: The Constitution establishes "separate institutions sharing powers"—quite a different thing. This means that no one branch has uncontrolled power; each branch is subject to some sort of check from one or both other branches.

That much is elementary learning. But what emphatically is not elementary is the extent to which Congress may condition delegations of power to the public administration so as to retain what has come to be called the "legislative veto." There are, of course, numerous statutes that do attempt to impose a legislative veto upon administrative actions; and I understand that the Subcommittee has been furnished with a complete listing of them. I do not know of any Supreme Court case on point (the closest is *Springer v. Philippine Islands*, 277 U.S. 189 (1928)—hardly a precedent, and surely not a *binding* precedent, in present context). Accordingly, resort must be made to fundamentals.

The following matters seem to be relevant: (a) Congress, under Article I, has the law-making power; (b) Congress, however, can delegate its law-making power; (c) delegations under the *Panama Refining* and *Schechter Poultry* cases in 1935, cases which have never been overruled expressly, must be canalized within recognizable boundaries; they must, that is, conform to an intelligible principle so that it can be determined if the delegate (the administrative agency) is acting within the scope of its lawful powers or, conversely, is acting *ultra vires;* (d) the Supreme Court, however, has validated delegations made under the loosest of standards or even under no standards at all, with the result that the "intelligible principle" doctrine has in fact been overruled *sub silentio;* see Davis, Administrative Law Treatise chap. 2; (e) Under Article I, Section 8, Clause 18 of the Constitution, Congress has power to make all "necessary and proper" laws not only to carry out its own delegated powers but also, in the second and often forgotten second part of Clause 18, the powers vested in other officers and departments of the national government; (f) the "executive function" or "executive power," under Article II is noteworthy for its silences; however, pursuant to the *Steel Seizure Case* of 1952—the leading judicial statement—executive powers must be in accordance with the express provisions of the Constitution or with a statutory grant of power (see the opinion for the Supreme Court by Black, J.); (g) there is no power in the President to direct or control decisions of the so-called independent regulatory commissions, but the Office of Management and Budget does have certain budgetary and other powers over the commissions; (h) under Article I, Section 7 of the Constitution "every order, resolution, or vote to which the concurrence of the Senate and the House . . . may be necessary . . . shall be presented to the President . . ." for his approval or veto; to my knowledge, attempted legislative vetoes have never been litigated under this section, but a number of Presidents, and their Attorneys General, have taken the position that a requirement for submission to Congress of proposed

executive actions is invalid under the doctrine of separation of powers; (i) possibly it could be argued that signature by the President on a bill containing a legislative veto provision, such as H.R. 3658, could be construed as a waiver by the President of any objection to the "legislative veto"—provided that the presidential approval is not accompanied by a statement expressing reservations about the legality of the legislative veto; (j) standing to challenge judicially a refusal to adhere to the terms of H.R. 3658 would presumably be available to anyone adversely affected, within the terms of the Administrative Procedure Act, by agency action; (k) administrative rule-making is necessary if the urgent tasks of government are to be accomplished.

Balancing the foregoing considerations, it is my opinion that H.R. 3658 is constitutionally valid. The main, perhaps only, barrier is (h), above, dealing with Article I, Section 7 and the President's veto power. Since H.R. 3658 is a relatively small step, dealing only with administrative rules carrying criminal sanctions, it seems likely that it would be upheld, when and if challenged in the courts. I see no reason why the bill should be invalidated, particularly since Article I, Section 8, Clause 18 gives express authority for Congress to pass such a statute. If Congress can legislate—and this no one denies—to impose criminal sanctions, then it can condition any delegation of power to an administrative agency. There is a doctrine of unconstitutional conditions in constitutional law, but by and large that refers only to conditions which run afoul of *express* constitutional provisions; H.R. 3658 does not do so, for at most it sets up a system of possible partial repeal of a statute. Congress has unrestricted power to repeal any statute.

4. *Wisdom of H.R. 3658:* The basic criterion is whether such a bill will unduly or unreasonably hamper the effective operation of the administrative process. It is difficult to see how it could. Speed, the myth to the contrary notwithstanding, is not characteristic of the public administration. Several decades ago, principally in the 1930s, high hopes were expressed that administrators could and would act expeditiously, but those hopes—for several reasons, not all attributable to the bureaucracy—have not been fulfilled. There is, in addition, a built-in safety valve permitting rapid action in the provision allowing "the agency for good cause" to act without regard to the subsection 553(b).

Congressional review of proposed rules would, furthermore, effect a measure of accountability not now present upon the public administration. Unaccountable power is irresponsible and contrary to the basic values of American constitutionalism.

There can be little doubt about the wisdom of H.R. 3658. (Cf. Davis, Discretionary Justice (1969).)

5. *Other matters:* The following relatively minor, but nonetheless important, matters merit inquiry:

(*a*) "Criminal sanction" is not defined. Section 3(f)(2) uses the term "criminal penalty," but does not define it. The line between civil and criminal punishment is not clear. Cf. *Kennedy v. Mendoza-Martinez*, in which a divided Supreme Court held that a deportation order was punishment in the constitutional sense, requiring notice and hearing and the rest of the elements of due process. The point is that H.R. 3658 should define the term.

(*b*) The provision for "thirty calendar days of continuous session of Congress" should, in my judgment, be changed to deal with: (a) a designated number of legislative days; and (b) times when Congress is in recess. What happens, for example, when Congress, as is its wont, takes the month of August off? And does H.R. 3658 contemplate Congress being in session all year? If not, then provision should be made for lengthy adjournments or recesses. Furthermore, does a brief recess—say, of three or four days—count in the thirty days? The point became important a few years ago when President Nixon pocket-vetoed some bills over the Christmas holiday. See Kennedy v. Sampson (U.S. Court of Appeals).

(*c*) Since the procurement activities of the Pentagon are so important, should it not be desirable to amend Section 553(a)(1) so as to make that part of "military" functions subject to H.R. 3658. The same might be said for certain functions of the State Department. That suggestion of course relates to the "contracts" exception. A question that should be explored here is whether the list of businesses barred from bidding on government contracts, etc.—the so-called "blacklist"—is not in the nature of a criminal penalty. In other words, there are sanctions other than fines, etc. that should be examined. CF. *United States* v. *Robel*, on the industrial security program of the Pentagon; also *Greene* v. *McElroy* and *United States* v. *Greene*, on the same matter.

(*d*) What does "good cause" mean? and what does "contrary to the public interest" mean? Isn't it about time that Congress either: defined such terms itself, within broad parameters or required the public administration to do so by way of an interpretative rule? I so believe.

(*e*) How is H.R. 3658 to be monitored? Can Congress rely on the bona fides of the public administration to faithfully execute this law? I am inclined to doubt it. Without impugning the integrity of anyone, Congress cannot proceed on the assumption that merely because a law is passed it will be enforced or obeyed. This means, to me, that some monitoring agency should be established—either Congress itself, or perhaps the General Accounting Office, or some new institution. In this latter connection, Senator Hartke has had a bill for some years calling for establishment of a lawyer for Congress. Perhaps the monitoring function could be made a part of the duties of such an office, should Congress create it. That it should be created is to me obvious, for who, for example, is to litigate separation of powers disputes for Congress? It will not do each time to hire outside counsel. CF. the Impoundment Control Act of 1974, 31 U.S.C. Secs. 1401 *et seq;* Sec. 1406 charges the Comptroller General with the duty of instituting court action when impoundments occur.

AMERICAN DENTAL ASSOCIATION,
December 4, 1975.

HON. WALTER FLOWERS,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I am writing to express the views of the American Dental Association concerning the variety of proposals before your subcommittee which would provide for Congressional review of administrative rules and regulations or would otherwise amend the Administrative Procedures Act to provide more meaningful public and other input into the development and promulgation of administrative rules and regulations. I would appreciate having this statement inserted as part of the subcommittee's record on these proposals.

The dental profession is keenly aware of the concerns which have given rise to this legislation and is in full sympathy with the intent of these bills. The last ten years have seen an unprecedented increase in the development of major legislative proposals which involve the health care field. These programs have involved virtually every aspect of health care in the United States. Very often this legislation has been extremely complex. These laws will have an enormous impact on the way in which health care is delivered in this country. Obviously the implementation of these programs has been of crucial interest to the dental profession. This implementation has been accomplished primarily through the development of rules and regulations by various agencies of the Department of Health, Education and Welfare.

Your committee already has been presented with numerous instances of abuse of regulatory authority. Increasingly, the result of this abuse, whether it is in the form of regulations which are in opposition to Congressional intent or regulations which exceed the Congressional authority has seen challenges to these regulations through the courts. In a large number of these suits the final verdict has been against the Department of HEW and its regulations. A prime example is the Social Security Amendments of 1972 (P.L. 92-603), one of the most controversial health laws ever enacted. Its implementation has been interrupted on several occasions due to lawsuits.

We are firmly convinced that much of this delay, controversy and abuse in the implementation of federal legislation could be avoided if there were more satisfactory procedures for comment on federal rules and regulations and if there could be an intermediate step in particularly significant cases allowing for Congressional review of the federal regulations. At the same time, we understand the potential complexity involved in Congressional review of the regulatory activities of the Executive branch of government. Accordingly, we feel that the emphasis for amendment to the Administrative Procedures Act should be on making the opportunities for public review and comment more equitable. However, some form of Congressional review should also be available as a final step before court action.

In particular, we would urge that the Administrative Procedures Act be expanded to apply to all proposed and final rules and regulations, including regulations that involve public property, loans, grants, benefits, or contracts. These

are the kinds of regulations which most often apply to health laws. They are presently excluded from the Administrative Procedure requirements. In addition, we would urge that the comment period allowed on all proposed rules and regulations be at least 60 days with a procedure established for an extension of at least 30 days in the case of particularly complex matters. Emergency authority for a shorter comment period should be retained but should be restricted to apply in only very limited situations.

In addition, we think it is imperative that when final rules are published which differ significantly from the regulations as they were initially proposed, these so-called final regulations should also be subject to a reasonable comment period before final promulgation. Revised regulations should be treated as if they are newly proposed. We also believe there should be imposed upon the agencies a requirement to describe more fully the rationale applied in cases where suggested comments are not followed. We believe this can provide a clear understanding of the regulations as developed by a particular agency.

The issue of Congressional review is exceedingly complex. We are concerned that a provision authorizing Congressional review of all regulations could become cumbersome. At the same time, there are regulations which should be subject to Congressional review. We would urge that all regulations be subject to potential Congressional review and not just those which would impose a criminal sanction for their violation. However, in order to prevent potentially spurious referrals in order to delay the implementation of a regulation, we feel that such referral should not occur unless at least a given percentage of the members of the committee which drafted the original legislation vote for such referral. Perhaps this percentage should be fifty percent or maybe less. However, referral should not be allowed on the basis of one member's request.

As indicated above, we do have great concerns with the potential for abuse of the regulatory process and the effects this can have on the dental profession as well as on all aspects of our lives. We strongly urge support for measures which would broaden the ability of the public to react to proposed federal regulations. The provisions of H.R. 10301 are compatible with our concerns and would make significant improvements in the procedures required for implementation of an agency's rule or regulation. In addition, we do support a level of review authority in the Congress as a means of assuring that Congressional intent is followed in the rule making process.

We thank you for this opportunity to present our views to the subcommittee.

Sincerely yours,

PAUL W. KUNKEL, Jr., D.M.D.,
Chairman, Council on Legislation.

BOARD OF SUPERVISORS, COUNTY OF LOS ANGELES.
Los Angeles, Calif., October 24, 1975.

Hon. GEORGE E. DANIELSON,
Congressman, 30th District,
879 South Atlantic Boulevard,
Monterey Park, Calif.

DEAR GEORGE: Thank you for your letter of October 14 advising that the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee is holding hearings to determine Congressional action in the area of administrative rulemaking. I commend you and the members of the Committee for undertaking this most necessary action.

We in local government are becoming more dependent on various funds allocated by the Federal government. These, of course, include Federal Aid Highway funds, housing and development funds, welfare, revenue sharing, in fact funds in almost every area of local concern.

This increasing dependence of local government requires constant vigilance by both the local officials and the Congress of the United States. We at local government must be concerned with the propriety and complete local integrity in the expenditure of these funds in accordance with the intent and purpose of the Congressional designations. You and your colleagues must, as you have expressed to me, be concerned that you do not detroy or usurp existing governmental structures.

There is a delicate balance that must be maintained in the administration of Federal Aid local programs. I am sure that these programs can be properly

administered and their objectives achieved under our existing forms of government. If any adjustments in the governmental structure are required, I am sure that Federal, state and local legislators exclusively should implement and carry out such adjustments.

Our concerns about the Federal bureaucracy are well outlined in Red Tape III, which was developed jointly by representatives of the cities, counties and others involved in the Federal Aid Highway Program. That document and my letter of September 30, 1975, outlines my individual concerns about the Department of Transportation. I am convinced that their bureaucratic, dictatorial attitude can only be contained by Congressional action. I sincerely hope that you and your colleagues will take prompt and effective legislative action to restrain and contain this usurping of Congressional authority by federal agencies.

In your letter, George, you expressed doubts as to the propriety of Congressional review of administrative rulemaking. In my opinion, this kind of review is essential. Experience indicates that Federal administrative bureaucrats apply their own interpretations to laws enacted by Congress. To me it appears proper for the Congressional committee who instituted the concept and enacted it into law to review the regulations controlling that law to insure compliance with Congressional intent.

If these comments can make a contribution toward resolving this problem, I would be pleased if you would put them in the record as I feel very strongly about this matter.

Very truly yours,

PETE SCHABARUM,
Supervisor, First District.

STATEMENT OF MCNEILL STOKES, GENERAL COUNSEL OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

Mr. Chairman and Members of the Subcommittee: I am McNeill Stokes, General Counsel of the American Subcontractors Association, which is a national association having a membership of approximately 5,000 subcontractors and represents subcontractors in all subcontracting fields. Our firm also represents on a regular basis several hundred individual clients who are contractors in the construction industry. On behalf of the American Subcontractors Association and as an individual lawyer who often represents contractors in the construction industry subject to numerous federal regulatory schemes, I support the passage of H.R. 3658, H.R. 8231, or similar legislation which may result from the deliberations of your subcommittee.

A clearly discernible fourth branch of government, the administrative rulemakers and adjudicators and regulatory agencies created by Congress, has evolved in the recent past with alarming swiftness. Even more alarming is the future growth of this "branch" of government which is destined to be if Congress does not take swift action to control it. We do not argue with the need for the administrative process to fill in the gaps left in the broad regulatory language of Acts of Congress by necessity. However, we do emphatically feel that the official in charge of implementing Congress' legislative will through administrative rules should be directly responsible to Congress, and thereby more directly responsible and answerable to the people of the United States.

We have seen the results of this lack of responsibility and congressional control in the administrative rulemaking which has taken place by the Department of Labor under the authority of the Occupational Safety and Health Act of 1970. Employers must comply with the safety and health standards which have been promulgated under this law by the Secretary of Labor and have thereby become the "law of the land." The vast majority of these standards were hurriedly passed, within a matter of weeks, without any consideration as to their practical, economic or safety effect on employers. The Secretary of Labor incorporated approximately 100,000 safety regulations from over 300 "consensus" standards with no adequate investigation into their complexity or intended applicability. An unbelievably extensive library would be required of every employer in the United States in order to comply with even the standards applicable to individual employers.

Moreover, even if they had all of the applicable standards available, the employers cannot understand what is required in many cases. Many of the standards appear absurd from a safety or engineering viewpoint. For example, one of our

clients in Atlanta, Georgia, received a citation and proposed penalty for violating a standard prohibiting putting ice in direct contact with ice water. This standard has subsequently been eliminated, but as ludicrous as this example seems, it is a very serious matter to the employer who is on the receiving end of the penalties assessed by the Federal Government, who is forced to prove himself innocent at great expense.

The cost to employers in the United States to come into compliance with the safety and health standards promulgated under the Occupational Safety and Health Act is, and will continue to be for many years to come, staggering. The Secretary of Labor has turned the Occupational Safety and Health Act through his administrative rulemaking power into a national building code containing the most stringent, and in many cases completely unnecessary, building code requirements ever promulgated. Most importantly, existing structures do not comply with many of the standards for types of building construction and construction material. Except for the national electrical code, the Secretary of Labor did not even see fit to include a "grandfather clause" which would exempt existing buildings. Consequently, practically every commercial building in the United States needs to be substantially modified, at a cost in the billions of dollars, to come into compliance with the standards promulgated by the Secretary. Yet, these same buildings complied with all of the local building codes and standards at the time of the construction of the building.

The standards incorporated by the Secretary are not only extremely complex and in many cases completely out dated, but many are also unbelievably vague, laying no standards by which an employer can govern its conduct other than the determination of the inspector in the field. Such a result was clearly foreseeable from OSHA's adoption into law of the voluntary consensus standards which represented goals, not mandatory practices. As Commissioner Robert Moran of the Occupational Safety and Health Review Commission has stated:

> Few, if any, occupational safety standards written prior to 1971, were meant to be mandatory. They were goals, which even the people who participated in the writing of the ANSI and NFPA standards did not pretend to live by. Both organizations included specific disclaimers in each publication of their standards. . . . It's no wonder that so many of them look silly, or down right arbitrary, or totally unenforceable when, in 1971, they were hastily adopted by OSHA as the law of the land.

Roofing contractors certainly have found out what Commissioner Moran is talking about. They have been cited hundreds of times and assessed thousands of dollars for failing to adequately guard the edges of an "open-sided floor". Yet, roofers can tell you that they have never worked on a floor in their lives. In a series of cases in the Courts of Appeals being handled by our firm, the lead case being *Diamond Roofing Company, Inc. v. Secretary of Labor, et al.*, the issue to be determined by the Court is whether a "roof" is a "floor". In the meantime, the Secretary of Labor has stepped up his efforts in citing roofers under this standard, even to the point of charging willful and repeated violations. This has occurred without the first decision by any court in the land ruling that a "roof" is a "floor", and without any reference to the word "roof" in the standard promulgated by the Secretary of Labor.

A favorite regulation to cite in any situation which is not specifically covered by another regulation is the "personal protective equipment" standard. The "personal protective equipment" standard in the general industry standards, which is one of the most frequently cited OSHA standard, requires that "Protective equipment . . . shall be . . . used . . . wherever it is necessary by reason of hazards of processes or environment." Among the hazards for which OSHA has used this standard to cite employers are: muriatic acid, cut lumber, logs, paint, electrical power lines, pinion gears, slaughter house eriscerators' knives, auto parts, Stoddard solution, boxes of freight, wheels on material handling equipment, and reciprocating power saws and ash.

Protective equipment required by this standard according to OSHA inspectors include: ordinary industrial coveralls, hard hats, rubber aprons, spiked "caulk" boots, safety shoes, a counter-weight door, and a tire-changing cage. Commissioner Moran has observed that "If OSHA truly believes that tire cages, spiked boots, counter-weight doors, and steel mesh gloves are necessary to protect employees from injury, then it ought to come right out and say so."

Some of these abuses in the standards promulgated by the Secretary of Labor in this field can be remedied to some degree by legislation currently proposed in the Congress, i.e., requiring economic impact statements for proposed regu-

lations, requiring grandfather clauses for existing buildings or machinery, providing for exceptions to the standards in cases when it can be demonstrated that the regulation is not applicable to a particular work situation. Further, of course, court decisions will help shape a reasonable interpretation and application of the standards promulgated by the Secretary of Labor. However, these remedies are make shift, after the fact remedies which would not be necessary if the federal agency did not have the authority to wholesale promulgate regulations with no prerulemaking control by Congress or the courts. Further, the Secretary of Labor under the Occupational Safety and Health Act has also not been amenable to receiving industry input into the development of standards, which is another key problem with the unbridled authority given to the administrative agencies.

Our firm recently handled a case in which the National Roofing Contractors Association challenged the Secretary of Labor's roofing regulation which was adopted with the advice and consent of the statutory Construction Safety Advisory Committee, set up by Section 7(b) of the Occupational Safety and Health Act. In granting the Secretary of Labor the widespread powers he has under OSHA, Congress required in the Act that an advisory committee be set up which " . . . shall include among its members an equal number of persons qualified by experience and affiliation to represent the viewpoint of the employers involved. . . ."

Despite the fact that every one of the persons representing construction employers on the committee during the promulgation of the roofing regulation in question was affiliated with a general contracting firm, the Secretary failed to appoint a roofing subcontractor representative or any type of subcontractor representative at all, which were the only contractors affected by this regulation. General contractors hire out roofing work and neither they nor any of their employees are involved in roofing work; therefore, in the terms of the statute, a general contractor representative is neither qualified by experience nor by affiliation to represent the viewpoint of roofing subcontractors.

Nevertheless, the Secretary of Labor denied the roofers their statutory entitlement to representation, the Court of Appeals for the Seventh Circuit by a two-to-one decision denied the National Roofing Contractors Association's challenge to the regulation because the court felt that no prejudice to the roofers had been shown, and the Supreme Court declined to grant certiorari to review the case. The factual record clearly supported the standard sought by the roofers and did not support the standard which was eventually promulgated, but because of the lack of direct representation in the rulemaking process by interested parties, the Secretary of Labor promulgated a harsh and unrealistic regulation and, because of the strict standards of judicial review of administrative rulemaking, the courts were effectively powerless to remedy the situation.

The horrible consequences of uncontrolled administrative rulemaking are classically shown in the experience of the administration of the Occupational Safety and Health Act, leading to the result of normally law abiding citizens being economically and technically unable to comply with the Secretary of Labor's standards and therefore having to take the alternative of defying the law. This ultimately can only have the effect of undermining voluntary compliance with the regulations and respect for the law, creating a clearly unhealthy situation.

Congressman Levitas, the sponsor of H.R. 3658, has stated on the floor of the House that "This bill is not the final answer to administrative and bureaucratic problems. It is a first step that needs to be taken." In fact, we note one problem with the legislation as currently proposed which we would urge the subcommittee to consider carefully and amend. That problem concerns the requirement that the administrative enforcement scheme must be administered by means of criminal penalties in order for it to be subject to the requirements of the Act. First of all, there is the question of just what constitutes a "criminal penalty", which is the main issue in a constitutional attack on the Occupational Safety and Health Act of 1970 currently being waged by our firm in the cases of *Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission, et al.*, a case recently decided in the Third Circuit U.S. Court of Appeals, and *Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission, et al.*, a case recently decided in the Fifth Circuit U.S. Court of Appeals. We are presently petitioning the United States Supreme Court to grant a writ of certiorari and review these constitutional issues. OSHA says that its civil penalties are not "criminal" because they are labeled "civil". We think that the

law is clearly that such penalties or fines are "criminal" if they are penal in nature and effect.

Assuming, however, that the label controls, I think that the passage of a bill such as H.R. 3658 with the "criminal" provision may set off a pell mell rush by administrative agencies to convert any criminal enforcement schemes to civil penalties schemes, so as to exempt their rulemaking from congressional control. In researching the law for *Irey* and other OSHA cases, we have discerned an unmistakeable recent trend toward civil penalty statutes, with the express intent to make enforcement of administrative regulations "easier". Good examples of this trend are the 1972 amendments to the Shipping Act, and the 1974 amendments to the Child Labor Standards under the Fair Labor Standards Act.

Since it is our position that all monetary penalties, be they "civil" or "criminal", exact punitive and vengeful fines from employers for wrongdoing, I feel that the excesses which the proposed legislation before this subcommittee is intended to control are equally undesirable in situations where only civil penalties are exacted for violation of administrative regulations. Therefore, I would recommend that this section of the bill be changed to provide "(a) the violation of which subjects the person in violation to imprisonment of any monetary fines or penalty."

The Third Circuit Court of Appeals in the *Irey* case expressed extreme reservations about Congress having failed to provide full judicial review of OSHA enforcement actions. They stated in part "We perceive no over-riding consideration which favors the congressional policy of recent years to insulate administrative adjudication from the open and searching examination that full judicial review provides. The necessity for an administrative agency on occasion to submit its determination to the scrutiny of a jury of citizens would be a helpful and disciplining experience." Doubtless, this Court and many others as well would welcome the same occasional searching examination by Congress of administrative regulations *before* the agency goes out and enforces them against the public.

Therefore, the American Subcontractors Association and I heartily endorse legislation giving the Congress the power to veto or otherwise control administrative rules and regulations, which in many cases have proved solely to hang another bureaucratic millstone around the American businessman's neck without any meaningful benefit. Embodied in the principles of the Magna Carta, the Declaration of Independence, the Constitution of the United States, and its Bill of Rights, is a basic concept that government must be by consent of the governed and that due process of law is essential. Yet, today the fact is that vastly more rules are made by the decree of an unelected bureaucracy than by the elected members of Congress. We urge the Congress to take steps to reverse this situation immediately, and we endorse H.R. 3658 and similar legislation as a necessary first step toward accomplishing that goal.

FEDERATION OF AMERICAN HOSPITALS,
Washington, D.C., November 13, 1975.

Hon. WALTER FLOWERS,
Chairman, Subcommittee on Administrative Law and Governmental Relations, House Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the members of the Federation of American Hospitals, I would like to submit a statement for insertion in the record in connection with your recent hearings on Congressional control of administrative rulemaking. The Federation of American Hospitals is the national association of investor-owned hospitals, an industry with 1,060 hospitals and over 105,000 hospital beds.

The Federation is in complete accord with the intent of the various administrative rulemaking measures which have been under the consideration of your Subcommittee. These bills have attracted perhaps the largest number of cosponsors of any legislation introduced so far in this Congress. We believe that this response is symptomatic of the growing Congressional disenchantment with the executive departments and agencies which now constitute a regualtory levia-

than. This disenchantment is also reflected in the increasing number of probing Congressional oversight hearings as well as a willingness to subpoena and call to task department heads.

Ever since 1965, with the advent of Medicare and Medicaid, the health care industry has been even more keenly aware of bureaucratic encroachments into virtually every aspect of the organization and delivery of medical services. While it is natural to expect that the federal government would wish to exert controls over expenditure of federal dollars, increasingly we have seen broad legislative intent interpreted in an arbitrary, if not contradictory manner, through the issuance of federal regulations. For example, the law governing the Medicare program provides for the reimbursement of reasonable costs to hospitals and subsequent regulations define those expenses considered to be allowable for reimbursement purposes. However, the regulations specifically exclude income taxes, as well as other legally required costs, that must be paid by investor-owned hospitals. This is clearly contrary to the legislative intent, and illustrative of a case in which the law has been supplanted by regulatory fiat.

Although I have acknowledged our support of the underlying principle of the administrative rulemaking measures—that of reaffirming the checks which Congress has traditionally been authorized to exercise in dealing with the administrative branch of government—I do so with a cautionary note. Congress is in the midst of grappling with a number of extraordinarily complex issues such as the economy, taxes, and energy—issues which by their very nature assume a top priority status. Pressing health issues such as manpower, appropriations, and national health insurance are also under consideration.

However, if Congress succeeds in passing a bill that permits control over the issuance of federal regulations, it could be counterproductive if members are continuously diverted from their legislative mandate in order to become a full-time watchdog. It is difficult to predict how cumbersome the procedures for the review of regulations would be. Nevertheless, I would like to suggest that a supplementary means of improving the relations between the Department of HEW and health providers, for example, would be a reaffirmation of the clear Congressional intent that industry advice and cooperation be sought by the Department. This was the basis for the creation of the Health Insurance Benefits Advisory Council (HIBAC) by Congress when Medicare was first established. The Federation believes that the Council's role in the regulatory process should be clarified and where appropriate, broadened.

We recommend that HIBAC be reconstituted as a 12-member advisory body, broadly representative of health providers, consumers, and third party payors, a size that we believe to be more workable than the present 19 members. The advisory council should meet more frequently and all proposed regulations affecting Title XVIII should be submitted to HIBAC thirty days prior to initial publication in the Federal Register. Any regulation which HIBAC determines to be contrary to the public interest or inconsistent with sound administration of the Medicare program should be reconsidered by the Secretary prior to initial publication. Whenever the Secretary rejects the advice of HIBAC, proposed regulations should automatically provide for a minimum sixty day review and comment period to allow careful examination by both Congressional committees and the health field. In this way, HIBAC could be an advisory body to both the legislative as well as the executive branch. This council approach could be modified and adopted for use in connection with other departments and federal agencies to assure administrative accountability and industry input.

Along with our colleagues from the American Hospital Association, we are concerned with the length of time allotted for public comment on proposed regulations. With few exceptions, a thirty day comment period is provided to the public following publication in the Federal Register of proposed regulations issued by the Department of HEW. This is totally inadequate in terms of allowing interested parties in the health sector to assess the regulations and form a thoughtfully reasoned response to them.

The health industry is regularly bombarded with proposed regulations and these are often of crucial importance not only to the institutions themselves, but to the millions of individuals for whom health care delivery is provided. A prime example is the issuance of Medicare and Medicaid regulations.

In order to assure that proposed regulations affecting health care are representative of sound public policy, it is mandatory that the public and the health sector as a whole, be given the time to respond with comments and constructive

recommendations For that reason, we recommend that the period for public comment be a requisite sixty days.

We believe that through a combination of efforts—entrusting HHBAC with increased responsibility, extending the public response to proposed regulations to sixty days, and continued Congressional review and oversight of these regulations—the working relationship between Congress, the executive rulemakers, and the public can be one of cooperation and mutual enhancement.

We appreciate this opportunity to express our views on this vital subject.

Sincerely,

MICHAEL D. BROMBERG.
Director, National Offices.
Federation of American Hospitals.

STATEMENT OF HON. MARJORIE S. HOLT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. Chairman and Members: I thank you for the opportunity to testify on the bills currently before the Subcommittee which would allow Congress to assert its proper role in retrieving rights which have been diminished by the excessive and often irresponsible uses of rule-making power by agencies of the Government. The abuse of this necessary power has compromised the health of the Republic and the freedom of its people. Congress must act immediately and substantially to restrict and to make responsible these excursions into extra-constitutional lawmaking without regard to the intent of Congress or the needs and rights of the American people.

Day after day, reports reach offices of Members of Congress detailing horrifying results of regulations applied to businesses, schools, and private individuals. Although these regulations have been published in the Federal Register, in spite of comment periods being advertised, the volume and the complexity of administrative rules are simply overwhelming our citizens. But I am also very much concerned about the quality and the propriety of many rules without reference to Congressional mandate, intent, or the wishes and needs of the American people.

Mr. Chairman, I will be brief and cite only one example to support my contention. Other Members and citizens will note the excesses of other agencies, but here I will focus on rules drafted by the Department of Health, Education, and Welfare defining for its Office of Civil Rights a comprehensive mission never contemplated by Congress. It will pursue "systematic discrimination," a term which places every aspect of school operations within the orbit of the Office of Civil Rights.

In the statement of purpose, HEW proposed to free the Office of Civil Rights from producing hard evidence of discrimination in individual cases. Instead, it would concentrate on manufacturing charges of "systematic discrimination" with statistics, interviews, and subjective analyses.

If recent experience is any indication, a school district could be accused of practicing racial discrimination if the calculus classes of its high schools contained insufficient numbers of black students, or if the percentage of black students disciplined exceeds their percentage of the school population.

Mr. Chairman, I will remind you that these rules come in spite, not because, of the basic law administered and enforced as a result of Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race or national origin in any federally-assisted program. It also contravenes Title IX of the Education Amendments of 1972, which prohibits discrimination by sex in educational programs receiving federal money.

These rules also run contrary to a recent court order governing relations between the Office of Civil Rights and the local school district of Anne Arundel County, Maryland, which I represent in Congress.

One does not find any appropriate limitations of the powers of HEW in these proposed rules of procedure. Indeed, HEW is attempting to achieve through rule-making what the court would not allow it to achieve in the Anne Arundel County case.

Mr. Chairman, we must curb these arbitrary and capricious exercises of power by HEW and by the dozens of other agencies which I suspect are equally contemptuous of Congress, the courts, and the American people. Authors of those rules should be called to task, agencies should be able to be enjoined, rules

should be closely reviewed by impartial Congressional oversight groups, and rules such as those I have described should be struck down.

Mr. Chairman, I urge swift and meaningful control of administrative rulemaking during your deliberations.

STATEMENT ON CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING, PRESENTED BY THE AMERICAN PROTESTANT HOSPITAL ASSOCIATION, OCTOBER 29, 1975

I am Charles D. Phillips, Ed. D., President of the American Protestant Hospital Association. The American Protestant Hospital Association represents some 165 Protestant Affiliated health care institutions, homes for the aging, agencies and 1600 personal members nationwide. The APHA's national office is located at 840 North Lake Shore Drive, Chicago, Illinois 60611.

THE PROBLEM

First, I would like to present a brief historical overview of the development of administrative rulemaking which affects hospitals. Shortly after the close of World War II, the Congress in its wisdom determined that this country had a shortage of hospital beds and that a need existed for newer and more modern hospitals. As a result The Hospital Survey and Construction Act of 1946, popularly known as the Hill-Burton Act, was enacted, providing governmental assistance through loans, grants, and loan guarantees to entities wishing to build hospitals.

Along with the construction assistance came the expected repayment provisions. However, unexpected repayment provisions were also promulgated, consisting of meticulous, detailed, ambiguous and sometimes contradictory administrative rules and regulations. The fourth branch of government was founded.

The next major development in administrative rulemaking which most crucially affected hospitals, and continues to do so today, was the advent of Medicare and Medicaid in the mid-sixties. The original act and each successive amendment has brought a new wave of regulations, some of which have bewildered and practically overwhelmed hospitals as they sought to implement them. An enormous set of reporting forms have been issued to assure compliance with the regulations, necessitating large increases in hospital administrative, accounting and clerical staffing in order to keep pace. It seems that at about the time the hospital field becomes familiar with the forms, they become inoperative through errors from the agency personnel in the Department of Health, Education, and Welfare or because of new amendments to the laws.

As an example, I cite the 1972 amendments to the Medicare-Medicaid law which created 90 new sections which then had to be implemented through rules and regulations written and administered by administrative agencies of DHEW. Some of the 1972 Amendments are yet to be implemented.

DHEW grows larger, but still some agencies decry their lack of adequate staff to meet Congressional deadlines for implementation. Often the amendments which are implemented fail to conform to Congressional intent. Regulations are withdrawn and rewritten, resulting in confusion, useless expense and the inability of hospitals to develop programs tailored to meet the needs of their service areas.

The passage in the early part of this decade of the Economic Stabilization Act resulted in another deluge of regulations and reporting forms. The health care industry was as stringently regulated as any other sector, and in fact, kept under control longer than most other sectors of the economy. The capabilities of hospitals to continue to operate were so nearly strangled by the regulations that the industry was forced out of desperation to seek judicial relief.

The American Protestant Hospital Association, after exhausting every administrative procedure, filed suit against such "arbitrary and capricious" treatment by DHEW and the Cost of Living Council. The nursing home industry won a similar suit, and APHA and other hospital groups were moving toward judicial success when the Congress allowed the Act to expire in April of 1974.

Another example of administrative rulemaking which reflects the problems hospitals continue to experience was the decision earlier this year by DHEW to withdraw the 8½% nursing salary differential from the Medicare reimburse-

ment to hospitals. Again the hospital industry was forced to resort to the courts to block the implementation of a regulation which we believed to be arbitrary and capricious and outside the intent of Congress. The court ruled for hospitals.

Drafters of the Administrative Procedures Act of 1946 may not have envisioned such a profusion of highly technical rules, guidelines and regulations that have come to plague rather than promote those to whom they apply. The Department of Health, Education and Welfare alone accounts for some 40% of all federal assistance. The need for more efficient implementation procedures has now been recognized by Congress as indicated by the number of bills recently introduced which attempt to deal with the problem.

LEGISLATIVE PROPOSALS

Now I want to call your attention to some of these proposed legislative solutions to the problems of administrative rulemaking. Do they address the concerns of hospitals? Do they apply to the Department of Health, Education and Welfare and its 40% of all Federal assistance.

H.R. 3658, sponsored by Rep. Elliott Levitas, and S 1678, the Senate counterpart sponsored by Sen. Abourezk, provide that when certain Administrative rules are published by an Agency in the FEDERAL REGISTER (Administrative Procedures Act of 1946, Section 553), the rules could *not* take effect for 30 days. During that time, the House or Senate could disapprove the regulations. Congressional action could be extended to sixty days under some circumstances. If either the House or Senate disapproved, the regulations would be blocked. On the other hand, if Congress did not act, or failed to adopt a disapproving resolution, such action would not be construed as approval. Thus, future litigation would not be precluded.

As far as hospitals are concerned, these proposals are limited. One, the bills do not apply to regulations related to loans, grants, benefits or contracts and would therefore exclude oversight of many HEW regulations. Two, the bills cover only regulations "the violation of which subjects the person in violation to a criminal penalty". HEW regulations do not carry such a penalty.

H.R. 8231, introduced by Rep. Del Clawson, and Senator Brock's similar bill, S 2258 would place *all* proposed regulations before Congress for 60 days during which time a disapproving resolution could be passed. The ambitiousness of this approach is a limitation. Can the Congress of 535 persons and thousands of staff do what the administrative agencies and bureaus can not do with their hundreds of thousands of personnel. Just the monitoring agency of Congress would have to be massive.

Finally, H.R. 2277, sponsored by Rep. John H. Heinz, would establish a study commission to make an overall cost-benefit analysis of all federal regulations and to report its recommendations to Congress within a year. This approach is limited in that it does not address the question of how to tailor regulations to Congressional intent.

LEGISLATIVE SUGGESTIONS

As pointed out above, each of the legislative proposals is limited as regards the hospital industry. The solutions appear to be somewhat analagous to emission control devices on automobiles. They are all "add on" approaches. To redesign the engine may be more appropriate. This would mean some very basic changes. One, the statute could provide generous implementation dates. Providing much more time for the administrative agency to examine and analyze the intent of a law would greatly increase its chances of being implemented appropriately, especially those requiring highly technical regulations. Two, provision could be made for input from and "prior review" by those affected by the regulations. An affected industry, if permitted, can augment and assist the administrative agency in question, with, of course, the administrative agency ultimately making an interpretation. Three, legislation which appeared to be potentially difficult to interpret could be given more "congressional intent".

Sponsors, supporters, committee and floor leaders of a given bill could attempt to increase their colloquys for the record. Also, definitive statements regarding the intent of the bill could be read into the record.

It is realized that congressional review of administrative rulemaking is not conducive to instant and simplistic solutions. However, it is one that must be addressed in some form. The American Protestant Hospital Association is grateful

for the consideration being given to the problem by this Subcommittee and offers any assistance we may be able to provide to its members and their staffs.

AMERICAN HEALTH CARE ASSOCIATION,
Washington, D.C., October 30, 1975.

Hon. WALTER FLOWERS,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN FLOWERS: On behalf of the American Health Care Association, the nation's largest organization representing nursing homes and related facilities, I would like to commend you and your colleagues on the Subcommittee for your current series of hearings on proposals to provide a mechanism of regular Congressional review of administrative rulemaking.

The nursing home profession is one of the most thoroughly regulated sectors of our economy, with almost every daily operating procedure subject to Federal and State rules. Hence, Federal regulations, both good and bad, are of crucial concern to our 8,000 member facilities.

Regarding the legislation which is the subject of these hearings, H.R. 3658 and H.R. 8231, the AHCA is pleased to associate itself with the recommendations made to the Subcommittee by the American Hospital Association. In addition, the attached report contains a discussion and a series of recommendations regarding the rulemaking practices of DHEW for the Medicare and Medicaid programs. This report was the result of a National Symposium on Participative Management in Nursing Homes which was held at George Washington University in June of this year, jointly sponsored by AHCA and GWU. The views expressed represent the concensus of workshops made up of Federal and State health and welfare officials, health providers and professionals, and representatives of consumer organizations. I believe their recommendations are sound and deserve your attention.

I would appreciate greatly if this correspondence and the accompanying report could be included in the record of the Subcommittee's October 29 hearing. Again, we salute you on your initiative in this important area.

Respectfully,

DR. THOMAS G. BELL,
Executive Vice President.

Enclosure.

SPECIAL REPORT: NATIONAL SYMPOSIUM ON PARTICIPATIVE MANAGEMENT IN NURSING HOMES

GOVERNMENT-PROVIDER LIAISON: HOW CAN IT BE IMPROVED?

(By Philip A. Gates, M.D., Bruce Thevenot, and Richard Wingler)

Workshop Eleven conducted a rigorous examination of a number of problems which were found to exist in the relationship between federal and state governments and nursing home providers in the administration of the Medicare and Medicaid programs. Of necessity the group had to focus on the process of rulemaking and regulatory enforcement, but these processes were judged in light of the desired outcome—quality patient care—and whether the adoption of rules fell within the realm of "possibility" versus "feasibility."

Corollary areas of discussion included practical problems of communication, the varied perceptions of nursing home care held by individuals involved in the process, fragmentation and confusion of administrative responsibility at the federal level, the financial and administrative demands on state governments, and the role of voluntary efforts by providers towards achieving program goals.

Federal Rule-Making

There was universal agreement among the panel members that regulations are indispensable in order to provide refinement of program objectives, assure quality performance and upgrade standards of care, and provide for fiscal accountability. However, federal rule-making and implementation procedures were found to be defective in many respects.

Most federal agencies, including the Department of Health, Education, and Welfare, develop policies and issue regulations under the general provisions of the Administrative Procedures Act of 1946. This act provides flexible guidelines governing rule-making procedures, including requirements for adequate public notice and opportunity for comment. The panel generally felt that the Administrative Procedure Act is essentially a sound and adequate statute which contains sufficient flexibility to allow the adoption of rule-making practices which can be tailored to conform to a variety of practical considerations. There was a strong consensus, however, that HEW has not for the most part availed of that flexibility.

In view of the recurring and complex regulations necessitated by Congressional amendment to the Medicare and Medicaid laws, several specific recommendations were offered which would greatly improve the regulatory process:

(1) *Longer public comment periods appropriate to the complexity of the proposed rule.*—Except for relatively inconsequential rule changes, a 60-day period should be the minimum with at least a 90-day period on more complex subjects. These changes would allow sufficient time for affected persons to evaluate the proposed rule and formulate reasoned responses.

(2) *Public hearings.*—When a substantial number of affected persons or organizations request this privilege, it was felt that public hearings could be extremely beneficial.

(3) *Field testing.*—Many regulations result in actions or programs of far-reaching impact. It was strongly recommended that field testing of regulations be undertaken prior to general implementation in order to ascertain any practical problems which might be encountered.

(4) *Timetables.*—To the greatest extent possible, even proposed regulations should be accompanied by a schedule setting forth time sequences for comments or hearings, publication of final rules, field testing and general implementation.

(5) *Full accountability of all public comments.*—Under the present system allowing written comments on proposed rules, there is no formal procedure to account for the disposition of such comments. The panel strongly asserted that persons who submit such comments should be entitled to some explanation of how their suggestions were taken into account in the adoption of the final regulation.

(6) *Cost impact statement.*—Proposed rules must include a statement of their anticipated economic impact. Such statements should identify not only the effect on the costs of patient services, but should likewise estimate overall funding and administrative requirements made necessary by the new regulation. Administrative cost estimates should address numbers of staff necessary to carry out the function as well as the dollar amount.

(7) *Summary of pertinent legislative history.*—In order that interested parties can be aware of the specific legal authority under which a regulation is being issued, the panel suggested that all regulations should be accompanied by a summary of pertinent legislative history. Such a summary should include relevant statutory excerpts or an entire act, if necessary. Appropriate Congressional reports associated with the enactment of the law should also be reprinted in conjunction with the regulation to show evidence of Congressional intent. These would include committee reports, resolutions floor colloquy, and joint conference reports.

(8) *Interface with state legislative action.*—Section 1901 of the Social Security Act clearly establishes the Medicaid program as a state program. It authorizes appropriations of federal funds "For the purpose of enabling each state, as far as practicable under the conditions of such state," to furnish medical assistance, rehabilitation and other services to eligible individuals.

In view of this fact, and inasmuch as the appropriation of state funds is also a requisite of this program, it is obvious the federal regulatory actions adopted for the Title XIX program must take into account the necessity for state actions.

A major problem exists in the lack of coordination between federal regulatory action and State legislative and administrative response. The panel suggests that a general policy be adopted under which any federal regulation requiring changes in state law or alterations of the state budgetary process should not be binding upon the state until after the next regular session of the state legislature.

Fragmentation of Administrative Responsibility

A major obstacle to the achievement of optimum federal-state provider liaison is the fragmentation of responsibilities, confusion and often utter frustration resulting from the multi-level administration of Medicare-Medicaid at the federal and state level. The panel examined the causes of this phenomenon at some length.

Some part of the problem can be attributed to human characteristics, a myriad of differing philosophies and perceptions about long term care, and bureaucratic inertia and "turfdom". In the long run, these obstacles can only be overcome by better knowledge, improved communications, and good faith.

However, the panel was also concerned about the more structured kind of confusion resulting from the sheer fragmentation of agencies and bureaus within HEW and some of the states.

It is interesting to note that Sen. Herman Talmadge, chairman of the Subcommittee on Health of the Senate Finance Committee, recently alluded to this problem in the context of announcing his intention to introduce legislation in the near future. According to the Senator, "In the federal administrative area we seem to have people running off in all directions making different decisions affecting the same doctor or hospital, or nursing home. We have the Medical Services Administration in the Social and Rehabilitation Service doing an inadequate job with Medicaid. We have the Bureau of Health Insurance of the Social Security Administration responsible for Medicare, and the Bureau of Quality Assurance responsible for Utilization Review and the PSRO program. In the forthcoming bill, provision will be made to establish a new combined administration for health care financing, headed by an Assistant Secretary for Health Care Financing, which would take the Medical Services Administration from SRS, take the Bureau of Health Insurance from SSA, the Bureau of Quality Assurance, and the Office of Long Term Care and combine them into one entity. This should at least achieve uniformity of policy and administration at the federal level as well as an ability to achieve accountability". (*Congressional Record*, June 20, 1975, p. S. 11123.)

Such a reorganization within HEW is entirely in line with a recommendation of the panel that all operating bureaus and associated offices having responsibility in the area of long term care be consolidated by legislative action if necessary. Further, it was predicted that following such a consolidation at the federal level, there would be an impetus for concomitant reorganization at the state level to achieve compatible realignment.

Viability of State Medicaid programs

Considerable attention was focused on the present and future capacity of the states to continue to exercise a major role in financing and administration of medical assistance.

It was stipulated that the efficiency and quality of state Medicaid administration varies widely. However, the alternative of direct federal administration was dismissed as unworkable and counterproductive.

Enforcement of regulations and application of procedures should be the responsibility of the state through certification and other appropriate process. Due to the considerable variations among state and local conditions, federal "uniform" regulations must necessarily be flexible, broad-brush, "goal oriented". Only upon evidence that a state is incapable of proper administration and accountability should HEW selectively intervene and assert a more aggressive role in the federal-state partnership.

It was the consensus that state participation in health delivery programs will continue. It was also the consensus that the states can continue to meet their financial commitments contingent upon:

Programs that meet basic needs—not basic wants.

Realism within programs.

Adequate, explainable rationale for policy.

Adequate lead time to implement program changes.

Assurance that the state will continue to have a degree of administrative autonomy and input into program design.

Voluntary Compliance

It was recognized by the panel that voluntary compliance on the part of providers is a goal devoutly to be desired and encouraged, but the regulatory and enforcement process must continue and be improved. There are techniques, however, such as multiple rating systems, accreditation, peer review programs, that can provide incentives for voluntary compliance and have an immense potential for enhancing quality of care. These techniques complement the regulatory process, and might, over time, ease the burden of rule-making and standards enforcement. Government, providers, and consumers all have a stake in fostering the development of voluntary-type actions which upgrade the quality of nursing home care in this country.

The participants in this discussion felt that many improvements are needed in order to streamline the relationship among the federal and state governments and the providers in order to achieve the best possible patient care in nursing homes. The foregoing recommendations can be a step in the right direction. The problems outlined by the panel must be confronted if the present programs are to meet their objectives. This need is even more compelling in contemplation of a national health insurance program.

STATEMENT OF AMERICAN NURSES' ASSOCIATION ON ADMINISTRATIVE RULEMAKING—NOVEMBER 10, 1975

The American Nurses' Association wishes to take this opportunity to submit its views on bills relating to Administrative Rulemaking. This Association is the professional organization for registered nurses representing approximately 200,000 registered nurses in the 50 states and 3 territories of the U.S.

The Association, along with other groups in the health care sector, has carefully reviewed and analyzed the four bills that have been introduced in both houses of Congress which would impose Congressional controls on administrative rulemaking. While we are appreciative of the fact that executive implementation of the law, is at times, inconsistent with original Congressional intentions, we question the potential effectiveness of a formal, shared administrative approach.

Among our concerns is whether the creation of a completely new system will not become even more unwieldly than the present one. At this point in time, each proposed rule is the responsibility of a sub-part of an executive office. It would appear from the burgeoning of the Federal Register in recent years, that the level of staff effort in these various departments involved in the promulgation and analysis of regulations must be quite sizeable. It is unclear to the ANA how any of the bills advocating the direct intervention of the Congress in this area would serve to streamline the current process. Rather, it seems that there would need to be a completely new staff of policy analysts housed within the Congressional domain to do its own reviews. None of the bills before the various committees for review suggest how they will reduce staff size or, in some manner, streamline the total level of effort needed to complete the rules process. In fact, we believe that those staff presently employed by the executive departments for rules development and analysis will be made more indispensable by this proposed legislation in that they would have responsibility for reacting to potential Congressional reactions ; in addition to those of the general public.

The Association understands that it is not the intent of the Congress, by this legislation, to react to each proposed rule proffered. However, seeing this right of additional review as another avenue for lobbying, it should surprise no one to find strong interest group pressures brought to bear on the legislative branch over issues that were originally regarded as relatively unimportant. The ANA feels that the potential for the inclusion of these types of issues for Congressional review has been underestimated by both the sponsors and co-sponsors of the various pieces of proposed legislation.

The American Nurses' Association does not see the legislated inclusion of Congressional review of proposed rules as an effective means to achieve the end desired. This is not to say that we are entirely unsympathetic with the cause, but only that another approach to enable the most cost-effective and pluralistic implementation of the law should be found. The ANA does see several steps that might be taken to begin this assurance by improving the effectiveness of the present general notice system.

First, we would recommend the extension of the standard comment period from thirty calendar days to 60 legislative days. Since the rulemaking process can never be fully separated from Congressional purview; and since Congress, through its members and their staff, provide assistance to many of their constituents wishing to respond to proposed rules, it only seems equitable that the calendar for comment periods should be based upon days when the Congress is in session and therefore capable of assisting in the rules development process.

Our second recommendation for improvement of the current process is to bring certain issues within the scope of the general notice system that are currently excluded from it; these would include loans, grants, benefits and contracts. We feel that it is important that policy determination in these areas becomes a matter of public record prior to implementation of such policies. We see these functions as distinct from those of internal agency management and personnel administration which should remain within the discretionary authority of the various executive delegates. A final suggestion would be to require agencies to resubmit final regulations as proposed rules if they differ markedly from their original drafts.

We hope that these comments will provide the basis for some revision of the current bills to address what this Association regards as a fundamental and vital concern for effective government; reflecting the need for the retention of some latitude in the exercise of administrative judgment by the various agencies of the executive branch of the government, coupled with the increased participation of the appropriate publics in the rulemaking process wherever possible. While not a perfect solution, we feel these suggested changes will go far toward striking an appropriate balance between these two concepts, thus augmenting the responsiveness and efficiency of the process.

We commend the Committee for consideration of this issue and ask that our statement be made a part of the hearing record.

PUBLIC WORKS AGENCY, COUNTY OF VENTURA,
December 1, 1975.

Subject: Enactment of H.R. 9801 as a measure to reduce Federal "red tape"—supporting resolution of Ventura County, Calif., Board of Supervisors.

Hon. PETER W. RODINO, Jr.,
Chairman, House Judiciary Committee,
Longworth House Office Building,
Washington, D.C.

DEAR CONGRESSMAN RODINO: Attached hereto is a copy of a self-explanatory letter which was addressed to the Board of Supervisors of Ventura County, California, at the behest of the Metropolitan Transportation Engineering Board. The MTEB is a technical transportation advisory committee with ties to the Southern California Association of Governments of which this County is a member.

The resolution which was submitted to the Board of Supervisors by the attached letter was adopted at their meeting of November 26, 1975.

It is presumed that similar resolutions are also being adopted by other local governmental agencies and that you will be receiving copies of their actions subsequently.

I have personally been active for some time as an appointee on several committees of organizations with Statewide membership functioning in the areas of County engineering and public works seeking the reduction of Federal "Red Tape". During this time, I have noted that efforts made by the Congress to curtail development of strangulating administrative regulations and processes through inclusion of national policy statements on the subject in the laws which set up the Federal programs have not proven very fruitful. Outside of such reviews and comments as may be made by individual members of Congress when the various proposed administrative regulations are published for comment in the Federal Register, it appears that there is presently no positive procedure for assuring Congressional awareness of the way in which the laws are being interpreted and applied by the Executive Branch of the Federal Government. Enactment of HR 9801 should provide such a procedure. Consequently, its enactment certainly appears to be highly desirable and worthy of support.

In following the suggestion of the MTEB, I am, therefore, forwarding the attached letter and resolution to you and other Congressional representatives who may be instrumental in bringing about the enactment of this bill or one similar to it.

Very truly yours,

A. P. STOKES,
Director.

Attachment.

BOARD OF SUPERVISORS, COUNTY OF VENTURA, STATE OF CALIFORNIA

(Tuesday, November 25, 1975, at 9 a.m.)

November 25, 1975.

From: Public Works Agency.
Subject: Resolution supporting enactment of H.R. 9801 by the U.S. Congress as a measure to reduce Federal "red tape."

STATEMENT OF MATTER FOR BOARD CONSIDERATION

For some time past, your Board has actively pursued a course of action seeking the reduction of Federal "Red Tape" in the regulatory controls imposed by the administrative agencies of the Federal Government on local agencies in the utilization of Federal fund allocations or grants under various Federal programs intended for local implementation.

In a letter of Nov. 12, 1975 addressed to me as a Regional Vice Chairman of the Metropolitan Transportation Engineering Board, a copy of HR 9801 was transmitted together with advice that it had the unanimous support of the Executive Committee of that organization, which is composed principally of the Directors of Public Works and Road Commissioners of Counties, Directors of Planning and Public Works and City Engineers of Cities, and the Director of Transportation Planning of SCAG in the metropolitan area in and around Los Angeles.

This Federal Bill is intended to establish a method whereby the Congress may prevent the adoption by the executive branch of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

If enacted, the bill could go a long way toward reducing bureaucratic "red tape" in Federal Programs and would prohibit Federal administrative officials from arbitrarily imposing their wishes on local officials.

The Metropolitan Transportation Engineering Board has urged the active support of local City Councils and Boards of Supervisors in favoring the enactment of this proposed legislation. It has further requested that local actions taken with regard thereto be disseminated to various Congressional representatives and other officials and organizations whose influence may help in obtaining its enactment.

A proposed resolution supporting the enactment of HR 9801 is attached for consideration by your Board.

REQUESTED OR RECOMMENDED ACTION

1. Pass, approve, and adopt the attached resolution and authorize its dissemination by the Director of Public Works to various Congressional representatives and other officials and organizations whose influence may help in obtaining the enactment of HR 9801.

A. P. STOKER,
Department Head.

Upon motion of Supervisor Grandsen, seconded by Supervisor Bennett, and duly carried, the Board hereby approved the above matter, this 25th day of November 1975.

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF VENTURA, STATE OF CALIFORNIA, EXPRESSING ITS SUPPORT FOR THE ENACTMENT OF H.R. 9801

Whereas, the Ventura County Board of Supervisors has for some time joined with other concerned representatives of the local electorate in efforts to obtain

relief from excessive and strangulating bureaucratic regulation of programs enacted by the U.S. Congress for implementation at the local level of government; and

Whereas, the Federal-Aid Highway Act of 1973 contains a statement of national policy for the minimization of "red tape" wherein the Secretary and all other affected heads of Federal departments, agencies, and instrumentalities for carrying out the statute and any other provisions of law relating thereto are directed to utilize measures to the maximum extent possible in issuing implementation procedures, to encourage the substantial minimization of paperwork and interagency decision procedures and the best use of available manpower and funds so as to prevent needless duplication and unnecessary delays at all levels of government; and

Whereas, despite the inclusion of such policy statements in the federal law, the proliferation of stifling bureaucratic control by the federal agencies administering the various programs thereunder has continued unabated as reflected in escalating local administrative costs; and

Whereas, it is apparent that Federal administrators, through the administrative process, are usurping the decision-making authority of the local elected officials under the guise of implementing Federal legislation and are causing additional "red tape" and exercising more stringent and complicated control than was intended by Congress; and

Whereas, despite provisions for local acceptance procedures in many of these administrative regulations which would theoretically reduce the involvement of Federal and State administrators in local program implementation activities, utilizing post audit procedures to assure proper expenditure of Federal funds allocated to the local agencies, very few, if any, such procedures have become evident at the local level with the sole exception of the Federal Revenue Sharing Program; and

Whereas, some measure of relief through direct action of Congress in reviewing the rules and regulations adopted by the various Federal agencies, such as the Federal Highway Administration and the Urban Mass Transportation Administration, is embodied in a bill, identified as HR 9801; and

Whereas, HR 9801, if enacted into law, would allow Congress to prevent the adoption of rules and regulations which are contrary to the law or inconsistent with Congressional intent or which go beyond the mandate of the legislation which those rules and regulations are designed to implement and, as such, could go a long way toward reducing bureaucratic "red tape" in Federal programs and would prohibit Federal administrative officials from arbitrarily imposing their wishes on local officials; Now, therefore, be it

Resolved, That the Ventura County Board of Supervisors recommends, supports, and encourages the enactment of HR 9801 to establish a method whereby Congress may prevent the adoption by the Federal executive branch, of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

Passed and adopted this 25th day of November, 1975.

JOHN K. FLYNN,
Chairman, Board of Supervisors,
County of Ventura.

Attest:

ROBERT L. HAMM, *County Clerk,*
County of Ventura, State of California.

[Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene at 10 a.m. Wednesday, October 22, 1975.]

CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

WEDNESDAY, OCTOBER 22, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:15 a.m. in room 2141, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Danielson, Mazzoli, Pattison, Moorhead, and Kindness.

Also present: William P. Shattuck, counsel; Jay T. Turnipseed, assistant counsel; Alan F. Coffey, Jr., associate counsel; and David Minge, consultant to the subcommittee.

Mr. FLOWERS. We will call our meeting to order this morning. Our first witness, and we are delighted to have him with us, is Prof. Ernest Gellhorn. I understand you are getting ready to leave the University of Virginia and go to Arizona. I am sure that will be Arizona State's gain and Virginia's loss, but it sounds like you are certainly moving up in the circles of law schools.

We are delighted to learn of that. We want to welcome you to our subcommittee this morning as we continue our hearings into the proposition of whether the Congress ought to have a veto over administrative rules and regulations. We will let you proceed as you see fit, Professor.

TESTIMONY OF PROF. ERNEST GELLHORN, PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA, AND INCOMING DEAN, THE COLLEGE OF LAW, ARIZONA STATE UNIVERSITY; ACCOMPANIED BY STUDENTS FROM THE UNIVERSITY OF VIRGINIA: WILLIAM H. HURD, PAUL W. JACOBS II, ROBERT EUSTIS AND JOSEPH V. TRUHE, JR.

Dr. GELLHORN. I am Ernest Gellhorn, a professor of law at Tempe, Ariz. My background in this area in terms of its relationship to the subcommittee is that I am a consultant to the Administrative Conference of the United States and a consultant to the Federal Trade Commission as well as the Senate Committee on Government Operations.

I also serve as a senior counsel to the Senate Committee to Investigate the Activities of the CIA within the United States which was chaired by the Vice President.

With me today are four students who have assisted me in preparing for this appearance. I would like to introduce them for the record. They are available to respond to questions as well as I am.

They are, first, Robert D. Eustis, a Virginia resident, a second year student at the University of Virginia Law School and a Harvard graduate.

Mr. FLOWERS. Let's identify them. Mr. Eustis? Thank you.

Dr. GELLHORN. Mr. William H. Hurd, a Virginia resident, a graduate of the University of Virginia as a college student and a second year student at the law school. Third, Mr. Paul W. Jacobs II, a second year student at the University of Virginia Law School, and finally to my right, Mr. Joseph V. Truhe, a Virginia resident, graduate of Yale University and second year student at the University of Virginia Law School.

Mr. FLOWERS. We would like to welcome all four of these students of yours and thank them for their participation and for being with us today.

Dr. GELLHORN. I do not have a prepared statement since I was contacted just last week, in terms of this testimony, but I have outlined some comments which I am willing to offer. It will take me 15 minutes or so. I will respond to questions along the way, if I raise questions.

Mr. FLOWERS. If any of the members have questions as Mr. Gellhorn proceeds, you may interrupt. We will let him proceed in this fashion.

Dr. GELLHORN. There are four areas I again want to comment on that I think are raised by this proposed legislation. The first is what does its aim or purpose appear to be and is that aim consistent with the concept of administrative regulations?

How much do they work together or perhaps in conflict? What are the possible effects, second, of congressional veto on administrative legislation, on the agencies themselves, on Congress?

This third area I want to consider are what are some of the alternatives for accomplishing some of these same objectives trying to put this proposed legislation in context.

Finally, what I propose to do is take a look at the legislation and make the assumption that you wish to proceed on this path, that you would like to adopt a congressional veto and then perhaps offer some suggestions as to how to adopt that—what would be, in my view, the most efficient and desirable methods.

Proceeding on that basis, looking at the purpose, aim or thrust of this legislation, it would appear to me to be an effort to widen the opportunity for legislative input and supervision of administrative regulations. In other words, it seems to foster the effort of applicability of administrative regulations.

Congress is, of course, much closer to the public in terms of it having to respond every 2 years in terms of the House and every 6 years in terms of each Senator to the public and public accountability. So this legislation would seem to foster the concept of public accountability.

It is different, however, at least in terms of its basic thrust, the proposed legislation isn't always different from judicial review; for judicial review, as I understand it, is an effort to insure that the administrative regulation is consistent with the congressional intent as specified in the statute, to assure that the appropriate procedures

were adopted, that the regulations comply with constitutional command and that they have been promulgated under fair procedures.

The focus here is not on the legality of the regulation but rather on its desirability. Does the proposed regulation serve a viable, available public purpose? Therefore, I would suggest that this kind of regulation—excuse me, legislation—raises the ultimate question about whether most administrative regulations is normative or expertness. By that I mean, is most administrative regulation directed toward issues which can be decided by value judgments once policy views, or are they intimately affected by continuing supervision, by a knowledge of scientific, economic, statistical or other related data which would involve the expertise, the continuing oversight of an administrative agency?

Posing the question in this fashion suggests an outcome because much if not most administrative regulations is adopted under the guise at least of assigning a problem to an expert group, asking them to study it, to come up with solutions in the form of executive policy, administrative regulations and adjudicative enforcement.

If one concludes that administrative regulation is primarily expert, then the idea of public accountability through legislative oversight or veto of administrative regulations could lead to interruption rather than promotion of administrative regulations.

On the other hand, if one concludes that administrative regulation is primarily normative, there is no more expert body than the Congress.

The second area I want to comment on briefly is the impact of this proposed congressional veto. It is difficult to assess abstractly without seeing how Congress would use this vehicle. It depends on the scope of the reach of the legislative veto. Would it cover most regulations? Would it cover just a few regulations?

That is hard to tell. I want to digress for a moment and comment on the Privacy Act of 1974 as an illustration of this point. When that act was adopted by Congress, Congress was told by testimony that it would affect about 850 record systems. After just a few weeks of operation, the act being effective September 27 of this year, the Justice Department has discovered that over 8,000 record systems are affected.

Mary Lordon, of the Justice Department, who is responsible for administering the program in terms of interpreting it, estimated before a Virginia law school class last week that the cost of the Privacy Act in terms of administrative cost will exceed $1 million in its first year.

I don't know how she gets that figure and it may not be precisely accurate. I don't know. I suspect Congress would not have been so quick to adopt the Privacy Act had it been fully aware of the cost of that proposal. I use that as an illustration to saying that this proposal is difficult to assess in advance and its impact is going to depend on how it is drafted and used.

Putting those cautionary comments as the foundation to my objections, I would suggest that the first point to note on the impact of this legislation would depend on its frequency of use. If it is used often, it would create an enormous workload for Congress.

For example, the students who are with me today, two of them, took a random sampling of the Federal Register over the last 3 months. They selected 10 workdays. On those 10 workdays, they found in the Federal Register 250 separate regulations adopted by administrative agencies.

The time that would be required, the number of personnel that would be required to review that regulation, just to see whether or not Congress ought to consider vetoing the proposed regulation could be enormous.

Increasing the size of the congressional staff which is the subject always of consideration further occupying the time of Members of Congress, and perhaps—and this is of course a consideration—turning Congress into a super administrative agency reviewing and implementing administrative regulations.

On the other hand one might suggest that Congress will only seldom interpose its views and alter or affect administrative regulations. In fact, it may review just a sampling of the regulation on a fairly careful basis saying we are only interested in particular kinds of administrative regulations that are of concern to specific committees.

Then the concern that I would raise is that all regulations will be delayed by this proposal since it postpones the effectiveness of any regulation by at least 30 days so long as it comes within the scope of these proposed bills.

One can then raise the question whether or not the delay of all regulations as a cost is worth the gain of the few regulations that are overturned or subjected to congressional scrutiny.

In fact, it raises a question as to whether or not this is an appropriate way of proceeding because the assumption here would be that administrative regulations are deserving of congressional oversight because of its tendency to be precipitous whereas my observation is that most administrative regulations are criticized because it is too lethargic, too slow in coming, too slow in responding.

Not always the case but frequently the assertion is that administrative agencies have not moved with sufficient speed and precision.

To that extent, of course, this legislation, one can suggest, points in the opposite direction. A second consideration in terms of the impact is to look at why the Congress vetoes a particular regulation—why might it veto a particular regulation. On the one hand it may simply disagree with the policy such as occurred when the Department of Transportation's National Highway Traffic Safety Agency adopted a regulation requiring that no car start unless the seat belts are locked.

Congress disagreed with that policy. In response to rather significant public pressure. That would seem to me to be a normative judgment, a value judgment highly appropriate for Congress to exercise. But I fear that Congress may on occasion utilize this authority for other purposes.

That would depend in part on the processes by which the congressional veto was exercised. Would it come to the attention of a committee or just a member of the committee or to that committee member's staff?

Would there be special pleading? Would there be trading of votes? Would the Congress be in other words because of this legislation sub-

jected to greater pressure from particular interest groups who have not succeeded in opposing the regulation when they opposed the regulation before the administrative agency?

What I am concerned about here is that this kind of proposal may focus the analysis of administrative regulations away from the administrative area where it must be somewhere in public under section 553 of the APA and instead to private sessions before individual Members of Congress or I would suggest more likely before their staff.

Reducing the public visibility of administrative regulations. One way of assuring public accountability, the first concept I have mentioned is to keep the administrative regulatory process open and visible.

This legislation may have the effect—I can't assess of course in advance. I can't be certain—but it could have the effect of pressing administrative regulations and their ultimate decisions into the private arena of congressional offices.

The impact on Congress is a third area to make an assessment of this proposed regulation. I have mentioned most of them already. I suspect that this kind of regulatory oversight would impose additional work on Congress' staff, create pressures to increase the size of the Congressional staff and intensify the opportunities for particular interests to make their views known in a less visible manner.

The impact on the agency is another area to consider, and one impact I have already mentioned. It will delay automatically all regulations subject to its effect. Frequently I would suggest that is undesirable.

It may not always be the case. Second, I would suggest that if Congress is to be the final arbitor of the desirability of administrative regulations, there may be a tendency of the administrative agency to pass the buck instead of realizing that the buck stops here at the agency.

They will say, let's try the regulation and if Congress approves, then we will implement it. It seems to me counter to the concept of responsibility and the reason for the establishment of the administrative regulations.

This may be a way for the agency to share the heat on a particular regulation. The possibility, in other words, is that administrative regulations may be less responsive.

Mr. FLOWERS. Let me interpose a comment and a question on that, Professor. Yesterday Mr. Mazzoli and Mr. Pattison of New York both were talking with witnesses, and observed that the tendency is on the part of the Congress to pass the buck to administrative agencies in connection with hard and difficult questions involved in legislation.

As a result some of the things that we ask administrative agencies to do is actually to make value judgments on policy matters that really ought to be made specific in the law itself.

It would seem the Congress could be more specific in the first instance, probably draft better legislation, give better direction to the administrative agencies. I would think that the administrative agency would be more likely to try to put something together in a manner that would be acceptable and avoid the blemish of a veto on their record.

What do you think about that?

Dr. GELLHORN. That focuses primarily in a different direction. That focuses on the enabling legislation or amendments to it where Congress can give more specific direction. The possibility for or the reaction you suggest in contrast to what I pointed out it would seem to me would occur if Congress in exercising its veto looked at the entire administrative regulation at one time.

But as this legislation is drafted, it looks at each rule item by item as they are adopted by the agency. In other words, this is taking a piecemeal approach instead of looking at all the regulations adopted by Occupational Safety and Health Administration or the Federal Trade Commission or the Federal Communications Commission.

Under this legislation, the congressional staff or committee would look at only the particular rule. One of the reasons I am concerned about this legislation or at least a question I would raise is whether or not it is desirable for Congress to exercise piecemeal review in contrast to a more comprehensive review as occurs generally when it enacts enabling legislation or when it exercises oversight through appropriations committees, investigating committees, and other oversight hearings.

So that the opportunity I suggested for sharing responsibility and passing the heat would be present, I would suggest, where the committees of Congress consider individual administrative regulations.

This would be intensified in fact, in my opinion, because the assignment of consideration of a particular regulation will not necessarily go to the congressional committee with oversight over that particular agency.

The regulation may have greater relationship to another committee's responsibility which would further exacerbate this tendency that I suggest the legislation has for individualized review.

But the consideration that you point to and reflect exists.

Mr. FLOWERS. Of course, the agency that you used as an example is a good one to consider, OSHA. I think perhaps the members through contact from small business people in their districts or apparently some people who it have asserted that they have been almost literally harassed out of business in some instances. They have further asserted that the further you get into it the worse some of these regulations seem. That kind of concern is what has prompted this legislative proposal, I am sure.

I think the question is and you state it very well, is whether Congress wants to take on the additional work, very detailed type of work for this oversight. We are called upon to determine whether it is our responsibility or whether we ought to continue to pass the buck so to speak to the administrative agencies and let them take that heat.

Dr. GELLHORN. That really leads into the next area I want to talk about and we ought perhaps to consider that in light of what are the alternatives available to Congress for exercising the oversight that is sought to be exercised, that this hearing in fact suggests ought to be exercised. I have noted a few of them here. One is by communication from Members of Congress to the agencies, by Members of Congress or their constituents appearing before the agencies and their

hearings when they decide on administrative regulations or more specifically when committees hold oversight proceedings.

Such oversight hearings are diverse in approach and many and varied in content. They have the advantage of developing some expertise, I would suggest, in congressional staff. They have the advantage of allowing continuous oversight of the entire regulatory scene.

For example, there is a committee of the House, a committee of the Senate, with primary responsibility for the activities of the Federal Communications Commission. I would—it would seem to me that those two committees are in a much better position than the entire Congress or other committees to assess individual regulations proposed by the Federal Communications Commission.

Another way, of course, of controlling administrative regulations is to pass legislation effectively vetoing the regulations or attaching riders to appropriations bills or similar amendments of agency enabling legislation. These are done not infrequently.

The overturning of the seat belt interlock program, the alteration of the Trade Commission's and Communication Commission's approaches to advertising are illustrations of situations where Congress has decided that proposed administrative regulations are not desirable.

The advantage of that approach, of course, is it requires a consensus of the entire Congress in terms of the majority vote from each House as well as the approval of the President.

The disadvantage is that it is a little bit more cumbersome, probably more time consuming and may not result in overturning as much administrative regulation.

It also, however, gives greater play for the expertness of administrative regulations to operate since the primary focus in the current scheme is to put the public attention and responsibility on the administrative agency.

The final area I wanted to note was assuming the decision is made to exercise closer scrutiny over administrative regulations through the use of congressional veto, how ought the legislation be drafted? Rather than addressing myself to the specifics of the proposed legislation. I thought I would make two comments that you might consider applying to any legislation in this area because I think that these two areas are more significant than the particulars of any specific legislation.

The first, I would suggest this as an experiment. Our precedents in the States, but they are different frequently and their experience is not necessarily the same as we are likely to have with the Congress.

Administrative regulations in the States is frequently quite different from administrative regulation in the Federal arena. What I would suggest is that if this is to be truly an experiment that in passing this legislation and considering it, it ought to be limited in scope initially in terms of perhaps agencies to which it applies or the subject matter to which it applies or the kind of regulation to which it applies.

Second, I would suggest a time limit, 3 to 5 years. Let's get some experience. Three to 5 years I would suggest would be an adequate time for the Congress to determine whether or not this is a desirable vehicle or whether or not it is undesirable.

But in that fashion, putting the 3- to 5-year time limit, this proposal would self-destruct. It would not continue on the books if it were un-

desirable. By imposing a 3- to 5-year time limit, you manage Congress workload, you can decide after 5 years whether the gain is worth the increased workload and whether it has an effect on the administrative agencies which I am not certain it will.

In addition, I would suggest that under an experimental approach, the Congress might direct the administrative conference of the United States to study the impact of congressional veto on the agency, on the Congress, on the public.

There is a precedent for this suggestion. The Federal Trade Commission Improvement Act of 1974 contains a provision that the new rulemaking provisions in that act are to be studied by the administrative conference after 2 years and a report prepared and sent to Congress.

That gives I think the expert body within the Federal Government, the administrative conference, an opportunity to review the impact of the proposed legislation and then Congress can make up its own mind whether or not it is desirable or undesirable.

Another alternative I would suggest for your examination and consideration is perhaps to limit the scope of this proposed regulation.

Instead of requiring or limiting the congressional option here to a veto, one might suggest an addition or an alternative of reconsideration recognizing, in other words, that Congress may not have the same expertise, the same continuing supervision, the same information that the agencies have, the more appropriate role for Congress maybe is to say we have looked at this proposed administrative regulation, we have some doubts about it and we would like to reconsider the regulation in light of these questions we are posing.

Consider it in light of our questions, but also in light of your information. The reason I make that suggestion is that in adopting the regulations, the administrative agency must understand the Administrative Procedures Act and have before it all information which affected and other interested parties wish to submit.

Congress surely does not want to put itself in the position of having the same record before it. Because those records tend to be voluminous, there is almost no limit to them.

Well, that is the substance of my comments. I am happy to respond as are the students who assisted with me and come before you here today.

Mr. Flowers. Thank you, Professor Gellhorn. Since I have asked a few questions in the course of your testimony, I will hold back now and yield to the gentleman from Kentucky, Mr. Mazzoli.

Mr. Mazzoli. It is a pleasure to visit with you. Your suggestion at the end was interesting about putting a time limit on the bill and perhaps not trying to draft the perfect bill but maybe something which as an experiment might be looked at in the years ahead.

Yesterday, one of the witnesses, I think the author of the bill, Mr. Levitas, of Georgia, cited as one of the horror stories of administrative regulations and what he would try to counteract by this bill the EPA's ruling in the city of Boston dealing with in-town parking and with parking lots and emissions. It would have prohibited parking downtown and eliminated three-quarters of the parking spaces in the garages. If that regulation were to be promulgated and selected under these laws to be submitted to the Congress for its verdict, would you consider that to be normative or expertness?

Dr. GELLHORN. It involves both. That is one of the problems. First of all, I would suggest that Mr. Levitas' bill would probably not have covered that particular regulation because I don't think it is enforced by criminal sanctions.

The second aspect is you could avoid the scope of his bill by one of the exceptions to the coverage of section 553.

Mr. MAZZOLI. What is that?

Dr. GELLHORN. There is a good-cause exception. If the agency for good cause doesn't wish to have public notice, it can avoid the notice. If it is an administrative or interpretive regulation, it is not covered by 553.

Mr. MAZZOLI. There would be expertness here and what would be the expertness factor in there?

Dr. GELLHORN. The question is what is the contribution of cars in downtown Boston to the air quality of the city of Boston?

Mr. MAZZOLI. The normative part would be what?

Dr. GELLHORN. How much is the public willing to stand in terms of dirty air versus inconvenience? It is a tradeoff in terms of using alternative means in getting to downtown Boston.

Mr. MAZZOLI. I thought the normative part would be what would Congress be willing to do and what would be the impact on the law?

Dr. GELLHORN. I would suggest that both of the bills before you are miscast. The purpose of the judicial review is to look at the congressional intent and authority and determine whether or not the administrative regulation is consistent with it.

I would suggest that the function of Congress is to decide whether it wants to change its intent or modify it.

Mr. MAZZOLI. Unless we were expert as a body enough to say that the emissions were improperly calculated by the EPA, then we would be—if I understand your approach—we would then be forced to approve that regulation even though it would exceed what we would consider a wise application of the law even though it would exceed what the Congress feels would be a proper balancing of the equities here.

Dr. GELLHORN. No. It is certainly appropriate and perhaps for Congress in that circumstance to disapprove the regulation. But in the process of doing so, it is really changing the agency's mandate as the agency understands it.

One of my concerns is that the air quality content in the city of Boston or the inconvenience of parking in the city of Boston is probably an ineffective way to make that judgment.

Mr. MAZZOLI. Let me ask you this, Doctor. How would you feel that the Congress would make the judgment of whether or not the agency has misunderstood its mandate?

Dr. GELLHORN. Well, one way, of course, is to look at the specific regulations and say if that is how they understood what it is we told them to do, then we ought to give them a different mandate. Let's rewrite the basic enabling act and suggest that they ought to put in there a consideration of public inconvenience.

One of my concerns in looking at the specific air quality of Boston would be that in providing an exception for the city of Boston, allowing them to have, say, more cars downtown and dirtier air or what-

ever the impact is going to be, you may have an impact on the air quality of Providence or Springfield.

Unless Congress also considers regulation of the air quality of those cities, going after the city of Boston is responding to the squeakiest wheel and not providing a consistent regulatory scheme.

Mr. MAZZOLI. Let me ask the gentlemen of your panel, whoever it would be, I would like to have that gentleman's appraisal or estimate of whether he thinks the Congress would be bogged down in apprising itself of these regulations and studying them with the view to some floor work.

Mr. JACOBS. It really depends on which bill you take. The one bill which would allow almost all regulations to be—to come under the scrutiny of Congress. We found 250, some with minor corrections. These would pass right through. But that is a rather large number.

If you take the other bill, we found that under the exceptions to 553 under part A and B, there were 66 regulations out of 250 that could escape.

Not only could they escape, chances are that if an agency really puts its mind to it without much effort at all, many more could come under good cause or turning what could be a substantive regulation into little more of a procedural regulation and escape congressional scrutiny.

Mr. MAZZOLI. I wonder if Mr. Truhe might make a judgment.

Assuming all 250, because we might take the Clawson approach, of those, how many would you think would normally come to the attention of the Congress?

Mr. TRUHE. Probably not very many. If someone were to sit down with the Federal Register and file through them, it would not be too hard to segregate the ones least likely to arouse any interest in anybody, changing an air zone by the FAA, different grid coordinates, a flood control map, changing a line here and there.

That might eliminate 90 percent of them.

Mr. MAZZOLI. What would you think would arouse either a panel or some review board to exercise its option to bring these regulations to the attention of Congress?

What would be the key elements they would look for?

Mr. TRUHE. Would look for something that has direct public impact like the FCC deciding how to balance the equities between nighttime cable TV licensees and daytime broadcasters.

Mr. MAZZOLI. Health and Welfare like EPA and OSHA?

Mr. TRUHE. OSHA sometimes. We did not run into too many OSHA things that we could evaluate. But for the EPA there are a lot of things that qualifying the State of Alabama under a previously adopted set of standards which would probably be except because there would be no need for notice and comment.

This is another problem. Also say the EPA wants to grant a stay in the application of a certain previously promulgated guideline. Who is to oversee that?

Mr. MAZZOLI. Mr. Eustis, in your work on this whole question, I was very much interested in what the Dean had talked about as one of the problems here that the possibility that the Congress is going to be lobbied again as it was lobbied in the first passage of the bill, by the proponents and opponents of the bill based upon a regulation which

might be the concrete evidence of the devotion of Congress to the bill, to the essence of the bill.

I wondered if Mr. Eustis might have some thoughts on how Congress, if we got into this thing, how we could avoid the lobbying problem?

Mr. EUSTIS. I really don't know the problems of lobbying. Perhaps Mr. Gellhorn can explain better.

Mr. MAZZOLI. Dean, you brought the point up. I thought it was an interesting one.

Dr. GELLHORN. Well, I would suggest that the most effective means of controlling private lobbying is to publicize the effort.

That is part Y, administrative regulations. They are required to be open in public hearing and require the agencies to develop a statement of basis and purpose. So I think constitutionally the scheme proposed here is not receptive to that kind of protection unless you go after the lobbying itself as has frequently been proposed.

It has been suggested it creates more problems than it resolves. I think that is a cost of that kind of proposal that one has to accept if you are going to adopt it with perhaps the admonition that one ought to be aware of it, that it may have some impact.

I think also that the debate in Congress when it considers legislative veto may itself have an impact on legislative—intent.

Mr. FLOWERS. Mr. Moorhead?

Mr. MOORHEAD. Professor Gellhorn, you don't really anticipate with this legislation that we would be reviewing all of the regulations in detail, do you?

Dr. GELLHORN. No, but you have to make an initial judgment. Somebody has to make that judgment.

Mr. MOORHEAD. Somebody is going to have to be reading them and some kind of a committee or staff is going to have to be going over them to bring them to our attention obviously.

Dr. GELLHORN. I am not certain that is how it would work. I would suspect that a particular regulation is going to irritate or upset some affected individual or business and they are going to call it to the attention of a congressional committee or the Congressman, anything that is going to increase the pressure on a constituent.

Mr. MOORHEAD. In Mr. Clawson's bill it refers to regulations contrary to legislative intent. Do you think that is a good way to ferrett out those portions of the regulations that we should be concerned with?

Dr. GELLHORN. No. I think that is a concept of administrative regulations. That is really a question of whether I favor the regulation or oppose it. More than one lawsuit represented a client who opposed administrative regulations and I have managed to make an argument that the regulation was really contrary to the legislative intent.

It is also somewhat redundant of the whole function of judicial review.

Mr. MOORHEAD. Assuming that most regulations that we consider are going to be those involving far-reaching policies or those that basically change rights of individuals, do you think those decisions should be made by an agency that is not responsible to the people or should it be made by the Congress who have the responsibility to people at least every 2 years?

Dr. GELLHORN. Cast now in that light I certainly would agree that public accountability and Congressional guidance to the agencies is important and should be made paramount.

The question I pose is not that issue but rather is this the way to accomplish that public accountability or are you in fact perhaps impeding, impairing or limiting public accountability? I am suggesting there is a possibility. I don't have certainty on my side but only the possibility that the actual impact of this legislation might be to impair public accountability.

It may be counterproductive.

Mr. MOORHEAD. In the Los Angeles area the EPA adopted regulations which would greatly restrict the downtown growth of Los Angeles, by limiting parking spaces and controlling the traffic flow.

Should that kind of decision be made by Federal Government people who are not responsible to anyone?

Dr. GELLHORN. I would suggest they are responsible. They are responsible to Congress. Congress does give them guidance. I would suggest that is an issue you can give more specified answers on. I would suggest that the parking in downtown Los Angeles and important as it is to the people of Los Angeles is not a matter of national significance that the Congress ought to direct its attention to.

Instead, I would suggest that it would be more appropriate for Congress to focus on the question of the quality of air, public convenience, the need for change on an incremental basis and positive basis, and over a period of time and that in making its specific judgment in a particular community, EPA ought to weigh those factors in a way as to not cause serious dislocation in any community.

With that kind of guidance then I would suggest that the courts can review administrative regulations, see whether or not the administrator has given adequate account for the particular factors.

This really gets back to the chairman's initial question and I subscribe a comment to which I subscribe wholeheartedly. Perhaps the most appropriate way to resolve the question of administrative regulations run right is to give the agencies more specific directions.

Constantly review their enabling legislation. Say is this really what we want them to do or might we be able to sharpen that judgment in light of the passage of time? I would suggest going back to the Environmental Protection Agency's original mandate and amending the legislation, reconsidering which may be a most appropriate technique.

Mr. FLOWERS. Thank you, Mr. Moorhead.

Mr. Pattison?

Mr. PATTISON. I am interested in pursuing this problem of the effect of this legislation on what happens in the Congress. I am wondering if you would agree that perhaps Congress as an institution is too responsive—might well be too responsive and that in fact the purpose of creating the regulatory agency and they are usually called independent regulatory agencies, was in fact to pass the buck from Congress to other institutions which were more capable of making judgments and which did not have to be anywhere near as responsive as Congress.

I am thinking for instance of an OSHA regulation which, for instance, says that you have to install roll bars on tractors. It is arguable

that that—they can establish that a certain number of people got killed by the fact that a tractor turned over and the roll bars would have saved their lives.

Arguably that is a good safety regulation if you want to pay the cost. That regulation then is promulgated and very quickly you hear from the farmers in the area that say my God, this is going to cost me $347 per tractor.

I can't afford it. Do something, Mr. Congressman, about this crazy regulation. No one has ever tipped over in a tractor on my farm. It would seem to me that that might well—that my response as a Congressman might well be you are right.

This is a crazy regulation. I as a Congressman, because I have this particular constituency, come before the Congress, bring that regulation before the Congress for a congressional veto.

Those who live in urban areas could not care less whether or not—are perfectly willing to go over with a—to go along with the overturning of that regulation. The only people interested in turning over that regulation are those affected by it who are the very people the regulation was directed toward.

You may have that kind of thing and the same thing contrary with the urban problem where the urban people say if you feel that is a problem, overturn it.

Don't you think we should pass the buck to other institutions?

Dr. GELLHORN. I think that is a serious consideration and I would say it follows from the fact that under this proposal, administrative regulation would be considered only a piecemeal basis. I don't think you would get that same almost log rolling result, to give it its typical name, if the Congress understood this legislative veto approach considered all the regulations of a particular agency.

Mr. PATTISON. I agree.

Dr. GELLHORN. That is the problem one tries to get around by saying instead of having the agency—the administrative regulations subjected to congressional veto on an individual basis, instead the pressure ought to be on the administrative agency oversight committee, to look at all the regulations at once.

The idea of public accountability as suggested by the chairman and Congressman Moorhead is not one that any reasonable person can argue with.

It is exactly what I think Congress ought to do.

Mr. PATTISON. But by being accountable to a very small segment and by Boston in one case or the farmers in another case, we may end up being very unaccountable to in general the people we are trying to protect which is the working man.

We are trying to protect his job safety whether then in the farm or in the city or in the factory.

Dr. GELLHORN. That is the strongest argument that can be made on behalf of the suggestion I offer of instead of having legislative veto, there be a legislative mandate for reconsideration so that the administrative agency is aware of the intense feeling in Los Angeles or the concern for inconvenience in Boston or the farmers concern that $347 per tractor is too much.

Mr. PATTISON. So perhaps a resolution from the oversight committee saying we require you to reconsider this regulation in the light of

these facts. They would have to go through a regular reconsideration period and say we are going to change it or we are not going to change it.

Dr. GELLHORN. The trade-off is the cost of delay which might be serious in this circumstance and piecemeal consideration which may still occur.

Mr. PATTISON. We could have legislation that says we could do it either way. We could say we require you to reconsider this in the light of certain facts or we require you to reconsider this but we want you to implement the regulation while you are considering it.

Dr. GELLHORN. That would be desirable.

Mr. FLOWERS. Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman.

Professor Gellhorn, I apologize for not being present during the earlier part of your testimony. I wonder if I might elicit your views and expressions on the possible constitutional question that might be presented if legislation in this area provided that either House of the Congress might veto an administrative regulation. That is, in terms of the Congress being a two House legislative branch and action by one House overriding the intent of the other House.

Would you care to comment on that?

Dr. GELLHORN. Well, I am being followed by a witness who has studied this question much more carefully. On the other hand, I do have independent views on it. Once again, there is a conflict here. One can rationalize this approach constitutionally by saying that—what Congress is doing is modifying each agency and enabling legislation, saying we are as a body in consensus agreeing we are going to modify all enabling legislation and the President is approving it, to say that administrative regulations shall henceforth be subject to approval or disapproval by either House of the Congress.

That complies with the separation of powers concept. It also complies with the basic structure that every bill must be approved by the majority of both Houses and the President or veto to override provision.

On the other hand, it seems to me that the separation of powers principle and the checks and balances approach it directed toward assuring a broad consensus before congressional action is implemented. To the extent to which this legislation permits one House to prevent further executive or independent agency action, it is inconsistent with the separation of powers concept.

Because of the dangers here, possibilities of isolated, piecemeal review, I think the constitutional issue is a serious one. I think it would depend in terms of its resolution on how the bill is specifically drafted and of course the particular case in which the question comes up.

On the other hand, one can make much the same criticism and comment about congressional oversight in committee oversight because once again you may have substantial impact on administrative regulations by a committee of Congress or a Member of Congress and a practical effect would give greater power to fewer people than even this legislation proposes.

On balance, I would urge that the legislation be considered on its policy rather than its potential constitutional conflict.

Mr. KINDNESS. Thank you. In the other area—well, it is a related matter actually. Would you care to comment on the possibility that legislation in this area might conceivably provide for all administrative regulations to have a fixed life, unless codified by action of the Congress so as to adopt in statutory form or as a part of or an adjunct to a statute those administrative regulations that have been promulgated during a period of time?

Dr. GELLHORN. Once again, it is always hard to answer those questions in the abstract because we are talking about just a wide range of governmental action. I can think of various regulations by the Federal Trade Commission that I would like to have a very short life because I obviously don't agree with them.

It is hard to separate my own policy views on particular regulations from the principle that you are suggesting. I think it is desirable though at the bottom because it forces the administrative agency to reconsider what it is doing.

That is an institutional means whereby they reconsider what they are doing. I am wondering, however, it might be more desirable than adopting a fixed life on the regulation which would have the agency reconsidering legislation again on a piecemeal basis, that instead you might require an administrative agency every few years to review its entire regulatory scheme and discard those that are no longer consistent or adopt regulations that ought to be adopted to implement the regulatory scheme.

In other words, a wide ranging review is not one that can come necessarily on the basis then which would result from the structural change.

The other consideration I would add is that good solid, sound, efficient management would mean that the agency would be doing this already or that the congressional oversight committee might be encouraging the agency to do this already.

I am not certain you need legislation in this direction.

Mr. FLOWERS. With the caveat to members of the committee that we are running short of time and we have several other witnesses, I will give them another shot at you, Professor, if they so desire.

Anyone have any further questions? Thank you very much and your students. We wish all of you well in the future. Come back to see us.

[The following memorandum was submitted by Professor Gellhorn for inclusion in the record:]

MEMORANDUM RE CONGRESSIONAL CONTROL OF ADMINISTRATIVE REGULATION

This memorandum summarizes my testimony before the Administrative Law and Governmental Relations Subcommittee of the House Judiciary Committee. This testimony related to H.R. 3658 and H.R. 8231 of the 94th Congress, 1st Session, and was given on Wednesday, October 22, 1975.

Congressional control of administrative regulation by veto of either House raises questions which can best be considered under four categories. First, what is the aim and purpose of the proposed regulation. Second, what is the likely effect that congressional veto will have on administrative regulation itself, on the agencies, and on the Congress. Third, what alternatives are there for accomplishing the legitimate aims and purposes of the proposed legislation, especially with fewer undesired side effects. Finally, what suggestions can be offered in drafting such legislation.

PURPOSE

The immediate aim of this proposed legislation is to widen the opportunity for legislative input and supervision of administrative regulation. The legislation supports the concept of "public" or political accountability. Administrative agencies are removed from the electorate in that their members are appointed by the President and approved by the Congress; Congress, by contrast is directly responsive to the electorate on a two to six year basis. Nevertheless, the agencies have been assigned law-making tasks which might otherwise be performed by the Congress. To that extent they exercise law-making without being subject to immediate political or public control. And the function of this legislation, allowing either House of Congress to overturn proposed administrative regulation, would be to assert greater control over such regulations. Before administrative rules could be enacted, they not only would have to comply with statutory requirements (such as notice and hearing under § 553) but they would also have to pass the hurdle of not being so obnoxious to the legislature that either House would overturn them.

It is important to note that this legislative control of administrative regulation has—or at least should have—a different function from that traditionally assigned judicial review. One is aimed at the desirability of the administrative regulation, whereas the other looks to its legality.

The focus of judicial review is to assure that the administrative agencies have acted within the scope of their delegated authority as well as in accordance with appropriate procedural norms. Court review of administrative regulation, in other words, assures its legality, including its consistency with the congressional intent as revealed by the agency's enabling legislation and related history. While this is the theoretical role of judicial review, it can be suggested—without undue cynicism—that administrative enabling legislation is often so broad and vague as to permit a variety of possible rules and regulations. The "public interest" standard of much legislative delegation to administrative agencies permits wholly different approaches, depending on the views of particular commissioners. It would not be surprising, therefore, if the regulations adopted by an administrative agency were not in fact consistent with the "original" legislative intent. This assumes that the legislative intent can be said to be of a single mind or purpose, however; in fact we know that the legislative direction is seldom so clear. In addition, one reason that administrative agencies are established is to resolve policy disputes where the Congress is unable to decide which approach to take. Despite these comments, this proposed legislation would not seem to rest on an effort to assure that agency regulations are consistent with the original congressional intent since it is not at all clear that judicial review has not adequately performed that task, on the one hand, or that congressional supervision by legislative veto would perform that task adequately, on the other.

The focus or primary thrust for this legislation would seem to lie in another direction. It would serve the function of determining the desirability of proposed administrative regulations—or, to use the intent analysis, of assuring that they are in accord with "current" congressional intent. Because most organic administrative legislation is broad and vague, administrative regulations seldom fail to pass judicial review as being ultra vires or outside the agency mandate. But just because administrative regulations may be within the agency's mandate, and therefore legal, it does not follow that such regulations are desirable. And the proposed legislation permitting single House veto of a regulation would provide one method for checking on the desirability of administrative rules.

All this is by way of introduction to suggest that this legislation raises the ultimate question of whether administrative regulations are primarily normative or expert. If the regulations are normative and reflect policy values, then Congress is at least theoretically in a better position to evaluate their desirability. Congress is the body that reflects the public desires—a least more effectively than do administrative agencies. On the other hand, if administrative regulations involve expertise and expertness and are determined not by normative judgments but rather by technological, scientific, economic, statistical or sociological, or related factors, then one might doubt the ability of Congress to determine the "desirability" of administrative rules by exercise of a veto power.

The difficulty with this analysis, of course, is that administrative regulations are probably both normative and expert. Nor is it always obvious whether one can distinguish between the two. For example, do administrative regulations proposed by the Environmental Protection Administration relating to parking in major

cities involve normative or expert judgment? On the one hand, they are concerned with air quality standards and health effects. On the other hand, they impinge on public convenience and affect basic resource allocations. Even such expert judgments as the safety of nuclear reactors involve basic decisions of acceptable risks which are, at bottom, value judgments on which the experts have no expertise. Their expertise is valuable only in assuring that the risks and costs have been accurately assessed. One other problem is the assumption here that relevant evidence can be summarized and made objective. This may not always be true. Then the issue almost becomes one of deciding who is in the better position of making an educated guess.

However viewed, this legislation goes to the foundation of administrative agencies. Among the justifications given for the establishment of administrative agencies are their expertness, their opportunity for specialized supervision of a particular problem, and their continuity. Where expertness is involved in administrative regulation, one can argue not only that the agency is likely to be in a better position to know whether or not the regulation is viable but also that it must be allowed flexibility and "breathing space" to perform the task. One regulation is inevitably related to other regulations. Yet the Congressional supervision proposed by this regulation will tend to operate on a piecemeal of ad hoc basis.

This leads to the next section of this memorandum which considers the impact of the proposed legislation on the agencies as well as on Congress and administrative legislation.

IMPACT

Obviously, it is always difficult to evaluate the impact of legislation in advance. This is particularly true where the legislation may affect many disparate and diverse agencies since the impact will undoubtedly vary among them. The effect of this legislation will also depend on its scope, and especially on the use which Congress makes of the authority to veto administrative regulations.

On the other hand, it is extremely important that some kind of evaluation be made. An example of recent legislation makes this point—as well as the hazards of prediction—with particular force. The Privacy Act was adopted by Congress in 1974 to go into effect on September 27, 1975. The original estimates made by the Congress which drafted this legislation were that it would affect approximately 850 recordkeeping systems. However, at last count the Justice Department reports that it has affected over 8,000 systems. Thus the cost of this program, which was originally estimated in the tens of thousands and then in the low millions, has now been suggested (by Mary Lawton of the Justice Department) as possibly exceeding one billion dollars.

Whether or not these figures are accurate, they make the point that seemingly desirable changes in the law may have a far-reaching effect and prove to be very costly. The Privacy Act also illustrates the point that legislation designed for one purpose may in fact result in another affect which may be counterproductive. For example, in order to assure that the Privacy Act was being complied with, Congress required that an agency retain records of its recordkeeping systems for five years. This not infrequently results in the retention of a record for a longer period than would otherwise be the case—all for the purpose of preserving privacy.

In assessing the impact of possible congressional veto of administrative regulation, the first point to note is the likely frequency of its use. If Congress makes frequent use of this authority to overturn administrative regulations, several likely effects can be identified: it will create an enormous workload for Congress; the impact on agency programs and regulations will be substantial—all will be delayed, others stopped, and others changed; Congress or its staff may become a "super agency" without the "accountability" protections currently available under the appointment process and the Administrative Procedure Act and with negative effects on efficiency. These costs would have to be balanced against the gains in accountability and other benefits.

If, as seems more likely, Congress uses this authority sparingly, the costs and benefits are likely to be quite different. The primary cost then would be in the delay which this legislation is likely to impose on all regulation subject to its coverage. In this circumstance the question is whether that cost is counter-balanced by the assurance that administrative regulations are acceptable to Congress and perhaps to the public.

The issue of delay is always difficult to resolve since its desirability is difficult to separate from one's view of the substantive result. Except one can note that most criticism of administrative enactment has not been with the errant

nature or precipitous enactment of agency rules, but rather with administrative lethargy and delay. As a consequence, one can suggest that the methodology if not the purpose of this legislation is misplaced.

Equally important in assessing the impact of this legislation is the reason for congressional use of its new veto power. This, in turn, depends on the process of examination which Congress adopts. How will it screen agency rules; will that process be performed by committee staffs and will they be given adequate direction? This raises a further concern about whether or not Congress can ever be in a position to exercise adequate and effective oversight over the regulations adopted by administrative agencies. Obviously, Congress is busy and has other, more momentous tasks.

Even assuming that an effective system can be devised for assuring close congressional scrutiny of administrative regulations in order to screen out only those deserving further consideration, there is the question of why Congress has acted to veto some regulations and not others. If it is because of a policy disagreement with the administrative agency, then the policy justification for this legislation would be served. It also seems possible, however, and perhaps probable, that the congressional veto may be the result of lobbying, of pressures of particular interests, or even of log-rolling. In that instance it can be argued that the congressional veto would not necessarily reflect a considered disagreement with administrative policy.

The underlying basis for this concern is that the congressional decision to screen or to select particular regulation for overruling, as well as its actual overruling, is likely to be a low-visibility decision. And one need not be especially mistrustful of Congress to be concerned about the quality of such decisions when they are generally hidden from public view.

A related and somewhat distinct point concerns the methodology by which Congress makes the decision that the regulation is worth considering and worth overturning. Administrative regulations subject to this legislative veto will have been supported by notice and comment hearings. And under § 553 of the APA, the agency is required to state the basis for its findings and rulings. But the proposed legislation makes no such requirement of the Congress. It can ignore the evidence presented at the administrative rulemaking hearing. It can ignore the reasons given by the agency. As now written in the proposed legislation, there is no "record" requirement that the Congress even be aware of why the agency has adopted a particular rule. Nor does the proposed legislation provide an opportunity for input by those affected by the regulation—as required by Section 553 of the APA. The several requirements now imposed on administrative rulemaking serve valuable functions of "public accountability." And it is not obvious that the mere closeness of Congress to the "people" is an adequate substitute.

Another area where this legislation may have a substantial impact is on the Congress itself. Administrative regulations are numerous and complex. They cover a wide range of subject matters. If the Congress is to perform its oversight function under this legislation carefully, the staff responsibility in screening and analyzing regulations in the 60-day delay period is likely to be enormous and time-consuming. Not only will the congressional workload be increased, but it is also likely that the focus of appeal by those adversely affected by administrative regulation will turn to Congress with an increasingly urgent basis. Whether further intensification of the lobbying process in Congress is desirable is at least an open question. Instead of Congress being a filter of special interests and a representative of the public's interest, it is possible that Congress will be divided among proponents of various special interests and that congressional defeat of administrative regulation will only reflect successful log-rolling rather than a considered evaluation of what desirable policy requires. This may, of course, put too harsh a light on how Congress acts. But it is hardly beyond the realm of reason.

Even more important is the possible effect of this legislation on the agencies. As already noted, one immediate effect will be to delay the implementation of agency regulation. More serious, however, might be the efforts that agencies would use to avoid its reach. As drafted, one form of the proposed legislation would permit agencies to avoid its reach by using one of the escape hatches in Section 553—such as calling the regulations procedural, saying that they are emergency, or relying on the "good cause" exemption.

The net result would be that agency procedures assuring accountability would be avoided with a corresponding gain in congressional control. Nor does the proposed statute provide any mechanism for Congress to police agency compli-

ance with its scope and thrust. A related concern is that if Congress becomes the final arbiter of the effectiveness of agency rules, the agencies may be prone to "passing the buck" to Congress. At least they may seek to have Congress share the heat for controversial administrative policy. In part this may be desirable, epecially where Congress has delegated authority to the agencies because it was unwilling to make the hard policy decisions. On the other hand, one might assess that impact as making the agencies even less responsible than they are now. To the extent to which responsibility is taken from the agencies, it seems even more likely that they will be unable to attract qualified personnel. This problem is certainly reflected by the difficulty of hiring a capable corps of administrative law judges, a group currently without particular authority or prestige.

Another technique for assessing the impact of this proposed legislation—albeit somewhat redundantly after the foregoing analysis—is to look at what a congressional veto might do to administrative rulemaking decisions and the reasons supporting those decisions. To the extent to which the power shifts from the agencies to the Congress and its staff, such decisions and their underlying reasons become less visible. This is particularly true since Congress will not be required to outline the reasons for its rejection of some regulations and its failure to interpose objection to others. What subsequent effect this may have on the role of judicial review is open to question.

If Congress has considered a regulation and declined to overturn it, has it impliedly endorsed the regulation—and would such approval alter the standard of judicial review, thereby limiting the assurance which judicial review seeks to provide? (The usual rule is that administrative regulation is subject to much closer scrutiny than law-making by Congress.) Of even greater concern is the effect of congressional veto on the rationale and scope of an administrative program. If the congressional overturn is really the result of special pleading and particular interest group lobbying, it will not at all be clear to the agency that the program itself should be scuttled. In fact, the likelihood would seem to be that the agency would adopt a similar rule which does not create quite the same political response. While this may be a benefit, it seems a costly method for achieving such a minor gain. But how is the agency to react if Congress disapproves of only part of the program, especially if the program is interrelated with other rules? This raises the further question that Congress might find a more efficient mechanism for communicating its views to the various administrative agencies, which is the concern of the next section of this memorandum.

ALTERNATIVES

Unless the alternatives for asserting greater congressional oversight of administrative regulations are either limited or likely to be ineffective, the questions raised already about the veto legislation cannot be readily dismissed. And a close analysis of other options available to Congress to assure that administrative regulation accords with the popular will and reflects desirable policy, suggest that the proposed legislation should be adopted—if at all—only as a last resort.

First, it should be noted that there are already many avenues available for exercising congressional oversight. There is, for example, the appointment process whereby the Senate can assure that administrative regulators reflect a philosophy consistent with the "popular will." Despite its occasional use, the appointment process has been notorious for its very limited check. As all too often has been shown, the administrative agencies have been the haven for the governing party's defeated candidates or political friends.

More fruitful would seem to be the reliance on the appropriations process. Administrative regulations normally are enforceable only with the aid of agency resources. And Congress controls the purse on such resources. Nor is it uncommon for legislative committees in the appropriations process to question commissioners closely on the regulations which they have proposed and adopted. There is, of course, the objection that such oversight tends to follow rather than precede the implementation of administrative regulations. However there is no magic in this process, and not infrequently congressional inquiries focus on proposed as well as past regulatory action. Similar legislative oversight is accomplished through the actions of standing committees and their investigations. A current example is that offered by the inquiry of the Senate Committee with responsibility for the Federal Communications Commission. It is now closely questioning the commissioners about their decision to limit the effect of Section

315 (the equal time provision) of the Communications Act. And there is, in addition, the time-honored legislative protection offered constituents by Congressmen in processing their complaints with the agencies. Where an administrative regulation has a substantial impact on congressional constituents, it is unlikely that the administrative regulation will be adopted without challenge.

These current avenues for legislative oversight of administrative regulations are of a different degree and kind than that proposed by the veto statutes being considered here. These other avenues provide for congressional input into the administrative process, but at the most they only call for a reconsideration of adopted regulations. In general they do not operate as a legislative veto of proposed or existing regulations—except in unusual circumstances.

Even where reversal is sought, a more reasonable alternative would seem to be the time-honored process of legislative reversal. Take, for example, the various cigarette rules considered by the Federal Trade Commission and the Federal Communications Commission in the 1960's. Those agencies had proposed that cigarette health hazards be disclosed in all advertisements and on all packages, as well as that radio and television ads be limited and ultimately banned. The standing committees of Congress with oversight responsibility over the two agencies followed the rulemaking processes closely. Ultimately they told the agencies that they wished the rules held in abeyance while Congress itself considered legislation directed toward cigarettes. And Congress did adopt legislation taking an intermediate approach to the problem. (It might also be noted that these regulations were primarily normative rather than "expert" in character.) Another example is the National Highway Traffic Administration's regulation of seatbelts. It required the establishment of an interlock system which prevented the operation of an automobile unless the seatbelts were in use. In response to constituent complaints, or at least to personal irritation, the Congress adopted legislation overturning the regulation.

These illustrations suggest that Congress is in a position to exercise effective oversight and veto of administrative regulations of normative character where the Congress substantially disagrees with the administrative judgment. There are some differences between this approach and the proposed veto legislation. Congressional oversight currently tends to operate after the regulation has been adopted, and this is not costless. For example, the seatbelt interlock regulation went into effect, added to the cost of cars, and only subsequently was overturned. Under the one-House veto proposal, on the other hand, the comparable "cost" is the opportunity due to the delay of all regulations not vetoed by Congress—a not insubstantial cost. Of course it is not at all clear that Congress would have vetoed the seatbelt interlock had the current proposed legislation been in force. Still it seems difficult to dispute the likely fact that Congress would have been more prone and found it easier to overturn the interlock regulation under the legislative veto procedure.

This very point, however, raises another basic question. Namely, is it appropriate for one House of Congress to be in a position to overturn administrative regulation. One can question whether this is consistent with the constitutional scheme requiring both Houses and the President (or unusual majorities of both Houses without the President's approval) to adopt legislation. The other side of this argument is that administrative agencies are creatures of the Congress and can exercise only such power as the Congress delegates to them. And once this legislative veto statute is approved, it can be said that Congress has granted the agencies only conditional authority to adopt substantive regulations. As to whether or not legislative vetoes are constitutional is considered in a lengthy article by Watson entitled "Congress Steps Out: A Look at Congressional Control of the Executive" in 63 California Law Review 983 (July 1975).

Whether or not these alternatives are adequate and outweigh the desirability of adopting the legislative veto idea also depends on one's perspective of how substantial is the problem of public accountability of administrative regulation, and whether or not the underlying causes of such lack of accountability are in fact addressed by this legislation. (Even then, of course, the question must still be answered whether or not the cost of this particular approach, especially when considered against alternative measures for accomplishing the same end, justify the prospective gain.)

MODIFICATION

Recognizing that the assessment of the impact of the legislative veto proposal in advance of its implementation is necessarily speculative and that perceptions

about the utility of this proposal will vary, it is useful to consider how the proposed legislation could be improved.

An immediate recommendation is to include within the proposed statute a provision recognizing its experimental nature. One suggestion, taken from the recent Federal Trade Commission Improvement Act of 1975, would be to require a study and report evaluating the impact and effectiveness of the proposed statute after a period of time. The FTC Improvement Act requires both the Federal Trade Commission and the Administrative Conference of the United States to study and report to Congress after 18 months on the operation of the new rulemaking process. That seems too short a period to assess this congressional veto proposal. I would therefore suggest that the Administrative Conference be required to begin an assessment of the operation of the legislative veto two years after its adoption and to report to the Congress its conclusions within two and one half years after the proposal is enacted.

Likewise it would seem appropriate to put a time limit on the applicability of the statute. Since this is an experiment, it ought not to continue in perpetuity without congressional reconsideration. But Congress is not likely to review this process which enlarges its powers over the agencies without such a time limit. I would therefore urge that the duration of the congressional veto statute be limited to three years. Congress would then have the study made available by the Administrative Conference and would be in a position to assess whether or not the gains of the veto procedure exceeded its costs.

Related to the experimental nature of this congressional veto procedure, but in reality a distinct point, is the suggestion that Congress limit the scope, subject and coverage of its veto powers. Not only should this authority be limited to substantive regulations adopted pursuant to § 553 of the Administrative Procedure Act as proposed by one of the bills, but it also ought not apply to all agency regulations. In order to make a study of its impact manageable and also to limit the number of rules which the Congress should review under this legislation, I would suggest that no more than ten agencies' regulations be subject to its mandate. The legislation might, in addition, be directed primarily at those agency regulations which are of immediate substantial concern to Congress and are likely to involve normative judgments. Likely candidates for such coverage would appear to be regulations adopted by the Environmental Protection Administration, the Consumer Products Safety Commission, the National Highway Traffic Safety Administration, the Occupational Safety and Health Administration, and the Federal Trade Commission.

Another recommendation, if this legislation is to be adopted, would focus on the basis by which Congress makes the decision. Specifically, my concern is with the availability of an adequate record and foundation for congressional decision. The agency's rule and its statement and basis should be supplied to Congress. In addition, a summary of the evidence received by the agency or relied upon by it in making the rule should be made available to Congress. In this manner, Congress would discourage use of the veto process as an opportunity to retry and hear de novo the issues involved in the proposed regulation. Otherwise Congress will be duplicating what the agencies have already done, increase its workload, and substantially diminish the value of agency hearings and the scope of agency authority.

A major modification would be to change the thrust of this legislation and to develop another approach for congressional oversight. Instead of relying on legislative "veto" of administrative regulations, Congress might empower itself (or one House) to "remand" administrative regulations to the agencies for their "reconsideration." This remand for reconsideration would allow the agencies an opportunity to assess the basis for congressional concern in light of the entire regulatory scheme and the alternatives available for accomplishing the same end. If this reconsideration approach were adopted, the Congress would avoid the confrontation aspect of the veto proposal while still allowing itself an effective opportunity for input and oversight over the regulatory process. Moreover, this approach would give greater recognition to the admitted expertise relied upon by agencies in the passage of their regulations.

One other modification that seems worthy of consideration relates to the ad hoc or piecemeal basis of the current proposals for legislative veto. Congressional veto of individual rules may turn out to be counterproductive to the extent to which administrative regulations are interrelated or part of a broader regulatory program. More rational congressional oversight would involve the Congress in examining entire administrative programs rather than individual

rules. The difficulty with this suggestion, however, is that it seems contrary to the veto approach and favors instead the alternative previously noted of continuous congressional committee oversight. At the moment it seems difficult to describe or devise a method for congressional veto or remand of particular regulations which would also consider the challenged administrative regulations on a more systematic basis.

ERNEST GELLHORN,
Professor of Law, University of Virginia.

Mr. FLOWERS. Our next witness is Mr. H. Lee Watson, of Los Angeles, Calif. I just found out he was born in my hometown.

TESTIMONY OF H. LEE WATSON, LOS ANGELES, CALIF.

Mr. WATSON. I have been asked to comment more on what I view the effects and the discussion I am going to provide is fairly theoretical. The effects I am going to discuss are based on the constitutional study. They are based on a study of the debates of the framers at the time the Constitution was adopted and the fears that they had.

So I am not going to talk so much about practical things like the load on Congress, the framers did not have much thought in that direction since at that time Congress was to be a much smaller body.

It is going to be a fairly theoretical discussion but I think it will present some interesting points.

Mr. FLOWERS. I note that you have a prepared statement. Would you like to place it in the record and then you can summarize your testimony.

Mr. WATSON. I believe you have been provided copies.

Mr. FLOWERS. We will place the prepared statement in the record and we will hear your remarks on this subject.

[The prepared statement of Mr. Watson follows:]

STATEMENT OF H. LEE WATSON, LOS ANGELES, CALIF.

Mr. Chairman, my name is H. Lee Watson. I am a recent graduate of Boalt Hall School of Law in Berkeley, California. I am currently employed and awaiting admission to the bar in Los Angeles, California. The comments which I make here today are based on an extensive, if not exhaustive, study which I conducted over a one and a half year period ending in the spring of this year. This study focused on both the historical precedents for the type of legislative provision being considered here today, and upon the constitutional foundations upon which such provisions must rest.

Certain statutory devices for control of the Executive Branch of Government and of administrative agencies have developed during this century despite continuing constitutional attack from the Executive. These devices, often referred to as the legislative veto or the committee veto, mark a departure from previous congressional practice. In the past the controls have most often appeared in statutes authorizing discretionary administrative action. The granted authority is qualified, however, by congressional retention of jurisdiction to disapprove proposed actions. Thus by resolution not subject to presidential veto, or by committee vote, a proposed administrative action to be taken pursuant to statutory authority may be aborted.

Over the years, bills containing these provisions for what I call extra-legislative control of government have been vetoed or criticized by Presidents Wilson, Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Nixon. President Ford has vetoed a bill containing a related provision, but has apparently taken no stand on the legislative or committee veto in general. The procedures have also been condemned as unconstitutional in the opinions of several Attorneys General. No doubt as a result of this opposition, and of opposition from within Congress, these provisions have received only sporadic use during most of this century. An exception to this rule came during World War II. During this period

many statutes granted the President war-time powers but allowed termination of those powers by concurrent resolution at the end of the war. Following the war, usage again dropped to a low level as presidential opposition resumed. Only in very recent months has a dramatic acceleration in the utilization of these devices occurred. Beginning in the waning days of the Nixon administration and redoubling under President Ford, this acceleration has been accompanied by a broadening in the subject matter areas subject to control. The bills before you today, H.R. 3658 and H.R. 8231 would for the first time institute a *general* "laying system," thus allowing legislative veto in a very broad area of administrative rulemaking.

In hopes that I might provide some helpful guidance at what could be a turning point in the workings of American government, I submit the following statement. These comments are amplified at considerable length in my article published in the July 1975 issue of the California Law Review. I propose not to take a stand here on the constitutionality of these measures, though I have done so in my article. In my opinion this question is one uniquely in the hands of Congress, and possibly is unreachable by the judicial system. The responsibility for careful consideration by Congress of the constitutional issues here involved is therefore much greater than in a situation where judicial review is available. I would hope, therefore, that constitutional problems will receive careful consideration by this committee.

There are a number of contexts in which congressional extra legislative control may be exerted. A statute may authorize the Congress or some subgroup thereof (1) to undertake some governmental action independently of the executive branch; (2) to command some executive action, such as the submission of a report; or (3) to act in response to some administrative action or proposed action. The bills which are currently under your consideration are in the latter category. They seek to create a mechanism by which Congress may disapprove administrative rulemaking. I will therefore restrict my remarks to this area of extra-legislative control.

In instituting a system of post-legislative control over administrative rulemaking, the variables to examine seem to be three-fold. The choice made among these factors will affect the nature and effectiveness of Congressional control, the nature of the powers likely to be given the administrative body, and the constitutional problems to be encountered. First, the nature of the administrative body subject to control must be considered. Where rules are to be proposed by the President or a Department under his immediate control, then the power of the President and Congress may still balance one another, though the relative roles of the legislative and executive branches may be shifted. On the other hand, if the rules are to be presented by an independent agency and the possibility of presidential input is minimal, then Congress has, in effect, created a governmental role for itself to the exclusion of the President. The agency is more likely to be subject to domination than is the executive, and the balancing of powers is gone.

Second, an important factor is the nature of the prescribed congressional response—whether positive or negative. Must Congress affirmatively act to approve each proposed set of rules, or is the control of a passive nature where Congress need only act to disapprove rules when it considers the administrative effort unsatisfactory? In the former case, the only congressional gain relative to enactment of the rules by legislation would seem to be the elimination of the Presidential veto power in the case of rules submitted by an independent agency. As in the case of enactment of the rules by legislation, judicial review of the rules for compliance with statutory standards is very likely eliminated. On the other hand, the passive control afforded by the possibility of a disapproving vote may prove no control at all if Congress finds it difficult or embarrasing to act. In my view passive control measures offer serious temptation for creation of federal powers otherwise unlikely to be created.

Finally, there must be considered the mechanism of the authorized response. The possibilities include joint resolution—a standard legislative practice which requires no prior authorization at all, concurrent resolution, simple resolution, vote of one or more committees, or decision of an individual Congressman. Response by committee or individual is not under consideration here. I consider there to be serious constitutional problems with these mechanisms relating to the dual role—simultaneous representation of local and national interests—which Congressmen are thereby required to fulfill outside the context of congressional vote. I will consider these mechanisms no further.

Congress obviously may control administrative rulemaking through standard legislative practices. Thus, a set of regulations may always be overturned by

joint resolution subject to Presidential review. This procedure may be implemented by a requirement that an agency report its proposed regulations to Congress some period before they are to take effect. Alternatively, an agency may be authorized merely to submit proposed regulations to Congress for adoption by joint resolution. This mechanism has the advantage that it is subject to no constitutional objection. It preserves the Presidential role as a balance to congressional power and avoids subjection of independent agencies to the sole dominion of Congress. Only by adoption of this mechanism may Congress amend regulations before allowing them to take effect. From the congressional point of view, however, there may be serious disadvantages to control by joint resolution. If positive adoption of each set of regulations is required before they may become effective, much of the advantage of delegation of rulemaking authority to administrative agencies is lost. While the President may be expected not to veto the adoption of rules which he has submitted or approved, this mechanism would give to the President, as well as to Congress, a veto power over rules submitted by independent agencies. If, on the other hand, disapproval by joint resolution is envisioned, the President may require the disapproval be supported by two-thirds of each house. This would effectively weaken congressional control.

To some extent these disadvantages may be overcome through exercise of the congressional rulemaking power. Thus, where congressional adoption of regulations is required, congressional action may be facilitated by any combination of rules providing for no amendment, limited debate, or priority vote. The same rules may be applied where congressional disapproval is to be expressed. Furthermore, in the case of disapproval the loss of control resulting from the Presidential veto power might be minimized by the following mechanism: a set of regulations could be made subject to disapproval by joint resolution, the vote of disapproval being facilitated by the rules discussed above. In the event that there is no such disapproval, the regulations would take effect automatically after a prescribed waiting period,* such as one year, unless adopted by joint resolution. Such a vote of adoption would also be facilitated by the rulemaking power. This would give Congress a greater amount of time to consider adoption of the regulations, but its primary purpose would be to serve notice on the agency, in the case of a negative vote disapproved by the President, that its regulations would be in effect, at best, for a short term. The agency might find it preferable to rescind its regulations and adopt an alternative set more acceptable to Congress.

The control of administrative rulemaking by concurrent or simple resolution avoids the problems associated with the Presidental veto. The employment of these devices, however, presents constitutional problems. The most apparent of these is with the concurrent resolution. The Constitution states:

"Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States . . . ."

Arguably this bans all use of the concurrent resolution, at least for other than internal congressional affairs. A statute authorizing a concurrent resolution by definition makes the concurrence of the Senate and House of Representatives necessary. Submission to the President would therefore be required and, according to common terminology, the resolution would be termed a joint resolution. This view was rejected, soundly I think, by the Senate Judiciary Committee in 1897 and has had few adherents since. The Senate Committee was considering the constitutionality of the statutory authorization of a concurrent resolution to request a report from an administrative agency. The committee concluded that the necessity for concurrence created by a statutory provision was not the "necessity" referred to in the Constitution. Rather, the constitutional provision required submission to the President when concurrence of the two Houses was a "constitutional necessity." This definition which equates the test for the constitutional requirement of joint action by the two houses with the test for required submission to the President certainly appeals to reason. It would seem irrational for a single House to be able to accomplish what the Constitution forbade to the two houses acting jointly. Thus, in the context of an affirmative vote, the situation under consideration by the Senate Committee, there should be no constitutional distinction between a concurrent and a simple resolution. I will return later to special problems involved with a negative vote, or vote of disapproval.

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*However, they would remain in effect only for a limited period.

The problem with the Senate Committee position is that it requires a test for "constitutional necessity" for concurrence of the two houses. The Committee suggested that the test was whether the action in question was "legislative in nature" or not. The ambiguity of the term "legislative in nature" leaves the matter pretty much up in the air, and all the Committee can be said to have decided is that a request for information needed to legislate is not itself "legislative in nature." In this conclusion the Committee had ample support dating back to the first Congress in 1789. I support the Committee's conclusion but suggest that "constitutional necessity" in a given situation must be determined by careful examination of the distribution of powers propounded by the Framers of the Constitution.

Where a resolution seeks to disapprove, rather than adopt, a set of regulations, there is a complication to the above discussion which I would like to suggest to you without suggesting a solution. The Senate Committee of 1897 considered only an affirmative demand for information and did not face this problem. The Framers of the Constitution acted under the assumption that it would be the role of Congress to affirmatively adopt the laws of the nation. In this context they adopted a bicameral legislative system. Its purpose was two-fold: first, the Framers desired that no new law be adopted without the concurrence of two separate combinations of state interests; second, the Framers felt that the requirement that the two houses of Congress concur in each action would impede the legislative branch, subduing hasty actions and preventing domination of the Executive. Where Congress acts affirmatively, these two purposes act in concert to dictate concurrence of the two houses. Where Congress acts negatively to prevent a change in the law, as where it seeks to disapprove a set of administrative regulations, these two purposes dictate opposite results. Thus, if the legislature is to be impeded, and hasty action prevented, concurrence should be required in a disapproving vote. On the other hand, if no new law is to be adopted without the concurrence of the separate combinations of state interests represented by the two houses, either house must be allowed to disapprove a set of regulations if it does not concur in their adoption. Which of these mandates is to be followed? In the case of regulations to be submitted by or under the control of the President, the danger of domination of the Executive is minimal and probably disapproval by simple resolution should be preferred. In the case of rules submitted by an independent agency the case is much less clear. Here the checking influence of the President is gone and the danger of hasty congressional action maximal, indicating that concurrent resolution disapproval should be preferred. In this case, however, there is the danger that the agency will become dominated by the interests of a single house, and that its regulations will be drafted to suit those interests. This suggests that simple resolution disapproval should be employed.

Having outlined the available mechanisms for Congressional control of administrative rulemaking and some of the constitutional problems involved with each, allow me to suggest some of the possible effects of adoption of these procedures. The present mechanism for control of administrative rulemaking is well known. At a point in time Congress enacts a statute authorizing an agency to promulgate rules in a particular subject area. The intention of Congress at that time, to extend it is determinable, delimits the discretion and power of the agency. Congress, faced with the necessity of relinquishing control over the power which it creates, has an incentive to write standards into the authorizing statute, and to compile a record from which its intent may be determined. The agency then proceeds to exercise the power it has been given by promulgating a set of regulations. If a question arises as to whether the agency has acted within its authority, it is the job of the judiciary to answer this question. To do so the courts attempt to determine the intent of Congress *at the time the authority was enacted*. The necessity of defining an intent at a specific point in time constitutes a limitation on governmental power.

If Congress itself seeks to review an agency's actions it very likely will do so according to its present views rather than according to a determination of its past intent. If the mechanism of review is confined to standard lawmaking practices, then Congress may validly redefine its previous intent and reverse or ratify the administrative action in the process. If extralegislative procedures are open for this review, then congressional intent may gradually be shifted without resort to the legislative process. At the same time judicial review as a mechanism to bind agency power to the anchor of past congressional intent will be eliminated. The courts, faced with the already difficult task of determining

past congressional intent, will be unlikely to reverse a congressional ruling which does not adequately distinguish between past and present intent. An important, and in my view constitutionally required, limitation on federal power will be removed.

I suggest not only that federal powers might be increased by employment of these mechanisms but that in some circumstances it will be placing this increased power directly in the hands of the Executive; that the appearance of control may be illusory. If Congress relies on its powers of control it may be tempted to neglect to specify standards or to compile a record of its intent. The Executive, in possession of the resulting enhanced powers, may then be able to place the Congress in the position of having to act or accept responsibility for not acting. Both choices may be untenable. To put it crudely, the President may find himself in possession of a tool for political blackmail. I feel that this has happened in the recent controversy over oil imports and price controls.

I don't feel that it is possible at this time to determine how real these dangers are. There is very little experience with this type of control. The impressive looking list of statutes provided by the Library of Congress Congressional Research Service is highly misleading. Its listing is heavily dominated by statutes of unquestionable constitutional validity. These include "report and wait" provisions which simply require the administration to report in advance its proposed actions, an exercise of Congressional power to acquire information on subjects of possible legislation, and the "no appropriation" provisions which amount to exercise of the congressional rulemaking power. In addition, there are the "report and wait" requirements with associated acceleration provisions by which Congress can waive the waiting period. These provisions may present technical constitutional questions, but they are of very limited effect.

Provisions for extra-legislative control of government which did not fit into the information gathering function were first employed in about 1910. For many years, uses were either so minor—for instance, committee approval of the location or design of a monument—as to go unnoticed or strongly opposed by the Executive and hence seldom employed. While a vast number of statutes enacted at the time of World War II contained provisions for termination of statutory authority by concurrent resolution, these resolutions were all tied to the end of the war, and furthermore were never employed. With the exception of the reorganization acts, virtually all important authorizations of simple and concurrent resolutions have come in the 1970's, mostly since 1973. Such resolutions have been passed, I believe, in only a handful of instances.

In conclusion, then, control of administrative rulemaking by congressional action outside the standard legislative process is problematical from a constitutional standpoint. Whether these procedures are to be deemed transgressive of constitutional bounds is a decision probably in the hands of Congress. In deciding the issue, the Congress should consider the related possibility of unexpected effects on the distribution and extent of federal power. It is suggested that these problems might be minimized by a carefully conceived exercise of the rulemaking power in conjunction with standard legislative practice. The resulting procedure may be more cumbersome than desired, but the doctrine of separation of powers has always had this failing.

Mr. WATSON. I would also like to submit to you for adoption or selective adoption a copy of my article. It is rather lengthy. I recommend section 4(b) as relevant to this discussion.

Mr. FLOWERS. We can do that. I will ask the staff to select relevant portions for our consideration.

Mr. WATSON. The bills which you are considering are H.R. 3658 and H.R. 8231, I believe, and are representative of one aspect of what is in my article which I refer to as extra legislative congressional control of Government.

By this I mean a situation where there has been a statute which authorizes some action by Congress or committees or individual Congressmen which will have some legally binding effect on the Government which, however, is not a part of the legislative process.

There are borderline areas, of course. For instance, a request by a committee for information from the Executive, I would not really

classify in this area. That would really be a part of the legislative process. Presumably that information would be needed for the purpose of legislating.

If you stick to what I would consider this extra legislative control area, I would classify three types of congressional actions. First of all, there is, which would be taken independently of the Executive or of the administration, I should say.

An example of that might be termination of some statutory authority, let's say by concurrent resolution. A second example would be an action by Congress or a House of Congress or a committee which orders the Executive to do something. The third would be an action in response to some executive proposal or action. That is the category we are talking about here.

Congress is responding to proposed regulations submitted to it by either adoption or rejection. So although my articles are much broader, I will focus my remarks on this third aspect of extra legislative control.

What I would like to do is outline the techniques by which this sort of control might be accomplished, extra legislative or by standard legislative techniques, suggest some of the effects that might be expected and at least mention the constitutional problems related to those effects.

In considering these mechanisms for approving administrative regulations there seem to be three variables that one might consider in deciding what mechanism—what procedure to adopt, First of all, there is a question of who is to submit the regulations that are to be approved or disapproved.

I see a difference where those regulations are to be submitted by the president or by some agency under the control of the President or on the other hand an independent agency which submits regulations into which the President has had no opportunity for input.

That is the first variable. Who submits these regulations. The second, there seems to be considerable difference in what type of congressional response is to be taken. In a few cases Congress has provided that before regulations should come into effect, it has to affirmatively vote to accept that.

Of course, this would be in a case where the agency is to submit a proposal for legislation and then enacts it. There are some cases where Congress is to adopt by a resolution, simple or concurrent, that proposal.

The alternative is a negative vote which is the case in both of these bills by which Congress by resolution or legislation would disapprove the regulations that have been submitted. I am going to discuss these variables in more detail once I go through the list.

The third and the final variable is the mechanism by which Congress acts. The choices here, the ones that have been considered over the past are joint resolutions, which is a resolution of both Houses of Congress and subject to Presidential veto, concurrent resolutions which requires the concurrence of the two Houses but is not subject to Presidential veto, single resolution of presumably either House.

Committee vote or even the decision of an individual Congressman. There has been one instance of a statute which allowed an individual Congressman to make a decision which in effect could change administrative regulations. The latter two categories, the committee and the

individual decision are not under consideration and I tend not to go into them any further unless somebody wants to question me on it.

Let me then go through the variables briefly. The difference between whether the regulations are to be submitted by the President or under the control of the President or by an independent agency may be fairly substantial.

Let me say now if the President submits—by that I mean if it is submitted by him or by an agency under his control—if the President submits these regulations, he has had presumably an input into them.

There is a mechanism by which the powers of Congress and the President can balance. The roles may be shifted from the ordinarily defined constitutional rules but at least that balancing is there.

I see a more severe problem in the case of a regulation submitted by an independent agency. Such an agency may be much more subject to control of Congress. The President does not have a say in these regulations. It—it carves out a role for the Congress in the Government independent of the President.

This provides some problems which should be considered. There are constitutional problems. This is an area that is fairly neat and this is probably solely in the hands of Congress. I would not expect the question to be reachable by judicial review. You have problems of standing. How would it get to court?

Second, I really suspect that a court would go off on the issue of political question, assuming that they could get a case to consider it at all.

I think the responsibility of Congress is much greater than in the run of the mill case of legislation. The second variable is whether Congress is to respond positively or negatively to the proposed regulations. If the response is positive, if Congress must OK each set of regulations, this is not a particularly practical way of doing it as I think you could see.

It in effect does away with all the advantages of delegation of rulemaking. Congress has to consider everything and either vote mindlessly or vote after considering each individual instance. There is nothing gained from such a mechanism of positive vote except perhaps the fact that the President will not be able to veto an adoption of regulations submitted by an independent agency.

If the President submits them, he will be expected not to veto Congress' adoption of it. The third variable is the mechanism of congressional approval and this is the most important mechanism.

First of all, there is a possibility of approval or disapproval by joint resolution. This means that the President plays a role. It has an advantage that there are no constitutional questions involved.

It is standard legislative procedure. If the vote is to be positive, if there is adoption, again, there is no need for advance authorization at all. The Congress can just do it any time it pleases. There is very much gain in fact over what exists now.

If joint resolutions are for disapproval, the President can require that disapproval be by two-thirds of each House which means that congressional control is considerably reduced from what I believe is desired.

I would suggest that a lot of the problems with joint resolutions control could be overcome by an exercise of congressional rulemaking

power. Now first let me suggest that what I am saying would be considerably more practical in a case where an individual authority is enacted by Congress with the caveat that what I am going to propose be adopted in that individual case than with a very general system as proposed by the legislation before you.

There you are going to get into the problems Mr. Gellhorn discussed relating to the load on Congress. What might be done with a joint resolution is this: First of all you might arrange that the rules are to be submitted to Congress for consideration.

Some period of time before they are to take effect. This is a fairly common piece of legislation and I see no constitutional problem with it whatsoever.

Congress, of course, may then during this waiting period enact a joint resolution which disapproves the regulations. This can be supplemented by the rulemaking power in regards to limited debate or to amended rules or priority vote. I would suggest that if the President should veto such a rejection of the rules, that the rules then be allowed to take effect automatically be it specified that in any case these rules take effect they are to be in effect only for a very limited period—a year, let's say—lest adopted by a joint resolution.

This adoption vote would also be supplemented by the rulemaking authority in the same manner as before. The advantage of this procedure would be this. First of all, Congress would not have to act very rapidly on the regulations. There would not have to be a long delay in their automatic effectiveness. Nor would Congress have to consider whether or not they wanted to adopt or reject in a 30-day waiting period.

If Congress had voted to overturn the regulations but the President had vetoed this vote, the agency would be under notice that it would be very likely to get the approving vote—very unlikely to get the approving vote later on. The agency might rescind its regulations rather than to have one in effect for a very short period.

That is basically my proposal. It is cumbersome, I admit that. The separation of powers has never facilitated ease in Government. That is the proposal I submit initially to get around the constitutional problems I see and the remaining mechanisms which I will discuss.

The second type of mechanism is the concurrent resolution. Let me discuss that in conjunction with the simple resolution. First of all, the concurrent resolution has one obvious difficulty which I think can be overcome: namely, the Constitution says any bill or vote, resolution, what have you, which requires the concurrence of the two Houses of Congress shall be submitted to the President for veto and the override procedure if necessary.

Well, the question arose back in 1897 whether this would ban all use of concurrent resolutions. The question the Judiciary Committee then considered was whether a statute which authorized a concurrent resolution which was for the purpose of requesting a report. I believe from the Secretary of War, was valid?

In other words, the statute at that time said the resolution in Congress. The question was, was concurrent resolution appropriate? The committee decided—and I think correctly, that the constitutional phrase where the concurrence of the two Houses is necessary does not refer to the mere fact that a statute makes concurrence necessary.

It refers to some kind of constitutional need. In other words, in a case where the Constitution requires the two Houses to act together, then in fact it has got to be submitted to the President.

Mr. FLOWERS. I think we have fairly well settled that in recent years. The war powers provisions show a general consensus that legislation that provides for disapproval by concurrent resolution is a proper exercise of congressional authority. I think probably everyone on the committee would agree with that. Let us go to the next situation.

Mr. WATSON. Have you noted the consequences of that situation, that decision? If that is the case there is no distinction between simple and concurrent resolutions. Wherever simple resolution is permissible, concurrent resolution is permissible.

Mr. FLOWERS. While there is the obvious difference that the concurrent resolution requires action by both Houses, I would tend to agree with that.

Mr. WATSON. The Senate committee there had considered the case of a positive request for information. In the measures being considered here, it is a negative vote in question. In other words, Congress is voting not to change a law of a House of Congress.

I am not sure that that same equating of concurrent and simple resolutions applies in this case. The reason is this. There are really two purposes behind the bicameral system of government. One is that the framers decided that for any change in law there should be the concurrence of two independent combinations of State interests.

Two, the framers felt that it was necessary to have some internal limitation on the power of Congress and the concurrence of two Houses was necessary to limit the power of Congress. Now when you have a positive vote those two purposes pull in the same direction.

The two Houses must concur. When you are talking about a negative vote, those pull in opposite directions. If Congress is to disapprove some change in the law as is represented by an administrative regulation, if that is to be done by simple resolution, then in fact if either combination of State interest disapproved that change in the law, they have their say.

On the other hand, Congress in that case does not face this internal control of the concurrence—requirement of the concurrence of two Houses. I am not trying to give you an answer. I am suggesting that the consideration for bicameral vote is different.

You have two purposes for bicameralism playing in opposite directions when you consider a negative vote.

Mr. FLOWERS. Yes.

Mr. WATSON. I can't solve that problem. I can only suggest it as being something you should consider. Let me go on to, I guess, my main point and it is a suggestion that there be an effect in this system which I have not seen suggested in the constitutional debates and what have you and that is that this type of legislation may provide for an increase in Federal power. Let me explain that. This I see as a constitutional problem. Mr. Chairman, you have suggested to Mr. Gellhorn that maybe with this type of legislation, Congress would more carefully enact statutes and define rules of administrative agencies more carefully.

I would suggest that the opposite might be the case. Now that Congress is creating a power to authorize an agency to do something which it does not have to let go of, it is likely to be less careful in defining that power.

It will set fewer standards. I think that this system—that is a serious danger. Let me describe the present system of review of administrative regulations and compare it with review under this system. As you know, presently when Congress enacts an authority for some agency, it faces the problem of defining at that time its intent. It has to compile a record if it wants the courts to be able to later find that intent.

It is the intent of Congress at the time the legislation is passed that is important. The agency—let me turn to my statement here if I can find it.

This is a little bit intricate so I would like to refer to it.

Mr. FLOWERS. We are running short on time and we are interested in your statement as well as the other gentleman.

Mr. WATSON. Let me conclude very quickly then. I see that this necessity for defining the intent at a specific point in time is a limitation on the power of the Federal Government.

I think it was an intended limitation, intended by the framers. What this legislation does is it removes that limitation. It allows Congress without going through the legislative process to gradually shift its intent over time. A Congress later which votes to adopt or reject a set of regulations is going to act according to its interpretation at that time of the enabling legislation, not what the intent of Congress was some years previous.

This is going to eliminate the possibility of a court coming along and saying no, this is what Congress meant way back when. A Congress is not going to be able to distinguish in a congressional vote between present and past intent. An anchor on Federal power would be removed.

This I think is a constitutional problem.

Mr. FLOWERS. Having listened to you and read your statement, I think you have raised some interesting questions that we must consider. I believe we shall consider them.

Mr. Moorhead?

Mr. MOORHEAD. I want to thank you for coming back to help us with the information that you have. I have just one question I wanted to ask. You seem to be somewhat shocked that Congress would be interested in reviewing these regulations that agencies promulgate. But, of course, you know that Congress can put as much detail as they want in legislation to begin with.

Instead, we choose to delegate that responsibility to the executive departments. But having delegated that responsibility, then to see that the delegation is really being carried out according to legislative intent.

It is a legislative function that is being carried out by the executive branch of Government. But it remains the responsibility of the legislative branch of Government to see that it is carried out correctly.

I would disagree with your observation that is postlegislative authority that they are carrying out. We must exercise some oversight on those regulations that are being adopted, and are actually in effect

law. Their rules have as much effect on the American people as anything else.

Mr. WATSON. I agree with that. I think we really see to that. I think that Congress at review of administrative regulations is essential. I think what we disagree on is the method that this review is to be carried out. Congress enacts legislation with the concurrence of the President and I think that if Congress is then going to go back and say no you did not do this the way we intended then the President should have his say then, too.

Mr. MOORHEAD. Thank you.

Mr. FLOWERS. Mr. Danielson?

Mr. DANIELSON. Thank you, Mr. Chairman. I have no questions.

Mr. FLOWERS. Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman. No questions. We appreciate your help and your testimony today.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. Mr. Chairman, thank you. I have just one question. Would you believe that we are well advised to get into this area at all, or should we at this point stop and try to enhance the legislative process for oversight?

Mr. WATSON. I would suggest if you do get into it——

Mr. MAZZOLI. I did not ask if we. Should we?

Mr. WATSON. I don't think we should proceed this way. I think you should try in more specific cases. There is just remarkably little experience with this. I was given a copy of the Library of Congress study which gives the impression—this has been going on for years. But it is misleading because most of the provisions in here are not the type under consideration.

Most of them have no constitutional problems at all. Virtually all experience with this type of legislation has come since 1973 with the exception of the Reorganization Act. I would suggest it would be much wiser to put this type of provision into individually enacted authorities rather than into a very general statement, try it out for a few years in specific cases and see how it works.

Mr. FLOWERS. Mr. Pattison?

Mr. PATTISON. I have no questions. Thank you.

Mr. FLOWERS. Mr. Watson, thank you very much. We look forward to seeing you in Tuscaloosa sometime.

Our next witness—and I am going to ask them to come forward together. We have two distinguished representatives, one State Senator David Neiditz, from West Hartford, Conn. Senator, we are delighted to have you with us. We have State Representative Thomas J. Anderson of Lansing, Mich.

Representative Anderson, you have counsel for your joint committee in Michigan with you. We would like to have him, too. Inasmuch as we are dealing with the experience of two of our great States in this area and both you gentlemen are experts of your respective States, I thought it would be appropriate that we get you here together and let Senator Neiditz proceed first, and then you, Representative Anderson. Then perhaps the panel will have questions.

TESTIMONY OF DAVID NEIDITZ, STATE SENATOR, WEST HARTFORD, CONN., ACCOMPANIED BY COUNSEL, KEN SANDERS, AND THOMAS J. ANDERSON, STATE REPRESENTATIVE, LANSING, MICH.

Mr. NEIDITZ. I am chairman of the Senate Judiciary Committee of the Connecticut General Assembly. I was a member of the House for four terms and a member of the Judiciary Committee before I was demoted to the Senate.

Mr. FLOWERS. You started off on the right foot. [Laughter.]

Mr. NEIDITZ. I am a member of the Regulations Review Committee in Connecticut. Connecticut has a very unique system. I have not yet reviewed the Michigan or Virginia set up but I think if I would outline it for you, it has certain things that are peculiar to Connecticut both historically and what grew out of the years.

Essentially since 1959 we have had some mechanism for review of relations of executive agencies. It was really when we passed the Uniform Administrative Procedures Act which is to some extent modeled after the Federal APA in 1971 and incorporated within it the existing regulation review provisions that we really—I think we have a strong review mechanism for administrative regulations.

This committee is made up of 14 members of both houses. We are unique in Connecticut in that all of our committees operate as joint committees which is the next nearest thing to unicameralism.

Of the 14 members, 6 are members of the Senate, 8 are members of the House. The committee is equally divided between the two parties. It is one of two committees, standing committees of the General Assembly which regardless of which party is in control has an equal number of Republicans and Democrats. I think this has aided the committee and aided the committee's image before the public and the media and the executive agency.

In order to disapprove—all executive administrative regulations must be submitted to the committee for the committee's approval. By reason of this—it takes 8 votes to disapprove the regulation.

So in other words we need at least one person from the other party to overturn a regulation. In my experience as a member of the committee for 6 years, I don't think we have ever had a partisan vote. There have been splits but it has never been along party lines.

The committee has given power to disapprove a regulation. It has 60 days from receipt of the regulation to do so. I think the point I would like to emphasize the most is it is the existence of the power rather than the exercise of power which I think has been very important in Connecticut.

I brought with me some reports of the legislative regulations review committee for the last several years and in the 1974–73 report, there are 142 sets of regulations submitted to the committee.

There were 11 disapproved in whole or in part. In 1973 there were 108 sets of regulations submitted to the committee and there were 8 disapproved. The most recent one, 1974——

Mr. DANIELSON. Would you speak directly into the mike please?

Mr. NEIDITZ. 11 of 159 sets of regulations were disapproved in whole or in part. Now we do—I was now interested in hearing Professor

Gellhorn and the other gentleman. I think that we feel that the power that the committee has is out in the open.

We receive written statements from outside groups, written statements from colleagues in the legislature which are available to the public. We have open hearings when requested.

Our meetings are all open. When we discuss it we don't have any—we discourage any ex parte communications with an interested party or group. If they have something to say, we want it in writing.

We want them to come in and tell the committee. We notify the agency that is involved and they sit in on all meetings. We very often adjust—we explain to them what the problems are and they make some adjustments and then resubmit regulations.

Mr. FLOWERS. Actually though your Connecticut law provides for the committee itself being able to accept or reject, is that correct?

Mr. NEIDITZ. That is correct. We do make a report. A question may be raised as to that delegation, the problem of delegation. However, we do make a report back to the House and the Senate.

Mr. FLOWERS. Still they don't have any say so. There would be no chance for further review by the full body?

Mr. NEIDITZ. Yes, there is. Every regulation that we disapprove goes to the next session of the General Assembly which must take action. The action may be inaction by approving. We have never in the years that the committee has been in effect in one form or another since 1959, the committee has never been overturned.

There is that mechanism. They must take some action. We are now in session annually. That makes a difference. I have reviewed the Levitas bill and the other bill, and the Levitas bill is in better shape.

The delay problem that Professor Gellhorn alluded to, we don't have. If there is an emergency, an executive agency can put a regulation in. It is effective for 20 days, at which point they have to come before the committee. There can be some other period of days in it if it involves the safety or the health of the public.

If it has to do with food law, restaurant cleanliness, or something like that, they can be effective if they certify that they are emergency.

Mr. FLOWERS. Has this created an inordinate workload for this particular committee in the Connecticut legislature?

Mr. NEIDITZ. I don't think it has. The members of the committee take their work seriously. We have a staff of three people, a secretary, a counselor, and a researcher. What we have done is made use of—we will contact the committee members of both parties who are on the committee there might be legislative oversight function in that area.

That has been generally helpful. We will go back to the committee. We don't have written committee reports for legislative intent. We may have to go to the floor debate on certain materials that were submitted during the hearings. But I think we are very conscious that we do not abuse the power.

I think even though our statute does not state it, I may have voted against a bill. Yet when the regulations come out, I don't play the role of a spoiler. The legislature has acted. My job on the regulation review committee is just to say: Is it in conformity with the statute?

Do they have that power under the statute to act and if they did, I vote yes. I think that we have never to my memory had a situation

where people have voted their prior views. We have been able to—certain executive agencies, certain licensing boards just take unto themselves, they feel like giving them the power. We had one this past year involving civil engineers and land surveyors whose duties are to license the people who want to go into that field. They submitted in the form of a regulation the—many years after being formed, sets of standards for different types of surveys.

Now that was in our view clearly beyond their legislative mandate. There may well be a need for setting standards for different forms of surveys. But that was a legislative matter.

They should either come to the legislature and ask for the power to make those standards or put them in the form of a bill. This they did not do. I think that we have had—Connecticut is one of the few States that administers most of the Federal environmental legislation itself and in those areas we have had regulations come back to the committee.

We have made some changes. I think that the executive agencies, the department of the environment has been just—in knowing that the regulations are going to come before this committee have been much more careful in their drafting.

We provide for the publication of the regulations prior to hearing and published in our law journal as well as when it is effective.

I notice that the current State law—Federal law, all you need is a description of the subject and the issues involved printed in the Federal Register. I think this is one of the problems that we deal with as legislatures with the Federal Government. I don't know if you have heard from your constituents who are also legislators or in the executive departments back home but we really suffer.

The SSI amendments, H.R. 1, when that came out, 20 of us from various States, mostly legislators, met with the chairwoman of the committee which had been charged with the bill. This was almost a year after. All of the answers to questions that we asked her and her staff just did not come out that way when the regulations finally came out.

We had no way of having input. Many States have had to maintain offices in Washington, not lobbying up here, not talking to members of their congressional delegation, but just getting into the interstices of the Federal agencies.

Not dealing at any high or policymaking level theoretically but just having gone to school with somebody who is working on regulations way down below. As far as legislative oversight after the fact, my gosh, people's lives are affected. It may be 2 or 5 years or 10 years before there is any meaningful legislative oversight.

I would much prefer a process where there was some power to review the regulations at the Federal level. It is obvious to me that if I have a problem in Washington, I will probably call a member of our congressional delegation who is on the appropriations committee who deals with the appropriations involved.

In some magical, mystical way that individual may have more influence in the agency than the substantive committee which handled the legislation. Yet if we are trying for open government, this is—what you are talking about here is opening up the process.

I think it must be very frustrating for you, as it is for us, to pass something you think is good legislation and then have something just

the opposite happen. I am struggling right now with the Juvenile Delinquency Act of 1974. We can't understand it. There are so many conflicts both in the statute and in the regulations and in the interpretations and in the rulings that come out that for the $200,000 that Connecticut might get under the statute, we have to remake our system.

We will never know until after we think we have conformed whether we have—there are no guidelines. We have no directions. There is really no one we can turn to on that. We just have to take a deep breath and hope.

Mr. FLOWERS. Well, I appreciate your comments of what is happening in Connecticut. It sounds like you have institutionalized this thing. Sixteen years now you have had it. It must be working fairly well.

How about a word from Michigan and then we will see what the committee would like to ask both you gentlemen.

Mr. ANDERSON. I am Representative Thomas J. Anderson, chairman of the Joint Committee on Administrative Rules in the Michigan Legislature. It is a joint committee of both parties, both houses, the chairmanship alternates, 2 years House. 2 years Senate.

It is one of the few joint committees we have in Michigan. I strongly favor what you are trying to do here in H.R. 8231 and 3658. I agree with the Senator on the Levitas bill. I think the purpose served by the statements of intent in these two bills can be applauded.

In my 2 years and my 12 years as a legislator almost all of which has been on the joint rules committee, I have seen many instances of congressional intent subverted or circumvented or modified seemingly by the rules that appear in the Federal Register about which people have had no opportunity to make input, people being the public at large.

This is an area in which Michigan does not have similar problems. We have a somewhat similar rules procedure to that which Connecticut was favored with. We think there are only two or three good ones in the whole country that really allow legislative review or oversight of what the agency is doing in administering the statutes provided by the legislature to the executive and to the administration.

We think the question of desirability of rules is important. In both the Clawson bill and the Levitas bill, the provision is made for a discretion as to whether rules being promulgated have met legislative intent, have not exceeded that intent or have not circumvented that intent. I think that is important. I think that is very imporant in that a committee situation such as we have in Michigan or in Connecticut which would not involve the entire Congress but which could provide some sort of review on selected features of the rules appearing in the Register could be most helpful to the Congress in making sure that the intent were followed.

In Michigan, our committee meets weekly almost year around. We have almost a year-round legislature and have had for a good many years. So far this year we reviewed 100 sets of rules ranging from a few pages to several hundred pages in size averaging perhaps 60 or 80 pages.

We have only had to reject one or two of those. We don't have the provision in our law in Michigan of modifying the rule. We respect

the executive prerogative. We think it is an important prerogative. We don't allow the legislature to modify the rule. We either approve or disapprove it.

If we disapprove it for the disapproval to stick, it has to be approved by resolution of both houses of the legislature. A disapproval by the committee, it must have the approval of the entire legislature. Our procedure is tight.

We provided in our law for public hearings at the input stage. No agency may promulgate a rule without submitting it to a public hearing at which the public has an opportunity to express their opinion on the ruling. Subject to—subsequent to their public hearing markup and writeup, it goes to the bureau for summation and to the attorney general for legality. Then it comes to the joint committee on administrative rules.

The joint committee is given 60 days and I would suggest some such feature in these bills allow this concept, in which to review these rules. If they take no action, the rules default into effect.

During that 60 days we approve outright or reject and then the rejection requires a resolution passed through the legislature to support.

The meetings at which we review those rules are open, public meetings. We notify all persons the agency tells us appeared at the hearings that they conducted to let them know that the rules are being considered by the committee and most often—this is important for you to know—most often, Mr. Chairman and gentlemen, the public does not appear.

But occasionally—we had one yesterday at which some of the people who testified at length before the agency hearing appeared and testified at length before our hearing. We approved the rules notwithstanding the testimony because we thought in balance they were good rules.

The fact is that it is not a cumbersome system. We meet weekly in committee. Everybody on the committee is conscientious about this responsibility more so than they are in some of the other committees they serve on.

The legislature feels that they are having a review process. This is important. Individual members sometimes appear at our hearings. We notify individual members at committee level that there is a rule to be considered by the committee.

We notify the chairman of the appropriate committee and if there are some regional relationships, we notify the appropriate legislator so he can be present if necessary or if he so desires. In summary, I would say that the public input question is an extremely important one.

One of the weaknesses of the Federal system is that often the rules are promulgated without the full opportunity before the rules are on the record of being subject to a public input.

Somebody writes up the rule and lays it in the Federal Register and says if you want to object to this ruling go ahead and do so. You have so many days in which to do it. We are working in Michigan right now on the very same thing with respect to the discharge of sewage.

The Federal Register last week contained regulations saying that certain overboard discharges will be permitted. This pulls the rug out from under Michigan's standard which is a good standard. There was no opportunity for prior review on that although we have had several pieces of correspondence. The rules themselves and their promulgation were not subject to the review they ought to have been in my judgment.

The second benefit of this kind of system, and both bills would contain this, would be the feeling of individual Members of Congress that somebody in the congressional system is looking to see whether these really meet the intent, that they are actually desirable rules with respect to the intent of Congress in passing the original act.

Third, I agree with the Senator very strongly that it immediately has the happy result that the agency becomes more careful in how they promulgate rules. So I would say then that I know your time is gone. I tell you that I brought some documents along which I will leave with you.

I brought a copy of our Administrative Procedures Act for your review. I brought also a copy of the Guideline we publish to the agencies as to how they conduct themselves with respect to our committee action.

We also have the operating rules of our committee. We have a copy of a house bill 4648, Michigan House bill introduced by all the house members of the committee which would modify and strengthen the committee review of the process.

[The documents referred to follow:]

HOUSE BILL No. 4648

March 18, 1975, Introduced by Reps. Hoffman, Anderson, Bryant, Forbes and Elliott and referred to the Committee on House Policy.

A bill to amend sections 3, 45 and 46 of Act No. 306 of the Public Acts of 1969, entitled

"Administrative procedures act of 1969,"

sections 45 and 46 as amended by Act No. 171 of the Public Acts of 1971, being sections 24.203, 24.245 and 24.246 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 3, 45 and 46 of Act No. 306 of the Public Acts of 1969, sections 45 and 46 as amended by Act No. 171 of the Public Acts of 1971, being sections 24.203, 24.245 and 24.246 of the Compiled Laws of 1970, are amended to read as follows:

Sec. 3. (1) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.

(2) "Agency" means a state department, bureau, division, section, board,

HOUSE BILL No. 4648

commission, trustee, authority or officer, created by the constitution, statute, or agency action. It does not include an agency in the legislative or judicial branches of state government, the governor, an agency having direct governing control over an institution of higher education, or the state civil service commission.

(3) "Contested case" means a proceeding, including but not limited to rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as though before a single agency.

(4) "COMMITTEE" MEANS THE JOINT COMMITTEE ON ADMINISTRATIVE RULES.

~~(4)~~ (5) "Court" means the circuit court.

Sec. 45. (1) The legislative service bureau shall promptly approve ~~the rules in a proposed filing~~ A PROPOSED RULE when it deems ~~them~~ IT proper as to all matters of form, classification, arrangement, and numbering. The department of the attorney general shall prompty approve ~~the rules~~ A PROPOSED RULE when it deems ~~them~~ IT to be legal.

(2) After the legislative service bureau and attorney general have approved ~~the~~ A proposed ~~rules~~ RULE but before the agency has formally adopted the ~~rules~~ RULE, the agency shall transmit by letter copies of the ~~rules~~ RULE bearing certificates of approval and copies of the ~~rules~~ RULE without certificates to the joint committee on administrative rules. After its receipt of the agency's letter of transmittal, the committee shall have ~~2 months~~ 60 DAYS in which to consider the ~~rules~~ RULE. Subsections (2) to (6) do not apply to AN emergency ~~rules~~ RULE.

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(3) If the committee approves the ~~rules~~ PROPOSED RULE within the ~~2 months~~ 60 DAYS, it shall attach a certificate of its approval to all copies of the ~~rules~~ RULE bearing certificates except 1 and transmit those copies to the agency.

~~(4) If the committee disapproves the rules within the 2 months, it shall cause a concurrent resolution to be introduced in the house of representatives or senate, or both, disapproving the entire set of rules or any specific rule and stating reasons therefor. If the legislature adopts the resolution, a copy shall be sent to the agency proposing the rules and the agency shall not formally adopt the rules nor file them with the secretary of state except that the agency may make minor modifications in the rules and resubmit them to the bureau, attorney general and joint committee in accordance with this section without further notice or hearing under sections 41 and 42.~~

(4) IF THE COMMITTEE DISAPPROVES THE PROPOSED RULE OR NEITHER APPROVES OR DISAPPROVES THE RULE WITHIN THE 60 DAYS IT SHALL IMMEDIATELY REPORT THE FACT TO THE LEGISLATURE AND RETURN THE RULE TO THE AGENCY. THE AGENCY SHALL NOT ADOPT OR PROMULGATE THE RULE UNLESS:

(A) THE LEGISLATURE PASSES A CONCURRENT RESOLUTION ADOPTING THE RULE WITHIN 60 DAYS AFTER RECEIVING THE REPORT.

(B) THE RULE IS SUBSEQUENTLY APPROVED BY THE COMMITTEE.

(5) AN AGENCY MAY WITHDRAW A PROPOSED RULE WITH LEAVE OF THE COMMITTEE. AN AGENCY MAY RESUBMIT A RULE SO WITHDRAWN OR RETURNED UNDER SUBSECTION (4) WITH MINOR MODIFICATION. SUCH A RULE IS A NEW FILING AND SUBJECT TO THIS SECTION BUT IS NOT SUBJECT TO FURTHER NOTICE AND HEARING AS PROVIDED IN SECTIONS 41 AND 42.

~~(5)~~ (6) If the committee approves the ~~rules~~ PROPOSED RULE within the ~~2 months~~ 60 DAYS or the legislature ~~does not adopt~~ ADOPTS the concurrent

resolution ~~disapproving the rules within 3 months after the rules are transmitted to the committee or 1 month after introduction of the resolution, whichever occurs first, the agency if it wishes to proceed shall thereafter formally~~ APPROVING THE RULE, THE AGENCY MAY adopt the ~~rules~~ RULE, in accordance with any applicable statute, and make a written record thereof. Certificates of approval and adoption shall be attached to at least 6 copies of the rules.

~~(6)~~ (7) On formal adoption of a rule, an agency, if requested to do so by an interested person either before or within 30 days after the hearing, shall issue a concise written statement of the principal reasons for its actions.

Sec. 46. (1) To promulgate a rule an agency shall file in the office of the secretary of state 3 copies of the rule bearing the required certificates of approval and adoption and true copies of the rule without the certificates. An agency shall not file a rule, except an emergency rule under section 48, until at least 10 days after the date of the certificate of approval by the ~~joint committee on administrative rules or until at least 10 days after expiration of the applicable period of time prescribed in subsection (5) of section 45 when the legislature has not adopted a concurrent resolution disapproving the rule during that period~~ COMMITTEE OR LEGISLATURE ADOPTS A CONCURRENT RESOLUTION APPROVING THE RULE. An agency shall transmit a copy of the rule bearing the required certificates of approval and adoption to the office of the governor at least 10 days before it files the rule.

(2) The secretary of state shall indorse the date and hour of filing of rules on the 3 copies of the filing bearing the certificates and shall maintain a file containing 1 copy for public inspection.

(3) The secretary of state, as often as he deems it advisable, shall cause to be arranged and bound in a substantial manner the rules hereafter

filed in his office with their attached certificates and published in a supplement to the Michigan administrative code. He shall certify under his hand and seal of the state on the frontispiece of each volume that it contains all of the rules filed and published for a specified period. The rules, when so bound and certified, shall be kept in the office of the secretary of state and no further record thereof is required to be kept. The bound rules are subject to public inspection.

1887 '75

JOINT COMMITTEE ON ADMINISTRATIVE RULES

PROCESSING OF PROPOSED ADMINISTRATIVE RULES

May, 1974

I. NOTICES OF HEARINGS AND PROPOSED RULES:

An agency proposing rules shall transmit 15 copies of the notice of its public hearing on the rules and 15 copies of the proposed rules marked "proposed rules" to the clerk of the Legislature's Joint Committee on Administrative Rules [Sec. 41(2)]. These rules should be sent to:

Joint Committee on Administrative Rules
Attention: Committee Clerk
Room 419, Capitol Building
Lansing, Michigan 48901

The Committee Clerk will distribute the notices and copies of the rules as follows:

8 copies to the offices of the Joint Committee on Administrative Rules members
2 copies to the Joint Committee on Administrative Rules staff members
1 copy to be filed in the Joint Committee on Administrative Rules Clerk's binder
2 copies to the Chairman of the appropriate Senate and House standing committees
1 copy to Gongwer News Service, Inc.
1 copy to Michigan Information & Research Service, Inc.
15

The purpose of this distribution is to give the Joint Committee on Administrative Rules and standing committee members and staffs an opportunity to attend hearings if they wish to do so.

The staff assistants of the Joint Committee on Administrative Rules are attending public hearings. This is merely an audit function and is not intended to obviate the necessity of agency compliance with any part of the Administrative Process. An agency transmittal is not complete and will not be acted upon by the Joint Committee on Administrative Rules unless the provisions of this memorandum are complied within a timely matter.

II. RULES TO LEGISLATIVE SERVICE BUREAU FOR FORMAL APPROVAL:

When submitting rules to the Legislative Service Bureau for formal approval, an agency shall submit at least 14 copies. The members of the Joint Committee on Administrative Rules will no longer receive copies of the rules at this time since they will be receiving the rules under the procedures outlined in paragraph 4 of this Memorandum. However, the Legislative Service Bureau will send two of the copies to this Committee for use by its staff.

Section 41a was added to the Administrative Procedures Act by Public Act 171 of 1971. The Section provides for requests for copies of proposed rules by Legislators to the Legislative Service Bureau. Pursuant to these requests, the Bureau will furnish copies of rules which have been formally approved by them and the copies will be so stamped indicating the date of approval. The Bureau is sending a memorandum to all Legislators advising them of this privilege. Until requests are received from Legislators, it will be impossible to determine how many additional copies of rules prepared for final approval will be required from agencies to meet the Legislative requests. When returning rules to an agency for final typing, the Bureau will advise the agency how many copies in

addition to the 14 previously mentioned will be required. Any agency not receiving this information should contact the Bureau.

III. RULES TO THE ATTORNEY GENERAL FOR FORMAL APPROVAL:

After the rules are approved by the Legislative Service Bureau, 9 copies shall be submitted to the Attorney General's Office; 8 copies to have the Bureau's certificate of approval attached, and one copy without attachment.

Upon certification by the Attorney General, the 8 copies of the rules with Legislative Service Bureau certificates and Attorney General certificates shall be returned to the agency.

IV. RULES TO THE JOINT COMMITTEE ON ADMINISTRATIVE RULES:

After an agency receives rules from the Attorney General with the Legislative Service Bureau and Attorney General certificates attached, the agency shall send to the Clerk of the Joint Committee on Administrative Rules a letter transmitting 6 copies of the rules with the 2 certificates attached and 25 copies without certificates [Sec. 45(2)]. This provision does not apply to emergency rules.

The form of proposed rules submitted to the Joint Committee on Administrative Rules shall be as follows:

> All rule changes submitted to the Joint Committee on Administrative Rules shall indicate new matter with CAPITAL LETTERS and --------- by lining out that which is to be deleted. Rules which are rescinded shall be written out and then lined out whether or not they are replaced in the same transmission. New rules need not be capitalized as long as the fact that they are new is indicated.

In addition to the certified rules, an agency shall send to the Committee Clerk 25 copies of a report on the rules being submitted which will include the following items of information:

A. A concise statement of principal reasons for the rules.

B. The names of the persons connected with the agency and of persons outside the agency urging adoption of the rules.

C. An analysis of the rules.

D. All methods of notice of agency hearing on the rules including newspapers and other publications used.

E. The time, place, length of hearing and approximate number of persons at the hearing.

F. The names and titles of agency representatives who attended the hearing and a summary of their remarks.

G. The names of organizations and interests represented at the hearing, names and titles of their representatives and a summary of their remarks.

H. The major suggestions made at the hearing by organizations and answers thereto by agency representatives.

I. Are there any fiscal implications to the State involved as a result of these rules?

J. If so, how will the fiscal implications be financed?

The submission of an incomplete report or failure to file the report will inevitably delay the Joint Committee on Administrative Rules in consideration of the rules.

The Committee Clerk will retain the 6 copies of the rules with certificates and distribute the other copies as outlined in paragraph 1 of this Memorandum.

V. PROCEDURES OF THE JOINT COMMITTEE ON ADMINISTRATIVE RULES:

A. Paper and Typing:

Since the Administrative Procedures Act of 1969, as amended, requires the Secretary of State to bind an official filed copy of the rules for permanent preservation, it will be necessary to have uniformity in paper size, margins, typing, etc. Typing or other reproduction of the rules shall be on 8-1/2 X 11 inch, 20 pound, white bond paper, single spaced on one side of the page only, and with a left hand margin of at least 1-1/4 inches. These requirements apply only to the 18 copies submitted hereafter to the Legislative Service Bureau for final, formal approval as to form and numbering. The additional copies filed with the Secretary of State for transmission to the Legislature, 170 when the Legislature is in session, may vary from these requirements, but their text is not to vary from that in the official copies with certificates filed with the Secretary of State.

B. Form for Specifying Effective Date:

A statement shall be made on another line following the line: "Filed with the Secretary of State," in either of the following forms:

(1) "These rules take effect upon filing with the Secretary of State."

(2) "These rules take effect (specific date later than filing date)."

(3) "These rules take effect upon their publication in the periodic supplement to the Michigan Administrative Code."

One of these statements should be added to rules to which the Legislative Service Bureau or Attorney General's certificates or both have been attached before July 1, 1970.

C. Time for Presentation by Agency of Proposed Rules to the Joint Committee on Administrative Rules:

The Committee meets regularly during session and at times designated by the Chairman when the Legislature is not in session. Each agency will be assigned a specific time for its presentation at the Joint Committee on Administrative

Rules meeting. It is suggested that the agency representatives plan to arrive 30 minutes prior to that assigned time. Adherence to this procedure should minimize unproductive waiting by agency representatives.

D. Effect of Withdrawal for Minor Changes:

In the event an agency withdraws a rule or set of rules for purposes of making "minor" changes or for any other reason, the 60-day period within which the Joint Committee on Administrative Rules must approve or disapprove the rules begins on the date of resubmission.

E. Action by Joint Committee on Administrative Rules:

The Joint Committee on Administrative Rules has two months after receipt of the letter of transmittal in which to consider the rules [Sec. 45 (2)]. The Committee Clerk will notify the agency when the letter of transmittal and proposed rules were actually received by the Committee in order to determine when the two months will elapse. In the two months' period, one of three things involving the Joint Committee on Administrative Rules may occur which are covered by paragraphs "F", "G", or "H" of Section V of this Memorandum. Concurring majorities of the members of the Joint Committee on Administrative Rules from each House are required for Committee action [Sec. 35].

F. Approval of Rules by the Joint Committee on Administrative Rules:

The Joint Committee on Administrative Rules may approve the rules whereupon the Clerk will attach the Joint Committee on Administrative Rules Certificate of Approval signed by the Chairman to all 6 copies of the rules bearing the other certificates and return 5 copies to the agency. The remaining copy shall be retained in the Committee files. The agency then formally adopts the rules and attaches its' certificate of adoption to the 5 copies and transmits one of the copies to the Governor's Office, and not less than 10 days thereafter, files 3 of the copies with the Secretary of State [Sec. 45 (3), (5) and Sec. 46 (1)].

G. Disapproval of Rules by the Joint Committee on Administrative Rules and the Legislature:

If the Joint Committee on Administrative Rules disapproves the rules within the 2 months, a certificate of disapproval will not be prepared or attached to the rules. However, a record of Committee disapproval will be made by the Committee Clerk and a notice of disapproval sent to the agency. The Committee then "shall cause a concurrent resolution to be introduced in the House of Representatives or Senate, or both, disapproving the entire set of rules or any specific rule and stating reasons therefore". The resolution will be introduced by the Chairman or Vice-Chairman of the Joint Committee on Administrative Rules on behalf of the Committee. The Committee Clerk will notify the agency of the introduction of the resolution. The statute does not state that the resolution has to be introduced within the 2 months, but in practice the introduction probably will not be delayed because under Sec. 45 (5), the Legislature is given a period of "3 months after the rules are transmitted to the Committee or one month after introduction of the resolution, whichever occurs first" in which to adopt the resolution. Any one of the following four possibilities as to the resolution might occur:

(1) Resolution of disapproval adopted. When a resolution of disapproval is adopted, a copy of the resolution is sent to the agency by the Secretary or Clerk of the House in which the resolution was introduced and "the agency shall not formally adopt the rules nor file them with the Secretary of State except that the agency may make minor modifications in the rules and resubmit them to the bureau, attorney general and joint committee in accordance with this section without further notice or hearing under sections 41 and 42". [Sec. 45 (4)].

(2) The resolution fails to be adopted on a final vote in the second House. The agency will not receive any advice from the Legislature when a resolution fails to be adopted on a final vote in the second House and will have to secure this information from Legislative journals. The agency may proceed to adopt the rules when adoption of the resolution has failed.

(3) The resolution has been introduced and is pending but has not been adopted by both Houses of the Legislature within the three-month or one-month limits. The agency could legally proceed to adopt and file the rules when the resolution has not been adopted within the time limits established. However, if there was some apparent chance that the resolution would still be adopted after the statutory time limits, the agency as a matter of expediency might wish to delay its adoption and filing.

(4) The resolution is not introduced within the three-month limit. Where a resolution is not introduced in the three-month limit, the agency could proceed to adopt and file the rules.

H. Failure of The Joint Committee on Administrative Rules to Act:

If the Joint Committee on Administrative Rules neither acts to approve nor disapprove the rules within the two months, the agency may proceed to adopt and file the rules. The Committee Clerk will notify the agency of this inaction.

VI. PROCEDURES FOLLOWING JOINT COMMITTEE ON ADMINISTRATIVE RULES CONSIDERATION:

A. Periods of Time:

(1) An agency shall not file a rule with the Secretary of State, except an emergency rule under section 48 of Act 306, until at least 10 days after the date of the certificate of approval by the Legislative Service Bureau. [See section 46, subsection (1), Act 306.] Rules not meeting this requirement should not be accepted by the Secretary of State.

(2) An agency shall transmit a copy of the rule to the Office of the Governor at least 10 days before the rule is filed with the Secretary of State. [In regard to the filing and transmittal of rules, see section 46, subsection (1).] In order to create evidence that the transmission has been accomplished, the agency should transmit the rule to the Governor's Office by letter or memorandum and retain a copy of the transmittal in the agency files.

B. Letters of Transmittal to Secretary of State:

Agencies should send the rules to the Registration Office of the Secretary of State, for filing with a letter of transmittal stating that all requirements of Act 306 of 1969, as amended, up to the date of filing have been met. Specific information as to the date of sending rules to the Governor's Office could be set forth in the letter; however, if only the general statement of compliance suggested in the preceding sentence is used, the Secretary of State's office may rely upon the statement as evidence of the proper transmission of rules to the Governor's Office. The Secretary of State's office will determine by visual examination whether the requirement set forth in Section VI-A-(1) of this memorandum has been satisfied.

C. Effective Dates of Rules:

The Act states that "a rule becomes effective on the date fixed in the rules, which shall not be earlier than 15 days after the date of its promulgation, or if a date is not so fixed, then on the date of its publication in the Michigan Administrative Code or a supplement thereto". Where it is desired to use a specific effective date for the rules, the time of filing will have to be chosen so that the specific date is at least 15 days after the actual filing date or the Secretary of State's office will refuse to accept the rules for filing. The use of a specific date is not recommended unless it can be fixed far enough ahead to allow time for the rules to be considered by:

(1) The Legislative Service Bureau,

(2) The Attorney General's Office,

(3) The Joint Committee on Administrative Rules,

(4) The Governor's Office.

VII. OTHER REQUIREMENTS OF ACT 306 AS AMENDED:

Your attention is directed to the following sections of Act 306 of 1969, as amended:

A. Sections 33 and 63 -- Requiring or authorizing descriptive and procedural rules.

B. Sections 41 to 44 -- Notice of hearings and conduct thereof.

C. Section 48 -- Emergency rules which can be effective without notice or hearing. These rules are somewhat different than

the immediate effect rules approved by the Governor pursuant to former Act 88.

D. Section 47 -- Withdrawal of filed rules before publication.

RULES OF THE JOINT ADMINISTRATIVE RULES COMMITTEE

1. A Chairman and a Vice-Chairman of the COMMITTEE shall be selected for a two-year term during each odd-numbered year, one from each House.

2. A quorum of the eight-member COMMITTEE shall be five members. COMMITTEE action, including action to suspend an administrative rule, must be by concurring majorities of the members from each House.

3. The COMMITTEE may meet during the legislative session every Tuesday at 9:00 a.m. or at such other time as called by the COMMITTEE Chairman or voted by the COMMITTEE.

4. Minutes of each meeting shall be printed and attached to each members' COMMITTEE book.

5. Each COMMITTEE meeting shall follow this Agenda:

   a) Roll call
   b) Minutes, Corrections & Approval
   c) Communications
      1) State agencies, transmittals of rules
      2) State agencies, notices of public hearing
      3) Public
      4) Other communications
   d) Staff report
   e) Old business
   f) New business
   g) Adjournment

6. Official action of the COMMITTEE shall include:

   a) Conducting hearings on any aspect of administrative rules.
   b) Receiving and transmitting correspondence.
   c) Forming subcommittees.
   d) Suspending administrative rules when the legislature is not in session.
   e) Retaining staff.
   f) Reimbursing expenses.
   g) Approving proposed rules.
   h) Disapproving proposed rules.
   i) Requesting agencies to withdraw proposed rules.
   j) Acting in any other manner not inconsistant with the Constitution, Act 306 of the Public Acts of 1969 and these rules.

7. The Chairman of the COMMITTEE may appoint a Sub-committee of one Chairman and other COMMITTEE members to investigate, hold hearings and report back regarding any business properly before the COMMITTEE.

8. These Rules may be modified or repealed by concurring majorities of the members from each House.

9. The COMMITTEE is created by and operates subject to the Constitution, Act No. 306 of the Public Acts of 1969, being sections 24.201 et seq. of the Compiled Laws of 1948, as amended, and these rules. Mason's is the parliamentary authority.

10. Hearings shall be held by the COMMITTEE and Notice shall be given to interested parties.

11. The Staff of the COMMITTEE shall be responsible for:

a) Maintaining files and members' COMMITTEE books.
b) Handling communications and records.
c) Setting up notice and facilities for hearings.
d) Performing other duties the COMMITTEE directs.

12. The COMMITTEE requests that each agency submit to the COMMITTEE a report, as provided in Memorandum Re Administrative Rules (1974,May), at page 2.(3.) at the time a proposed rules is submitted to the COMMITTEE.

ADMINISTRATIVE RULES: Legislature — Power to suspend under Act 88, P.A. 1943.

CONSTITUTIONAL LAW: Joint Committee on Administrative Rules — Power to suspend administrative rules under Mich. Const. 1963, Art. IV, Sec. 37.

Only the joint committee on administrative rules, acting between sessions under Mich. Const. 1963, Art. IV, Sec. 37, as to rules promulgated during that period, has the actual power to suspend an administrative rule.

During legislative sessions, the only true power of the legislature to suspend a pending administrative rule or regulation, is by bill, the "legislative disapproval" of a pending rule by concurrent resolution under Section 8c of Act 88, P.A. 1943, being no more than a recommendation to the promulgating agency to withdraw or amend the rule. If the recommendation is disregarded, the legislature must act by bill.

Because of Mich. Const. 1963, Art. IV, Sec. 22, requiring that all legislation be by bill, Act 88, P.A. 1943, may not constitutionally be amended to give either the legislature itself or its joint committee on administrative rules, acting by concurrent or other resolution, power to suspend an administrative rule promulgated during sessions.

Said Act 88, P.A. 1943, may, however, constitutionally be amended to give the joint committee on administrative rules the "legislative disapproval" authority given the legislature itself under Sec. 8c of said Act, because said authority amounts only to a recommendation.

No. 4586 July 13, 1967.

Honorable Robert J. Huber, Chairman
Joint Committee on Administrative Rules
State Senate
The Capitol
Lansing, Michigan

Your inquiry, under date of May 4, 1967, relative to the legislature's power to suspend administrative rules promulgated under Act 88, P.A. 1943, is respectfully acknowledged.

Since the inquiry comprehensively involves Article IV, Section 37 of the Michigan Constitution of 1963, as well as the provisions of said Act 88 itself, orderly treatment suggests that the applicable constitutional and statutory material first be generally recited, after which your several questions will be stated and answered seriatim.

A. Article IV, Section 37 of Michigan Constitution 1963 provides as follows:

"The legislature may by concurrent resolution empower a joint committee of the legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session. Such suspension shall continue no longer than the end of the next regular legislative session."

B. Article IV, Section 22:

"All legislation shall be by bill and may originate in either house."

C. Article IV, Section 27:

"No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house."

D. Article IV, Section 17:

"Each house of the legislature may establish the committees necessary for the efficient conduct of its business and the legislature may create joint committees. On all actions on bills and resolutions in each committee, names and votes of members shall be recorded. . . ."

E. Section 1a of said Act 88, P.A. 1943, being M.S.A. § 3.560(7a) (C.L. 1948 § 24.71a), as amended, provides in part as follows:

". . . Prior to the adoption, amendment or repeal of any rule, the state agency *shall* publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing. . . ." (Emphasis added)

F. Section 1b of said Act 88, P.A. 1943, being M.S.A. § 3.560(7b) (C.L. 1948 § 24.71b), as amended, provides as follows:

"The legislature reserves the right to approve, alter, suspend or abrogate any rule promulgated pursuant to the provisions of this act." (Emphasis added)

G. Section 4 of said Act 88, P.A. 1943, being M.S.A. § 3.560(10) (C.L. 1948 § 24.74), as amended, provides in part as follows:

"No rule made by any state agency shall be *filed* with the secretary of state *until* it has been *approved* by the legislative service bureau as to form and section numbers and the attorney general as to legality *and* has been *subsequently confirmed and formally adopted* by the promulgating state agency in accordance with law." (Emphasis added)

"No rule made by a state agency shall *become effective until* an original and 2 duplicate copies thereof have been *filed* in the office of the secretary of state *and until such rule has been published* in the supplement to the Michigan administrative code, as provided in section 6. . . ." (Emphasis added)

I. Section 6 of said Act 88, P.A. 1943, being M.S.A. § 3.560(12) (C.L. 1948 § 24.76), as amended, provides in part as follows:

"The secretary of state shall:

"Compile, publish and index supplements to the Michigan administrative code, which supplements shall be published every 3 months. Such quarterly supplements shall contain *all rules filed in the office of the secretary of state not less than 30 days before the end of the preceding calendar quarter,* bear a publication date and certification of period covered by the rules contained therein."

"Quarterly supplements shall be published *not later than 45 days after the close of the period* covered thereby." (Emphasis added)

I. Section 8b of said Act 88, P.A. 1943, being M.S.A. § 3.560(14b) (C.L. 1948 § 24.78b), as amended, provides as follows:

"All rules *promulgated* by any state agency, *including* all rules *filed* with the secretary of state *and published* as provided by law, *shall be transmitted* to the secretary of the senate and the clerk of the house of representatives and to each member of the legislature *by the secretary of state* before the first day of the regular session of the legislature next following the promulgation or publication thereof. The secretary of state *shall similarly file during any regular session* of the legislature all rules promulgated between the first day of the regular session and the short adjournment thereof. The secretary of the senate and the clerk of the house of representatives *shall lay all such rules before* the senate and house of representatives, and the same *shall be referred* to the joint committee on administrative rules in the same manner as bills are referred to standing committees." (Emphasis added)

J. Section 8c of said Act 88, P.A. 1943, being M.S.A. § 3.560(14c) (C 1948 § 24.78c), as amended, provides as follows:

"*If the committee* to which any such rule shall have been referred, *or any member* of the legislature, shall be of the opinion that such rule is violative of the legislative intent of the statute under which such rule was made, *a concurrent resolution* may be introduced declaring the legislative intent and *expressing the determination of the legislature that such rule should be revoked or altered. Adoption* of such concurrent resolution *shall constitute legislative disapproval* of the rule, but rejection of the resolution shall not necessarily be construed as legislative approval of such rule. *If any agency* shall *persist in a* rule disapproved by the legislature, *the same may be abrogated by legislation.*" (Emphasis added)

K. Section 8d of said Act 88, P.A. 1943, being M.S.A. § 3.560(14d) (C.L. 1948 § 24.78d), as amended, provides as follows:

"*The secretary of state shall transmit to the legislative service bureau* a sufficient number of copies of *all rules and regulations* filed in the office of the secretary of state *from the time of the short adjournment* of the last regular session of the legislature *and during the interim until the next regular session* thereof, for the use of the joint committee on administrative rules." (Emphasis added)

L. Section 8f of said Act 88, P.A. 1943, being M.S.A. § 3.560(14f) (C.L. 1948 § 24.78f) provides in part as follows:

> "The *joint committee on administrative rules is created* which *may meet during sessions* of the legislature *and* during the interims *between sessions* and to which shall be referred all rules *promulgated* pursuant to this act.
>
> * * *
>
> "The committee *shall consider all rules* referred to it and shall conduct hearings on such rules as it deems necessary. *If authorized by concurrent resolution* of the legislature, *the committee may suspend any rule or regulation promulgated subsequent to the adjournment* of the last preceding regular session of the legislature. The *committee shall notify* the *promulgating state agency and the secretary of state* of any rule it suspends, *which rule shall not be published* in the administrative code or supplement while so suspended." (Emphasis added)

(1) Your initial inquiry asks the general power of the legislature, while in session, to suspend, amend or abrogate, first, rules filed but not yet effective; next, rules filed and effective.

Under above reference I (Section 8b of the Administrative Code Act, being Section 8b of said Act 88, P.A. 1943, as last amended by Act 161, P.A. 1964), a promulgated but not yet published or effective rule is filed by the Secretary of State with the secretary of the senate and clerk of the house, who place it before senate and house respectively. The senate and house then refer it to the joint committee on administrative rules. Thereafter, under reference J (Section 8c of said Act, as amended), if either said joint committee or any legislator feels that the promulgated and pending (but not yet effective) rule violates the legislative intent of the statute under which the rule was made, "a concurrent resolution may be introduced declaring the legislative intent and expressing the determination of the legislature that *the rule should be revoked or altered. Adoption of such concurrent resolution shall constitute legislative disapproval of the rule . . .*" (The statute goes on to state that rejection of the resolution shall not necessarily be construed as legislative approval of the rule.)

You will note that the language of reference J (said Section 8c, as amended) restricts the legislature, by its concurrent resolution, to a determination that the "rule *should be* revoked or altered," and that such determination constitutes "disapproval." Relative then to that part of your inquiry which concerns "the power . . . to *suspend*, amend or abrogate," we find no such power under reference J, and (also, because any authority of the joint committee on administrative rules, to *suspend* a rule under reference A or reference L, exists only in the interim *between* legislative sessions [though such suspension itself may carry through a succeeding session]), must have recourse to the general authority of reference F (Section 1b of the Act). Under said general authority (particularly in the light of reference B), it is readily inferable that any action by the legislature to *amend* a rule must be by *bill* under regular legislative procedure. However, when you inquire (as does your first question) as to legislative action to *"abrogate"* a pending but not effective rule, it is my opinion that your first action should be under the earlier discussed "legislative disapproval" pro-

ature of reference J. A bill will not be necessary if the promulgating agency itself acts to abrogate the rule. Similarly, authority to (effectively) "suspend" a promulgated rule which is not yet effective, lies, at least originally, in that same "legislative disapproval" procedure, because the promulgating agency is thus given opportunity to withdraw the rule. Under references G, H, and J, a pending rule would, unless withdrawn, clearly go on to publication and effective rule status. As the first effort, therefore, to avert such result, (and, accordingly, to "suspend" a pending rule), the disapproval procedure is indicated. At that point, of course, it is procedure by concurrent resolution. However, if that action fails (through neglect or refusal of the promulgating agency to withdraw the rule), your only recourse is to act by bill.

As to rules (under part b. of your aforesaid first question) that have already become effective, it is clear that any action by the legislature under its reserved power (reference F) to ". . . alter [amend], suspend or abrogate" such rules, would be legislation, and therefore must be by bill (reference B).

(2) Your second question is as follows: May the legislature when in regular session, suspend (not amend or abrogate) temporarily or permanently, rules or regulations by concurrent resolution?

As will possibly occur again herein, your question (2) converges upon question (1), or at least this opinion's treatment thereof. As earlier stated, administrative rules or regulations, *already* duly processed to *effective* status under the Administrative Code (said Act 88, P.A. 1943, as amended), may *not* be suspended, whether temporarily or permanently, by concurrent resolution. Though it has never been formally so adjudicated, the intent of said Administrative Code clearly appears to be to give the effect of law to an administrative rule duly adopted under its provisions. Certainly, as both federal administrative agencies and those of many states, it has repeatedly been held that administrative rules have the force of law. The general rule is stated in 2 Am. Jur. 2d 119 (Administratvie Law, § 292) as follows:

> "Rules, regulations, and general orders enacted by administrative agencies pursuant to the powers delegated to them have the force and effect of law, . . . [citing]
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> *Public Utilities Com. v. United States,* 355 U.S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh den 356 U.S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713;
>
> *Atchison, T. & S.F.R. Co. v. Scarlett,* 300 U.S. 471, 81 L. ed. 748, 57 S. Ct. 541, reh den 301 U.S. 712, 81 L. ed. 1365, 57 S. Ct. 787;
>
> *United States v. Michigan Portland Cement Co.,* 270 U.S. 521, 70 L. ed. 713, 46 S. Ct. 395;
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> *Aldridge v. Williams* (U.S.) 3 How. 9, 11 L. ed. 469;
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> *State v. Friedkin,* 244 Ala. 494, 14 So. 2d 363;
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> *McSween v. State Live Stock Sanitary Bd.* 97 Fla. 750, 122 So. 239, 65 A.L.R. 508;
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> *Pierce v. Doolittle,* 130 Iowa 333, 106 N.W. 751;
>
> *Union Light, Heat & Power Co. v. Public Service Com.* (Ky.) 271 S.W. 2d 361;

Connell v. Bauer, 240 Minn. 280, 61 N.W. 2d 177, 40 A.L.R. 2d 776;

Bailey v. State Bd. of Public Affairs, 194 Okla. 495, 153 P. 2d 235;

Foley v. Benedict, 122 Tex. 193, 55 S.W. 2d 805, 86 A.L.R. 477;

Smith v. Highway Board, 117 Vt. 343, 91 A. 2d 805.

Such administrative rules, then, may be suspended (or amended or abrogated) only by constitutionally ordained legislative process, namely by bill.

The same view has been expressed at some length by a predecessor in my office in the course of an extended opinion on the subject of rules adopted pursuant to the Administrative Code. Please see O.A.G. 1957-58, Vol. II, Op. No. 3352, p. 246, wherein at pp. 253 and 254 it was stated as follows:

> *"Clearly, when the legislature delegates the rule-making power to a state agency, it is pursuant to a legislative act initiated by a bill. Such delegated power may be suspended or entirely revoked in any particular instance at any time the legislature may see fit. But to suspend or entirely revoke a law conferring rule-making power requires the passage of another law, initiated by bill and subject to the veto power. In my opinion the rule itself, being the product springing from the exercise of the rule-making power, cannot lawfully be suspended, altered or abrogated by the legislature except by the passage of a bill by the legislature which becomes a law.* To hold otherwise permits the legislature to circumvent the conditional mandate imposed on the passage of legislation and to deprive the governor of veto power by use of the concurrent resolution. What the legislature is prohibited from doing directly, it is prohibited from doing indirectly.
>
> "' * * * nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under the forms which that instrument has rendered essential.' *1 Cooley, Constitutional Limitations, 8th Ed.*, p. 266.
>
> "Based on what has been said hereinbefore, I am of the opinion that the legislature by the adoption of a concurrent resolution may not constitutionally suspend, alter or abrogate a rule or regulation promulgated by a state agency and in effect pursuant to delegated rule-making power. * * *." (Emphasis added)

(3) This question inquires whether the legislature may give to the joint committee on administrative rules the same power to suspend rules or regulations promulgated *during regular session* (to no longer than the end of the next session), which that committee now has, by force of constitution (reference A) and statute (reference L), but only as to rules or regulations promulgated *subsequent to adjournment*. The answer is no. The legislature may not of course accomplish indirectly what it cannot do directly. As earlier recited herein, the only existing "authority" of the legislature itself (other than acting by bill) to suspend rules or regulations filed during session, is the "legislative disapproval" procedure under reference J, more

critically the adoption of a concurrent resolution that "such rule should be voked or altered." As also indicated however, such action, rather than *suspending* the rule, effects "legislative disapproval." It should be noted that this entire procedure *assumes* that, upon such legislative disapproval being recorded, the promulgating agency will either withdraw the rule from further processing toward effective status, or alter it as desired. This is made clear by reference J's final sentence which (to cover the contingency of a recalcitrant agency) provides as follows:

> "If any agency shall persist in a rule disapproved by the legislature, the same may be abrogated by legislation."

All of this serves only to emphasize the basic reality that, by force of Michigan Constitution 1963, Article IV, Section 22 (reference B), the legislature acts effectively only by *laws*. A concurrent resolution does not have the force and effect of law, and is "not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it." See *Becker v. Detroit Savings Bank*, 269 Mich. 432, at 434, 435.

Our mention of a "statutory" source of the power of the joint committee on administrative rules to suspend rules or regulations promulgated *between* sessions, should not be misunderstood. Except for Michigan Constitution 1963, Article IV, Section 37 (reference A), specifically authorizing the legislature to confer this power on said joint committee between sessions, the power could not exist. The statute (reference L) represents nothing more than legislative action pursuant to said constitutional authorization. Finally, since the constitutional authorization is specifically restricted to rules and regulations promulgated *between* sessions, the legislature is without authority to confer the power on the joint committee *during* sessions.

(4) a. As already indicated, the legislature's "authority" to *suspend*, by concurrent resolution, a rule or regulation filed *during session*, lies indirectly in the "legislative disapproval" procedure under reference J, whereby said resolution expresses "the determination of the legislature that such rule should be revoked or altered." It depends, of course, on cooperative action of the promulgating agency to withdraw or amend the rule.

Because of reference B ("All legislation shall be by bill"), Act 88, P.A. 1943, may not constitutionally be amended to give either the legislature itself or its joint committee on administrative rules the actual legal *power* to suspend, by concurrent or other resolution, rules or regulations filed *during session*.

b. Since, however, the very "authority" of the legislature itself to record "legislative disapproval," constitutionally accomplishes, as we have noted but risk repetition to emphasize, no more than a recommendation to the administrative agency to withdraw or amend its pending rule, and since the legislature might conceivably find it useful, in the area of pending administrative rules, to have some such authority of recommendation reposed in its joint committee, I hasten to add that I see no constitutional obstacle to the amendment of Act 88, P.A. 1943, to that innocuous end. Former Section 8e of the Act (M.S.A. § 3.560(14e); C.L. 1948 § 24.78e; repealed by Act 161, P.A. 1964) gave such authority to the joint committee, but only

between sessions and as to "rules . . . which have not been theretofore considered by the legislature."[1] Neither 1947-48 O.A.G. No. 458, p. 378 (considering a comparable statutory provision) nor earlier quoted 1957-58 O.A.G. No. 3352 (Vol. II) p. 246 (at which time Section 8e was in the same form as when finally repealed) undertook to pass on the constitutionality of such a statute as to pending but not yet effective rules. As you will note, Section 8e authorized a resolution which was not only a mere recommendation ("ought to be revoked or altered"), but actually a *preliminary* recommendation, that is, preliminary to the full legislature's later recommendation (by joint resolution) of "legislative disapproval," in the event the agency persisted in the offending rule. You may, of course, if you wish, use former Section 8e as the model for your amendment of said Act 88, suitably providing, however, for the joint committee to act *during* rather than *between* sessions. It will of course be necessary to remove the clause, "and which have not theretofore been considered by the legislature."

The inescapable legal fact of this situation of administrative rules is that the promulgating agency is exercising its lawful, statutorily-conferred, rule-making power. As suggested by earlier-quoted 1957-58 O.A.G. No. 3352 (Vol. II) p. 246 at pp. 253, 254 (though that opinion addressed itself exclusively to rules already effective), only a comparable legislative act, specifically a *statute*, can revoke that rule-making power, and accordingly only a *statute* can lawfully (except for Michigan Constitution 1963, Article IV, Section 37) suspend, or alter or abrogate a rule or regulation lawfully promulgated under that rule-making power. (See emphasized portion of said quotation.) In other words, the legislature may take away what it has *given by law*, but it must *take it away by law*. Any "law" purporting to authorize the legislature to revoke or suspend or amend either the rule-making power or its lawful product through the medium of committee, or even legislative, resolution, would be unconstitutional and void.

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[1] "The legislature may provide by concurrent resolution for the creation of a joint committee on administrative rules which shall be empowered to meet during the interim between sessions of the legislature, and to which shall be referred all rules promulgated pursuant to this act and which have not been theretofore considered by the legislature. The committee so created shall consider all such rules referred to it, and shall conduct hearings on those rules which in the opinion of the committee appear violative of the legislative intent of those statutes under which they were made. If, after hearing, the committee is of the opinion that any such rule ought to be revoked or altered, it may adopt a resolution to that effect setting forth the reasons therefor, and shall transmit such resolution to the agency affected. If, after such committee action, the agency involved persists in the offending rule, the committee or any member thereof, or any member of the legislature, may introduce at the next legislative session a concurrent resolution declaring the legislative intent and expressing the determination of the legislature that such rule should be revoked or altered. Adoption of such concurrent resolution shall constitute legislative disapproval of the rule, but rejection of the resolution shall not necessarily be construed as legislative approval of such rule. If any agency shall persist in a rule disapproved by the legislature, the same may be abrogated by legislation. The committee shall in every case report to the legislature at the commencement of its next session its doings in the interim. The committee shall also have such powers as are granted to it by any other statute."

(5) Your final question inquires as to the changes, if any, necessary to be made in Michigan Constitution 1963, Article IV, Section 37 (reference A) to give the legislature power to suspend a pending but not yet effective administrative rule, promulgated *during* session, by concurrent resolution or by a resolution of the joint committee on administrative rules.

We should of course bear in mind that the present constitutional provision is obviously only a stop-gap device, designed to prevent the taking effect of administrative rules promulgated *between* sessions. The joint committee's power to suspend a rule "to the end of the next legislative session," is clearly intended only to defer that rule for legislative consideration at the following session. Thus, ultimate *legislative* action is not only contemplated, but constitutes the very purpose of the provision. In no way does that interim constitutional power envision the joint committee assuming the final constitutional responsibility and function of the legislature itself to consider and pass upon the rule. The language, "suspend," is that of postponement only, not an expedient of indirect legislative disapproval or rejection.

Moreover, in the context of present law, it takes no more than a concurrent resolution to express the "legislative disapproval" which will, in all likelihood, persuade the promulgating agency to withdraw or amend its rule. Legislation will rarely be necessary.

If, however, constitutional amendment is deemed necessary by you in the respect inquired, subject Article IV, Section 37, may be changed to read as follows:

> "The legislature may, by either its concurrent resolution or the resolution of its joint committee on administrative rules, temporarily or permanently suspend any rule or regulation of an administrative agency, promulgated but not yet effective. Said joint committee may exercise such power as to rules or regulations promulgated between sessions."

This completes my answers to the several questions you have presented.

FRANK J. KELLEY,
Attorney General.

MOTOR VEHICLES: Test of driver for alcohol content. Performance of test by physician, nurse and medical technician.

The term "direction" in section 625a of the Motor Vehicle Code does not require the personal presence of a licensed physician when a licensed nurse or medical technician withdraws blood from a person for chemical analysis provided appropriate directions have been given by a licensed physician.

No. 4559 August 14, 1967.

Mr. John H. Butts
Prosecuting Attorney
Cheboygan, Michigan 49721

You have asked my opinion on the following question pertaining to Act 104, P.A. 1964, relating to the withdrawal of blood from a person for the purpose of analysis for alcohol content:

CONSTITUTIONAL LAW: Administrative rules, suspension by the legislature of—

The legislature has no constitutional right to suspend legislative rules promulgated in accordance with the statutes in any manner except by the exercise of its legislative power through legislation initiated by a bill as the constitution requires.

No. 3352 October 8, 1958.

Hon. Joseph J. Kowalski
State Representative
9164 Steel Avenue
Detroit 28, Michigan

By Chief Assistant Attorney General Faville.

The opinion of the Attorney General is requested on the following questions:

1. May the legislature constitutionally suspend by concurrent resolution the operation of a rule or regulation promulgated by a state agency in accordance with the provisions of the administrative code act, P.A. 1943, No. 88, as amended?
2. May a committee of the legislature by resolution constitutionally exercise the power referred to in Question 1?
3. May the legislature, or a committee thereof, constitutionally amend and thereafter approve by concurrent resolution a rule promulgated by a state agency pursuant to Act 88 of the Public Acts of 1943?

Each of these questions relates to the "constitutionality" of action by a legislative committee or by the legislature itself. There is no provision of our state constitution expressly governing legislative review of administrative rules adopted by state agencies. For the sake of a better understanding of

the constitutional questions that are involved, it is desirable to review the action of rule making.

Generally speaking, administrative rules may be classified into three groups:[1]

(a) *Procedural rules.* Rules within this class are those governing practice and procedure before administrative agencies and relate to such things as notice, hearing, rules of evidence, decisions, orders, and appeal procedure.

(b) *Legislative regulations.* Perhaps the bulk of administrative rule making deals with regulations implementing the substantive provisions of statutory law. In cases of this type the legislative act sketches a general outline of the substantive law and contemplates its completion and clarification by administrative rule making. Often, by the act itself nothing is commanded to be done or omitted unconditionally, and no conduct or omission is per se punishable. Mr. Justice Robert H. Jackson, experienced in the problem of rule making as former Attorney General of the United States, wrote with clarity on the rule-making power while a member of the Supreme Court. In discussing the Federal Trade Commission Act, Justice Jackson said:

> "It may help clarify the proper administrative function in such cases to think of the legislation as unfinished law which the administrative body must complete before it is ready for application. In a very real sense the legislation does not bring to a close the making of the law. The Congress is not able or willing to finish the task of prescribing a positive and precise legal right or duty by eliminating all further choice between policies, expediencies or conflicting guides and so leaves the rounding out of its command to another, smaller and specialized agency.
>
> "* * *
>
> "Such legislation does not confer on any of the parties in interest the right to a particular result, nor even to what we might think ought to be the correct one, but it gives them the right to a process for determining these rights and duties. (Citing cases.)
>
> "Such legislation represents inchoate law in the sense that it does not lay down rules which call for immediate compliance on pain of punishment by judicial process. The intervention of another authority must mature and perfect an effective rule of conduct before one is subject to coercion. The statute, in order to rule any individual case, requires an additional exercise of discretion and that last touch of selection which neither the primary legislator nor the reviewing court can supply. The only reason for the intervention of an administrative body is to exercise a grant of unexpended legislative power to weigh what the legislature wants weighed, to reduce conflicting abstract policies to a concrete net remainder of duty or right. Then, and then only, do we have a completed expression of the legislative will, in an administrative order which we may call a sort of secondary legislation, ready to be enforced by the courts."[2]

In this type of rule making the statute normally outlines the substantive provisions and delegates to the administrative agency the authority to promulgate regulations within specified legislative standards. The statute provides a sanction for violation of the regulation. Any regulations written by the administrative agency are pursuant to a specific delegation of power.

(c) *Interpretative regulations.* This type of regulation represents no more than the opinion of the administrative agency as to the meaning and requirements of a statute which did not delegate express power to the

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[1] Cooper, *Michigan Legal Studies*, "Administrative Agencies and the Courts," University of Michigan, 1951, pp. 255-258.

Cooper, *The Lawyer and Administrative Agencies*, Prentice-Hall, Inc., 1957, p. 275 et seq.

[2] Dissenting opinion in the case of *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 96 L ed 1081, 1093-1094 (1952).

agency to adopt regulations under standards and contained no sanction for violation of regulatory provisions. The function of the administrative agency is only to interpret and apply the statute.

In each case under the foregoing category, the function of rule making is performed by an administrative agency within the executive branch of government. Stated broadly, under traditional separation of powers concepts, the legislature passes laws dealing with generalities and governing for the future. The enforcement by the executive branch of its rules constitutes the application of the statutory law to specific parties. This latter function could not normally be performed by the legislature even in the first instance through statutory enactment.[3] "The legislature makes the law, the executive applies it."[4]

Having laid the groundwork of rule making by the foregoing paragraphs, let us now turn to a consideration of the legitimate scope of legislative review of administrative rules.[5]

The first attempt in Michigan to provide for the compiling, codification and publication of rules and regulations promulgated by state agencies appeared in Act 88, P.A. 1943.[6] This act authorized the publication of the Michigan Administrative Code and required all rules theretofore promulgated to be codified, approved by the Attorney General, and filed by the state agency within three months of the effective date of the act or become void. The only requirement for review and approval of new administrative rules after the adoption of the 1943 act was approval by the Attorney General as to form and legality.

A bill was introduced in the 1945 session of the legislature which, after making minor amendments to the definitions of Section 1, added a new Section 8a to the 1943 act requiring that all rules theretofore or thereafter authorized or promulgated by a state agency and published as provided by law be transmitted to the legislature for review. All such rules not approved by the legislature by a concurrent resolution by the time of the short adjournment were abrogated, and neither the same rule nor the substance thereof could again be promulgated unless the same was first transmitted to the legislature and approved by concurrent resolution. By express proviso the abrogation of any rule was not to affect any right, action or proceedings arising or accruing prior to the abrogation. This bill passed both houses and was known as Senate Enrolled Act No. 69. It was vetoed by Governor Kelly with a message to the Senate.[7] Among other things the Governor stated the Act decreed automatic death for all rules which had not met with legislative approval at the time of the short adjournment. He gave as his opinion, in which he said the Attorney General joined, that the act was of doubtful constitutionality.

Senator Bonine responded to the Governor's message by advocating the passage of the Act over the Governor's veto, claiming that state agencies had

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[3] *The Flint and Fentonville Plank-road Company v. Woodhull*, 25 Mich. 99.

[4] Howe, *Current Trends in State Legislation 1955-56*, "Legislative Review of Administrative Rules," Legislative Research Center, University of Michigan. 1958 Addition, pp. 218, 219.

[5] Sometimes the review of administrative rules is vested in an executive official, such as, the Attorney General or the Governor, and not in the legislature. See Howe, "Legislative Review of Administrative Rules," supra, p. 168. Under the Model State Administrative Procedure Act and the law of some States, declaratory judgment proceedings may be commenced in court to test the legality of a rule after it has been promulgated but before the agency attempts to enforce it. See Howe, supra, p. 169.

[6] C.L. 1948 § 24.71 et seq.; M.S.A. § 3.560(7) et seq.

[7] Senate Journal 1945, p. 1328.

promulgated as rules some of the identical provisions which the legislature had rejected.[8] The Senate refused to override the Governor's veto.[9]

At the next session of the legislature in 1947 a bill was passed and approved by the Governor amending Act 88 of 1943.[10] The 1947 act amended the definitions and added several new sections, the most important of which were:

Section 1b which read: "The legislature reserves the right to approve, alter, suspend or abrogate any rule promulgated pursuant to the provisions of this act."

Section 3c which provided that the legislature could disapprove any rule required to be filed under the act by concurrent resolution adopted before the short adjournment of the session. This section contains the same proviso as appeared in the 1945 enrolled act.

Section 3e which authorized the creation of a joint committee on administrative rules empowered to meet during the interim between sessions of the legislature and to consider and approve the operation of any rule filed under the act and suspend the same until the next regular session of the legislature. This section also provided that "All such determinations by the committee on suspension of a rule shall be final on matters of fact, but shall be reviewable as to law."

Two significant changes are apparent in the form of the 1947 act. First, it changed the procedure proposed in the 1945 enrolled act from affirmative approval to a negative disapproval. Second, it authorized the creation of a joint committee empowered to suspend the operation of rules between sessions of the legislature.

Shortly after the adoption of the 1947 act, the legislature created a joint committee on administrative rules which held its first meeting on June 5, '47. It promptly asked the Attorney General, "What rules and regulations omulgated by any state agency can legally be considered by the committee appointed under Section 3e of the Act?" The Attorney General answered that the powers and duties of the joint committee were confined to "such rules heretofore or hereinafter authorized or promulgated as have not heretofore (theretofore) been considered by the legislature. Obviously, this includes all the administrative rules which have not been considered by the legislature as a law-making body." As a second question the joint committee requested determination as to what constituted legislative consideration of a rule in accordance with the act. The Attorney General held that this provision meant action either favorable or unfavorable by a resolution or bill adopted by both houses of the legislature.[11]

The joint committee promptly embarked on a schedule of hearings regarding rules on which the committee had received complaints. Representatives of the promulgating state agency were called before the committee and required to answer the complaints and to explain the basis for the existing rule. Thus, a pattern of individualized complaint and answer became established for the meetings of the committee. Only occasionally did the committee direct

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[8] Senate Journal 1945, p. 1329. Apparently, Senator Bonine referred to changes in the child labor laws which had been proposed in the legislature during the 1943 session. See *Staff Report to the Michigan Joint Legislative Committee on Reorganization of State Government*, "The Legislature," No. 11, March, 1951, p. 11-30.

[9] Senate Journal 1945, p. 1334.

[10] Act 35, P.A. 1947.

[11] O.A.G. 1947-48, No. 486, p. 378.

its attention to the procedure used in the adoption of the rule or regulation under consideration.[12]

The complaint and answer method is still the procedure used by the joint committee today. The committee has adopted rules of procedure which prescribe the filing of a written complaint with the committee and which "shall specifically set forth the rule or rules, and/or policies promulgated by the agency and upon which the complaint is based." An answer shall be filed to the complaint by the administrative head of any commission, board and/or bureau, against whom the complaint has been directed. The rules of procedure require that the answer "shall specifically set forth the statute and section or sections thereof upon which the rule is based and the claims and justification under the law of the contested rule and/or policy in refutation of the claims upon which complainant relies." A hearing procedure is set forth under which the complainant may appear before the joint committee with witnesses and be heard. The agency head answering the complaint and his witnesses shall be heard in defense.[13] Because of the Attorney General's ruling,[14] the joint committee was unable to proceed in those stalemate situations typified by The Lawn Seed Ruling.[15] The committee members said they could not act until a new rule was submitted to them. The Attorney General said he could not act until the legislature had acted. The result was that in The Lawn Seed case the Department of Agriculture was unable to establish the desired rule.[16] To alleviate the situation the legislature enacted Act 9, P.A. 1951,[17] which amended Section 8e of the 1947 act by deleting therefrom the limitation that the committee's suspension of a rule should be "until the next regular session of the legislature" and by adding a new sentence reading,

> "The operation of any rule heretofore or hereafter suspended by the committee shall continue to be suspended until such rule is reinstated by the committee or is considered or approved by concurrent resolution of the legislature."

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[12] Staff Report No. 11, p. 11-33. Early in its history the joint committee became involved in a case known as "The Lawn Seed Ruling" where the refusal of the Attorney General to approve a rule which had been previously suspended by the committee resulted in a stalemate. The Attorney General based his ruling on the provision of the law that once a rule had been suspended the state agency could not promulgate that rule or a similar one until the legislature had by affirmative action authorized the new rule. Ibid., pp. 11-37 and 11-38.

[13] See *Rules of Procedure* 1957-1958 adopted by the Legislative Committee on Administrative Rules. This practice of hearing individualized complaints was criticized in the 1951 Staff Report to the Joint Legislative Committee in the following language:

> "This concern with determination of the rights of a specific party or parties is not properly a legislative activity. Determination of the rights of a party subject to administrative regulation should be a function of the courts once it has gone beyond the area of an administrative agency's adjustment. The role which the committee has assumed unnecessarily disrupts the administrative process." (p. 11-34)

In its findings and recommendations, the Staff recommended that the Joint Committee on Administrative Rules cease hearing cases of private parties aggrieved by the rules or their application. The report states:

> "This activity is essentially judicial." (p. 11-39)

[14] See footnote 11.

[15] See footnote 12.

[16] Staff Report, p. 11-38.

[17] Section 6 of Act 88, P.A. 1943, has been amended by Act 90, P.A. 1949, and Act 140, P.A. 1955. Act 22, P.A. 1954 added a new section to stand as Section 6a. None of these amendments is pertinent to the discussion here.

The immediate effect of this statutory change was to enable the joint committee to reinstate the Lawn Seed Rule in order to allow the Department of Agriculture to amend it.

Under date of December 17, 1953, the Attorney General in response to a request from a state representative held that the provisions of Act 88, as amended, purporting to give a legislative committee power to suspend an administrative rule was unconstitutional.[18] The basis of the opinion was that the legislature itself could not lawfully determine whether an administrative rule was in conformity with the statute under which it was promulgated for the reason that it was obviously necessary for the legislature to construe the statute and the rule in order to make such a determination which the opinion said is a judicial function and therefore exclusively within the judicial branch of state government.[19] Since the Attorney General concluded that the legislature could not perform a judicial function as a body, he held it could not lawfully delegate such review power to one of its committees.

The views of the Attorney General did not deter the legislature or its committee from continuing the review of promulgated rules. For example, the Joint Legislative Committee on Administrative Rules on September 17, 1957 suspended rules, already fully effective, promulgated by the State Board of Examiners in Optometry.[20] And at the regular session of 1958 the legislature itself adopted a concurrent resolution[21] "altering" the rules of the Public Service Commission relating to railroad track inspections[22] by writing into the rules substituted changes in the inspection requirements and by abrogating some sections of the rules entirely.

To determine the validity of the review procedures of administrative rules by the legislature, it is first desirable to understand the nature of the rule-making power conferred upon a state agency. The right to enact laws is a legislative power of a sovereign state.[23] Article V, Section 1 of the Michigan Constitution provides:

> "The legislative power of the state of Michigan is vested in a senate and house of representatives; * * *."

Legislative power as such may not be delegated[24] but this does not mean the legislature is prohibited from delegating to state agencies the authority to make administrative rules. What the legislature may do has been stated by a Pennsylvania court in an oft quoted decision as follows:

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[18] This was a letter opinion and not published in the Biennial Report of the Attorney General.

[19] The Attorney General's opinion has been criticized as being based on fallacious reasoning even under the strictest doctrines of separation of powers. It is said the opinion assumes that the legislature would exercise the same mental processes under its review power as a court would in the exercise of judicial power. It can as well be said that officers in the executive branch are exercising "judicial" power every time one decides to enforce a law because the reasoning process is the same, i.e., interpretation of a statute and decision of its applicability to the facts of a given case. For further comments see Howe, "Legislative Review of Administrative Rules," supra, pp. 220-224.

[20] Rules 2, 4, 5, 7, 8 and 9 were suspended. These rules had previously been approved by the Attorney General and published in Supplement 9 to the 1954 Administrative Code, p. 13.

[21] Senate Concurrent Resolution No. 20. For the legislative history, see Senate Journal No. 51, pp. 657-658; S.J. No. 55, pp. 752-753, 766; S.J. No. 59, p. 832; House Journal No. 64, pp. 1317-1318, 1334-1335; S.J. No. 65, p. 1015.

[22] The Commission rules are published in Supplement 14 to the 1954 Administrative Code, p. 19 et seq.

[23] *Decker v. Secretary of State*, 209 Mich. 565, 570.

[24] *Chemical Bank and Trust Co. v. County of Oakland*, 264 Mich. 673, 684.

> "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."[25]

Illustrations of the pronouncement in *Locke's Appeal* are found in *Rock v. Carney*, 216 Mich. 280, where the court upheld legislation authorizing the State Board of Health to designate what diseases are dangerous communicable diseases and what diseases are contagious diseases. The court declared that there was no attempt on the part of the legislature to delegate to the board the power to make a law; but rather the delegation was of a power to find a fact, a scientific fact, a medical fact. In *People v. Soule*, 238 Mich. 130, the court upheld the action of the legislature in empowering the Conservation Commission to promulgate orders for the protection of fish, game, and fur-bearing animals by suspending the open season provided by law, after making a factual determination of local conditions.

There can be no doubt that where the power granted is administrative, such as rule making, it is proper and is not invalid as a delegation of the legislative power reposed by the constitution in the senate and house of representatives.[26]

Act 88, as amended, grants no rule-making power to state agencies. Section 1a of the act specifies in part:

> "The power to make rules, as defined herein, is hereby conferred upon state agencies, as defined herein, but only to the extent that such agencies are vested by law with rule-making power."

Accordingly, it is necessary to examine the specific applicable statutes to determine whether the power to make rules has been conferred by the legislature upon a designated state agency. If the rule-making power has been granted, then under the provisions of Act 88 (Section 4) rules promulgated by the agency are required to be filed with the Secretary of State but shall not be so filed until approved by the Attorney General as to form and legality and subsequently confirmed and formally adopted by the promulgating agency. Upon compliance with these preliminary requirements, the rules become immediately effective upon publication by the Secretary of State.

It is obvious that under this process prior legislative approval of promulgated rules is not a condition precedent to effectiveness. Under Act 88 review by the legislature customarily is a condition subsequent to the effective date of the promulgated rule. Under the Michigan procedure, at the time the rule becomes effective the rule-making power delegated by the legislature has been fully exercised by the agency. In fact Section 9 of Act 88 raises a rebuttable presumption upon the filing or publication of a rule that there has been compliance with all requirements of that act.

Under Act 88 legislative disapproval of a rule may be expressed either (1) by adoption of a concurrent resolution under Section 8c or (2) by action of the joint legislative committee under Section 8e suspending the operation of the rule. This opinion has hereinbefore classified administrative rules into three groups, viz., procedural rules, legislative regulations and interpretative regulations. There will seldom be occasion for the legislature to disapprove a procedural rule since the passage of Act 197, P.A. 1952[27] (the administrative procedure act), as a supplement to Act 88, which outlines in detail the rights of the public in the administrative procedure before state administrative agencies. In writing procedural rules a state agency should have no difficulty in following the requirements of Act 197. Nor is there occasion for the legislature to review interpretative regulations since these regulations do not have

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[25] *Locke's Appeal*, 72 Pa. St. 498; cited with approval in *King v. Concordia Fire Insurance Company*, 140 Mich. 258, 268, *People v. Soule*, 238 Mich. 130, 139, and *In re Brewster Street Housing Site*, 291 Mich. 313, 340.

[26] See *Shivel v. Kent County Treasurer*, 295 Mich. 10; *Emmons v. State Land Office Board*, 305 Mich. 406.

[27] C.L.S. 1956 § 24.101 et seq.; M.S.A. § 3.560(21.1) et seq.

the force and effect of a rule, but are the agency's opinion of the meaning of a statute and should be received and considered as such.

We are left with legislative regulations in the exercise of the rule-making power which form the bulk of administrative rules and legislative review.

In granting authority to a state agency to make a legislative rule or regulation, the legislature has delegated a portion of the legislative power in the sense that the agency may not promulgate a law but it may prescribe a rule for the determination of a fact or a condition of things upon which the law is to be applied. It is clear that the contents of the rule could have been enacted by the legislature in the first instance as a law and without the necessity of being conceived pursuant to delegated power. For example, many of the provisions of the motor vehicle code now appearing in the statutes could have been promulgated as rules by a state agency.

I recognize that argument has been made that a state agency in exercising delegated rule-making power is performing an executive function and not a legislative function but, in my judgment, this argument cannot be supported since the power exercised is pursuant to delegation by the legislature and not pursuant to the inherent power in the executive branch to make rules. If this argument is sound, then the legislature has no lawful right to suspend, alter or abrogate rules adopted by the executive branch because such legislative action would be an unconstitutional encroachment.

Accepting the position that the action of a state agency in adopting rules pursuant to legislative delegation is a legislative or quasi-legislative function, the remaining question is the method the legislature must pursue in order to lawfully suspend, alter or abrogate such rule.

Under Act 88 the legislature now expresses its disapproval by adopting a concurrent resolution. But this is not a law. It has been said by our Supreme Court that a concurrent resolution does not have the force and effect of law and, therefore, not a competent method of expressing the legislative will if such expression is to have the force of law and bind others than the members of the house or houses of the legislature adopting it.[28] The state constitution requires that—

> "All legislation by the legislature shall be by bill and may originate in either house of the legislature."[29]

Clearly, when the legislature delegates the rule-making power to a state agency, it is pursuant to a legislative act initiated by a bill. Such delegated power may be suspended or entirely revoked in any particular instance at any time the legislature may see fit.[30] But to suspend or entirely revoke a law conferring rule-making power requires the passage of another law, initiated by bill and subject to the veto power. In my opinion the rule itself, being the product springing from the exercise of the rule-making power, cannot lawfully be suspended, altered or abrogated by the legislature except by the passage of a bill by the legislature which becomes a law. To hold otherwise permits the legislature to circumvent the conditional mandate imposed on the passage of legislation and to deprive the governor of veto power by use of the concurrent resolution. What the legislature is prohibited from doing directly, it is prohibited from doing indirectly.[31]

> "* * * nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which

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[28] *Becker v. Detroit Savings Bank*, 269 Mich. 432, 434-435. Cf. *Boyer-Campbell v. Fry*, 271 Mich. 282; *United Insurance Co. v. Attorney General*, 300 Mich. 200; *Moran v. LaGuardia*, 270 N.Y. 450, 1 N.E. 2d 961.

[29] Article V, § 19, Constitution of 1908.

[30] *Attorney General v. Marr*, 55 Mich. 445, 450.

[31] *Mason v. Perkins*, 73 Mich. 303, 319; *Brennan v. Recorder of Detroit*, 207 Mich. 35, 39.

invests them with the power, and under the forms which that instrument has rendered essential."[32]

Based on what has been said hereinbefore, I am of the opinion that the legislature by the adoption of a concurrent resolution may not constitutionally suspend, alter or abrogate a rule or regulation promulgated by a state agency and in effect pursuant to delegated rule-making power. Neither can a joint committee of the legislature suspend a rule or regulation so promulgated. The legislature itself has apparently recognized the doubtful validity of its action pursuant to Act 88 because at the regular session of 1958 it passed and the Governor approved Act 177 substantially amending the provisions of that act and the legislative procedures thereunder.[33] Under Act 177, which became effective September 13, 1958, the legislature may no longer suspend, alter or abrogate a rule by adoption of a concurrent resolution, but the rule may be abrogated by legislation. This, of course, means legislation initiated by a bill as the constitution requires.

PAUL L. ADAMS,
Attorney General.

MOTOR VEHICLE CODE: Violation of—
CRIMINAL LAW: Pleas of guilty to charges of certain traffic offenses—
JUSTICES OF THE PEACE: Limitation on fees in certain traffic offenses—

Where a plea of guilty is entered to a charge contained in a traffic summons or on complaint and warrant for offenses delineated in subsection (f) of section 728 of the Michigan Vehicle Code, as amended by Act 47, P.A. 1957, the justice of the peace is limited to fees which may not exceed $2.00.

No. 3222 October 9, 1958.

Mr. James W. Bussard
Prosecuting Attorney
Ottawa County
Grand Haven, Michigan

By Assistant Attorney General Ramsey.

We have your request for an opinion with reference to a memorandum which you distributed to the justices of the peace of Ottawa County.

On page 3 of your memorandum you made the following statement:

> "I further interpret the intent of the law to be that when the respondent does appear, *in response to a ticket in all cases, no complaint and warrant are necessary, none should be drawn up, and no* fees should be charged or accepted for same."

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[32] 1 Cooley, Constitutional Limitations, 8th Ed., p. 266.

[33] Act 177 retains in Section 8e provision for the appointment of a joint committee on administrative rules which shall conduct hearings on those rules which, in the opinion of the committee, appear violative of the legislative intent expressed in the statutes pursuant to which the rules were made. I do not condemn this procedure since it is but one step leading to ultimate legislation if a rule is to be abrogated. Our Supreme Court has said:

"Legislators have a right to act upon their own knowledge and observation, upon hearsay, upon information derived from the public press, upon the ex parte petitions of interested parties, upon anything in short, which satisfies their judgment; and public opinion is one of the most important facts to be considered in determining upon the propriety or advisability of a proposed law."

The Flint and Fentonville Plank-road Company v. George S. Woodhull, 25 Mich. 99, 108. Cf., *Attorney General v. Wayne Circuit Judge*, 157 Mich. 615, 623.

MICHIGAN

ADMINISTRATIVE PROCEDURES ACT OF 1969

(Act 306 of 1969, as amended)

Reprinted From

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Legislative Service Bureau
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ADMINISTRATIVE PROCEDURES ACT OF 1969

Act 306 of 1969

ADMINISTRATIVE PROCEDURES ACT OF 1969

Act 306, 1969, p. 562; Eff. Jul. 1, 1970.

AN ACT to provide for the effect, processing, promulgation, publication and inspection of state agency rules, determinations and other matters; to provide for state agency administrative procedures and contested cases and appeals therefrom in licensing and other matters; to provide for declaratory judgments as to rules; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

CHAPTER 1. GENERAL PROVISIONS

24.201 Administrative procedures; short title.

Sec. 1. This act shall be known and may be cited as the "administrative procedures act of 1969".

HISTORY: New 1969, p. 562, Act 306, Eff. Jul. 1, 1970.

24.203 Administrative procedures act; definitions.

Sec. 3. (1) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.

(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute or agency action. It does not include an agency in the legislative or judicial branches of state government, the governor, an agency having direct governing control over an institution of higher education, or the state civil service commission.

(3) "Contested case" means a proceeding, including but not limited to rate-making, price-fixing and licensing, in which a determination of the legal rights, duties or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as though before a single agency.

(4) "Court" means the circuit court.

HISTORY: New 1969, p. 562, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 96, Act 40, Imd. Eff. Jul. 1.

24.205 Definitions L to P.

Sec. 5. (1) "License" includes the whole or part of an agency permit, certificate, approval, registration, charter or similar form of permission required by law, but does not include a license required solely for revenue purposes, or a license or registration issued under Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

(2) "Licensing" includes agency activity involving the grant, denial, renewal, suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license.

(3) "Party" means a person or agency named or admitted, or properly seeking and entitled of right to be admitted, as a party in a contested case.

(4) "Person" means an individual, partnership, association, corporation, governmental subdivision or public or private organization of any kind other than the agency engaged in the particular processing of a rule, declaratory ruling or contested case.

(5) "Processing of a rule" means all action required or authorized by this act as to a rule which is to be promulgated, including its adoption, and ending with its promulgation.

(6) "Promulgation of a rule" means that step in the processing of a rule consisting of the filing of a rule with the secretary of state.

HISTORY: New 1969, p. 563, Act 306, Eff. Jul. 1, 1970.

24.207 Definition of rule.

Sec. 7. "Rule" means an agency regulation, statement, standard, policy, ruling or instruction of general applicability, which implements or applies law enforced or administered by the agency, or which prescribes the organization, procedure or practice of the agency, including the amendment, suspension or rescission thereof, but does not include the following:

(a) A resolution or order of the state administrative board.

(b) A formal opinion of the attorney general.

(c) A rule or order establishing or fixing rates or tariffs.

(d) A rule or order pertaining to game and fish and promulgated under Act No. 230 of the Public Acts of 1925, as amended, being sections 300.1 to 300.5 of the Compiled Laws of 1948, Act No. 165 of the Public Acts of 1929, as amended, being sections 301.1 to 306.3 of the Compiled Laws of 1948 and Act No. 286 of the Public Acts of 1929, as amended, being sections 311.1 to 315.2 of the Compiled Laws of 1948.

(e) A rule relating to the use of streets or highways the substance of which is indicated to the public by means of signs or signals.

(f) A determination, decision or order in a contested case.

(g) An intergovernmental, interagency or intra-agency memorandum, directive or communication which does not affect the rights of, or procedures and practices available to, the public.

(h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet or other material which in itself does not have the force and effect of law but is merely explanatory.

(i) A declaratory ruling or other disposition of a particular matter as applied to a specific set of facts involved.

(j) A decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected thereby.

HISTORY: New 1969, p. 563, Act 306, Eff. Jul. 1, 1970.

24.211 Construction of act.

Sec. 11. This act shall not be construed to repeal additional requirements imposed by law.

HISTORY: New 1969, p. 563, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 96, Act 40, Imd. Eff. Jul. 1.

CHAPTER 2. PUBLIC INSPECTION

24.221 Agency rules, determinations and other documents; publication, inspection, copying.

Sec. 21. (1) An agency shall publish and make available for public inspection and copying during its business hours or on subscription on request of any person:

(a) Final orders or decisions in contested cases and the records on which they were made.

(b) Promulgated rules.

(c) Other written statements which implement or interpret law, rules or policy, including but not limited to guidelines, manuals and forms with instructions, adopted or used by the agency in the discharge of its functions.

(2) To the extent required to prevent an unwarranted invasion of personal privacy, an agency may delete identifying details when it publishes or makes available a matter required to be published and made available for public inspection.

(3) The publications may be in pamphlet, loose-leaf or other appropriate form in printed, mimeographed or other written manner. Except as otherwise provided by law, the agency may charge not more than cost for each copy of the publication.

HISTORY: New 1969, p. 563, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 96, Act 40, Imd. Eff. Jul. 1.

24.222 Exemptions.

Sec. 22. (1) This chapter does not apply to:

(a) Material exempted from disclosure by statute.

(b) Interagency or intra-agency letters, memoranda or statements which would not be available by law to a party other than an agency in litigation with the agency and which, if disclosed, would impede the agency in the discharge of its functions.

(c) Material obtained in confidence from a person, matter privileged by law and trade secrets.

(d) Financial and commercial information relating to a specific regulated person prepared by or for the use of an agency responsible for the regulation or supervision of the person.

(e) Investigatory materials compiled or used for regulatory or law enforcement purposes except to the extent available by law to a party to a contested case.

(f) Material the disclosure of which would constitute an unwarranted invasion of privacy.

(2) This chapter does not authorize the withholding of information otherwise required by law to be made available to the public or to a party in a contested case.

HISTORY: New 1969, p. 564, Act 306, Eff. Jul. 1, 1970.

24.223 Noncompliance of agency; effect, procedure.

Sec. 23. (1) Except to the extent that a person has actual and timely notice of the terms thereof, a person shall not in any manner be required to resort to, or be adversely affected by, a matter required to be published and made available and not so published and made available.

(2) The circuit court for the county in which the agency records are situated may order, on petition of any person, the production of any identifiable material improperly withheld from public inspection and copying.

HISTORY: New 1969, p. 564, Act 306, Eff. Jul. 1, 1970.

CHAPTER 3. PROCEDURES FOR PROCESSING AND PUBLISHING RULES

24.231 Rules; continuation, amendment, rescission.

Sec. 31. (1) Rules which became effective before July 1, 1970 continue in effect until amended or rescinded.

(2) When a law authorizing or directing an agency to promulgate rules is repealed and substantially the same rule-making power or duty is vested in the same or a successor agency by a new provision of law or the function of the agency to which the rules are related is transferred to another agency, by law or executive order, the existing rules of the original agency relating thereto continue in effect until amended or rescinded, and the agency or successor agency may rescind any rule relating to the function. When a law creating an agency or authorizing or directing it to promulgate rules is repealed or the agency is abolished and substantially the same rule-making power or duty is not vested in the same or a successor agency by a new provision of law and the function of the agency to which the rules are related is not transferred to another agency, the existing applicable rules of the original agency are automatically rescinded as of the effective date of the repeal of such law or the abolition of the agency.

(3) The rescission of a rule does not revive a rule which was previously rescinded.

(4) The amendment or rescission of a valid rule does not defeat or impair a right accrued, or affect a penalty incurred, under the rule.

(5) A rule may be amended or rescinded by another rule which constitutes the whole or a part of a filing of rules or as a result of an act of the legislature.

HISTORY: New 1969, p. 564, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 96, Act 40, Imd. Eff. Jul. 1.

24.232 Statutory construction rules; discrimination; crimes; adoption by reference.

Sec. 32. (1) Definitions of words and phrases and rules of construction prescribed in any statute, and which are made applicable to all statutes of this state, also apply to rules unless clearly indicated to the contrary.

(2) A rule or exception to a rule shall not discriminate in favor of or against any person, and a person affected by a rule is entitled to the same benefits as any other person under the same or similar circumstances.

(3) The violation of a rule is a crime when so provided by statute. A rule shall not make an act or omission to act a crime or prescribe a criminal penalty for violation of a rule.

(4) An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by an agency of the United States or by a nationally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and distribution to the public at cost and the rules shall state where copies of the adopted matter are available from the agency and the agency of the United States or the national organization or association and the cost thereof as of the time the rule is adopted.

HISTORY: New 1969, p. 564, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 97, Act 40, Imd. Eff. Jul. 1.

24.233 Organization, operations and procedures rules.

Sec. 33. (1) An agency shall promulgate rules describing its organization and stating the general course and method of its operations and may include therein forms with instructions. Sections 41 and 42 do not apply to such rules.

(2) An agency shall promulgate rules prescribing its procedures available to the public and the methods by which the public may obtain information and submit requests.

(3) An agency may promulgate rules, not inconsistent with this act or other applicable statutes, prescribing procedures for contested cases.

HISTORY: New 1969, p. 565, Act 306, Eff. Jul. 1, 1970.

24.235 Joint legislative committee on administrative rules; membership, terms, expenses, meetings, reports.

Sec. 35. The joint committee on administrative rules is created and consists of 3 members of the senate and 5 members of the house of representatives appointed in the same manner as standing committees are appointed for terms of 2 years. Members of the committee shall serve without compensation but shall be reimbursed for expenses incurred in the business of the committee, the expenses of the members of the senate to be paid from appropriations to the senate and the expenses of the members of the house to be paid from appropriations to the house of representatives. The committee may meet during a session of the legislature and during an interim between sessions. The committee may hold a hearing on a rule transmitted to it. Action by the committee, including that under section 52, shall be by concurring majorities of the members from each house. The committee shall report its activities and recommendations to the legislature at each regular session.

HISTORY: New 1969, p. 565, Act 306, Eff. Jul. 1, 1970.

24.236 Joint committee on administrative rule procedures and standards for rules.

Sec. 36. The joint committee on administrative rules may prescribe procedures and standards not inconsistent with this act or other applicable statutes, for the drafting, processing, publication and distribution of rules. The procedures and standards shall

be included in a manual which the legislative service bureau shall publish and distribute in reasonable quantities to the state departments.

HISTORY: New 1969, p. 565, Act 306, Eff. Jul. 1, 1970.

24.238 Filing of requests by individuals for promulgation of certain rules.

Sec. 38. A person may request an agency to promulgate a rule. Within 90 days after filing of a request, the agency shall initiate the processing of a rule or issue a concise written statement of its principal reasons for denial of the request. The denial of a request is not subject to judicial review.

HISTORY: New 1969, p. 565, Act 306, Eff. Jul. 1, 1970.

24.241 Notice of public hearing held prior to adoption of rule; time, contents, distribution.

Sec. 41. (1) Before the adoption of a rule an agency shall give notice of a public hearing and offer any person an opportunity to present data, views and arguments. The notice shall be given within the time prescribed by any applicable statute, or if none then at least 10 days before the public hearing and at least 20 days before the adoption of the rule. The notice shall include:

(a) A reference to the statutory authority under which the action is proposed.

(b) The time and place of the public hearing and a statement of the manner in which data, views and arguments may be submitted to the agency at other times by any person.

(c) A statement of the terms or substance of the proposed rule or a description of the subjects and issues involved, and the proposed effective date of the rule.

(2) The agency shall transmit copies of the notice to the joint committee on administrative rules, the legislative service bureau, the office of the governor and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. The notices shall be by mail or otherwise in writing to the last address specified by the person. Requests for notices shall be renewed each December.

(3) The public hearing shall comply with any applicable statute but is not subject to the provisions of this act governing contested cases, unless a rule is required by law to be adopted pursuant to adjudicatory procedures.

HISTORY: New 1969, p. 566, Act 306, Eff. Jul. 1, 1970.

24.241a Request by legislator for copies of proposed rules or changes in rules.

Sec. 41a. A member of the legislature may annually submit a written request to the legislative service bureau requesting that a copy of all proposed rules or changes in rules, or any designated proposed rules or changes in rules submitted to the legislative service bureau for its approval, be transmitted to the requesting member upon receipt of the same by the legislative service bureau.

HISTORY: Add. 1971, p. 557, Act 171, Imd. Eff. Dec. 2.

24.242 Notice of public hearings on rules; publication of notice.

Sec. 42. The agency shall publish the notice as prescribed in any applicable statute, or if none then in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the proposed rule. Methods that may be employed by the agency, depending upon the circumstances, include publication of the notice in 1 or more newspapers of general circulation or, when appropriate, in trade, industry, governmental or professional publications. If the persons likely to be affected by the proposed rule are unorganized or diffuse in character and location then the agency shall publish the notice as a display advertisement in at least 3 newspapers of general circulation in different parts of the state, 1 of which shall be published in the Upper Peninsula.

HISTORY: New 1969, p. 566, Act 306, Eff. Jul. 1, 1970.

24.243 Notice of public hearings on rules; noncompliance with requirements; contest for noncompliance.

Sec. 43. (1) A rule hereafter promulgated is not valid unless processed in substantial compliance with sections 41 and 42. However, inadvertent failure to give the notice to any person as required by section 41 does not invalidate a rule processed thereunder.

(2) A proceeding to contest a rule on the ground of noncompliance with the procedural requirements of sections 41 and 42 shall be commenced within 2 years after the effective date of the rule.

HISTORY: New 1969, p. 566, Act 306, Eff. Jul. 1, 1970.

24.244 Notice of public hearings on rules; exceptions to requirements.

Sec. 44. Sections 41 and 42 do not apply to an amendment or rescission of a rule which is obsolete or superseded, or which is required to make obviously needed corrections to make the rule conform to an amended or new statute or to accomplish any other solely formal purpose, if a statement to such effect is included in the legislative service bureau certificate of approval of the rule.

HISTORY: New 1969, p. 566, Act 306, Eff. Jul. 1, 1970.

24.245 Approval, disapproval, and adoption of rules; statement of reasons for adoption.

Sec. 45. (1) The legislative service bureau shall promptly approve the rules in a proposed filing when it deems them proper as to all matters of form, classification, arrangement and numbering. The department of the attorney general shall promptly approve the rules when it deems them to be legal.

(2) After the legislative service bureau and attorney general have approved the proposed rules but before the agency has formally adopted the rules, the agency shall transmit by letter copies of the rules bearing certificates of approval and copies of the rules without certificates to the joint committee on administrative rules. After its receipt of the agency's letter of transmittal, the committee shall have 2 months in which to consider the rules. This subsection does not apply to emergency rules.

(3) If the committee approves the rules within the 2 months, it shall attach a certificate of its approval to all copies of the rules bearing certificates except 1 and transmit those copies to the agency.

(4) If the committee disapproves the rules within the 2 months, it shall cause a concurrent resolution to be introduced in the house of representatives or senate, or both, disapproving the entire set of rules or any specific rule and stating reasons therefor. If the legislature adopts the resolution, a copy shall be sent to the agency proposing the rules and the agency shall not formally adopt the rules nor file them with the secretary of state except that the agency may make minor modifications in the rules and resubmit them to the bureau, attorney general and joint committee in accordance with this section without further notice or hearing under sections 41 and 42.

(5) If the committee approves the rules within the 2 months or the legislature does not adopt the concurrent resolution disapproving the rules within 3 months after the rules are transmitted to the committee or 1 month after introduction of the resolution, whichever occurs first, the agency if it wishes to proceed shall thereafter formally adopt the rules, in accordance with any applicable statute, and make a written record thereof. Certificates of approval and adoption shall be attached to at least 6 copies of the rules.

(6) On formal adoption of a rule, an agency, if requested to do so by an interested person either before or within 30 days after the hearing, shall issue a concise written statement of the principal reasons for its actions.

HISTORY: New 1969, p. 566, Act 306, Eff. Jul. 1, 1970;—Am. 1971, p. 557, Act 171, Imd. Eff. Dec. 2

24.246 Promulgation of rules; procedure; arrangement, binding, certification, and inspection of rules.

Sec. 46. (1) To promulgate a rule an agency shall file in the office of the secretary of state 3 copies of the rule bearing the required certificates of approval and adoption and true copies of the rule without the certificates. An agency shall not file a rule, except an emergency rule under section 48, until at least 10 days after the date of the certificate of approval by the joint committee on administrative rules or until at least 10 days after expiration of the applicable period of time prescribed in subsection (5) of section 45 when the legislature has not adopted a concurrent resolution disapproving the rule during that period. An agency shall transmit a copy of the rule bearing the required certificates of approval and adoption to the office of the governor at least 10 days before it files the rule.

(2) The secretary of state shall indorse the date and hour of filing of rules on the 3 copies of the filing bearing the certificates and shall maintain a file containing 1 copy for public inspection.

(3) The secretary of state, as often as he deems it advisable, shall cause to be arranged and bound in a substantial manner the rules hereafter filed in his office with their attached certificates and published in a supplement to the Michigan administrative code. He shall certify under his hand and seal of the state on the frontispiece of each volume that it contains all of the rules filed and published for a specified period. The rules, when so bound and certified, shall be kept in the office of the secretary of state and no further record thereof is required to be kept. The bound rules are subject to public inspection.

HISTORY: New 1969, p. 567, Act 306, Eff. Jul. 1, 1970;—Am. 1971, p. 558, Act 171, Imd. Eff. Dec. 2.

24.247 Effective date of rule; withdrawal or rescission of rule; notice.

Sec. 47. (1) Subject to the requirements of chapter 2 and except in case of a rule processed under section 48, a rule becomes effective on the date fixed in the rule, which shall not be earlier than 15 days after the date of its promulgation, or if a date is not so fixed then on the date of its publication in the Michigan administrative code or a supplement thereto.

(2) Except in case of a rule processed under section 48, an agency may withdraw a promulgated rule which has not become effective by a written request stating reasons, (a) to the secretary of state on or before the last day for filing rules for the interim period in which the rules were first filed, or (b) to the secretary of state and the legislative service bureau, within a reasonable time as determined by the bureau, after the last day for filing and before publication of the rule in the next supplement to the code. In any other case an agency may abrogate its rule only by rescission. When an agency has withdrawn a promulgated rule, it shall give notice, stating reasons, to the joint committee on administrative rules that the rule has been withdrawn.

HISTORY: New 1969, p. 567, Act 306, Eff. Jul. 1, 1970;—Am. 1971, p. 559, Act 171, Imd. Eff. Dec. 2.

24.248 Emergency rules, promulgation.

Sec. 48. (1) If an agency finds that preservation of the public health, safety or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule its reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of such procedures and file in the office of the secretary of state the copies prescribed by section 46 indorsed as an emergency rule, to 3 of which copies shall be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed therein or 6 months after the date

of its filing, whichever is earlier. The rule may be extended once for not more than 6 months by filing of a governor's certificate of the need for such extension with the office of the secretary of state before expiration of the emergency rule. An emergency rule shall not be numbered and compiled in a supplement to the Michigan administrative code, but shall be noted therein.

(2) If the agency desires to promulgate an identical or similar rule with an effectiveness beyond the final effective date of an emergency rule, it shall comply with procedures prescribed by this act for processing of a rule which is not an emergency rule. Such rule shall be published in a supplement to the code.

HISTORY: New 1969, p. 567, Act 306, Eff. Jul. 1, 1970.

24.249 Filed rules; distribution.

Sec. 49. (1) The secretary of state shall transmit or mail forthwith, after copies of rules are filed in his office, copies on which the day and hour of such filing have been indorsed, as follows:

(a) To the secretary of the joint committee on administrative rules and the legislative service bureau.

(b) To the secretary of the senate and the clerk of the house of representatives for distribution by them to each member of the senate and the house of representatives. When the legislature is not in session, or is in session but will not meet for more than 10 days after the secretary and clerk have received the rules, the secretary and clerk shall mail 1 copy to each member of the legislature at his home address.

(2) The secretary of the senate and clerk of the house of representatives shall present the rules to the senate and the house of representatives.

HISTORY: New 1969, p. 567, Act 306, Eff. Jul. 1, 1970.

24.250 Legislative standing committees; functions.

Sec. 50. When the legislature is in session the joint committee shall notify the appropriate standing committee of each house of the legislature when rules have been transmitted to the committee by the secretary of state. If the joint committee determines that a hearing on such rules is to be held it shall notify the chairmen of the standing committees and all members of the standing committees may be present and take part in the hearing. The chairman or a designated member of the standing committee should be present at the hearing but their absence does not affect the validity of the hearing.

HISTORY: New 1969, p. 568, Act 306, Eff. Jul. 1, 1970.

24.251 Amendment and rescission of rules by legislature.

Sec. 51. If the joint committee on administrative rules, an appropriate standing committee or a member of the legislature believes that a promulgated rule or any part thereof is unauthorized, is not within legislative intent or is inexpedient, the committee or member may do either or both of the following:

(a) Introduce a concurrent resolution at a regular or special session of the legislature expressing the determination of the legislature that the rule should be amended or rescinded. Adoption of the concurrent resolution constitutes legislative disapproval of the rule, but rejection of the resolution does not constitute legislative approval of the rule.

(b) Introduce a bill at a regular session, or special session if included in a governor's message, which in effect amends or rescinds the rule.

HISTORY: New 1969, p. 568, Act 306, Eff. Jul. 1, 1970.

24.252 Suspension of rules by joint committee on administrative rules.

Sec. 52. If authorized by concurrent resolution of the legislature, the joint committee on administrative rules, acting between regular sessions, may suspend a rule or any part thereof promulgated during the interim between regular sessions. The committee shall notify the agency promulgating the rule, the secretary of state, the department of administration and the legislative service bureau of any rule or part thereof it sus-

pends, and the rule or part thereof shall not be published in the Michigan administrative code while so suspended. A rule suspended by the committee continues to be suspended until the end of the next regular session.

HISTORY: New 1969, p. 568, Act 306, Eff. Jul. 1, 1970.

24.255 Publication of rules as Michigan administrative code and supplements thereto.

Sec. 55. (1) The department of administration shall publish interim supplements to the Michigan administrative code periodically but not less frequently than quarterly, and annual supplements. An interim supplement shall contain all rules filed in a period ending 30 days before the end of the preceding interim, a table of contents, a publication date and the interim period covered by the rules contained therein. An annual supplement shall contain all rules published in the interim supplements for the preceding year, cumulative numerical listing of amendments and additions to, and rescissions of, rules since the last publication of the code and a cumulative alphabetical index.

(2) The legislative service bureau may adopt a system of supplements, and necessary adjustments, which do not coincide with a calendar year or which would eliminate publication of a final interim supplement for any annual period by publication of the rules therefor in the annual supplement for that period.

(3) The department of administration shall publish, as often as appropriations are available, all rules promulgated by each agency and remaining in effect in a publication to be known as the Michigan administrative code.

HISTORY: New 1969, p. 568, Act 306, Eff. Jul. 1, 1970.

24.256 Publication of rules; editorial work, form, time.

Sec. 56. (1) The legislative service bureau shall perform the editorial work for the Michigan administrative code and its interim and annual supplements so that the classification, arrangement, numbering and indexing of rules will be uniform and conform as nearly as practical to those of the compiled laws. The bureau may correct in the publications obvious errors in rules when requested by the promulgating agency to do so. The bureau may provide for publishing all or any part of the code in pamphlet or loose leaf form.

(2) An interim supplement shall be published not later than 45 days after the end of the interim period covered thereby. An annual supplement shall be published at the earliest practicable date.

HISTORY: New 1969, p. 569, Act 306, Eff. Jul. 1, 1970.

24.257 Publication of rules; omissions permitted; cost of publication.

Sec. 57. (1) The legislative service bureau may omit from the Michigan administrative code or its supplements, or any of them, any rule, the publication of which would be unduly expensive, lengthy or of interest to relatively few persons, if the rule in printed or reproduced form is made available on application to the promulgating agency, and if the code publication contains a notice stating the general subject of the omitted rule and how a copy thereof may be obtained.

(2) The cost of publishing and printing interim and annual supplements shall be prorated by the department of administration on the basis of the volume of rules of each agency included in the supplements, and the cost thereof shall be paid out of appropriations to the agencies.

HISTORY: New 1969, p. 569, Act 306, Eff. Jul. 1, 1970.

24.258 Publication of rules; retention of type; printing separate pamphlets for agencies.

Sec. 58. (1) The legislative service bureau shall acquire and maintain those parts of the type used in printing the Michigan administrative code and its supplements for

rules currently in effect. Any part of such type shall be used in printing for the agency such parts of the rules, with reimbursement for the expense of such use, as may be agreed by the agency and the bureau.

(2) The code shall be arranged and printed so as to make convenient the publication in separate pamphlets of the parts of the code relating to different agencies. Agencies may order such separate pamphlets and the cost thereof shall be paid out of appropriations to the agencies.

HISTORY: New 1969, p. 569, Act 306, Eff. Jul. 1, 1970

24.259 Publication of rules; distribution.

Sec. 59. (1) The department of administration shall order printed a sufficient number of copies of the Michigan administrative code and its supplements to meet the requirements of this section. The department shall deliver or mail copies as follows:

(a) To the secretary of the senate a sufficient number to supply each senator, standing committee and such secretary.

(b) To the clerk of the house of representatives a sufficient number to supply each representative, standing committee and such clerk.

(c) To each member of the legislature 1 copy at his home address.

(d) To the legislative service bureau 1 copy for each attorney on its staff.

(e) To the department of the attorney general 25 copies.

(f) To each other state department 3 copies.

(g) To each county law library, bar association library and law school library in this state 1 copy.

(h) Additional copies to such officers and agencies and any other governmental officers and agencies and libraries when approved by the legislative service bureau.

(2) Such copies are for official use only by such agencies and persons and they shall deliver them to their successors, except that members of the legislature may retain copies of the code sent to their home addresses. The department of administration shall send to the home address of a new member of the legislature a complete copy of the code. The department shall deliver to the state library copies of the code and its supplement when requested by it sufficient for its use and for exchanges. The department shall hold additional copies for sale at a price not less than publication cost which shall be determined by the department.

HISTORY: New 1969, p. 569, Act 306, Eff. Jul. 1, 1970.

24.261 Filing and publication of rules; presumptions arising therefrom; judicial notice.

Sec. 61. (1) The filing of a rule under this act raises a rebuttable presumption that the rule was duly adopted, filed with the secretary of state, and made available for public inspection as required by this act.

(2) The publication of a rule in the Michigan administrative code or a supplement raises a rebuttable presumption that:

(a) The rule was duly adopted, filed with the secretary of state, and made available for public inspection as required by this act.

(b) The rule printed in the publication is a true and correct copy of the promulgated rule.

(c) All requirements of this act relative to such rule have been complied with.

(3) The courts shall take judicial notice of a rule which becomes effective under this act.

HISTORY: New 1969, p. 570, Act 306, Eff. Jul. 1, 1970.

24.263 Declaratory ruling by agency as to applicability of rule.

Sec. 63. On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

HISTORY. New 1969, p. 570, Act 306, Eff. Jul. 1, 1970.

24.264 Declaratory judgment as to validity or applicability of rule.

Sec. 64. Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

HISTORY New 1969, p. 570, Act 306, Eff. Jul 1, 1970.

CHAPTER 4. PROCEDURES IN CONTESTED CASES

24.271 Contested cases; time and notice of hearings.

Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

HISTORY New 1969, p. 570, Act 306, Eff. Jul. 1, 1970.

24.272 Defaults, written answers, evidence, argument, cross-examination.

Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

HISTORY: New 1969, p. 571, Act 306, Eff. Jul. 1, 1970.

24.273 Subpoenas; issuance; revocation.

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

HISTORY: New 1969, p. 571, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 97, Act 40, Imd. Eff. Jul. 1.

24.274 Oaths; depositions; disclosure of agency records.

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

HISTORY: New 1969, p. 571, Act 306, Eff. Jul. 1, 1970.

24.275 Evidence; admissibility, objections, submission in written form.

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

HISTORY: New 1969, p. 571, Act 306, Eff. Jul. 1, 1970,—Am. 1970, p. 97, Act 40, Imd. Eff. Jul. 1.

24.276 Evidence to be entered on record; documentary evidence.

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determi-

nation of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

HISTORY: New 1969, p. 572, Act 306, Eff. Jul. 1, 1970.

24.277 Official notice of facts; evaluation of evidence.

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

HISTORY: New 1969, p. 572, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 98, Act 40, Imd. Eff. Jul. 1.

24.278 Stipulations; disposition of cases, methods.

Sec. 78. (1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

HISTORY: New 1969, p. 572, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 98, Act 40, Imd. Eff. Jul. 1.

24.279 Presiding officers; designation; disqualification, inability.

Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

HISTORY: New 1969, p. 572, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 98, Act 40, Imd. Eff. Jul. 1.

24.280 Presiding officer; powers.

Sec. 80. A presiding officer may:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

HISTORY: New 1969, p. 572, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 98, Act 40, Imd. Eff. Jul. 1.

24.281 Proposals for decision; contents.

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

HISTORY: New 1969, p. 573, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 98, Act 40, Imd. Eff. Jul. 1.

24.282 Communications by agency staff; limitations; exceptions.

Sec. 82. Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.

HISTORY: New 1969, p. 573, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 99, Act 40, Imd. Eff. Jul. 1.

24.285 Final decisions and orders.

Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact which would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material and substantial evidence. A copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

HISTORY: New 1969, p. 573, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 99, Act 40, Imd. Eff. Jul. 1.

24.286 Official records of hearings.

Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof, objections and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

HISTORY: New 1969, p. 573, Act 306, Eff. Jul. 1, 1970.

24.287 Rehearings.

Sec. 87. (1) An agency may order a rehearing in a contested case on its own motion or on request of a party.

(2) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of judicial review, the agency on its own motion or on request of a party shall order a rehearing.

(3) A request for a rehearing shall be filed within the time fixed by this act for instituting proceedings for judicial review. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

HISTORY: New 1969, p. 573, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 99, Act 40, Imd. Eff. Jul. 1.

CHAPTER 5. LICENSES

24.291 Licensing; applicability of contested case provisions; expiration of license.

Sec. 91. (1) When licensing is required to be preceded by notice and an opportunity for hearing, the provisions of this act governing a contested case apply.

(2) When a licensee makes timely and sufficient application for renewal of a license or a new license with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order or a later date fixed by order of the reviewing court. This subsection does not affect valid agency action then in effect summarily suspending such license under section 92.

HISTORY: New 1969, p. 574, Act 306, Eff. Jul. 1, 1970.

24.292 Licenses; suspension, revocation, amendment proceedings.

Sec. 92. Before the commencement of proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation or amendment of a license, an agency shall give notice, personally or by mail, to the licensee of facts or conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license. If the agency finds that the public health, safety or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of a certified copy of the order on the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

HISTORY: New 1969, p. 574, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 100, Act 40, Imd. Eff. Jul. 1.

CHAPTER 6. JUDICIAL REVIEW

24.301 Judicial review as of right or by leave.

Sec. 101. When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

HISTORY: New 1969, p. 574, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 100, Act 40, Imd. Eff. Jul. 1.

24.302 Judicial review; method.

Sec. 102. Judicial review of a final decision or order in a contested case shall be by any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105.

HISTORY: New 1969, p. 574, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 100, Act 40, Imd. Eff. Jul. 1.

24.303 Petitions for review; place of filing, contents.

Sec. 103. (1) A petition for review shall be filed in the circuit court of the county where petitioner resides or has his principal place of business in this state, or in the circuit court for Ingham county.

(2) A petition for review shall contain a concise statement of:

(a) The nature of the proceedings as to which review is sought.

(b) The facts on which venue is based.

(c) The grounds on which relief is sought.

(d) The relief sought.

(3) The petitioner shall attach to the petition, as an exhibit, a copy of the agency decision or order of which review is sought.

HISTORY: New 1969, p. 575, Act 306, Eff. Jul. 1, 1970.

24.304 Petition for review; filing, time; stay; record; scope.

Sec. 104. (1) A petition shall be filed in the court within 60 days after the date of mailing notice of the final decision or order of the agency, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. The filing of the petition does not stay enforcement of the agency action but the agency may grant, or the court may order, a stay upon appropriate terms.

(2) Within 60 days after service of the petition, or within such further time as the court allows, the agency shall transmit to the court the original or certified copy of the entire record of the proceedings, unless parties to the proceedings for judicial review stipulate that the record be shortened. A party unreasonably refusing to so stipulate may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record.

(3) The review shall be conducted by the court without a jury and shall be confined to the record. In a case of alleged irregularity in procedure before the agency, not shown in the record, proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs.

HISTORY: New 1969, p. 575, Act 306, Eff. Jul. 1, 1970;—Am. 1970, p. 100, Act 40, Imd. Eff. Jul. 1.

24.305 Inadequate record; additional evidence, modification of findings, decision order.

Sec. 105. If timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material, and

that there were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record.

HISTORY: New 1969, p. 575, Act 306, Eff. Jul. 1, 1970.

24.306 Grounds for reversals.

Sec. 106. (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

HISTORY: New 1969, p. 575, Act 306, Eff. Jul. 1, 1970.

CHAPTER 7. MISCELLANEOUS PROVISIONS

24.311 Repeals.

Sec. 111. Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948, are repealed.

HISTORY: New 1969, p. 575, Act 306, Eff. Jul. 1, 1970.

24.312 References to repealed acts.

Sec. 112. A reference in any other law to Act No. 88 of the Public Acts of 1943, as amended, or Act No. 197 of the Public Acts of 1952, as amended, is deemed to be a reference to this act.

HISTORY: New 1969, p. 576, Act 306, Eff. Jul. 1, 1970.

24.313 Effective date and applicability.

Sec. 113. This act is effective July 1, 1970, and except as to proceedings then pending appliès to all agencies and agency proceedings not expressly exempted.

HISTORY: New 1969, p. 576, Act 306, Eff. Jul. 1, 1970.

24.314 Rules in process.

Sec. 114. When an agency has completed any or all of the processing of a rule pursuant to Act No. 88 of the Public Acts of 1943, as amended, before July 1, 1970, similar processing required by this act need not be completed and the balance of the processing and the publication of the rule shall be completed pursuant to this act. An effective date may be added to such a rule although it was not included in the notice of hearing on the rule pursuant to subsection (1) of section 41, when such notice was given before July 1, 1970.

HISTORY: Add. 1970, p. 100, Act 40, Imd. Eff. Jul. 1.

24.315 Exemptions.

Sec. 115. Chapters 4 and 6 shall not apply to the Bureau of Workmen's Compensation or the Workmen's Compensation Appeal Board created by Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.899 of the Compiled Laws of 1948.

HISTORY: Add. 1970, p. 101, Act 40, Imd. Eff. Jul. 1.

Mr. ANDERSON. It would say simply that when the committee approves a rule, it is approved. When the committee disapproves a rule it stands disapproved unless a resolution of the legislature overturns that ruling.

At the present time a disapproval must be concurred in by the entire legislature. We are trying to strengthen that particular feature.

I also have included a couple of appendixes. They respect questions which have arisen in much the context that some of the statements that were made here this morning. I am available for your questions today and subsequently by telephone or mail along with my committee staff counsel, Ken Sanders, who is with me today.

I will ask if he wants to make any brief statement. He has 27 years' experience in both the Missouri Legislature and the Michigan Legislature in the business of administrative rules procedure and in legislative service bureau work generally, and as a matter of fact, Mr. Hutchinson, who is one of the sponsors of 8231, along with Mr. Moorhead and Mr. Clawson, and others, was instrumental in 1958 while a Michigan Senator in rewriting our old 1943 Administrative Procedures Act.

Mr. Sanders helped Mr. Hutchinson in that rewriting and redrafting. We will be pleased to lend any assistance we can in your consideration of this concept. We applaud the idea of affording Congress a better look at the rules promulgated by the agency.

We don't intend to imply that we want to take away the prerogative of the Executive. That is not the point. The point is that Congress in our judgment should have a better opportunity to know what is going into that Federal Register and what is being promulgated on the citizenry of America.

Mr. FLOWERS. Thank you.

Mr. DANIELSON. The House is in session but there has not been a quorum call. We will receive the documents which Mr. Anderson offered. Is there any objection? It is so ordered and they will be placed in the record at the beginning of your testimony.

It is my intention at the chairman's suggestion to adjourn on the second bell of a quorum call. If we can discipline our questions we might cover the whole ground.

Mr. Moorhead?

Mr. MOORHEAD. Thank you both for coming here today. I know we are interested in the effect your procedures have had on the rules and regulations in your State. I gather from one brief statement that you made that you felt that the quality of rules and regulations that have been promulgated by the administrative agencies have actually improved because of the oversight in anticipation of it.

Do you think that that might very well happen for us on a Federal level if we had legislation of this kind?

Mr. NEIDITZ. I believe it would. The comment Mr. Gellhorn or the other gentleman made that you might do this by asking for reconsideration, I think there is no better way of getting an executive agency to reconsider something than the introduction of a resolution knocking out the regulation.

I am using the term regulation to mean what you term rulemaking or rule.

Mr. Moorhead. Do either of your States put any restriction on the rules being reviewed by your legislatures? In one of our bills here we restrict the regulations that can be reviewed to those involving a criminal penalty. Is there any such restriction in your laws?

Mr. Neiditz. No; there is not. The law applies to every agency which is either required or empowered to make regulations.

Mr. Moorhead. In light of your experience, would you feel it would be best to leave those limitations out of our law?

Mr. Neiditz. I would say so. Especially we do reviewing of things in the environmental field and some other areas where there are sizable civil dollar penalties which may not be criminal but they are certainly close to it.

Mr. Moorhead. Because there is a restriction on time, I want to let my fellow members have an opportunity.

Mr. Anderson. I would like to address myself to that question. Section 7 of the Michigan Administrative Procedures Act which I have left with you details some exceptions of types of things which will not be considered rules under the act.

They are rather the obvious ones. In addition to that, we exempt emergency rules from this procedure.

Mr. Moorhead. We have such clauses in our legislation here, too, we exempt emergency situations. While you have hit that point, I wonder how you would define emergency? Have you been able to nail it down and make it something that was able to be determined without too much difficulty?

Mr. Anderson. In Michigan the only one who can issue an emergency rule is the Governor. The agency promulgates the rule but it has to be issued by the Governor as an emergency. We give them 6 months in which this rule may apply. There is a limitation that he may extend it for an additional 6 months period beyond which he can't do it.

The agency in and of itself cannot promulgate emergency rules.

Mr. Flowers. Mr. Mazzoli?

Mr. Mazzoli. Thank you very much, Mr. Chairman. I have a question for Representative Anderson, I believe who brought up the point of the improvement in the general level of rulemaking—perhaps the Senator did as well. Have you seen any improvement on the draftsmanship of the assembly by reason of this requirement and perhaps by reason of what gave birth to these bills, which is perhaps an overreaction on the part of the executive branch of government?

Mr. Anderson. That is true.

Mr. Sanders. Michigan is unusual in that since the early 1940's all legislation has gone through the legislative drafting agency. Beginning in 1964 all rules have gone through so that we have parallel as to form.

Mr. Mazzoli. Since 1964.

Mr. Anderson. In addition to that point on your question, Mr. Mazzoli, the rules definitely have taken an improvement in appearance and form as a result of the committee's activity. We sometimes ask the agency to withdraw the rules perhaps as a result of some public discretion or of our own findings that the rules have certain weaknesses or inaccuracies or perhaps circumventions.

This has been necessary of decreasing frequency of late. The last couple of years they have been fewer and fewer because the agencies are gun shy now about being turned down.

Mr. MAZZOLI. I believe Representative Anderson mentioned that the rules would meet the intent of the original legislation and also be desirable in light of those original enactments. On what basis do you decide what is desirable? Is that just an overall attitude of what the assembly meant to do or is there something more empirical in how you determine what is a desirable regulation?

Mr. NEIDITZ. I think that it is a value judgment but I would not deny that except that this business that only the bureaucrat writing rules or regulations in an executive agency exercises value—ideology free judgment, and just uses empirical optimum point to reach where he is going.

He has somehow some genius of walking this tightrope. I would even deny that.

Mr. MAZZOLI. You think we are just as capable of making value judgments as they are?

Mr. NEIDITZ. You have a lot more heat on you every 2 years to make your judgments a little sharper. I think the whole thrust—whether it is disruption or a normative or what his impact is, the delay. We have had Federal agencies delay for 2 years in issuing regulations and we in the States have to live under those.

Furthermore, you could provide that a resolution can go in while the executive agency is doing its review. There is nothing to prevent the Congress from putting in a resolution knocking the thing out when they see the first publication in the Federal Register.

It can be going along at the same time.

Mr. FLOWERS. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. The mechanism in both your State legislatures are substantially different than the mechanism provided in the bills before us. Both of you use a separate committee specifically designed to oversee all rules and regulations as opposed to doing the original authorizing in the committee.

You would recommend that mechanism, I take it, rather than——

Mr. NEIDITZ. I probably would not for the Congress because of the tremendous number of areas. I would probably feel—again Professor Gellhorn said and it is true under the two bills before you, it is not necessary that the resolution would be referred to the same committee that brought out the original bill.

Sure it is not true. But from my experience it would be—I think the presiding officer would be in deep trouble if he took a criminal justice bill and sent it to the Agriculture Committee.

Mr. DANIELSON. The committee thanks all of you for attending. I regret we don't have more time. I would like to pick the brain of counsel that has 27 years of experience. Things look at lot different from the arena than they do from the hills.

Mr. NEIDITZ. I would like to leave similar material that Mr. Anderson left.

Mr. FLOWERS. Such material will be received and put into the record as previously noted. We must now adjourn to attend a vote on a matter of an administrative regulation which we may overturn. The committee stands adjourned until 9:30 tomorrow morning.

[Whereupon, at 12:20 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., Thursday, October 23, 1975.]

[The following portions of State statutes are included in this record as examples of State legislation providing for review administrative regulations.]

CONNECTICUT

SEC. 4–169. Approval of regulation by attorney general. No adoption, amendment or repeal of any regulation, except a regulation issued pursuant to subsection (b) of section 4–168 shall be effective until one copy thereof has been presented to the attorney general by the agency proposing such regulation, and approved by him, or by some other person designated by him for such purpose. The review of such regulations by the attorney general shall be limited to a determination of the legal sufficiency of the proposed regulation. In the event the attorney general or his designated representative fails to give notice to the agency of any legal insufficiency within thirty days of the receipt of the proposed regulation, he shall be deemed to have approved the proposed regulation for purposes of this section.

Sec. 4–170. Legislative regulation review committee. (a) There shall be a standing legislative committee to review all regulations of the several state departments and agencies following the proposal thereof, which shall consist of eight members of the house of representatives, four from each major party, to be appointed on the first Wednesday after the first Monday in January in the odd-numbered years, by the speaker of said house, and six members of the senate, three from each major party, to be appointed on or before said dates by the president pro tempore of the senate. Said members shall serve for the balance of the term for which they were elected. Vacancies shall be filled by appointment by the authority making the appointment. Members of said committee shall receive twenty-five dollars per diem for their services, together with necessary expenses incurred in the performance of their duties. The members of said committee shall elect from among their members two co-chairmen, one of whom shall be a member of the senate and one of whom shall be a member of the house of representatives, and either of whom may call meetings of the committee for the performance of its duties.

(b) No adoption, amendment or repeal of any regulation, except a regulation issued pursuant to subsection (b) of section 4–168, shall be effective until seventeen copies thereof have been presented to the standing legislative regulation review committee by the agency proposing such regulation at a regular meeting of said committee, and approved by the committee. The form of proposed regulations which are presented to the committee shall be as follows: New language shall be in capital letters and language to be deleted shall be enclosed in brackets. An agency may present a proposed regulation to the committee for approval at the same time that it presents the same regulation for approval of the attorney general under section 4–169. Said committee shall study all proposed regulations and, in its discretion, may hold public hearings thereon. In the event the committee fails to give notice to the agency of either its approval or disapproval of the proposed regulation within sixty days after its presentation to said committee, the committee shall be deemed to have approved the proposed regulation for purposes of this section. In the event the committee disapproves a proposed regulation or any part thereof, it shall give notice of such disapproval to the agency, and no agency shall thereafter issue any regulation or directive or take other action to implement such disapproved regulation, provided the general assembly may reverse such disapproval under the provisions of section 4–171. If the committee disapproves any regulation proposed for the purpose of implementing a federally subsidized or assisted program, the general assembly shall be required to either sustain or reverse every such disapproval.

Sec. 4–170a. Review of old regulations. Notwithstanding any provision of this chapter, the legislative regulation review committee is authorized to review and approve or disapprove any regulation adopted prior to January 1, 1972, by any agency subject to this chapter.

Sec. 4–171. Submission of disapproved regulations to general assembly. On or before February fifteenth of each regular session of the general assembly, the co-chairman of the standing legislative regulation review committee shall submit a copy of all proposed regulations which have been disapproved by the standing committee under subsection (b) of section 4–170 to the general assembly for its study. Such regulations shall be referred by the speaker of the house or

by the president of the senate to an appropriate committee for its consideration and such committee shall schedule hearings thereon. The general assembly may, by resolution, either sustain or reverse a vote of disapproval of the standing committee under the provisions of said subsection (b), except that in the event the general assembly fails during its regular session to sustain by resolution the disapproval of a regulation proposed for the purpose of implementing a federally subsidized or assisted program, the vote of disapproval shall be deemed reversed for purposes of this section and the proposed regulation shall become effective. Any action of the general assembly under the provisions of this section shall be effective as of the date of passage of the resolution in the second house of said general assembly.

MICHIGAN ADMINISTRATIVE PROCEDURES ACT OF 1969

24.235. Joint legislative committee on administrative rules; membership, terms, expenses, meetings, reports

Sec. 35. The joint committee on administrative rules is created and consists of 3 members of the senate and 5 members of the house of representatives appointed in the same manner as standing committees are appointed for terms of 2 years. Members of the committee shall serve without compensation but shall be reimbursed for expenses incurred in the business of the committee, the expenses of the members of the senate to be paid from appropriations to the senate and the expenses of the members of the house to be paid from appropriations to the house of representatives. The committee may meet during a session of the legislature and during an interim between sessions. The committee may hold a hearing on a rule transmitted to it. Action by the committee, including that under section 52, shall be by concurring majorities of the members from each house. The committee shall report its activities and recommendations to the legislature at each regular session .

24.245. Approval, disapproval, and adoption of rules; statement of reasons for adoption

Sec. 45. (1) The legislative service bureau shall promptly approve the rules in a proposed filing when it deems them proper as to all matters of forms, classification, arrangement and numbering. The department of the attorney general shall promptly approve the rules when it deems them to be legal.

(2) After the legislative service bureau and attorney general have approved the proposed rules but before the agency has formally adopted the rules, the agency shall transmit by letter copies of the rules bearing certificates of approval and copies of the rules without certificates to the joint committee on administrative rules. After its receipt of the agency's letter of transmittal, the committee shall have 2 months in which to consider the rules. This subsection does not apply to emergency rules.

(3) If the committee approves the rules within the 2 months, it shall attach a certificate of its approval to all copies of the rules bearing certificates except 1 and transmit those copies to the agency.

(4) If the committee disapproves the rules within the 2 months, it shall cause a concurrent resolution to be introduced in the house of representatives or senate, or both, disapproving the entire set of rules or any specific rule and stating reasons therefor. If the legislature adopts the resolution, a copy shall be sent to the agency proposing the rules and the agency shall not formally adopt the rules nor file them with the secretary of state except that the agency may make minor modifications in the rules and resubmit them to the bureau, attorney general and joint committee in accordance with this section without further notice or hearing under sections 41 and 42.

(5) If the committee approves the rules within the 2 months or the legislature does not adopt the concurrent resolution disapproving the rules within 3 months after the rules are transmitted to the committee or 1 month after introduction of the resolution, whichever occurs first, the agency if it wishes to proceed shall thereafter formally adopt the rules, in accordance with any applicable statute, and make a written record hereof. Certificates of approval and adoptioin shall be attached to at least 6 copies of the rules.

(6) On formal adoption of a rule, an agency, if requested to do so by an interested person either before or within 30 days after the hearing, shall issue a concise written statement of the principal reasons for its actions.

24.250. Legislative standing committees; functions

Sec. 50. When the legislature is in session the joint committee shall notify the appropriate standing committee of each house of the legislature when rules have been transmitted to the committee by the secretary of state. If the joint committee determines that a hearing on such rules is to be held it shall notify the chairmen of the standing committees and all members of the standing committees may be present and take part in the hearing. The chairman or a designated member of the standing committee should be present at the hearing but their absence does not affect the validity of the hearing.

24.251. Amendment and rescission of rules by legislature

Sec. 51. If the joint committee on administrative rules, an appropriate standing committee or a member of the legislature believes that a promulgated rule or any part thereof is unauthorized, is not within legislative intent or is inexpedient, the committee or member may do either or both of the following:

(a) Introduce a concurrent resolution at a regular or special session of the legislature expressing the determination of the legislature that the rule should be amended or rescinded. Adoption of the concurrent resolution constitutes legislative disapproval of the rule, but rejection of the resolution does not constitute legislative approval of the rule.

(b) Introduce a bill at a regular session, or special session if included in a governor's message, which in effect amends or rescinds the rule.

Kansas

(Kan. Stat. Ann. (Supp. 1974))

77–428. Compiled regulations; existing regulations; annual filing; effective dates; submission to legislature; action by legislature. (*a*) On or before September 1, 1965, every state agency shall prepare and file with the revisor of statutes a complete compilation of all rules and regulations, in accordance with the provisions of this act, together with a citation of the authority pursuant to which each regulation or any part thereof was adopted. All regulations on file with the revisor which are in force and effect at the time this act takes effect shall continue in full force and effect and may be amended, revived, or revoked as provided for in K. S. A. 77–405 to 77–414, both sections inclusive, and other laws applicable at the time this act became effective until January 1, 1966. On January 1, 1966, all regulations of state agencies filed in accordance with the provisions of K. S. A. 77–405 to 77–414, both sections inclusive, and prior laws shall become null and void and on the same date the Kansas administrative regulations compiled pursuant to the provisions of this act shall become the regulations of the state agencies with the publication of such regulations. The effective date of such publication shall be January 1, 1966. From and after the effective date of this act, all new regulations and all amendments, revivals, or revocations of regulations regularly adopted during the period from May 1 to October 1, inclusive, in any year shall be filed with the revisor of statutes on or before October 1 of such year, and shall become effective on and after May 1 of the succeeding year.

No regulations may be filed after October 1 or prior to May 1 in any year, except emergency regulations. It is the intent and purpose of this act to provide an annual effective date for all regularly adopted and filed regulations, except emergency regulations, which date shall be the effective date of the publication of the Kansas administrative regulations or the effective date of the publication of the annual supplement for such Kansas administrative regulations.

(*b*) At the commencement of each regular session of the legislature, the revisor of statutes shall submit to each house of the legislature one copy of all rules and regulations, except emergency rules and regulations, filed in his office prior to October 1 of the preceding year. Within sixty (60) days after such rules and regulations are so submitted, the legislature may adopt a bill or joint resolution modifying and approving or rejecting any of the rules and regulations so submitted. When any such bill or joint resolution is adopted, such rules and regulations shall become effective as modified and approved or if rejected such rules shall be void. In the event no bill or joint resolution is adopted relating to any rules and regulations submitted pursuant to this subsection, such rules and regulations shall take effect and be in force from and after the date specified in subsection (*a*) of this section. [K. S. A. 77–426; L. 1974, ch. 421, § 3; July 1.]

§ 9-6.9. *Testing validity of rule; nullification of rule by General Assembly.*—(a) The validity of any rule of statewide application may be determined upon petition for a declaratory judgment thereon addressed to the Circuit Court of the city of Richmond by any person who might be adversely affected by its enforcement and who alleges that it is invalid; provided, that the validity of any rule which is not statewide in application may be determined by such petition addressed to the circuit or corporation court of any county or city in which such rule is applicable. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that it is unconstitutional or exceeds the statutory authority of the agency or was adopted without compliance with the rule-making procedures prescribed in this chapter or that, in the case of a rule adopted under § 9-6.5, action under § 9-6.5 was not justified.

(c) An appeal may be had from the decision of the court to the Supreme Court of Appeals as provided by law.

(d) Any rule shall be and become null and void from and after the time when either house of the General Assembly adopts a resolution declaring it null and void. No rule having substantially the same object shall thereafter be adopted unless and until the General Assembly repeals the resolution. (1952, c. 703.)

§ 9-6.10 *Right to hearing before agency; notice and opportunity to be heard; depositions; subpoenas.*—(a) Any person whose rights, duties or privileges have been or may be affected by any action or inaction of an agency without a formal hearing may demand in writing a formal hearing of his complaint and a hearing thereon shall be held as soon as practicable before the agency. Unless otherwise provided by statute any agency may conduct preliminary hearings by means of subordinates of the agency but such hearings shall not be formal hearings as required by this paragraph.

(b) In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding the issues cannot be fully stated in advance of the hearing or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable. An opportunity shall be afforded all parties to present evidence and argument with respect thereto.

(c) Depositions may be taken and read as in actions at law.

(d) The agency shall have power to issue subpoenas and subpoenas duces tecum, and at the request of any party shall issue such subpoenas. The failure of a witness without legal excuse to appear or to testify or to produce documents shall be reported by the agency to the Circuit Court of the city of Richmond and the proceedings thereon shall be as provided in § 8-302. (152, c. 703.)

§ 9-6.11. *Rules of evidence in contested cases.*—In contested cases;

(a) All relevant and material evidence shall be received, except that: (1) The rules relating to privileged communications and privileged topics shall be observed; (2) hearsay evidence shall be received only if the declarant is not readily available as a witness; and (3) secondary evidence of the contents of a document shall be received only if the original is not readily available. In deciding whether a witness or document is readily available the agency shall balance the importance of the evidence against the difficulty of obtaining it, and the more important the evidence is the more effort should be made to produce the eyewitness or the original document.

CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

THURSDAY, OCTOBER 23, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:45 a.m., in room 2141 Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Mazzoli, Moorhead, and Kindness.

Also present: William P. Shattuck, counsel; Jay T. Turnipseed, assistant counsel; Alan F. Coffey, Jr., associate counsel; and David Minge, consultant to the subcommittee.

Mr. FLOWERS. We will call the meeting to order. Our first witness this morning is Mr. Fred J. Emery, Director of the Federal Register. Mr. Emery, please come forward and take a seat. Mr. Emery it could be said you run one of the most important publishing houses in the United States.

We are looking forward to hearing from you, sir. You may proceed.

TESTIMONY OF FRED J. EMERY, DIRECTOR, THE FEDERAL REGISTER

Mr. EMERY. Thank you, Mr. Chairman. I appreciate the opportunity to testify this morning with respect to H.R. 3658 and H.R. 8231. I might briefly state a few of my own professional background qualifications before I get into the prepared statement. I am a lawyer and I also have spent a good portion of my professional career at both the State and Federal level either in legislative or regulatory areas so my experience in this area predates my experience as Director of the Federal Register.

I must admit, I think I read the Federal Register more before I had this job than I do now. I am also a member of the Standing Committee on Legal Drafting of the Bar Association. At the outset I would like to review briefly the functions of the Federal Register.

As you know the Federal Register was created by the Congress to serve as the central depository of the administrative actions of the executive branch. In enacting the Federal Register Act, the Congress established the Administrative Committee of the Federal Register as the policymaking body.

The committee by law consists of the Archivist of the United States as chairman, the Public Printer, and a representative of the Attorney General. Under the law I serve as secretary of the committee.

The Administrative Committee over the years has been concerned with establishing orderly procedures and uniform formats to make the material published easily accessible to the affected public. The committee's regulations for—governing publication in the Federal Register, are contained in chapter I of title I of the Code of Federal Regulations.

The material we publish originates in the executive agencies. It comes to us over the signature of the head of the agency or other responsible official designated by him to sign such documents.

Now I would like to describe the typical notice and comment rulemaking procedure that is followed by Federal agencies under sections 552 and 553 of the Administrative Procedures Act.

Typically a Federal agency will publish in the Federal Register a notice of proposed rulemaking. This document will usually set forth:

1. The full text of the new rules or amendments to existing rules that are being proposed.

2. An invitation for public comment on the proposals which states the deadline date for comments and any administrative requirements, such as the number of copies required.

3. The statutory authority for the proposal, and,

4. A preamble statement containing background information.

Usually at least 30 days is allowed for public comment. If the proposed changes are complicated, the agency will probably allow a longer period for comment.

After the comment period closes, the agency will review the comments received. This review will involve identifying the major issues raised by the comments so that they can be considered by the agency.

After the comments are reviewed and considered by the technical and legal experts within the agency, recommended decisions are usually made to the policymaking levels within the agency. Once the major policy questions are at least tentatively decided, a draft of a final rulemaking document is prepared.

This is then circulated within the agency and unless major objections are raised this document becomes the final regulation that is signed by the appropriate official and submitted for publication in the Federal Register.

The final rule:

1. Sets forth the full text of the new rules or regulations or amendments.

2. Cites the statutory authority.

3. Contains a preamble statement that recites the steps that led up to the final rule, and,

4. Announces the effective date of the new rules or amendments.

Under the Administrative Procedures Act the effective dates should be at least 30 days after publication of the adopted rules in the Federal Register, with exceptions for emergencies and other exceptions.

Frequently effective dates are established according to the amount of time needed to prepare for the new rule. For example, major changes in automobile safety requirements will usually require 2 years

or longer for the industry to make the necessary tool, design, and assembly line changes.

The effective date would allow at least that much time.

The above description is necessarily over-simplified. Each Federal agency has developed its own techniques for following the general requirements of the Administrative Procedure Act.

Also many statutes contain additional specific requirements such as review by an advisory committee, or a two-step notice and comment procedure which may affect the proceeding with an agency.

I might add, however, that probably the most significant part of each rulemaking document is the part that has come to be known as the preamble. This is the explanation of the document and regardless of how technical the rule itself might be the preamble should set out in layman's terms the subject matter of the document, its purpose and import.

Frankly our experience has been that many of the irritations, frustrations and possibly even some of the costs stemming from agency regulations are due to the fact that so many of them are so hard to read and to understand.

Properly written preambles would ease this problem somewhat by giving the reader a quick insight into what the regulation is all about.

Needless to say such clear explanations would also be invaluable to the Congress in its oversight activities or in carrying out the procedures contemplated by the two bills before you.

The regulations that govern publication in the Federal Register require that each document contain an adequate preamble. However, many do not. My office recognizes this problem and is attempting to correct it. We are now engaged in an effort to develop a model for the first paragraph of each document to enable the reader to determine quickly what the document is all about.

In the near future we will start working with agencies toward the goal of having such a paragraph for each important Federal Register document.

I would hope that our efforts to promote clear explanations at the beginning, of each document, will also result in clearer, better written regulations. I believe agencies will find it extremely difficult to summarize, in plain language, documents that are vague, obscure, or loaded with legalisms.

I might add that this problem of clarity is not a new problem nor is it limited to Federal regulations. In his 1946 book "The Art of Plain Talk," Rudolph Flesch wrote a chapter entitled "How To Read the Federal Register." After setting out several typical documents, he unhappily concluded——

> Slowly we begin to understand. The Federal Register is not supposed to be read at all. It simply prints things, so that someday, somewhere some government official can say, yes, but it says in the Federal Register. . . . All this government stuff, in other words, is not reading matter, but prefabricated parts of quarrels.

That the problem is not limited to Government is indicated by the recent experience of the Sentry Insurance Co. in its efforts to write its automobile insurance policy in plain English.

While the new plain talk policy was primarily intended to alert the purchaser to exactly what was being purchased, the Sentry Insurance

Co. found that it did the same thing for many persons both within the company and without who thought they understood the old policy.

The company found that many questions were raised about provisions or limitations in the new policy that had been in existence in other policies for years. Apparently many of the insurance experts did not really understand the language until it was stated clearly.

At this point I would like to give you a few relevant statistics on numbers of pages and of documents published in the Federal Register in 1974 and to date this year.

Year	Total Federal Register pages	Pages rules	Pages proposed rules	Pages of notices indexes, and other reader finding aids
1974	45,422	10,981	5,939	28,502
1975 through Sept. 30	45,091	10,245	6,094	28,752

Federal Register documents, for a typical month, July 1974

Final rules	509
Proposed rules	237
Notices	1,877
Total, Federal Register documents	2,623

However, as you well know, statistics can raise as many questions as they answer and the above numbers are no exceptions.

For example the Federal Register for March 3, 1975, contained a final rulemaking document for the new Energy Research and Development Administration that took up 21 Federal Register pages.

This document was basically a reorganization of the former Atomic Energy Commission regulations that are now under the authority of ERDA and would impose no significant workload on the Congress. By comparison, the Federal Register for March 12, 1975, contained an 11-page document containing the final Department of Agriculture regulations on meat grading.

Because of the controversial nature of this document it is likely that it alone could have imposed a significant additional workload on the interested congressional committees.

I hope that the above figures will be of some help to this subcommittee. However, to make any meaningful estimate of the potential additional work load under the bills before you would require some case by case review of significant and controversial rulemaking documents.

In closing I would like to say that I am very encouraged to see the interest your subcommittee is taking in the rulemaking activities of the executive agencies. For many years my office has been raising a sometimes lonely voice in pointing out that rulemaking in the executive agencies requires special attention and special skills.

Now whatever the outcome with respect to the two bills before you I believe that your hearings will stimulate more effective, public interest oriented rulemaking by Federal agencies. I am hopeful too, that these hearings will also give some impetus to our efforts to contribute to that goal.

Thank you.

Mr. FLOWERS. Thank you, Mr. Emery. I would respond that I am encouraged that you are looking into ways to require improved preambles and a model for initial paragraphs in documents submitted for inclusion in the Federal Register.

Do you have any control over whether or not something is printed in the Federal Register or do you have to accept whatever is proffered you by an agency?

Mr. EMERY. We do have some control under the regulations of the administrative committee of the Federal Register. I have authority to reject documents not complying with those regulations. One of the regulations is that a document must include an effective preamble. When a document comes to us it is signed by a high level official or a cabinet member so we have not been too vigorously enforcing this rule.

Our authority has not been expanded recently but with the current interest in this area we can now exercise more authority. But, it is more a leadership type of thing. It is a matter of telling agencies what we want and helping them to do it.

If we do that, we will achieve a result without being in the position of a traffic cop.

Mr. FLOWERS. Right, but the authority to reject a document does give you a degree of control in that it relates to material contained in the preamble and otherwise in the document.

Mr. EMERY. That is right.

Mr. FLOWERS. In the scheme of Government organization where does the Federal Register stand? Who do you work for?

Mr. EMERY. My immediate boss is the Archivist of the United States.

Mr. FLOWERS. So you are in the GSA?

Mr. EMERY. Right.

Mr. FLOWERS. Mr. Emery, in your compilation of what you published in 1974 and to date in 1975, do you have any material that would reflect which agencies send you the most business?

How does that break down?

Mr. EMERY. We do have that kind of information. I must admit I did not bring it with me. The Environmental Protection Administration is one of our heaviest contributors, the Labor Department in general, OSHA in particular. The Department of Transportation has a large rulemaking activity.

Actually the bulk of the material in the rules and regulations areas as opposed to the notice-type area comes really from the newer agencies, not those referred to around town as the traditional regulatory agencies.

It is the executive branch agencies like Agriculture, DOT, EPA, and others that are producing the bulk of the regulations.

Mr. FLOWERS. Do you have any record of how many rules and regulations are on the books now? I know we have what you have done in the last year or so. Has anybody got an index or machine which indicates this?

Mr. EMERY. Well, the shelf in my office of the Code of Federal Regulations, I think, now is in the 13- to 14-foot range. I think roughly 60,000 pages make up the Code of Federal Regulations. That would be the total bulk of all regulations considered to be permanent and future in effect.

That would compare to the United States Code.

Mr. FLOWERS. About 60,000 pages. It is hard to relate the 60,000 pages to the number of regulations. At the rate we are going now, it seems like that that will enlarge greatly in the immediate future if you add to the more than 10,000 pages of rules last year those you are publishing this year.

You are growing enormously with each year. Many of these, as you said, do not replace old rules. They are new rules by traditional agencies as well as the newer agencies.

Mr. EMERY. Some of them are recodifications or rewritings. The Code of Federal Regulations has not been growing year to year with anywhere near the same percentage as the Federal Register but it has been growing.

Mr. FLOWERS. Is there any way to utilize a computer on this?

Mr. EMERY. We have done more of that in the last 6 months. We have been looking to computerization in the last few years. We have been making progress but as a result of the Privacy Act we have learned a lot in the last 6 months. Virtually all the Privacy Act material was submitted to us in machine readable form and was printed using electronic composition at the Government Printing Office.

We took the lead on that and it worked out very well. We see a lot of payoff in terms of information retrieval. We are going to be able to publish hopefully a digest of the Privacy Act material that will be something that probably we would not otherwise have had the capacity to do.

Mr. FLOWERS. Do you utilize a computer in connection with the rules and regulations that are on the books? Do you have any way of retrieving by computer, say, the Federal Trade Commission rule on such and so and at the same time retrieve perhaps a FDA rule on a similar subject?

Mr. EMERY. Not at the present time; no. With the experience we have had under the Privacy Act we have plans with the Government Printing Office on the drawing board that would hopefully have that capability not too far down the road.

We are talking about a multiyear project.

Mr. FLOWERS. Does any agency of Government have such capability?

I think what I am trying to get at is in this great mass of 60,000 pages worth of regulations, does anybody know or have any idea about conflicts or opposing regulations within different departments?

Is there any way of ascertaining to what extent they do duplicate each other?

Mr. EMERY. I don't think so. I am sure that none have the capability with respect to others.

Mr. FLOWERS. Mr. Moorhead?

Mr. MOORHEAD. I want to thank you for being with us here this morning. Of the 10,000 pages approximately that were put in last year and have been put in so far this year, can you give me some idea how much of that OSHA and the Environmental Protection Agency has put in?

Mr. EMERY. I did not bring any statistics breaking it down that way.

Mr. MOORHEAD. Is there a pretty substantial amount of it, though?

Mr. EMERY. In both cases they have had substantial regulations. I don't know that OSHA has published that much in the last 2 years. The bulk of the material they published started in 1970 and 1971 and 1972.

Most of it was published in the 1970–73 period.

Mr. MOORHEAD. Do you think the 30-day period that you usually—an agency gives in order to make comments upon these regulations is adequate for the average businessman or person who is going to be affected by this maze of regulations to comment; let alone get change?

Mr. EMERY. Thirty days is inadequate. In the document published by the Administrative Committee of the Federal Register in 1971 when they adopted the preamble requirement, the preamble of that document indicated that a number of the comments we received focused on that problem.

Most agencies now do give more than 30 days.

Mr. MOORHEAD. Well, even when you find proposed rules that would be unworkable, if the agency receives them in 28 days or 29 days, what opportunity is there for the agency to really consider them before they go into effect?

Mr. EMERY. From my own experience with a number of agencies in town, they do get considered. I know when I was responsible for some particular rulemaking activities, I read literally hundreds of comments or summaries of comments. I think that is being done in most agencies now.

It takes a while. That is one reason why there is a substantial time between the closing date for comments and the time the rules come out.

Mr. MOORHEAD. Do you believe elected officials in the Senate and the House should have final determination as to whether legislative intent is being followed in these regulations? Shouldn't Congress at least exercise oversight?

Mr. EMERY. My appearance here this morning in this particular area is not as a spokesman for Archives, GSA, or in the substantive area of the bills before you for any part of the executive branch. But no; clearly Congress has the right through its oversight authority and it has exercised that authority in the past.

We in this country talk about rules and regulations. The British call what we are talking about delegated legislation. I like their term better than I do ours.

We are talking about legislative authority that Congress has delegated to the executive branch. Congress also has a chance to review it and take it back. Whether or not the approach of these two bills is the best way to do it, I have some of the same questions that other witnesses have raised.

The legitimate oversight role may be the better way to do it.

Mr. MOORHEAD. One of the major purposes of these hearings is to find out from you and others like you if you have any suggestions about how we can get a handle on this thing. There is a question that must be answered.

Mr. EMERY. There is one area I am familiar with. This is a fairly simple area but it certainly worked very well. The Congress a couple

of years ago passed the act requiring that advisory committee meetings first of all be open to the public and second, be announced in the Federal Register with the subject matter and all the rest.

Apparently that came under the oversight in the Senate of the Committee on Government Operations. Starting last September, I started to receive copies of letters that that committee was sending to Federal agencies saying we notice you published a document in the Federal Register and it doesn't allow enough time for people since there is a 15-day-minimum notice requirement.

From September 1974 to March 1975, I received copies of a number of letters that were going to Federal agencies. We have not received many since March 1975 which I take to mean that this oversight had its effect. Agencies were getting a letter from the Hill saying we notice you are not complying with the law we passed. It worked.

Mr. MOORHEAD. If you have any other suggestions, I would appreciate if you would make them in writing during the course of our hearings. We are very interested. One last question I have.

There is a major difference between the two bills, in that one of them is related only to those regulations involving a criminal penalty. The other is not. Do you have any idea about the percentage of these regulations that are put into the Federal Register that do have criminal penalties and those that do not?

Mr. EMERY. We tried very hard to come up with some percentage and we did not find an easy way to do it. So I guess the answer is "No."

We did find that—I don't think these figures are meaningful. There are something like 5,000 separate parts. A part usually deals with one subject area of regulations. We found that over 100 of those had criminal penalties.

We did it on the basis of looking at the last year or two regulations. I do know that the most important statutes passed in recent years, OSHA, Consumer Product Safety Act, all have criminal penalties.

Mr. FLOWERS. Mr. Emery, following up on what I asked you earlier, if you do have information that would help us in ascertaining from whence these rules come, could you furnish us with that later, like Agriculture, Transportation or what agency is giving you the most business?

Mr. EMERY. Yes, sir.

Mr. FLOWERS. Of course, recognizing that one of the basic approaches in the legislation before you has a 30-day waiting period and one has a 60-day waiting period, do you think that aside from these obvious delay times in implementing the rules that there would be any other material time lag occasioned by the legislation under consideration here?

Mr. EMERY. I am afraid there would be. I think that the very ones that would be most likely to become controversial before the Congress are the ones controversial before the agency.

The ones that take 6 months to 2 years in the agencies would be attempted to be refought up here. The toughest ones are also often the ones that are highly technical.

I think that the reason the Congress delegated that authority in the first place is that you don't have the staff to deal in those technical areas. I am not sure I understand how you would do it in a 30- or 60-day period without reproducing another staff equal to the EPA staff.

Mr. FLOWERS. We had some testimony yesterday which indicated that on either of these proposed bills there would be perhaps and probably important rules and regulations that would not be covered. Do you have a judgment on that? Do you think that both of these bills would cover most of the important rules and regulations which are published in the Federal Register?

Mr. EMERY. I would think that they would probably cover most of the important ones; yes. Although I think personally that the legitimate oversight authority should be exercised in all the areas. I think frankly the Federal agencies really don't object to that. Sometimes in the agency when the Congress passes a law and gives you the authority, in the past you have had the feeling that the Congress is onto something else and it has lost interest in that area.

I think that these bills would take care of a certain area.

I would hope that the oversight authority would apply in other areas, too. It keeps the product improving all the time if we down at the bottom of the Hill know that people up here are interested on a continuing basis and have not lost interest after an act was passed.

Mr. FLOWERS. Counsel, Mr. Minge would like to ask a question. I am going to yield to him.

Mr. MINGE. There are a series of exceptions in section 553 of the Administrative Procedures Act incorporated in at least one of the bills. Do you think that agencies would be able to make use of these exceptions to nullify the impact of H.R. 3658 if it were enacted?

Mr. EMERY. No. I don't think so. I think 5 or 10 years ago my answer might have been different. At that time if you decided you wanted to make a rule effective immediately or waive notice and comment, you recited the language of the act and the chances are nobody would question you.

I don't see that happening much any more. There is somebody around who is going to question you on whether that is good cause finding. There are going to be telephone calls from people when an agency does that from people who want to know what is the background, what is the administrative law in this area.

I really don't think that is an important issue.

Mr. MINGE. Are there important agency guidelines which are not published in the Federal Register?

Mr. EMERY. Yes; I think there are still a lot of them around. Traditionally a lot of that material grew up and even though the Administrative Procedure Act has required it to be published if it is regulatory in effect, there is a gray area in there.

A lot of material around town has never been published. For example the Federal Highway Administration of DOT is now in the process of publishing a lot of material that governs the grant program which runs $4 to $6 billion a year. Up until a few years ago none of that was published in the Federal Register.

There are still areas where there is still material not published.

Mr. MINGE. So to be complete, the legislation ought to try to cover those guidelines as well.

Mr. EMERY. If Congress is going to exercise oversight in this area, it should be across the board without regard to the way these two bills are going to do it.

One of the problems with handling it the way these two bills do it is you are going to be looking at piecemeal type things and you may not be able to deal with it as effectively as if you are dealing on a continuing oversight basis.

You don't always get the whole picture as the individual documents come through. That is the problem, with say one document in a 60-day period. You can get yourself in a position where the Congress would not object to a whole line of individual things and 2 years later you look back and see that you don't like the way the whole thing came together.

Mr. FLOWERS. On the other hand, you may object to it on a piecemeal basis but taking the whole package it is a reasonable approach. I am concerned that the piecemeal approach of the two bills too, in that we start from the present and we go forward.

We already have 60,000 pages of rules and regulations that are exempt from this approach under the provisions of the two bills although of course they are subject to general oversight of the Congress.

We have found, at least up to this point, that apparently the general oversight responsibility has not been taken very seriously. I think that these hearings are evidence that we do take it more seriously now. I believe the other committees of the Congress are approaching it seriously, too.

Mr. Emery, we appreciate very much your coming here. It may be that as we proceed we will want further information from your agency. I am sure you will be cooperative with us in that regard.

Mr. EMERY. Thank you.

Mr. FLOWERS. Thank you very much. To the other persons listed to testify today, I apologize for the bells ringing for attendance in the House.

We had no knowledge in advance that the House would be going into session at 10 o'clock today. We will recess for let's say 10 minutes while the chairman and the other members meet this quorum call.

Then we will proceed at say, 10:30. Thank you.

[Quorum call.]

Mr. FLOWERS. The further bells indicate our problem in attempting to continue this hearing. I am going to have to announce that we will postpone today's hearing. I apologize to those who have come to testify for the Federal Trade Commission and the Occupational Safety and Health Administration. We would like to invite you to come back at a future date. We will have continuous votes and I don't think we could do justice to you gentlemen this morning.

If you would be so kind as to meet with us again probably next week, we will give you adequate notice and make it convenient for you. We will appreciate it very much.

Under those conditions we will adjourn the meeting for today.

Thank you very much.

[Whereupon, at 10:40 a.m., the subcommittee adjourned subject to the call of the Chair.]

CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

WEDNESDAY, OCTOBER 29, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:55 a.m., in room 2141, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Mazzoli, Pattison, Moorhead, and Kindness.

Also present: William P. Shattuck, counsel; Jay T. Turnipseed, assistant counsel; Alan F. Coffey, Jr., associate counsel; and David Minge, consultant to the subcommittee.

Mr. FLOWERS. We will call this morning's meeting to order as we continue our consideration of legislation concerning congressional veto of administrative rules and regulations, H.R. 3658, H.R. 8231, and related bills. Our first witness is one of the primary sponsors of this legislation under consideration, our distinguished colleague from California, Mr. Del Clawson.

Proceed as you desire, Mr. Clawson.

TESTIMONY OF HON. DEL CLAWSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CLAWSON. Thank you very much, Mr. Chairman. Your courtesy is appreciated. With me is my administrative assistant, Anita Charles, who has done the yeoman work on this legislation, worked with the people we have consulted.

Mr. FLOWERS. Do you retain a potential veto of rules and regulations promulgated by the administrative assistant?

Mr. CLAWSON. I would not go quite that far. [Laughter.]

Mr. Chairman and members of the committee, you have a copy of my statement and a little bit of humor we have put on the top, the cartoon, I thought might be appropriate for you. That is one of the current issues of the small society. I do have a formal statement. I believe all of you have copies of it.

Rather than read that, may I summarize to some extent?

Mr. FLOWERS. We will receive the entire statement and I will ask the reporter to place it in the record at the conclusion of your remarks here today.

Mr. CLAWSON. Thank you.

We realize you are considering two bills simultaneously and they both address themselves to the similar subject at issue. Of course we don't claim that ours is now in any way perfect but naturally we would like to see it considered as a general approach without any limitations that may be on the other. As a result, we would hope that if during the markup and your consideration, after you have completed the hearings, if you need anything additional from us we would be happy to supply it. Or if there is any information where we can work out a compromise arrangement between the two or with the committee in its deliberations we would be happy to offer our services in this area.

The beginning of this effort started last year in the last Congress when Clem McSpadden, then a member of the Rules Committee, and Congressman from Oklahoma, introduced legislation that was rather simple in its approach and yet did exactly what this bill hopes to do.

While hearings were held in the Rules Committee—at that time that was the only committee to which the bill was referred—they did not get around to scheduling it for the House. Clem ran for governor and did not get back to the House.

I was interested in it and so we began work on the bill and finally drafted what you have as H.R. 8231. We realize that there are some things that probably should be included in the bill that are not. There have been a number of questions and issues raised in the hearings so far that we feel we probably should have provided. A declaration of congressional intent that the process of review by the Congress or any of the committees should not be taken as an endorsement by the Congress of any regulations being within the scope of the authorizing statute for approval.

Perhaps this should be incorporated into the legislation. Also it is difficult and we have been unable to obtain the hard data concerning the number of rules and regulations that carry a criminal penalty versus those that don't. It may be that the committee would want to have something on that and see if you can come up with the number in both categories and what your attitude should be in connection with this question.

There have been a number of questions on constitutionality and so on. Many of them have been answered. What I would like to do, if I may, so that you will be aware of what we are trying to say in the statement. May I read the latter part of it, beginning on the bottom of page 5.

The proposal will become effective 60 legislative days thereafter or at such later time as may be required by law, or specified by the rule, regulation or change itself or the report submitted with it, unless within that time either House of Congress adopts a resolution of disapproval because it is contrary to law, inconsistent with Congressional intent or goes beyond the mandate of the legislation it is intended to implement.

Provision is also made for adoption of a concurrent resolution specifically approving the rule, regulation or change.

Upon the adoption of any such concurrent resolution the rule, regulation or change may become effective immediately or as soon thereafter as is permitted by law.

Special provisions for discharging a disapproval resolution are not included in H.R. 8231 in the belief that the danger of unduly burdening the House Calendar with discharge petitions does not balance what experience indicates are relatively minor potential difficulties for individual members in obtaining full hearing of their objections by colleagues on the responsible committees.

We do rely on the committee system which has, in our opinion, served Congress well, and recognize the concern that the volume of rules and regulations referred to the committees might prove a burden.

However, a review of the Annual Federal Register Index for 1974 reveals that in some areas of administration a whole spate of regulations on one subject were issued simultaneously. Many of these can obviously be dismissed as not meeting the criteria for action outlined in our bill. These would appear to include "in house rules," personnel directives, et cetera.

The determination could be made easily by the committees. We have deliberately refrained from specifying exemptions because of the view that the very tendency of loose bureaucratic interpretation of the statutes would immediately gravitate to the loopholes.

The development of the space program in my home town of Downey, Calif. acquainted me with the advantages of fallout benefits which accrue from one activity and ultimately benefit other disciplines. I would hope it is not too ambitious to expect a similar fallout from the form of legislative review of administrative rules and regulations proposed in H.R. 8231.

First, I believe we could assure many individuals in this country and interest groups who are not large or powerful enough to afford costly litigation that their valid complaints will be heard. These people don't enjoy a favored relationship with their regulators. They are the disenfranchised in this new form of law making by nonelected government officials.

Secondly, while it is true that there would be increased duties for congressional committee staffs, we would hope there might also be a decrease in rules and regulations the bureaucrats are aware, fall within the gray area.

Thirdly, the problem of policing conflicting rules and regulations has been mentioned as one of the most exasperating concommitants of federal regulation. In a recent television panel on regulatory reform conducted by American Enterprise Institute, former Governor of California, Ronald Reagan, observed:

> Back when we were subsidizing agriculture and had the subsidy program, I uncovered an incident of my own where we had six government agencies that were spending $35 million telling poultry raisers how to improve egg production. A seventh government agency was spending $12 million buying surplus eggs, and this can be duplicated a thousand times.

The form of oversight with teeth provided by our legislation would at least require review by one other single governmental entity, the Congress, and provide a better chance for uncovering these costly duplications than now exists.

Fourthly, as a member of the House Budget Committee and one of the House conferees on the budget legislation of the last Congress, I would hope that as a result of the increased attention provided by this legislation, the vast body of rules and regulations already on

the books might be revised. Everyone who has ever watched Mission Impossible on TV knows the value of self-destructing directives.

Unfortunately it is a requirement difficult to achieve in Federal programs. But I hope we will give it some thought and that new rules and regulations might be related to those already in effect as they are evaluated by congressional committee experts.

A fifth form of beneficial fallout might actually redound to the benefit of the bureaucracy itself. Because the horror stories of bureaucratic abuse of power command our attention it is easy to overlook the many competent public servants in the agencies and the carefully drawn directives which adhere to the best principles of rule making.

In reacting to the legislation, I think some of our people downtown are not giving themselves enough credit, especially if they assume that Congress will have such a tremendous task coping with one abuse after another. On the contrary, we may find that the knowledge of the congressional veto power will tend to reduce the need for Congressional action.

As is frequently the case, the deterrent effect which the mere existence of the power produces may be of even more value than its actual use. A good point was made by Commissioner Barbara Franklin of the Consumer Product Safety Commission during the American Enterprise Institute Regulatory Reform discussion.

After referring to the issue of "accountability" Ms. Franklin commented . . . "I am not elected. I am a person appointed by the President, confirmed by the Senate, for a fixed term, 7 years.

> How do I really know that the decisions I make, and I am going to make a lot of them in 7 years . . . that are going to affect a lot of peoples' lives, a lot of dollars . . . how do I really know that what I am doing is what the public really wants me to do?
>
> I have a concern about that, because I could be very insulated. I don't see enough mechanisms to make sure that I am doing the job I should be doing in the public interest.

Finally, I would hope that by providing an orderly framework for resolving some of these disputes which properly hinge on the Executive and legislative constitutional roles, we might reduce the sniping which lately seems characteristic of relations between the two branches. Although the founding fathers established a system of checks and balances to foster a healthy tension between the separate arms of the Federal Government it is doubtful that they had in mind open warfare.

This last objective may appear too ambitious, but we can't be faulted for trying.

I don't know that I can respond accurately to your questions but if you have some I will respond as explicitly as possible.

Mr. Flowers. A number of questions have been raised already in these hearings in terms of problems which may exist with this legislation and they involve issues we intend to give serious consideration. There is one potential question and that relates to the fact that, in effect, it gives the Congress another bite at the apple by application of this potential veto power, over rules and regulations. This might cause a further shifting of the burden of the hard decisions from the Con-

gress to the executive agencies with the idea that if they come up with something not acceptable to Congress, the regulation would be subject to a veto.

What would you say to that argument against the legislation?

Mr. CLAWSON. If it is just a matter of not liking it and we could always veto it, I question that that would be even thought of by the majority of the members of a committee or Congress.

I think when we pass a bill and that bill is to be implemented by rules and regulations, Congress would not stoop to being that arbitrary and capricious about what they are going to do.

Mr. FLOWERS. I didn't really mean to put it on that level. Let's say rather if the Congress disapproves of the rules and regulations they can always interpose a veto. It might be said the Congress could thereby shift a burden that ought to be on the legislative branch in the first instance that is, the burden which is to write a competent piece of legislation which gives clear directives to administrative agencies, regulatory agencies, in terms of what sort of rules and regulations ought to be issued to implement the law.

Mr. CLAWSON. Apparently, Mr. Chairman, we have not done that in the past. Otherwise we would not see so many complaints coming in from people in the field and in the private sector, those that are regulated.

Mr. FLOWERS. I would agree with you that we may not have done that in the past but the question is whether this legislation would improve our batting record?

Mr. CLAWSON. I think it might improve in both directions at the same time. It might improve the legislative process, we might address ourselves to more specifics so there won't be room for all the misinterpretations by the agencies.

Also the fact that the agencies themselves in writing the guidelines and rules and regulations would be a little more careful because of the very fact we have this authority.

Mr. FLOWERS. Wouldn't you agree also, Del, that one of the basic problems has been the failure—almost total failure of the Congress in years gone by to exercise the proper oversight function?

Mr. CLAWSON. I agree with you wholeheartedly. I think that criticism is directed appropriately at the Congress.

Mr. FLOWERS. That kind of activity I think in this particular Congress in this year has seen an enormous improvement. Many, many committees of the Congress are getting into the oversight business which is a matter for the legislative branch to aid and direct the executive branch in addition to a lot of other things.

Now, one other criticism has been leveled at this approach and that is that it would create sort of a piecemeal veto power. You dealt with this partially in your statement. We have got the great mass of rules and regulations that are already on the books.

Yet we have a standing start from when this legislation takes effect. The congressional veto would only be applicable from then forward. It would not operate on the rules that are already on the books.

Is it your idea that this could be corrected by emphasis on the oversight, review of all the rules and regulations by the appropriate committees of Congress?

Mr. CLAWSON. I think it was several years ago that Senator Mansfield over in the other body made the comment that Congress might very well take one full Congress, 2 years, and address itself to what we have already done rather than do something new.

I believe frankly by using this as a vehicle and calling attention to the rules and regulations and guidelines as they come down the pike from the agency, and focus our attention that have already been adopted and as a result give us a chance to have more specific oversight to what has been done in the past and perhaps where remedial action is needed we can provide it by consultation with the executive branch and with the regulatory agency.

Mr. FLOWERS. I yield to the gentleman, your colleague from California, Carlos Moorhead.

Mr. MOORHEAD. I thank you for the effort you have put into this legislation. I think it is long overdue and you have done a very, very excellent job. Under your bill would it be accurate to say that the congressional review would not occur until after the public comment and after the period had passed when the final rule had been adopted by the regulating agency?

Mr. CLAWSON. Mr. Moorhead. I don't believe that we have specifically defined that and left it flexible purposely so that the agencies and the Congress can decide what to do under the act itself and existing law. I see no problem with this.

It can be even done simultaneously as far as I personally feel. Whether or not that would create a problem or that we or they could work it out or whether it is submitted to us at the same time, I don't see a particular problem.

Mr. MOORHEAD. It is most vital that public comment be in there, too, or the agencies will never see the problems that are going to be created for industry or for a group of our constituents.

Mr. CLAWSON. One of the complaints in the publication of some of these in the Federal Register is that frequently sufficient time is not provided for these public comments and they go into effect before there is time to digest what the effect might be upon an individual business or industry or that section of the private sector affected by the regulation.

So I certainly would not want to see any suppression of public comment. In fact I would invite even more.

Mr. MOORHEAD. There is one thing that you mentioned that I am curious about. Do you believe these Federal agencies—the problem is that they are exceeding the authority that Congress has given them or, that the Congress sometimes uses the agency as the whipping boy for the problems that are created partially by us and partially by the agencies when an idea just does not work?

Mr. CLAWSON. It is possible that not one of us has gone the route of criticizing the bureaucracy and the agency and excusing our own acts and blaming them for what has happened.

I have been guilty of that too and of course still am critical of the bureaucracy with the possible exceptions of those who might be present at the hearings today. [Laughter.]

I have been critical and have used that as a whipping boy just exactly in that manner. Part of that is because Congress has abrogated its responsibility in my opinion and we have been passing the buck.

I believe we ought to take the buck back and be responsible for these things so that the people who look to us for accountability can point to us and say you are the man responsible and don't blame it on bureaucracy.

I think that is that we are attempting to do in this legislation.

Mr. MOORHEAD. I join with you in that feeling. As you know, the two bills have one major difference. H.R. 3658 excludes any regulation that does not have a criminal penalty. You have said that you don't know what the figures are on the regulations that carry criminal penalties and those that do not. Don't we have any idea what the breakdown would be?

Mr. CLAWSON. It is difficult for us to even define it. We tried to get some figures. We tried to get some indication of whether it would be a 50–50, 60–40, or whatever. Apparently there is no figure available. We had not anticipated that kind of question on what the ratio would be.

I don't believe there ought to be an exception. I think we ought to have everything included and then we would not have the agencies trying to find a loophole and trying to get around the intent of the legislation.

Mr. MOORHEAD. It is true that an individual could be almost as severely damaged by a tough civil regulation.

Mr. CLAWSON. I agree with that observation.

Mr. MOORHEAD. I wish to thank you again for coming here.

Mr. CLAWSON. Thank you, Mr. Moorhead. We refer to your district and Mr. Danielson's.

Mr. FLOWERS. The gentleman from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman. I would like to welcome the gentleman from California—and I am familiar with the provisions of the bill. Under your bill would a regulation be referred to the committee which considered the basic legislation in the first place?

Mr. CLAWSON. That is the intent of the legislation, that the people responsible for the legislation, that the regulation rule implements would have it because their review could be handled so expeditiously because they are already familiar with the legislation.

Mr. MAZZOLI. In one of our earlier hearings someone brought up the examples where there might be a problem in determining a feasible way to do it. It was indicated that the law may apply to subjects falling within the jurisdictions of committees other than that of the committee that originally generated the law. Do you have any comment on that?

Mr. CLAWSON. I don't see it in that sense. However, we do have some examples of other countries—England at one time and still does have a similar situation. They set up a select committee to handle all of these rules and regulations as they came back.

However, since setting up that special committee they have now augmented that with all the other committees and the experience has been better since they went back to the original committee. I frankly believe that it might be better to still use that because of the familiarity of the staff as well as the committee members.

If it doesn't work we could change that part of it.

Mr. MAZZOLI. That brings me to my next point. While I have been wrestling with a specific problem in connection with the bill I want

to say I agree with the idea. As a matter of fact I am a cosponsor of one of the bills.

Mr. CLAWSON. There are over 200 sponsors now of this legislation in the House.

Mr. MAZZOLI. Obviously it certainly hits a responsive chord on the part of most Members of Congress. I think that the problem is going to be the practical problem of how we can best work this thing out.

The question I would like to ask the gentleman relates to the fact that on page 5 of your statement you say these proposals will become effective within 60 days unless a resolution of disapproval is adopted by the Congress on the basis that the regulations would be contrary to law, inconsistent with congressional intent or that the regulation would be beyond the mandate of the legislation it is intended to implement.

I wondered if the gentleman would tell me how he believes a regulation dealing with EPA would be considered upon going back to the Committee on Interstate Commerce that created the law and then to the floor. For the purposes of the discussion, let us assume that the regulation issued by EPA was designed to clear the air or clean the water.

Do you think that there would be a different disposition of the regulation in the House as there was a disposition of the main law?

Mr. CLAWSON. I doubt it unless there was a very flagrant violation. I doubt if there would be a change in what the law was designed to do particularly if the committee reported it favorably. Under the statute as we drafted it, there is no amendment, there is no room for making a change.

The resolution is voted either up or down. It would have to be a flagrant issue before you would see a change.

Mr. MAZZOLI. Are we not really trying to get to the flagrant violations?

Mr. CLAWSON. Yes. In the main most of these would sail on through without any problems.

Mr. MAZZOLI. It would be the flagrant ones that possibly would see the House or the committee reversing a position and it would be reversed on the ground that the regulation involved distortion of the intent requiring that it be reversed.

Mr. CLAWSON. We have some examples of that. The EPA in the last Congress when they had the parking space fee that they were going to put all across the country. It was the Congress that finally stopped that from going into effect. We have a precedent for doing that very thing.

Mr. MAZZOLI. I thank the gentleman very much. It is certainly an important bill. We have had a series of interesting hearings and we will have more. I hope our committee will come out with something that will satisfy the need and clear away some of the underbrush and more importantly prevent more underbrush from being planted.

Mr. CLAWSON. Thank you.

Mr. FLOWERS. Del, thank you very much for being with us. We are delighted you testified and brought your views to us along with your fine statement.

Thank you.

Mr. CLAWSON. Mr. Chairman, thank you. May I also express my appreciation for this scheduling? I was out in California during all

last week and I realize you accommodated my schedule in order to provide this time this morning. It is appreciated.

Mr. FLOWERS. We appreciate that. We are sure you would do the same for us in the Rules Committee.

Mr. CLAWSON. This was a joint referral, as you are aware. There has been some discussion among the members of the Rules Committee about holding hearings which we have not yet done.

They have quite a number of things, some of them that are strictly Rules Committee jurisdiction. I would hope that there is no delay in the action of your committee, to move right along. I would certainly do everything in my power to see that the Rules Committee might go ahead and consider this from your committee.

If that can be done and the members are agreeable, so be it.

Mr. FLOWERS. We have a considerable amount of work ahead of us.

Mr. CLAWSON. I realize that, but I thought I would let you know that because of my interest in this legislation we would do everything we can to expedite it.

Mr. FLOWERS. Thank you very much, Del.

Mr. CLAWSON. Thank you.

[The prepared statement of Hon. Del Clawson follows:]

STATEMENT OF THE HONORABLE DEL CLAWSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Concerning H.R. 8231, a Bill to establish a method whereby the Congress (acting in accordance with specified procedures) may prevent the adoption by the executive branch of rules or regulations which are contrary to law or inconsistent with congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

Mr. Chairman and members of the committee, thank you for your courtesy permitting me to testify today concerning H.R. 8231, my bill to establish a method whereby Congress may prevent the adoption by the Executive branch of rules or regulations which are contrary to law or inconsistent with Congressional intent or which go beyond the mandate of the legislation which they are designed to implement. One hundred and thirty-six of the Members of the House have indicated their interest through cosponsorship. Senator Brock informs us he has been joined in co-sponsorship by Senators Helms, Muskie, Baker, Eastland, Huddleston, Fong, Domenici, Beall, Fannin and Young.

A review of the record of these hearings inspires gratitude for the contributions of my colleagues and the other expert witnesses who have been called to testify.

We have been asked just what bureaucratic excess led to the introduction of our bill. The answer is that like many legislative decisions it was slow and evolutionary. It was more like the uneasy physical process which begins with that first twinge in a tooth. From then on the tongue just naturally keeps track of the trouble spot and takes note of each new twinge. After a while, the toothache isn't much of a surprise and neither is the eventual trip to the dentist.

Like most Congressional offices we have our share of complaints from people at home exasperated at the extent of Federal regulation and the frequently overzealous enforcement of Federal rules and regulations which seem to rival each other in complexity and capriciousness. We gradually became aware of the voluminous correspondence engendered by rules and regulations which seemed to have only the most tenuous relationship to the legislation they were designed to implement. For example, the EPA parking rules. My colleague Congressman Danielson has already indicated the disastrous economic impact of those regulations on the Los Angeles basin. The FDA vitamin regulations are another glaring example.

The 33rd District of California which I represent is an area of Los Angeles County which houses diverse industry, ranging from aerospace contractors and subcontractors to food processors and most forms of manufacturing. Many of our people work in industries which while not within the District are in the

greater Los Angeles area . . . some I suspect in the adjacent Districts of two members of the Subcommittee. The following complaints are typical of many:

"These regulations are so far from what I believe and understand the way a free enterprise system is supposed to work. Management of our company is sick and tired of all the Federal, State, County and City laws and rules and regulations. They are impossible to comply with."

"At a time when we should be doing everything we can to stimulate our economy, the FHA Certification Program actually hinders it by requiring additional manufacturing costs that are not reflected in the value of the carpet. In effect, the average American consumer who buys carpet is penalized by having to pay for the additional costs for backmarking, Administrator's fees, laboratory testing costs plus a yardage fee for every square yard manufactured as mandated by FHA."

..."I (along with many other small business owners) have been perturbed by the excessive time and work it takes to try to process a product through EPA so we can sell to our customers.

"Just a week or so ago we had an inspector from the San Francisco office spend at least ½ a day of my time, along with our plant personnel, checking imprinted bottles, as well as printed labels. This was a very simple product mix with water. Heaven knows how long it would have taken if he had chosen a more complicated formula! It is getting so we hate to see an EPA envelope show up in the mail, as it means more precious time devoted to going over perhaps a change in their regulations. All in all, it sometimes seems it is too much bother and expense to even try to formulate and sell the products... and have heard of many small businesses who have discontinued these lines because of this."

To criticize Congress as "unresponsive to the real concerns of the people at home" would be to ignore the increasing volume of legislation directed specifically at the more arbitrary rules and regulations. We requested Congressional Research to compile a list of such bills for a single month this year, selecting March as a "midway" point. While CRS wouldn't vouch for the accuracy of the list, and I am sure we missed many bills which were stated in positive terms without reference to the offending regulations, we came up with a list of over 84.

Against this background of gathering concern, our former colleague and fellow Member of the Rules Committee, Clem McSpadden received an interested hearing when he appeared before the Rules Committee in October of last year in support of his bill, H.R. 11374 of the 93rd Congress, a bill "To return to the Congress those things which shall reflect the intent of Congress without bureaucratic misinterpretation." I am under the impression that the agency depredation which drove him to introduce the bill involved a loan program of the Department of Agriculture for livestock producers and the rules governing the definition of livestock producers.

It was a major disappointment that the schedule last year didn't permit us to follow through on this legislation before final adjournment of the last Congress. When it became apparent that we couldn't act last year, we began to work out, through consultation, the details of this legislation which was introduced this year in final form as H.R. 8231, with cosponsors from the House Judiciary Committee and the House Rules Committee to which it was, as you know, jointly referred.

When * * * the Occupational Safety and Health Administration can require that vehicles at construction sites must be equipped with back-up alarms. But when that agency also requires that employees wear earplugs as a protection against the noise, thereby making it difficult to hear the alarms * * *

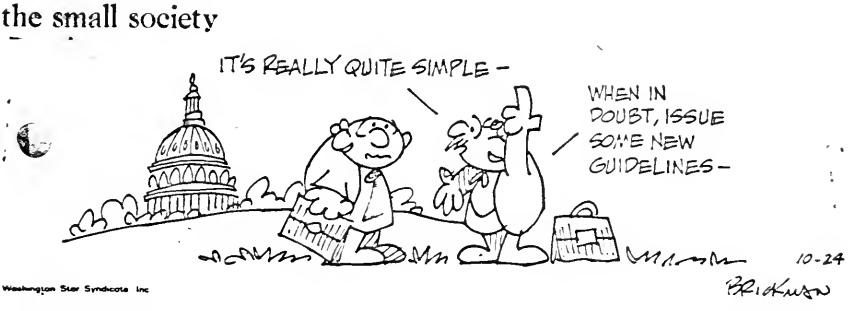
Or when, according to Dr. Murray L. Weidenbaum, distinguished economist and author, the EPA can tell the Department of Agriculture it is imposing severe restrictions on the use of pesticides to kill fire ants. But the Department had a major program under way to get rid of them. Now the Department says EPA's ruling makes it impossible to carry out its eradication program. So the Department thinks fire ants may spread over a third of the United States * * * as far north as Philadelphia. Fire ants may not harm the environment as much as pesticides. Their bite however is not only painful but can even cause death.

Or when a single individual, according to the report of Mr. David Swoap to Congressman Michel, can by altering the guidelines under which the food stamp program is administered, $5,050 for a family of four before taxes to $5,050 after taxes thereby increasing the scope of the program without approval of either OMB or Congress * * *

Or when the Department of Transportation can issue regulations in effect creating a new level of government called "Metropolitan Planning Organization" which in the opinion of our cities in Los Angeles County will remove the last vestige of local decision-making in the area of city streets and county highways from City Councils and Boards of Supervisors * * * not through the elective process, but by Administrators of the Department of Transportation. * * *

Then revising and extending Hamlet's famous comments for the record of these hearings can be excused on grounds the reference is peculiarly appropriate. "The time is out of joint;—Oh cursed spite that ever I was born to set it right." There is enough genuine concern in the Congress as evidenced by some of the recent votes on amendments similar to the legislation under consideration to earn the Chairman and the members of this Committee commendation for their sense of the fitness of things in conducting these hearings. At the very least this problem of rules and regulations which go beyond the mandate of the law they propose to implement deserves examination.

H.R. 8231 would provide that whenever any officer or agency in the executive branch of the Federal Government (including any independent establishment of the United States) proposed to prescribe or place in effect any rule or regulation to be used in the administration or implementation of any of the United States or any program established by or under such a law or proposes to make or place in effect any change in such a rule or regulation, such officer or agency shall submit the proposed rule, regulation or change to each House of Congress together with a report containing a full explanation.



The proposal will become effective sixty legislative days thereafter or at such later time as may be required by law, or specified by the rule, regulation or change itself or the report submitted with it, unless within that time either House of Congress adopts a resolution of disapproval because it is contrary to law, inconsistent with Congressional intent or goes beyond the mandate of the legislation it is intended to implement. Provision is also made for adoption of a concurrent resolution specifically approving the rule, regulation or change. Upon the adoption of any such concurrent resolution the rule, regulation or change may become effective immediately or as soon thereafter as is permitted by law.

Special provisions for discharging a disapproval resolution are not included in H.R. 8231 in the belief that the danger of unduly burdening the House calendar with discharge petitions does not balance what experience indicates are relatively minor potential difficulties for individual members in obtaining full hearing of their objections by colleagues on the responsible committees.

We do rely on the Committee system which has, in our opinion, served Congress well, and recognize the concern that the volume of rules and regulations referred to the committees might prove a burden. However, a review of the Annual Federal Register Index for 1974 reveals that in some areas of administration a whole spate of regulations on one subject were issued simultaneously. Many of these can obviously be dismissed as not meeting the criteria for action outlined in our bill. These would appear to include in-house rules, personnel directives, etc. The determination could be made easily by the committees. We have deliberately refrained from specifying exemptions because of the view that the very tendency of loose bureaucratic interpretation of the statutes would immedately gravitate to the loopholes.

The development of the Space program in my home town of Downey, Calif. acquainted me with the advantages of "fall-out" benefits which accrue from one activity and ultimately benefit other disciplines. I would hope it is not too ambitious to expect similar fall-out from the form of legislative review of Administrative rules and regulations proposed in H.R. 8231.

First, I believe we could assure many individuals in this country, and interest groups who are not large or powerful enough to afford costly litigation that their valid complaints will be heard. These people don't enjoy a favored relationship with their regulators. They are the "disenfranchised" in this new form of law-making by non-elected government officials.

Secondly, while it is true that there would be increased duties for Congressional committee staffs, we would hope there might also be a decrease in rules and regulations the bureaucrats are aware, fall within the "gray area."

Thirdly, the problem of policing conflicting rules and regulations has been mentioned as one of the most exasperating concomitants of Federal regulation. In a recent television panel on regulatory reform conducted by American Enterprise Institute, former Governor of California, Ronald Reagan, observed "Back when we were subsidizing agriculture and had the subsidy program, I uncovered an incident of my own where we had six government agencies that were spending $35 million telling poultry raisers how to improve egg production. A seventh government agency was spending $12 million buying surplus eggs, and this can be duplicated a thousand times."

The form of oversight with teeth provided by our legislation would at least require review by one other single governmental entity, the Congress, and provide a better chance for uncovering these costly duplications than now exists.

Fourthly, as a member of the House Budget Committee and one of the House conferees on the Budget legislation of the last Congress, I would hope that as a result of the increased attention provided by this legislation, the vast body of rules and regulations already on the books might be reviewed. Everyone who has ever watched "Mission Impossible" on TV knows the value of self-destructing directives. Unfortunately it is a requirement difficult to achieve in Federal programs. But I hope we will give it some thought and that new rules and regulations might be related to those already in effect as they are evaluated by Congressional committee experts.

A fifth form of beneficial fall-out might actually redound to the benefit of the bureaucracy itself. Because the "horror stories" of bureaucratic abuse of power command our attention it is easy to overlook the many competent public servants in the agencies and the carefully drawn directives which adhere to the best principles of rule-making. In reacting to the legislation, I think some of our people downtown are not giving themselves enough credit, especially if they assume that Congress will have such a tremendous task coping with one abuse after another. On the contrary, we may find that the knowledge of the Congressional veto power will tend to reduce the need for Congressional action. As is frequently the case, the deterrent effect which the mere existence of the power produces may be of even more value than its actual use. A good point was made by Commissioner Barbara Franklin of the Consumer Product Safety Commission during the American Enterprise Institute Regulatory Reform discussion. After referring to the issue of "accountability" Ms. Franklin commented * * * "I am not elected. I am a person appointed by the President, confirmed by the Senate, for a fixed term, seven years.

"How do I really know that the decisions that I make * * * and I'm going to make a lot of them in seven years * * * that are going to affect a lot of peoples' lives, a lot of dollars * * * how do I really know that what I'm doing is what the public really wants me to do?

"I have a concern about that, because I could be very insulated. I don't see enough mechanisms to make sure that I'm doing the job I should be doing in the public interest."

Finally, I would hope that by providing an orderly framework for resolving some of these disputes which properly hinge on the Executive and Legislative Constitutional roles, we might reduce the sniping which lately seems characteristic of relations between the two branches. Although the founding fathers established a system of checks and balances to foster a healthy tension between the separate arms of the Federal government it is doubtful they had in mind open warfare.

This last objective may appear too ambitious, but we can't be faulted for trying.

Mr. FLOWERS. Our next witness is Mr. Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Department of Justice.

I am sure you will undoubtedly want to embrace this legislation wholeheartedly.

TESTIMONY OF ANTONIN SCALIA, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY JACK GOLDKLANG, ATTORNEY, OFFICE OF LEGAL COUNSEL

Mr. SCALIA. I embrace the purposes this legislation was intended to achieve. I have Jack Goldklang, an attorney in the Office of Legal Counsel, with me.

Mr. FLOWERS. We welcome him. You may proceed as you see fit.

Mr. SCALIA. Mr. Chairman, I appreciate the opportunity to comment on those bills.

Mr. FLOWERS. Well, without objection we will receive your full statement. You may read whatever part of it you wish.

Mr. SCALIA. Mr. Chairman and members of the subcommittee, I appreciate the opportunity of providing you with the views of the Department of Justice on H.R. 8231 and H.R. 3658. These bills differ somewhat in coverage but their essential purpose is the same: To provide a means whereby either House of Congress may set aside regulations issued by executive agencies.

The first of these bills, H.R. 8231, provides that proposed regulations which implement legislation shall not take effect for 60 days. During the 60-day period either House of Congress may adopt a resolution disapproving a regulation because it contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

The other bill, H.R. 3658, is generally similar except that it establishes a period for disapproval which can be as long as 90 days, and makes various exclusions from coverage based on the rulemaking provision of the Administrative Procedures Act, 5 U.S.C. 553, which the bill would amend.

Thus interpretative rules, and rules relating to military and foreign affairs, agency management or personnel, or public property, loans, grants, benefits, or contracts are not covered.

A further limitation is that the congressional disapproval procedure in H.R. 3658 applies only to regulations which can be enforced by criminal penalties.

We are opposed to both these bills, for reasons both of practicality and of constitutional principle. As to the practical aspects, there are a number of points to be considered. The bills would impose considerable delay upon the administration of any program dependent on covered regulations to be examined.

Surely a change with such important consequences can only be justified if it can be demonstrated that existing institutions are not performing correctly. One would have to be clearly convinced both that

executive agencies were issuing a large number of unauthorized regulations and that the courts were failing to review these actions when called upon to do so. I am unaware of any evidence supporting these propositions and believe them to be entirely false.

Second, even if it were concluded that congressional review of regulations was both necessary and a matter which I will address at length later, constitutional, one would expect any steps in this new direction to be narrow and experimental rather than—as these bills do—sweep across the whole range of governmental activity.

Congressional review of Federal regulations is a new device; existing samples date, as far as we can tell, from the last Congress. Recent enactments of this sort have been designed to reach relatively specific problems—petroleum allocation, Public Law 93–159; education standards, Public Law 93–526; and election campaign practices, Public Law 93–443. The lack of real experience under these measures counsels a cautious, wait and see approach rather than a swift move into omnibus legislation of the kind proposed here.

Time should be taken to observe both the practical and legal effects of the existing legislation before extending it to the full range of Government activity. As you may know there is litigation pending which may provide some legal guidance in this area.

Incidentally, neither H.R. 8231 nor H.R. 3658 takes any account of the conflicting legislation now on the books. The Presidential tapes law provides for a one House review within 90 days, Public Law 93–526; the emergency fuel provision requires that either House must have at least 5 days, Public Law 93–159; the campaign finance law allows 30 days for a one House vote, Public Law 93–143; and the educational amendment allows 45 days for passage of a concurrent resolution, Public Law 93–380.

Are these provisions overridden by the present bills? Presumably—but not unquestionably—not. In any case the variances in the earlier legislation demonstrate either that Congress has not had sufficient experience to decide what kind of provision is appropriate, or that a standardized provision is undesirable.

It is not clear how the present bills would work in practice. Existing laws containing congressional review provisions simply provide for disapproval by either one House or concurrent resolution; although they may provide standards within which the Executive must act, Public Law 93–526 concerning Presidential recordings, they establish none for the Congress.

In other words, they purport to permit disapproval of otherwise lawful regulations simply because Congress or one House of Congress does not like them. By contrast H.R. 8231 and H.R. 3658 appear to be attempts to judicialize this process by limiting Congress to a determination of lawfulness. I stress the word "appear" because the language in which the bills are framed leaves some uncertainty.

On its face H.R. 8231 seems clearer in this respect. Section 2(b) authorizes either House to adopt a resolution of disapproval because the proposed regulation contains provisions which are contrary to law or inconsistent with the intent of the Congress, or because it goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

This is plain enough—except that the stringing together in the disjunctive of similar phrases makes one wonder whether the mandate of the legislation may not be something different from the intent of the Congress, and whether both may be broader than the requirement that the regulation not be contrary to law.

In short the language lends itself too readily to an interpretation which would permit redefinition of the original intent or mandate.

The other bill, H.R. 3658, is more ambiguous. The proposed Administrative Rulemaking Control Act begins with findings that the executive agencies have often exceeded the intent of Congress in the manner in which such agencies have administered various laws; and that the executive agencies in the administration of any law should be more responsive to the intentions of Congress in enacting such law.

Sections 2(2) and 2(3).

The sponsor of H.R. 3658 stated to this subcommittee last week that his bill would give Congress the opportunity to disapprove the proposed administrative rules which it believes would exceed the intent of the legislation that authorized their drafting.

However, the operative provision of the bill, which authorizes either House of Congress to disapprove a regulation, does not establish any standard for disapproval. We are left to speculate therefore whether the findings that begin H.R. 3658 are merely formalistic prolog or are meant to suggest the exclusive criteria by which Congress will act.

As a practical matter however, I do not think it really makes much difference whether the language just discussed is meant to limit Congress to a determination of the regulation's compliance with statutory intent. Even if that is the goal, Congress is not equipped—neither by procedure, training or inclination—to achieve it.

Congress is designed and established to make known its own intent, not to ascertain what was the intent of someone else, even when that someone else is an earlier Congress or the same Congress at an earlier point in time.

However hard it may try to perform the latter function, I cannot shake the conviction that it will end up performing the former. What is likely, I fear, is that we will be forced to cross the ever-shifting sands of a congressional intent defined by separate and successive Houses of Congress as they see fit. It will be a confusing and never ending process of retouching legislative history.

The urge to improve on what one has supposedly finished—to fill in gaps and correct mistakes—is often irresistible. Museums have stories, many apocryphal, some true, of the vandal who is caught adding paint to the work of a contemporary master.

Upon being apprehended the vandal turns out to be the artist himself, supplying a few afterthoughts. This may have its charm, but it also has its limits. What the museum bought was the artist's creation at the time that he painted it. We would not want Picasso to return after 50 years to cubify the pictures from his blue period.

Once the canvas is hung it no longer belongs to the artist alone. It becomes something for others to appreciate and interpret.

The same considerations apply to what—being swept along by the strength of this analogy—I might term the artistry of Congress. It is fundamental that statutes are construed by the courts with reference to the circumstances existing at the time of passage.

The interpretation placed upon an existing statute by a subsequent group of Congressmen, or even by the same group that enacted it, but at a later date, is not controlling. Unless this were the case, the best evidence of the meaning of a statute would be testimony of the legislators who enacted it—yet the courts have made it clear that such testimony is not only not determinative, but not permissible.

As one court has observed, a legislature speaks through statutes, and in cases where the statutes require interpretation, through committee reports and debates.

In other words, the language of the statute and the recorded statements in its legislative history are the finished painting. If the congressional review process envisioned by these bills is one in which the Congress will debate the indications of varying intent contained in the statutory language and the recorded legislative history, then at least the nature of that process—though not the entrusting of it to the legislative branch of Government—will be in accord with established principles of law.

I have little expectation, however, that this is what is meant to occur. And if, as seems to me, the obvious design of these bills, the Congress is to create out of whole cloth, or even—the best that can be envisioned—to summon up out of its unrecorded institutional memory an intent that is not apparent in the language or printed history of the original statute, then correct principles of statutory construction will be violated.

Those principles of construction are based now on sound considerations. The framers created a process whereby both Houses and the President were to have a role in creating legislation. Under the Constitution the President may not only propose legislation, but also veto it.

It is not enough that even both Houses of Congress agree to a new interpretation of a statute after it has been passed. Presidents have sometimes vetoed clarifying legislation on the grounds that, in their view, the amendment did not clarify, but vitiated the intent of the original act.

In such cases, the abortive action of the subsequent Congress did not supplant the contemporaneous intent of the Congress which enacted the legislation.

The pending bills, by permitting not merely the entire Congress, but even one House, to interpret legislation already passed, would completely upset this system and commence a never-ending process of ex post facto legislative history.

Indeed it is easy to envision a situation in which executive implementation of a valid statute could be frustrated indefinitely, because one House of Congress favors or disfavors one alternative interpretation while the other House disfavors the other, or favors it.

It should be apparent from the foregoing discussion that the practical defects in the present proposals are not technical or accidental, but stem from the basic inappropriateness, under our system, of the separate House of Congress assuming the tasks which the bills contemplate. What is really at stake is the fundamental principle of separation of powers among the legislative, executive, and judicial branches.

As our system operates Congress makes the laws, in as much detail as it desires; the President executes those laws, with due regard for the congressional intent; and the judiciary determines the President's execution, including issuance of regulations, to be of no effect when it is inconsistent with the laws or the Constitution.

This rough division of Government power is what the doctrine of separation of powers is all about.

Both of the present bills disrupt this system in one way or another, depending upon how the ambiguities discussed earlier are resolved. If they envision Congress setting regulations aside on the basis of its own notions as to what constitutes desirable enforcement policy, they intrude upon the executive's functions.

If, on the other hand, they mean only to permit congressional review of the executive's compliance with statutory intent, they intrude upon the province of the judiciary. Either way, they carry Congress beyond its proper function of making laws under article I of the Constitution.

The fact that the judiciary will regard legislation of this sort as infringing its powers is suggested by recent arguments before a three-judge district court in the Presidential papers case, now pending.

Judge McGowan of the U.S. Court of Appeals for the District of Columbia commented from the bench on the action of the Senate which purported to override regulations issued by GSA.

Judge McGowan. Well, Congress passed a statute, did it not? Congress—and by Congress, I mean the regular legislating process—passed a statute which delegated the writing of regulations and set forth certain factors to be followed.

The question whether the Administrator's regulations comply with those factors is in the last analysis a judicial question. It is not what some Senate committee says.

Mr. Goldbloom (Justice Department). That's correct.

Judge McGowan. Or what one House, even one House of the Congress, says, not acting in the regular legislative way.

Mr. Goldbloom. That's right. * * *

You can strike Mr. Goldbloom's comments as self-serving. Judge McGowan's comments are the ones I call your attention to.

Mr. Flowers. It might be asserted that Judge McGowan's statements are self-serving also. It could be a case in which the judiciary has infringed on the congressional power—but that is not at issue today.

Mr. Scalia. Yes, sir. [Laughter.]

The infringement of these bills upon executive power is even easier to demonstrate from the very text of the Constitution. Indeed, it is difficult to conceive of language and history which would make the point more explicitly. Two provisions of article 1, section 7, are involved.

The Constitution provides, first, that every bill which passes the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President for his approval or disapproval.

If disapproved, it does not become law unless repassed by a two-thirds vote of each House. And if that were the only provision in the Constitution, we would still have argument whether that provision alone might not render improper what these bills seek to do.

But that is not the only thing the Constitution says about it.

At the Constitutional Convention, it was recognized that Congress might evade the bill veto provision by passing resolutions rather than bills. During the debate on this clause, James Madison observed that:

> If the negative of the President was confined to bills; it would be evaded by acts under the form and name of resolutions, votes.

Madison believed that additional language was necessary to pin this point down and therefore:

> Proposed that or resolve should be added after bill * * * with an exception as to votes of adjournment.

Madison's notes show that after a short and rather confused conversation on the subject, his proposal was at first rejected. However, at the commencement of the following day's session, Mr. Randolph, having thrown into a new form Madison's proposal, renewed it. It passed by a vote of 9 to 1. Thus the Constitution today provides—not in clause 2 of section 7, dealing with the passage of legislation which has its own presidential veto provision, but as an entirely separate clause 3—the following:

> Every Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

It should be apparent from the wording of this provision, and from its formulation, as a separate clause apart from the clause dealing with legislation, that it was intended to protect the President against all congressional evasions of his veto power, and not merely those that were formally connected with the legislative process.

Of course, the fact that it refers only to concurrent resolutions, and not to one-House resolutions, such as H.R. 8231 and H.R. 3658 would provide, was not meant to sanction avoidance of the Presidential veto by the latter process.

The framers probably would never have envisioned that a single House would purport to take any legally effective action on behalf of the entire Congress. In other words, the provisions of H.R. 8231 and H.R. 3658 for a one-House resolution are not in literal violation of section 7, clause 3, of the Constitution only because they contain, in addition to the defect which that provision addresses, the defect of being an unlawful delegation of congressional power to one of its Houses.

As one scholar recently stated:

> It verges on irrationality to maintain that action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clauses so state, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt.

The purpose of the veto was not merely to prevent bad laws but to protect against inroads by Congress of the kind represented by H.R. 8231 and H.R. 3658. Leading participants in the convention of 1787, such as James Madison, Gouverneur Morris, and James Wilson, pointed out that the veto would protect the Office of President against "encroachments of the popular branch" and guard against the legislature's "swallowing up all the other powers."

In the Federalist Papers, Hamilton states that the primary purpose of conferring the veto power on the President is to enable him to de-

fend himself. Otherwise, he might be gradually stripped of his authorities by successive resolutions, or annihilated by a single vote.

Though Presidents have repeatedly questioned the constitutionality of congressional review provisions of the sort contained in H.R. 8231 and H.R. 3658 they have sometimes signed legislation with such features when they viewed the remainder of the legislation as essential.

Justice Jackson wrote an interesting opinion on this and I commend this to your attention. The argument suggests itself, however, that repeated congressional use of such provisions, and occasional Presidential acceptance, comprise a constitutional practice which establishes their validity. They cannot be so.

Custom or practice may give consent to vague or ambiguous constitutional provisions, but it cannot overcome the explicit language of the text—especially when that text is supported by historical evidence that shows it means precisely what it says.

Moreover, if one is to rely upon practice, it must be both generally accepted and of long standing. Repeated objections have shown that this is not a generally accepted practice. The objections have come not only from Presidents and scholars, but on occasion from within Congress itself. In debate earlier this month on the joint resolution authorizing personnel in the Sinai, Congressman Eckhardt commented on the provision allowing Congress to withdraw personnel by concurrent resolution.

He noted that under article I, section 7, such a resolution had to be presented to the President:

> If that language can be written more directly I would like to know how it could be so written.

The historical record also shows that the use of resolutions of this sort is not a longstanding, but a recent phenomenom. From the First Congress through the 1930's resolutions were limited to matters in which both Houses have a common interest, but with which the President has no concern.

They never embraced legislative provisions proper. That analysis has not been done by the executive branch but was done by a Senate report in 1897.

A concise formulation of the common understanding may be found in Congressman Mann's statement that a concurrent resolution has no force beyond the confines of the Capitol. It was not until the 1930's that enactments of the present sort first appeared, see R. Ginnane, the Control of Federal Administration by Congressional Resolutions and Committees, and not until very recently that they became fairly frequent.

If, then, we are to give any credit to constitutional custom, we believe that it argues persuasively against the validity of congressional action by resolution. The tradition begun with the adoption of the Constitution and continued uniformly until relatively recent years is entitled to far greater weight than a disputed current practice.

Last April I testified before this same subcommittee on emergency powers legislation. I noted at that time that the provisions in H.R. 3884 for terminating emergencies by concurrent resolution presented problems and that the Executive has repeatedly expressed the view that use of such a device to offset executive powers is constitutionally objectionable.

I was content at that time and in that context merely to note our objections. When, however, I was asked to comment upon bills which have as their sole purpose the establishment of a one-House veto provision, I felt compelled to describe in some detail the seriousness of the constitutional issues before you.

In last April's hearings, the chairman of this subcommittee speculated that—

> When the Supreme Court gets through with something noncontroversial maybe they will turn to this.

Unfortunately we cannot always depend on the courts to solve our problems. The answers in the present case are in my view entirely clear, and Congress itself has a serious obligation to apply them. If it does not the fears of the framers may be realized and separation of powers may become an obsolete phrase.

For the reasons stated, we must oppose both H.R. 8231 and H.R. 3658.

Mr. Chairman, I appreciate your kind attention and even virtual lack of interruption. We will be happy to answer any questions.

Mr. FLOWERS. You have made an excellent statement. You have done your usual good job with a thorough analysis of the legislation. We appreciate it. I appreciate your quoting the chairman of this subcommittee although I don't remember saying that. After listening and reading along with you on this statement, Mr. Scalia, I am inclined to say that our system is fraught with a weak Executive. Maybe what we need to do is to build up the strength of the Presidency so that he can function properly in this complex world we live in.

You are not suggesting that there is any more power necessary under the Constitution to afford us a strong Executive, are you?

Mr. SCALIA. I have not suggested that, Mr. Chairman, although since you raise the point I may note my view that much of the concern seems to exist nowadays that there has quite suddenly become—suddenly occurred a vast transformation of the allocation of powers within the Federal Government and the Executive is much more out of control of the Congress than it once was, those concerns are simply not supported by many of the facts.

We have gone through a terribly scaring period during which period there may have been some problems of that sort.

Mr. FLOWERS. Those are very fresh on the minds of the members of this committee.

Mr. SCALIA. But the basic division of powers, the basic responsiveness and responsibility of the Presidency to the Congress, I don't think is worse today than it was in the 1920's.

Something just came to my attention in connection with testimony the other day which I had not realized. It was not until the 1940's that executive branch personnel would appear as I am appearing today to account for executive branch action to congressional committees.

Before that process was entirely one of written interrogatories from the Congress to the Executive which would be replied to in writing. Nowadays on any given day here on the Hill there is a large number of high level personnel from the Executive coming before committees, not just making statements but being grilled on what they have done and what they propose to do.

As I say—I think that is entirely good and that is a change from what things were. I just don't think we should get——

Mr. FLOWERS. I would say that the period which you are talking about, was a period when we had probably a very timid executive branch that would not dare step out into the gray area of what was congressional intent if it were not clearly shown by the law, I would say that was pre-Franklin Roosevelt.

Mr. SCALIA. Teddy Roosevelt sent the Navy to Japan and said let Congress bring them back. I doubt whether Andrew Jackson was timid.

Mr. FLOWERS. But consider the degree of complexity in those days as compared to these days, there was no EPA, no OSHA, we could go down a shopping list that did not exist then. Really, we are not talking about giving the Congress any new power.

The Congress has the power now to upset any rule or regulation by amendatory process of basic legislation. We would not disagree with that.

Mr. SCALIA. No, sir. If they want to amend it, they should move right out and amend it. I am not asserting that the Presidency does not have more power today than it did in the 1920's. The entire Federal Government does. The thing that has changed the most is a drastic change largely through court decisions in what was thought up to that point to be a rather strict prohibition against delegation of authority by the Congress.

We have had delegation to the Presidency by the Congress since the 1920's of considerable powers under broad and unspecified guidelines from the Congress. Telling some independent regulatory areas for example to regulate communications and power in the public interest with very little other specificity.

That is something that has happened since the twenties. But it does not go to whether the Congress has the power to stop anything. Congress absolutely has the power to set forth more specified guidelines or to alter anything the agency does.

Mr. FLOWERS. We are talking about facilitating the use of a power that exists and allowing one House to do it rather than both Houses which would also be subject to the Presidential veto. I recall that you noted the discussion earlier this year of the constitutional problem. I frankly personally don't think it is a problem.

I think we already have that kind of provision in enough basic legislation that I cannot foresee a court upsetting such a provision. But that is something that can be argued in another forum at another time and probably will be at some point.

But really if the Congress has delegated all of this legislative power through loosely drawn legislation, that I agree with you has been the case in the recent past particularly, it would seem that the veto power over administrative rules would really just be another aspect of the amendatory power that Congress inherently possesses.

I don't see really why the fear exists on the part of the executive branch to the Congress exercising this type of overview. It is essentially an oversight process.

Mr. SCALIA. Well, it gets back to the separation of powers and the Constitution. You say it is an amendatory power, but when the Congress wants to amend a statute, it is not only clear in the Constitution

but the accepted practice that it passes a statute amending the earlier statute.

Mr. FLOWERS. If the Congress were more explicit in the basic legislation there would never have been any power vested in the executive branch to promulgate rules and regulations.

Mr. SCALIA. That is true. That is at least a minimal restraint upon Congress and not to make its delegation too broad and unspecific. I agreed with the point you were making earlier that legislation of this sort I think not only does not help but actually worsens the basic problem which is the lack of specificity in the original legislation.

Legislation, to give a few examples, such as NEPA. The agency themselves have not come swinging into environmental protection saying let's grab some power from the Congress. They themselves are very aware of the lack of adequate guidelines they have.

Mr. FLOWERS. We have shifted our decisions to someone else.

Mr. SCALIA. You say protect environment but everytime you protect environment you hurt something else.

Mr. FLOWERS. The biggest problem with this approach is we might tend to be more lax in the basic legislation. I think that is one of the biggest failings of legislation as far back as I can remember in Congress. If the Congress has this easy access to a veto of the rules and regulations, then we might tend to shift that burden more to the executive branch and then come back and oppose rules and we don't like.

Mr. SCALIA. I also think, Mr. Chairman, that what you are giving up by passing generalized legislation without any specific guidelines is consideration by the entire Congress. What you are retaining by keeping this kind of a strength is not consideration by the entire Congress nor realistically even consideration by one House.

This process is essentially going to be implemented by the committees just as the general oversight process is. That to my mind is no substitute for the entire Congress making a hard political decision. Instead of passing a law that says there shall be no sex discrimination in Congress, making the decisions as to what that means.

Mr. FLOWERS. I yield to the gentleman from California, Mr. Moorhead, and then Mr. Kindness.

Mr. MOORHEAD. Thank you, Mr. Chairman.

We were talking earlier about the separation of powers in Government. It seems to me that in recent years, so many of our powers, normally congressional powers, have been taken over by the courts—the civil rights rulings, the busing rulings against cities and so forth. The delegation of authority to the various administrative agencies of Government has also occurred.

It would seem that this legislation aims merely at taking back some of that which has been delegated in the past. Would you comment on that?

Mr. SCALIA. My initial comment would be I have enough trouble defending the executive without trying to speak for the courts as well.

But I don't think the courts—the courts will have the last word on this matter. I don't think that there is any way if the courts are bound to run away with your legislation, I don't think there is any way that

this provision can stop them because I think a court will find, if it chooses to, that the subsequent action by one House of Congress was in fact an accurate indication of what the original intent was.

Mr. MOORHEAD. At least seven States have adopted this kind of procedure, maybe more. Representatives of two of the State legislatures have come in and told us it is working very well. There is apparently no difficulty with court action.

I wondered, if it is so contrary to the Constitution, why that has not occurred?

Mr. SCALIA. I suppose the answer I would give to that is the allocation of powers among the three branches of government is not the same in all the States as it is within the Federal Government. As you know some States have a very strong executive, much stronger than the President within the Federal system.

Other States have a relatively weaker executive and a stronger legislature.

Mr. MOORHEAD. But they are very similar to the Federal in most every instance.

Mr. SCALIA. The formal structure may be but as far as the actual balance of powers as it has worked out over the years, my impression is——

Mr. MOORHEAD. The State of Michigan is one of the States that is involved. In that State there is a relatively strong executive. It has the separation of powers, very much like the Federal system. It is not a small State. It is one in which——

Mr. SCALIA. I do not deny that a sytem like this can work. A system of parliamentary government can work and works in more countries than our system does whereby the Congress cannot only review regulations but in effect the Congress would decide who is running the executive branch.

It just happens not to be the worst we have chosen and the wording of the Constitution on the point could not possibly be any clearer. If one were to lay back and try to imagine to himself if the original framers envisioned these precise bills and wanted to prevent them, what language would they have adopted.

I can hardly imagine anything clearer than what they said.

Mr. MOORHEAD. On page 2 of your testimony you cite delay that would be caused by this procedure. Do you think 60 days is really that unreasonable?

Mr. SCALIA. Well, it is not just the 60 days or 90 days under the other bill but it is also the process when the Congress disapproved it of going back to the drawing board and trying to get up new ones and coming back again. What you have added really is a new stage of review, whether it is judicial-type review or not, a new stage of review in a process which already has a number of stages.

This has been one of the criticisms of our judicial process—that it is so multitiered that it takes too long to get regulations through. That is not the direction in which we have to go.

Mr. MOORHEAD. On page 6 you say the Congress is equipped neither by training nor inclination to do this job. Would you say the Congress does have the will to carry out its own legislative intent?

Mr. SCALIA. To write statutes, certainly. But what I am saying is that Congress is not equipped to do the job of analyzing what was the

legislative intent of an earlier Congress. Realistically, that is not what you gentlemen are here for. It is not what you do well nor what I think you are inclined to do.

You are here to write laws, to oversee the executive branch, but not to sit down like a judge—let's look at the books and study all the statements of intent and so forth.

This is lawyers' and judges' work, not legislators' work whose job is to write new legislation, not to analyze the old.

Mr. MOORHEAD. It is done all the time. If you read the Congressional Record, you will see that type of work increasingly occupies a substantial portion of our time. That is, analyzing what the intent was of previous legislators.

Mr. SCALIA. I don't say, Congressman, that some Members of Congress might not do it better than judges do it or anybody in the Justice Department trying to write a legal memorandum on the point. But it strikes me as not real legislative work.

I mean no disrespect by it but it does not seem to me what you people came up here for.

Mr. MOORHEAD. What would you think of placing a time limit in this legislation, to see how it works?

Mr. SCALIA. I think I would favor that although I would favor even more taking a close look to see how the examples of similar legislation which are now on the books are working before you extend the principle to new fields. As I indicated in my testimony, those examples were only passed by the previous Congress.

It would be worthwhile it seems to me to see how they operate.

Mr. MOORHEAD. I am not trying to tear down your testimony. I am trying to bring it out. We appreciate the thoughtful observations you have. But we do want to make sure that we have all the information. I did not want you to get the wrong idea. I gather you are saying that Congress has no role in this rulemaking process and because the rulemaking process is so important and is so complex in nature. I can't quite accept that point of view.

Mr. SCALIA. Well, I don't really believe that Congress has no role in the rulemaking process. Three years ago or so, I can show you a speech of mine when I was at that point chairman of the Administrative Conference decrying precisely the fact that Congress has not given enough guidance to rulemaking, that the agencies don't know what they are supposed to do.

I believe Congress has the most important of all functions in rulemaking and that is to tell the agencies with some specificity what the rules are supposed to achieve, not just a generalized rule such as preventing sex discrimination or protecting the environment.

I think that is an enormously important role. The problem is it has to be done before the legislation is let go. Once it is let go, under our system, the executive branch is charged with implementation.

Mr. MOORHEAD. You say the Framers of the Constitution probably never envisioned that a single House would purport to take action on behalf of the entire Congress. For many years, the Reorganization Act of 1939 was in effect and it permitted either House of Congress to disapprove a Government reorganization plan.

Was this procedure unconstitutional?

Mr. SCALIA. Yes, sir. I would have my doubts about the validity of proceeding in that fashion.

Mr. MOORHEAD. Why have the courts never ruled on such a vital issue?

Mr. SCALIA. No one asked them to.

Mr. MOORHEAD. If constitutional lawyers felt there was a serious question about it, it is difficult to understand why it never came up.

Mr. SCALIA. There have been articles written about this. There are various degrees of clarity of the violation of the principle of article 1, section 7. The Reorganization Act is certainly less clear a violation than these present proposals which subject all generalized implementation of legislation to subsequent congressional approval.

I think this is a much clearer case. But personally I think the Reorganization Acts are suspect to the same degree.

Mr. MOORHEAD. I wish to thank you for coming. You have given us a great deal of information to ponder in our consideration of this legislation.

Mr. FLOWERS. I recognize the gentleman from Ohio, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

I thank you for a very excellent statement. Your testimony suggests to me that the proper way for the Congress to proceed in matters of this nature is to overturn objectionable regulations by repealing the statutory provisions that authorized the objectionable regulation and, also, by legislating in more detail. But, if the Congress attempts to legislate in such detail about some of the complex matters that have been the subject of legislation in recent years, we might never get a bill passed.

That, in turn, might be a blessing to the Nation. But I would like to ask about alternative means of achieving this sort of control over the manner in which laws are administered and ask for your comments on a couple of points. Could the Congress provide for and call upon the executive branch and the independent agencies to promulgate proposed regulations prior to the enactment of the statutory provisions, and thus provide some timely input into the legislative process?

Mr. SCALIA. Yes. I believe that there are statutes on the books now which require that legislation—that regulations will not go into effect until a certain time period has elapsed, within which time period Congress may pass legislation preventing those regulations from taking effect or altering them in some way or another.

I have no problem with that. Congress can say whenever you promulgate regulations, they won't be effective until a certain time passes. That would achieve the same thing as these bills except that it would require the concurrence of both Houses of Congress, and it would be subject to the Presidential veto.

That is the way the legislative process is supposed to operate.

Mr. KINDNESS. Another alternative would be for the Congress to provide that all regulations that are not codified within a specific period of time would expire.

Mr. SCALIA. I suppose that could be done, but I think it would be a very risky business unless the Congress is prepared to undertake an enormous study of some of the regulations governing some technical

aspects of communications, for example, because FCC matters are tremendously complex and even detailed.

I am not prepared to wade in and say whatever I am not convinced of automatically disappears.

Mr. KINDNESS. You would have a great amount of uncertainty about this?

Mr. SCALIA. I would not feel comfortable in your position letting something die without letting—knowing more about it than you will have time to acquire.

Mr. KINDNESS. We might avoid the enactment of a whole lot of unnecessary legislation, wouldn't we?

Mr. SCALIA. As you know, the chairman wanted to know whether I would support the President's statement on this general area of regulatory reform. I think everything I have said is in accord with the direction he recommends which is simplification by elimination of regulations in those areas where we don't need regulation.

I view these proposals as going in the opposite direction, creating a new tier of regulatory review at which tier all of the participants in the rulemaking, the proper industry people, the public interest people and whatnot, will then move from the agency—right now they move from the agency to the courts.

Under this proposal they will go from the agency to the Hill and then to the courts. It is not my view of how to simplify it. To simplify, write clear legislation in the first place and if there is a dispute as to what ought to be done, maybe that means the society does not want the legislation because society can't make up its mind.

That is the very function of the Congress which function is not served by a single committee or a single House of Congress looking at legislation. If the full Congress can't agree on what ought to be done, maybe nothing ought to be done.

Mr. FLOWERS. Mr. Minge?

Mr. MINGE. Thank you, Mr. Chairman.

Your last comment was that "If Congress can't agree on what ought to be done, perhaps nothing should be done." Isn't it accurate to view this bill as simply saying the same thing in different words? If Congress cannot agree that a particular rule is good, we should not have the rule.

Mr. SCALIA. Congress has agreed. Congress said originally I agree to whatever the President or an agency chooses to do so long as it is directed toward this goal. It says that when it adopts legislation with broad and unspecific provisions in it. What these specific provisions do is attempt to enable it to take back that delegation without the President's consent and without the consent of both Houses of Congress, just one consent of one House of Congress.

If this were changed so that Congress says we can't agree, then I would have then no objection to it. But that would require both Houses of Congress saying it and their saying it being submitted to the President for his constitutional veto prerogative.

Mr. MINGE. This legislation would have to traverse just that route.

Mr. SCALIA. That is so. So the President vetoes it and his veto is overridden.

Mr. MINGE. We have complied with the Constitution.

Mr. SCALIA. I hardly think so. That reasoning would say you could take any power from the President, whatever, so long as you do it and he vetoes it and you override.

Mr. MINGE. There is some argument that can be made along that line. You spoke in quite highly—spoke highly of judicial review as a technique for insuring that rules comply with congressional intent. I think judicial review is important but the executive branch and I suppose primarily the Justice Department has strongly opposed some forms of judicial intervention in this area. For example, would you recommend that preenforcement judicial review of rules and regulations be authorized across the board by Congress? Would the administration object to that? Would it object to a broadening of the standing concept so public groups can litigate and so we would not have to trouble the Supreme Court with the issue?

Mr. SCALIA. I don't think we have to agree. There is preenforcement of most rules within the Federal system right now. That is a loss of one battle concerning your oversight.

Mr. MINGE. The Justice Department and the agencies still litigate the issue. They have not given up.

Mr. SCALIA. They litigate unsuccessfully to the extent that they litigate. I am not aware of what the litigative practice is on the point. In any case, whether the review comes before or after the rule is promulgated, the point it seems to me is that the courts will strike down a rule that is out of accord with the congressional intent of the legislation that existed at the time the legislation was passed.

To the extent this legislation provides for Congress to do that, it is not providing for anything that does not already exist, it is just putting that function in a different branch of government and in a branch I don't think the courts will be content to leave it with.

I very much doubt whether they would permit a subsequent one House determination to prevail over what they themselves independently decide was the intent of the original Congress that passed the legislation in question.

Mr. MINGE. I would like to observe that judicial review is highly desirable but in practice it does not always work as well as one might hope. It certainly involves delays. If one cannot obtain preenforcement judicial review, he must risk the imposition of penalties or loss of grants in order to test validity of rules. Most people are reluctant to run those risks.

You can multiply the problems of judicial review.

One is left with the question, how should we best handle this? Maybe we should try two or more approaches simultaneously. This legislation is one possible alternative approach.

Mr. SCALIA. Bear in mind, Mr. Minge, this legislation does not as I read it preclude judicial review. You go from the Halls of Congress to the law courts when you are done in the Congress. It is not as though you are getting rid of the length and difficulty of the judicial process.

Mr. MINGE. I am aware of that.

Mr. FLOWERS. Thank you very much, Mr. Scalia. We look forward to your next visit with us.

Mr. SCALIA. Thank you very much, sir. I enjoyed being here as usual.

Mr. FLOWERS. We are running short of time. Our next witness is our former colleague and old friend, Mike McKevitt, also formerly in the executive branch of our Nation's Government, and now working another side of the street.

Mike, it is good to see you.

You are particularly welcome here today. We hope things are going well with you. We will be happy to hear what you have to tell us today.

TESTIMONY OF HON. JAMES D. "MIKE" McKEVITT, WASHINGTON COUNSEL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. MCKEVITT. I would like to ask in the interests of time and witnesses behind me that unanimous consent be afforded me to include my remarks in full in the record.

Mr. FLOWERS. We will extend that to you.

Mr. MCKEVITT. Thank you. I have very strong attitudes about this legislation not only on behalf of my client, the National Federation of Independent Business, for which I serve as Washington counsel, but because of my past experiences formerly as general counsel to John Love in the White House when he was head of the Energy Council, and also attitudes developed while district attorney in Denver and prior to that assistant attorney general for the State of Colorado.

You have to consider not only constitutional questions—and there are some delicate constitutional questions—but there are some practical questions.

I would begin by stating that I think this legislation is sorely needed and I say so personally and on behalf of the National Federation of Independent Business From a legal aspect I shudder when we talk about growth of Government. I recall a time when there was a serious question about whether an administrative agency could even draft a criminal penalty.

I as a district attorney refused to ever prosecute an action that was not drawn up by the State legislature. There is still a great deal of legal decision that states any such laws are unconstitutional. I think that this even would preempt a need for the Levitas measure so far as this legislation is concerned.

I think, looking back historically, it is something we ought to give serious consideration to. I recall our experiences before as district attorney, we questioned in the attorney general's office and never proscribed to that procedure in the State of Colorado.

I recall other experiences as assistant attorney general—a case we had to take which I argued in the U.S. Supreme Court, and that was whether the U.S. Red Cross was an agency of the U.S. Government.

It hung on this question of what did Congress mean, and it hung on a statement in the House, this doesn't include the American Red Cross, does it? Had we had the Levitas or Clawson bill, this would have been resolved without an appeal to the U.S. Supreme Court.

With all due respect to those gentlemen across the street, I don't think they understood the issue because the American Red Cross came back a year later and asked for reconsideration and wanted to be covered.

The point of it is the fact that I think if Congress creates as they do, they not only have the power but I think they have the obligation to review what they create. Maybe this is new constitutional thinking, but as a practical aspect I think it is sorely needed.

I think that too many of us on the House floor in the past wondered if we were creating a monster. With all due respect to the Picasso sentiment maybe there are some artists that would like to redo their work and find out what did they really create and maybe perfect it.

A classic example right now is the Magnuson bill which is overdue as far as rules are concerned, and there is a great deal of concern as to what will come out of it. Recent history would bring out the abuse of OSHA. I dont want to revisit the horror stories which I heard as a member of the House Small Business Committee.

We are all aware of them. We should be thinking about things that alleviate this. The point that concerns me is this: There is a degree of hostility towards Congress, as I saw when I went into Justice. I had some nightmares there, since I was John Dean's successor.

The fact is we know best, according to them. I think it is time Congress reached out and pulled back some of its power and also a certain amount of its obligations. I see this finally coming back to economical and practical aspects. You talk about the bigs, big labor, small, government. What about small business, labor, and government? We don't have the manpower to respond to a variety of all regulations. You do get hit sometimes by an indifference, by too much bureaucracy on this thing and it is not just where—with all due respect to the former gentlemen who testified—where it would funnel back to a particular committee or a subcommittee or the counsel thereof.

Many of these counsel are very responsive. In addition to this, it would be a variety of members across the country when this is pending who would get an input from their constituents who would inquire of that particular subcommittee and say we see no potential abuses here.

As a result of it, I think it would give Congress an excellent opportunity to review what it had created to make its art work even more perfect if it was good in the first place. That is the sum and substance on my feelings on it.

Mr. FLOWERS. Mike, I would agree that it would emphasize the oversight function in a way we don't have it now. There is a growing awareness as you have observed—and I commented on this earlier—in the Congress to really exercise oversight.

I think it is a welcome sign for the American people. I was joking with Mr. Scalia about the power of the executive branch. His statement would lead you to believe that we have government by legislative fiat in this country and it is—nothing is further from the truth.

The push for this type of legislation comes from a feeling on the part of many legislators that we have lost the reins of government. We have government by executive fiat and we want to change that and reacquire the kind of balance that ought to be and ought to have been in this country since the beginning.

I thank you for being with us, Mike. It is always good to see you. I call upon my friend from Ohio, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

I appreciate your testimony here today very much. It supports the line of thinking that is becoming dominant throughout the country. I would like to ask your reaction to the two alternative suggestions that I asked Mr. Scalia about. First, the possibility that the Congress might codify all regulations and that there would be a time limit on the life of noncodified regulations.

Is that a practical approach in your view?

Mr. McKevitt. I question how much your colleagues would want to put up with it. It is another way of approaching the problem. You are saying specifically guidelines or codifying the regulations themselves?

Mr. Kindness. The regulations.

Mr. McKevitt. Anything that has an elected body reviewing the regulations before they go into force and effect is sorely needed.

Mr. Kindness. The other alternative of Congress calling upon executive branch and independent agencies for their input by way of regulations prior to enactment?

Mr. McKevitt. That is a sound suggestion as well. I would hope you will receive their cooperation. Sometimes you will run into indifference or arrogance. I think maybe it is a matter of crossing the bridge, getting them to work with staff counsel on the Hill side. I think there is another practical aspect. Sometimes it is the only gut situation. Until you are faced with the reality of it, the enactment of a law, some people don't come out of the shoot and say this affects me this way.

That is a practical problem.

Mr. Kindness. Thank you very much for your responsiveness and for your testimony.

Mr. McKevitt. Thank you.

Mr. Flowers. Mike, thanks a lot for being with us. We will certainly take into consideration whatever you said here today.

Mr. McKevitt. Thank you, Mr. Chairman.

[The prepared statement of Mr. McKevitt follows:]

Statement of James D. "Mike" McKevitt, Washington Counsel to the National Federation of Independent Business

Mr. Chairman, I would like to thank you for the opportunity to appear before your Subcommittee in support of the legislation which would provide Congressional review of the rules and regulations proposed by executive agencies. From my perspective both as a former Member of Congress and as Washington Counsel for the National Federation of Independent Business (NFIB), I can say that this proposal merits enactment.

As a former Member of Congress, I know the frustration of trying to deal with constituent complaints that flow from the mindless petty rules and regulations put down by faceless bureaucrats who never have to fill out all the forms that they are constantly devising for other people.

I know that in recent years Congress has come under a great deal of criticism for various reasons, but the fact remains that Congress is a great deal more responsive to, representative of, and accountable to the general public than any non-elected Federal bureaucracy. In addition, the entire legislative process is becoming more and more open and accessible than it ever has been.

From my position as Washington Counsel for NFIB, which is comprised of 430,000 member firms across the country—the largest group of its kind in the United States representing business firms—I remain in contact with countless small businessmen throughout the country who face the daily harassment that comes from trying to comply with regulations that are not only nonsensical but too often cannot even be discovered. All the businessman knows is that if he is not in compliance he might well be subject to costly fines and assessments for his alleged violations.

Rules, regulations and policies are decided without his input and in many cases they damage his competitive position.

Within the Federal government, small business is often an afterthought. Its needs and interests are too often lost in the maneuvering of big business, big labor and big government for advantage over each other.

Small business does not have the resources to hire the accountants, lawyers, and consultants needed to cut through the jungle of red tape and intrigue so it can play the Washington game on an equal footing with the big boys. Nor does it have the resources or the time to fill out nonproductive forms and paperwork and comply with unneeded regulations that are based on nothing more than the whims of the Federal bureaucracy.

Something must be done to protect the small, independent business community from these costly and damaging mistakes of the bureaucracy. Something must be done before the mistakes are made, not after small firms across the country are forced to close their doors as a result of them.

The most glaring example of this destructive procedure is the enactment and implementation of the Occupational Safety and Health Act (OSHA). It was written by big labor, aimed at big business and implemented by big government, all without the slightest consideration for its impact on small, main street-type businesses.

Once the legislation was enacted the Department of Labor bowed to union pressure and implemented it so quickly and so unfairly that it set off a tumultuous, angry reaction in the small business community that is still raging today.

It took two volumes of the *Federal Register* to publish the OSHA regulations and these referred the reader to over 17 linear feet of reference material. A small businessman was expected to be familiar with these regulations and to comply with them, yet the D.O.L. did not provide any sort of guide or checklist and could not even supply a copy of the regulations to a small businessman who wanted to take the time to review both volumes. Those who wanted to comply were stymied because they couldn't even ask for assistance without exposing themselves to inspection, citation and fine. This coupled with the gestapo tactics of some inspectors make OSHA intolerable.

Some of the regulations that were incorporated in this fashion and enforced are:

Requiring fire extinguishers to be placed at eye level;

Requiring split toilet seats in all restrooms;

Requiring two restrooms in businesses that employ both men and women, even if they are husband and wife;

Forbidding the use of ice in water coolers;

Subjecting employers to citation and fine for employees not wearing hardhats or protective glasses even though they had been told to do so;

Requiring roll bars on farm tractors;

Requiring ladders over 20 feet tall to be tied at the top and prohibiting climbing them until they are secured. How?

These are just a few examples of the poor planning and lack of practical input into these regulations. Yet, the small business is still responsible for obtaining, comprehending and complying with them. Nobody questions the need for a safe and healthy work place, but we can question the need to comply with unnecessary and counterproductive regulations. Their cost in consultants' and lawyers' fees, lost production time and compliance cannot be estimated, but in August the Department of Labor proudly announced that "from its inception on April 28, 1971, through May 1975, OSHA made 241,740 inspections resulting in 168,143 citations alleging 870,683 violations, with proposed penalties totalling $21,994,202." In June 1975, this figure was increased by $894,367. In other words, in just four short years OSHA cost the small business community nearly $23 million in fines alone.

Other instances of Federal regulations disregarding the impact of their actions on small business are numerous. A sampling of these are:

Federal Energy Administration Emergency Allocation Plans, which blatantly favored large firms with their own fuel storage capacity. These firms were assured of an ample supply of fuel for the needs of their business while small firms without this capability were left to fend for themselves with other consumers in the long lines of the pumps. This was a decided competitive advantage for the bigger firms.

Pure food and environmental laws (Wholesome Meat, Wholesome Poultry, Clean Air and Clean Water Acts) required substantial change in physical plants, facilities or equipment to comply. Large firms could not only use this as an excuse

to modernize, but had ready access to the tax-exempt public bond market to raise the necessary capital for compliance. Small, marginal firms couldn't afford compliance or couldn't meet arbitrarily set deadlines, or when they could they had to borrow privately at exorbitant rates and many were forced out of business.

Employee Retirement Income Security Act (ERISA) regulations have completely crushed the hopes of many small firms that had intended to establish their own pension plans. Additional paperwork and red tape cost some firms, the very smallest, over $700 per employee in added costs (the average is over $300) and has forced many small employers to drop their plans entirely.

The legislation you are considering is an important first step in making the administrative process more responsive. I would add that it is not just business groups that are affected. Environmental groups, consumer groups and public interest groups all have an interest in making government more accountable.

Failure of accountability only contributes to the continuing decline of credibility of our Federal government. The private citizen who has run afoul of some rule or regulation and searches in vain not just for a remedy, but even for someone simply to hear his case, is not going to have much faith in the concept of government "for the people".

The bills you are considering will not magically eliminate all administrative and bureaucratic problems. They will, however, provide a Congressional remedy in those cases where administrative rulemaking clearly goes beyond that which was contemplated by Congress in the first place.

Mr. Chairman, on behalf of NFIB and as a former Member of this House, I would like to commend you for holding these hearings on this legislation and strongly urge that you report this legislation favorably and quickly.

Thank you.

Mr. FLOWERS. Our next witness is Dr. Leo J. Gehrig, senior vice president of the American Hospital Association. We do have a time problem. I am sure you will help us with it, Dr. Gehrig.

Please proceed, sir.

TESTIMONY OF DR. LEO J. GEHRIG, SENIOR VICE PRESIDENT, THE AMERICAN HOSPITAL ASSOCIATION

Dr. GEHRIG. I represent some 7,000 member institutions and I would say briefly we truly appreciate and thank the committee for this opportunity.

I have a longer statement I would like to submit for the record.

Mr. FLOWERS. Without objection we will receive it and permit you to proceed as you see fit.

Dr. GEHRIG. Our association wishes to commend this subcommittee for holding the hearings and considering this issue. We especially commend the principal sponsors of the two major bills, Representative Elliott Levitas of Georgia and Representative Del Clawson of California, as well as the many cosponsors of their excellent proposals to deal with this very difficult issue, and you, Mr. Chairman, for your bill, H.R. 10194, which amends the APA and removes the existing exemption.

In the course of our full testimony we seek to briefly discuss some of the problems that the hospital field faces with the regulatory process at the present time; to give some indication of the magnitude of the issue; to review some aspects of the bills, H.R. 3658 and H.R. 8231, which are before you; and finally, to provide a series of recommendations for the committee's consideration in reporting out legislation on this matter.

During the past decade hospitals and other health care providers have been hit with a barrage of governmental regulations which, as the committee knows, have the force of law.

These regulations are developed and promulgated by a wide variety of governmental agencies, boards, and departments in the executive branch. Incidentally, these governmental regulations promulgated at the national level, are joined at the point of delivery of health care—the community hospital—by other national voluntary and State and local governmental regulations.

I indicated this only to point up the fact that the community hospital which each of us looks to for care is struggling to meet the needs and demands for health care by its community and is also dealing with a host of regulatory requirements with which it must comply.

Administrators and boards of trustees of such hospitals, which I am representing to you today, are not naively seeking to do away with all regulations, but they are clearly and loudly saying that essentially there be improvement in the process by which regulations are developed, promulgated, and that the regulations be more adequately reviewed for consistency with law and congressional intent.

The first 8 pages of my statement describe a few recent examples of regulations of concern to health care providers which have in the recent past raised very serious questions as to their consonance with law and the intent of Congress.

In midsummer of this year, the Health Subcommittee of the House Ways and Means Committee held the first oversight regulation hearings in my recall. The discussions in this hearing were limited to four regulations, each of which is more adequately described in my statement.

It is important to note that by the time that hearing occurred on June 12, three of the four issues were under litigation. At this time two of the regulations have been withdrawn as a result of court action; one is still in the courts; and the fourth is being changed in a legislative bill which is soon to be reported out of the Ways and Means Health Subcommittee. These are real problems.

Existing oversight review of regulations, while helpful, is limited to but a few isolated examples of significant issues and is inadequate.

Actions resulting from such oversight reviews even when corrective action is taken have for most understandable reasons, only been completed long after the regulation is implemented and much damage is done.

The action of confrontation in the courts, this committee is aware, has become increasingly used to deal with issues on which the executive branch of government has appeared to exceed its authority. This, too, is an unsatisfactory routine solution and it is slow and costly.

One of the examples I cited was an administration cost-cutting action to discontinue the nursing cost differential for aged patients under medicare. This unlawful action was taken without any substantiating evidence for it and occurred despite the fact that during the brief comment period, many responses from across the country provided data which pointed out to the executive branch the inappropriateness and unlawful aspects of the regulation.

It was also promulgated despite the fact that H.R. 7000, introduced by Congressman Mark Hannaford, which would have prevented this regulation from taking effect, was cosponsored by almost one-half of the House of Representatives. Early this fall, action of the courts resulted in a judgment that the regulation was unlawful and finally resolved the issue.

We believe that the bills before you provide a more effective and efficient way by which continuing congressional review can be carried out to assure that regulations which are promulgated will be consistent with the congressional intent and the statutes on which they are based.

Our testimony on pages 8, 9, 10 details some of our problems such as the exception of loans, grants, benefits, or contracts from the APA which automatically exclude many of the regulations of key importance to us.

Also indicated is our recent experience of totally inadequate time periods for comments. Regulations which have required months and in some cases a year or more for development cannot be analyzed and constructively commented upon in the usual 30-day period.

In fact, that 30-day period shrinks dramatically to barely more than 2 workweeks when one recognizes the necessary time for the Federal Register and mails to disseminate basic regulations to all parts of the country and similarly to transmit comments back to executive agencies, regulations that are complex and have taken the executive branch a year or more to develop, and we are given a 30-day period.

If you look at the practical aspects, the mails to the interested parties, the Federal Register publication and comments, it is a 2-week period obviously.

Tell us how to fix it. We have gone to the Secretary of HEW in the past with very little avail. We have more recently talked to Secretary Mathews, and we are hopeful you will be sympathetic to our problems in this area.

We want to work together on it. Frankly, an issue this important should not be left to the concern and sympathy of one man. I believe the Administrative Procedures Act ought to take some cognizance of this area.

The following specific legislative recommendations for inclusion in a bill to deal with this complex and important issue are recommended:

1. Reforms in the rulemaking process should be incorporated in the Administrative Procedures Act.

2. The exemption in the Administrative Procedures Act for rules relating to loans, grants, benefits, or contracts should be deleted.

3. The provisions of the act should apply to rules, regulations, and any other significant issuances such as guidelines or intermediary letters, which establish new policy or modification in policy.

4. A 60-day period for public review and comment on complex proposed regulations should be the minimum provided, with extensions permitted when necessary and justified.

5. The agency proposing rules or regulations should be required to provide information concerning the financial impact of such rules or regulations.

6. The purpose of the legislation should be to prevent the adoption of rules or regulations that are contrary to law or inconsistent with congressional intent or go beyond the mandate of the legislation they are designed to implement.

7. A final rule or regulation should be permitted to take effect after 30 calendar days of continuous session of the Congress after the final rule was published unless:

A. One House passes a resolution stating that it does not favor the rule, or

B. A resolution is referred to a committee, in which case the committee would have 30 days to complete its action.

8. To avoid excessively burdening congressional committees, no rules or regulations should be referred to committees except on the motion of one or more members of the relevant committee.

We have been conscious of the fact that portends additional workload on Congress. We have reviewed the Federal Register for 1 year those concerns of importance to hospitals. We found 105 regulations promulgated.

When we boiled down those issues, it became a very small portion but a very important portion. We believe it has feasibility in that direction.

9. In the event that provision is made for some regulations, by reason of good cause to take effect without the usual congressional review, either House of Congress should have the authority to review and veto the rules after their effective date.

In summary, recent history demonstrates both the need for legislative reform of the regulatory process and, we believe, the practicality of such reform to remedy existing defects in the Administrative Procedures Act.

Legislative action in concert with the proposed bills will provide the method by which Congress, in its continuing review, may prevent the adoption by the executive branch of rules and regulations that are contrary to law or congressional intent. Such legislation also will provide a more adequate means by which the public may participate more effectively in the Federal rulemaking process.

Mr. Chairman, we thank you and your committee for this opportunity to be heard on an issue that is of intense interest and concern to the health and hospital field. We think the review process should be applicable after the effective date to insure that such actions that are contrary to law might have the review under consideration before the subcommittee.

If in any way the association can be of assistance in your further considerations, we would be delighted to try to help.

Mr. Flowers. We appreciate your statement. Particularly helpful was your comment about your own review of the last year and the rules and regulations that have been promulgated. We have not had that kind of check on things that you provided us with here. If you can give us, then, along those lines any greater detail—it may be in your full statement—of that review by your association, we would appreciate it.

Dr. Gehrig. We would be delighted to. I would like to add that we recognized—and I had a more complete description of it in the even shorter statement—but in reviewing 1 year, we are not giving you solid evidence, but I know testimony from individuals from the Federal Register will give you a magnitude.

But I wanted to give you a feel, and the evolution of this problem seems to be on an increasing crescendo in recent years. I am not sure it gives you a guideline. I feel that the legislation under consideration and the sorts of aspects that we have tried to highlight in our summary will have an effect where past experience will be less than valuable.

I believe this continuing oversight by Congress with regard to the legality of a regulation would in—unless without the review process possibly slow down some individuals who are exceeding the bounds of what I think is either the intent of the law or the judgment and it is pointed out and yet they proceed.

Mr. FLOWERS. There have been other witnesses that made that point, too.

Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman. Dr. Gehrig, I appreciate your statement. I would just like to clarify one point.

In section 553 of the Administrative Procedures Act, subsection (a) (2) contains the exception of matter relating to agency management, personnel or public property, loans, grants, or contracts which your association would prefer to see taken out of the law.

Dr. GEHRIG. I think the action of the chairman in his bill, if I recall correctly, puts a period after the word "personnel" in that clause and by that effectively removes the last four items, grants, benefits, loans, and the other item which is escaping my mind.

It is that point we would fully support.

Mr. KINDNESS. To clarify further, subsection (b) relating to notice contains exclusionary language at the end saying except when notice or hearing is required by statute, this subsection does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.

Since the language does not track exactly, it seems to me that there may be the need for some modification of language of that portion of subsection (b) relating to notice. It seems to overlap somewhat with the language that you are suggesting needs to be eliminated in subsection (a).

I would be glad to hear any comments later.

Dr. GEHRIG. I would say that if that is true, and not being an expert on it, I am not sure, but that is an excellent point, and if it does conflict—it seems to me the intention of the chairman's bill was specific in excluding that—we would like to see it remain consonant with the appropriate section of 553.

Mr. KINDNESS. I have not studied the chairman's bill.

Mr. FLOWERS. We will get a copy for you. [Laughter.]

Mr. KINDNESS. The point is you are certainly going to want to have notice if this subject matter is no longer to be exempted under subsection (a). You are certainly going to want to have notice of anything relating to rulemaking in those areas?

Dr. GEHRIG. Yes, sir. I do find myself understanding in Mr. Clawson's bill which does to some suggest the possibility that the rulemaking procedure of notice, comment, and final regulations may be circumvented—circumscribed and not dealt with or superseded by his legislation.

We would not want to see that happen. We believe that action should be after or at the time final regulations are promulgated. One then does have the firm thinking of the executive branch before one begins to look at it. Frankly, we are in that posture of confrontation much too often.

The operators of community hospitals are more anxious to work constructively. We are in a bind where constructive work and comment goes down the drain.

We get certain regulations, some of which are inconsistent with the statute. Under no circumstances, what the committee is looking at in terms of these bills contains the elements that you are putting together, and it would put us in a better position to deliver care.

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. FLOWERS. Thank you again, Doctor, for being with us. We will certainly consider what you have had to say.

Dr. GEHRIG. Thank you, sir.

[The prepared statement of Dr. Gehrig follows:]

STATEMENT OF LEO J. GEHRIG, M.D., SENIOR VICE PRESIDENT, AMERICAN HOSPITAL ASSOCIATION

Mr. Chairman, I am Leo J. Gehrig, M.D., Senior Vice President of the American Hospital Association, representing more than 7,000 member institutions, including most of the hospitals in the country, extended and long-term care institutions, mental health facilities, and hospital schools of nursing and over 21,000 personal members. We appreciate this opportunity to present the views of the Association on the matter of Congressional control of administrative rulemaking.

Our Association wishes to commend this Committee for holding hearings and considering this issue. We especially commend the principal sponsors of the two major bills, Representative Elliott Levitas of Georgia, and Representative Del Clawson of California, as well as the many cosponsors of their excellent proposals to deal with this very difficult issue. In the course of our testimony, we would like to briefly discuss some of the problems that the hospital field faces with the regulatory process at the present time; to give some indication of the magnitude of the issue; to review some aspects of the major bills, H.R. 3658 and H.R. 8231, which are before you; and finally, to provide a series of recommendations for the Committee's consideration in reporting out legislation on this matter.

ADMINISTRATIVE RULEMAKING IN THE HEALTH CARE FIELD

During the past decade, hospitals have been hit with a barrage of governmental regulations which, as the Committee knows, have the force of law. These regulations are developed and promulgated by a variety of governmental agencies, boards, and departments in the Executive Branch. Not infrequently the uncoordinated promulgation of regulations have included requirements that do not appreciably improve care to patients but significantly increase costs. At the same time, actions are being taken to hold down payments for services to levels that do not take into account the cost increases mandated by government. Sometimes payment limits seem to be imposed in ignorance of the differences between holding down government payments and holding down hospital costs. Regulatory actions have not only dealt with matters affecting the very financial integrity of institutions, but have also intruded directly and inappropriately into the operation of such institutions.

Among others, some recent regulatory actions that have very important effects on hospitals have been (1) Medicare's action to delete its allowance for the above-average costs of nursing care for the aged, (2) Medicare limits on hospital costs that are reimbursable, (3) rules specifying how hospitals must review the use of their services, and (4) impoundment of governmental and program grant funds. In such areas as these, the administering agencies have exercised a wide latitude of interpretation of basic authority.

NURSING COST DIFFERENTIAL

At the time Medicare was enacted, Congress recognized that the program required a definition of the method by which institutions and other health care providers would be paid for the care rendered to beneficiaries. In the enabling legislation, Congress established that inpatient care would be fully reimbursed

on the basis of reasonable costs. Congress further recognized that it would be unfair to obligate other purchasers of hospital care for any part of the cost of providing care to Medicare patients because of inadequacies in reimbursement for care of these patients. The legislation, therefore, states that "the cost in respect to individuals covered by the Medicare insurance programs will not be borne by individuals not so covered." These two concepts were clearly enunciated in the law.

The Social Security Administration (SSA), in implementing the law, had to define what it considered to be reasonable cost. It was clear that existing accounting systems did not accurately reflect a number of cost elements, including additional service requirements of aged patients. From the very first, the Medicare program recognized that to accurately reflect the higher costs of care for aged people, a factor must be added to the basic cost of care. Therefore, in 1966, at the beginning of the program, a 2 percent factor was added to the basic cost figures in the Medicare reimbursement formula.

From July 1, 1969, onward, however, in the Department's quest for cost savings, HEW proposed that this 2 percent factor be eliminated. Then, after the injustice was pointed out and recognized, the 2 percent factor was replaced in part by an allowance for the difference between nursing care costs for Medicare patients and for others. While the 2 percent was computed on the basis of institutions' total Medicare costs, the nursing cost differential of 8½ percent was computed only on routine nursing salary costs. This, in effect, reduced the factor that was added to basic care costs from the original 2 percent to 1 percent. As noted, the new differential was applied only to routine patient care and not to Medicare patients who were being treated in special care facilities, such as coronary and intensive care units.

The allowance of an 8½ percent differential on routine nursing salaries was based on studies that showed that routine nursing care for aged patients is more costly because it is more extensive and because it requires more time. A number of studies were carried out across the country regarding this matter, and they documented the additional requirements of care for aged patients.

What factors contribute to these additional requirements? The studies show that many aged patients require assistance in eating; are either incontinent or require help for use of bed pans or bedside commodes; suffer more often such types of impairments as fractures or paralysis that demand a great deal of so-called routine care; are confused, disoriented or depressed and as a result are unable to help themselves; have hearing or sight problems; suffer from more secondary medical conditions that have to be treated along with the reason for the current hospitalization; and receive more medication. All of this care requires additional nursing time, and the cost of this additional care is not reflected in the cost reimbursement process unless special allowance is made for it.

In 1969, the Social Security Administration, in adopting the nursing cost differential, provided by regulation that "further studies will be conducted periodically to determine [the] amount of the inpatient routine nursing salary cost differential and how such a differential should be applied in the future." Nevertheless, in 1975 the Administration promulgated a regulation eliminating this justified differential.

This regulatory action was taken precipitously as a cost-cutting measure, and with no justification based on new studies or any other evidence of a change in the cost of providing nursing care to the aged. Because the Association considered this unlawful, it sued for relief in the courts. Supporting the AHA's position, the U.S. District Court issued an injunction prohibiting implementation of this unlawful regulation.

There has been no appeal by the Administration of this decision and in hearings last month an Administration witness indicated that there would be no appeal. This final regulation was published despite extensive comments which pointed out the illegal and inappropriate aspects of the regulation and Congressional sponsorship of legislation to prohibit this regulation from taking effect which had been cosponsored by almost one-half of the Members of the House of Representatives.

LIMITATION ON COVERAGE OF COSTS UNDER MEDICARE

The legislation authorizing the setting of limits on reimbursable costs provides the Secretary of Health, Education, and Welfare with the power to establish limits on inpatient costs within groups of similar hospitals. The groupings of

hospitals were to allow for differences that could result from hospital size, the nature and scope of services provided, the types of patients treated, the location of the institutions, and other factors affecting the efficient delivery of needed health services. It was expected that the limits would apply to a relatively small number of institutions with extraordinary expenses. This provision of the law did not, however, eliminate the requirements that Medicare pay reasonable cost or that the cost of care for Medicare patients be borne by that program rather than by other patients. The American Hospital Association recognizes that the establishment of this grouping system is a difficult task since the variations between institutions are considerable and the comparative cost of services must be considered carefully before any conclusion of inefficiency or unjustified costs are reached.

In implementing this section, the Social Security Administration has utilized a most simplistic approach in the classification of institutions and thus in the determination of what limits of reimbursable cost are reasonable. Many major factors affecting costs are not reflected in the classification system. The system utilizes three basic elements—bed capacity, per capita income, and metropolitan or non-metropolitan designation. These elements in no way define with precision classes of hospitals that permit appropriate economic comparison and are not satisfactory for establishing limits on reimbursement. As proposed initially, the limits were used to identify only very unusual cases, and an appeal and exceptions process was to be applied to the many important factors that could only be taken into account as exceptions.

The initial system for grouping hospitals needed a full trial before its adequacy could be appraised and its defects corrected. Yet, before any of this could be done, the system was revised and the limitations made so much more severe as to place some 753 hospitals, according to the Social Security Administration's own estimates, outside the limitations, thereby arbitrarily penalizing the institutions. These hospitals may appeal to the Social Security Administration for an exception. However, our experience with the exceptions process shows that decisions are interminably slow and that reasonable appeals are rarely decided in favor of hospitals. Furthermore, the penalty of inadequate reimbursement falls upon such institutions immediately, and relief, if it is granted, can only come many months after the hospitals have experienced serious financial problems and have been forced to go to a high-cost money market for operating funds. The net effect is to generate new and unnecessary costs that will ultimately have to be paid by purchasers of health services.

The recent action of the Administration not only altered the classification system but also altered the reimbursement ceilings. The initial formula established by the Social Security Administration set the ceilings on inpatient routine care at the 90th percentile of the cost of routine care among hospitals within a defined grouping, plus 10 percent of the median hospitals' costs. The grouping process is essentially arbitrary, and its relationship to the cost of efficient performance is very imprecise. Nevertheless, the Administration has now compounded this arbitrariness by reducing the basic limitations to the 80th percentile plus 10 percent of the median cost, subjecting a very much larger number of hospitals to the limits, increasing the size of the potential penalty, and overloading the cumbersome and inadequate appeals process.

Reduction of the ceilings has been rationalized on the basis that the revised classification system provides for more accurate and equitable comparisons, resulting in identification of inefficient providers. Our analysis, however, indicates that this conclusion is just not so. First, a rational classification system requires a relatively homogeneous population within each subgroup. Categories of providers being compared should be similar with respect to their basic characteristics. Our statistical study of the data from 1974 and 1975 shows that the revised 1975 schedule has less homogeneity than the 1974 schedule. In addition, aberrant, inconsistent and inexplicable variations occur when the revised system is applied.

We have examined the data showing the effect of the application of this new system to hospitals, and the results are totally unrealistic. It is illogical to accept, as this system would have us assume, that levels of efficiency differ so much that more than half of all hospitals in the state of Washington and more than one-third of the hospitals in California and Maryland would exceed the proposed limits, while only 1.8 percent of the hospitals in North Dakota would be affected, and less than 3.5 percent of the hospitals in Illinois, Nebraska, and Arkansas would be subject to denial of a portion of their reimbursement. It is

illogical also that more than 40 percent of the teaching hospitals of this country should be affected and arbitrarily penalized by these ceilings. We do not think these results are rational or indicative of an improved methodology, yet the Department is proceeding without apparent concern for these problems.

The result is simply to place more hospitals outside the limitations—*not* to ensure that the system will more accurately identify hospitals in which costs are unreasonable. It is also clear that this action is not motivated by promised improvements in the classification system, but was undertaken simply to produce budget savings. These savings will not derive from cutting unnecessary costs but will result in further subsidization of the Medicare program by other users of health care facilities and other third-party payment programs.

Congress recognized from the first that its provision for cost limits had imposed on the Social Security Administration a task requiring considerable sophistication and caution. However, the American Hospital Association is convinced that Department officials have chosen to utilize this carefully enunciated program of cost limitation as a vehicle for budgetary manipulation without regard to its deleterious impact upon the ability of many hospitals to render needed care to Medicare and other beneficiaries. We believe that its regulatory action is not consistent with Congressional intent or with the basic limits of the statute.

OTHER REGULATIONS

During the past year, the promulgation of regulations relating to utilization review also was carried out for budget reduction purposes. The basic legislation underlying this provision was enacted in 1965. Recently the Executive Branch seems to have concluded that the requirements it could apply based on this authority could be drastically changed and might then reduce government expenditures. In carrying out this intention insufficient time was provided for adequate development of regulations, conflicting directives were disseminated, and the first 6 months of this year was a period of complete confusion regarding these proposed governmental requirements. Legal action finally resulted in HEW withdrawing key portions of these regulations.

Congress under other legislative authority has clearly expressed itself repeatedly on other precipitous cost-cutting actions of the Executive Branch. Executive department impoundment of appropriated funds was the subject of extensive court actions and was found to be illegal. Congress also acted to limit executive department authority regarding deferrals and rescissions on appropriations, and further discussion of this important Congressional action is unnecessary. Undoubtedly, you are aware of other instances of legislation enacted solely to overrule the Executive Branch.

PROCESSES TO PREVENT IMPROPER REGULATION

It has long been recognized that there is a possibility that the Executive Branch will exceed its authority, fail to give an adequate hearing to various viewpoints, or act without adequate consideration of the issues. As a result, some federal regulations were made subject to the Administrative Procedure Act, enacted some 29 years ago. As you know, that Act is intended to provide public prior notice, opportunity for comment, and time to prepare for operation under new regulations.

However, not all regulations are required to follow the Administrative Procedure Act (APA). Our particular concern is that rules relating to loans, grants, benefits, or contracts are not covered by the Act and are issues of great importance to the health field. The Administrative Conference of the United States has recommended the deletion of this exemption, and we concur with that recommendation. We would suggest further that all significant policy issues be required to follow the processes mandated by the APA. The Professional Standards Review Organization program, enacted in 1972 and moving toward full implementation, is being operated under policies that for the most part were not spelled out in regulations and therefore did not follow APA procedures. This should not be permitted to continue.

Although the APA provides for a notice of proposed rulemaking before final publication, the health field often finds regulations so significant and so complex that the 30-day comment period generally allowed is totally insufficient to permit adequate analysis and comment. The 30-day comment period actually provides interested individuals less than 20 calendar days for substantive analysis and

development of comments on regulations, many of which have taken federal agencies months to develop. The 30-day comment period includes the time for *Federal Register* information to reach all areas of the country and for mail return of comments to governmental agencies. The AHA has attempted to assist in facilitating this process by more rapidly disseminating proposed rules to its members and by coordinating responses to rules through development of comments encompassing membership views. These Association and individual efforts to comment on regulations are thwarted because of the unreasonable time constraint. Yet a 30-day comment period is almost always proscribed, and requests for extension of time usually go unheard.

It is essential that proposed regulations involving complicated and important issues be accompanied by comment periods of no less than 60 days and an additional comment period of 30 days should be granted when justified. However, adequate opportunity for discussion of an issue prior to publication of the regulation and adequate time for analysis and comment are not sufficient to prevent the final promulgation of improper regulations that exceed the intent of Congress and the authority of basic legislation. Furthermore, the Legislative Branch of government has responsibility for oversight of Executive Branch actions relating to regulation and a number of Congressional committees have established oversight subcommittees that are helpful in serving this purpose. The subcommittee process is relatively slow and is limited to but occasional hearings of a small selected portion of Executive Branch rulemaking. In challenging the statutory basis for regulation, the judicial process has been increasingly utilized. However, like the existing legislative oversight process, legal action is slow. It also is costly.

Actions more directly related to controlling the regulatory process are in effect in five states and in several foreign countries, including Great Britain, Canada, Australia, and New Zealand. It appears that these jurisdictions have found it practical for legislative bodies to conduct ongoing review of proposed regulations.

This Congress, too, reviews proposed regulatory action in some areas under special legislation. The Library of Congress identified 126 laws providing for legislative review of administrative decisions. Among these laws are the Budget Impoundment and Control Act of 1974, which provides for reviews and opportunity to prevent deferrals and rescissions in the case of appropriations; and Title IX of the Education Amendments of 1974, which allows a period during which the Congress may consider and act on resolutions disapproving certain regulations. Further, there is an opportunity for Congressional oversight of proposed Executive reorganizations under what is considered the first establishment of legislative veto in 1933 and has subsequently been renewed on a number of occasions. We believe that ongoing legislative review of the regulatory process to ensure the consistency of regulations with law and Congressional intent is feasible and is needed.

SIZE OF THE PROBLEM

Our experience with regulations affecting the hospitals of the United States indicates to us not only that the regulatory process deserves further legislative control but that such control is entirely practical. During the year ending September 30, the American Hospital Association identified some 105 proposed regulations as having specific relevance to hospitals. Of these regulations, only a small percentage merit legislative review because they appeared to be contrary to law or inconsistent with Congressional intent or go beyond the mandate of the legislation they are designed to implement.

The vast majority of the regulations will not require detailed review by any Congressional committee. Legislation before you provides a mechanism by which a limited number of regulations requiring Congressional attention can be identified. Then, either house of Congress can deal directly with these regulations or can refer them to relevant committees for review and action. With only a limited number of key issues requiring specific action by Congress and relevant committees, the additional workload would be small and, thus, be a task that Congress could accomplish without undue effect on its legislative program.

LEGISLATIVE PROPOSALS

The American Hospital Association has reviewed two bills that are before this Subcommittee and that would accomplish much of what the Association rec-

ommends. The bills are H.R. 3658, introduced by Representative Levitas, and H.R. 8231, introduced by Representative Clawson. The bills have attracted a large number of cosponsors, and a number of identical bills have been introduced. As I indicated earlier, this Association wishes to commend these sponsors and cosponsors for their interest and action on this important matter.

In reviewing these bills, the AHA made its evaluation against certain principal objectives that it believes are important in the entire process of rulemaking and should be contained in legislation addressed to this issue: (1) The exemption from Administrative Procedure Act (APA) rules related to loans, grants, benefits, and contracts should be eliminated; (2) More adequate time for analysis of and comment on proposed rules should be provided for complex regulations and, where justified, an extension of this comment period should be allowed; (3) Authority should be established for Congressional review and veto of Executive Branch rules and regulations that are contrary to law, or inconsistent with Congressional intent, or go beyond the mandate of the legislation they are designed to implement; (4) A heavy workload should not be imposed upon the Congress in reviewing regulations; (5) new provisions should be incorporated in the APA to avoid conflicts in future activities and to minimize misunderstandings; (6) All important policy matters not now included in regulations but included in guidelines, intermediary letters, manuals and similar releases should be required to follow APA procedures; and (7) All regulations proposed by the Executive Branch should be accompanied by a statement detailing the financial impact of the regulation so that the cost benefit effect of the regulatory action can be estimated.

H.R. 3658

Representative Levitas' bill, H.R. 3658, amends the Administrative Procedure Act and in this way assures coordination between present rulemaking processes and proposed legislative review and veto authority. The bill provides that a resolution opposing a regulation would be referred to a committee for consideration only upon approval of a motion to that effect. This provision would help to prevent an excessive number of committee referrals.

However, the requirement of a floor vote for referral to a committee may be an unnecessary burden. A provision that referral of a regulation to the relevant committee be made on the motion of one or more members of that committee without the requirement of a majority approval may suffice to keep referrals to a reasonable number. Such an approach also would avoid involving Congressional members in a primarily procedural action rather than in substantive issues.

H.R. 3658 is not specific as to the purpose for which Congressional review of regulations should be carried out and under what circumstances Congressional action should be taken. We recommend that the purpose of this legislation should be to take action on regulations "which are contrary to law or inconsistent with Congressional intent or which go beyond the mandate of the legislation they are designed to implement." This bill does not remove the existing exemption in the APA for regulations relating to loans, grants, benefits and contracts. We recommend that this exemption be eliminated. Furthermore, the bill would apply only to rules that impose criminal sanctions for violations. This limitation is much too restrictive, and we recommend that it be dropped.

The bill allows rules or regulations to be implemented in some instances without following generally applicable procedures. Where the urgency of application may justify such action, we recommend that provision be made for review and veto after the effective date of such regulations so that improper actions taken in emergencies are not permanently exempt from proposed reviews.

We noted what appears to be a technical error in the language of the bill, which provides for a time period for action to discharge a resolution from a committee based upon the date of introduction of the resolution rather than on the date the resolution was referred to the committee.

H.R. 3658 does not provide a remedy for the excessively brief comment period being provided in the case of many complex regulations.

H.R. 8231

Representative Del Clawson's bill, H.R. 8231, does not amend the APA but does include within its purview review of regulations relating to loans, grants, benefits, and contracts. Further, its purpose is stated as being to establish a method

whereby the Congress may prevent the adoption by the Executive Branch of rules or regulations that are contrary to law or inconsistent with Congressional intent or go beyond the mandate of legislation that they are designed to implement. We concur strongly with this purpose.

We are advised that H.R. 8231 is intended to deal with rules or regulations that are published as final proposals. While total consideration of the bill justifiably supports this intent, the language of the bill has been misconstrued by a number of individuals who believe it applies to proposed regulations. We believe this confusion could be avoided through a simple change in the legislative language.

This bill proposes to routinely withhold the implementation of regulations for 60 days unless approved by concurrent resolutions of both Houses of Congress. It further provides that regulations would be routinely referred to committees. We believe that implementation of rules and regulations should be withheld for only 30 Congressional calendar days unless the regulations are referred to Congressional committees for study. Furthermore, regulations should not be routinely referred to relevant committees but should be referred only on the motion of one or more members of such committees.

Mr. Chairman, the American Hospital Association would like to make the following specific legislative recommendations for inclusion in a bill to deal with this complex and important issue.

1. Reforms in the rulemaking process should be incorporated in the Administrative Procedure Act.

2. The exemption in the Administrative Procedure Act for rules relating to loans, grants, benefits or contracts should be deleted.

3. The provisions of the Act should apply to rules, regulations and any other significant issuances, such as guidelines or intermediary letters, which establish new policy or modification in policy.

4. A 60-day period for public review and comment on complex proposed regulations should be the minimum provided, with extensions permitted when necessary.

5. The agency proposing rules or regulations should be required to provide information concerning the financial impact of such rules or regulations.

6. The purpose of the legislation should be to prevent the adoption of rules or regulations that are contrary to law or inconsistent with Congressional intent or go beyond the mandate of the legislation they are designed to implement.

7. A final rule or regulation should be permitted to take effect after 30 calendar days of continuous session of the Congress after the final rule was published unless (a) one house passes a resolution stating that it does not favor the rule or (b) a resolution is referred to a committee, in which case the committee would have 30 days to complete its action.

8. To avoid excessively burdening Congressional committees, no rules or regulations should be referred to committees except on the motion of one or more members of the relevant committees.

9. In the event that provision is made for some regulations, by reason of "good cause," to take effect without the usual Congressional review, either House of Congress should have the authority to review and veto the rules after their effective date.

In summary, recent history demonstrates both the need for legislative reform of the regulatory process and, we believe, the practicality of such reform to remedy existing defects in the Administrative Procedure Act. Legislative action in concert with the proposed bills will provide the method by which Congress, in its continuing review, may prevent the adoption by the Executive Branch of rules and regulations that are contrary to law or inconsistent with Congressional intent or go beyond the mandate of the legislation they are designed to implement. Such legislation also will provide a more adequate means by which the public may participate more effectively in the federal rulemaking process.

Mr. Chairman, we thank you and your Committee for this opportunity to be heard on an issue that is of intense interest and concern to the health and hospital field.

Mr. FLOWERS. Our next witness is Dr. Raymond T. Holden, chairman of the board of trustees, and Dr. Edgar T. Beddingfield, Jr., member of the house of delegates, American Medical Association.

We certainly welcome you, and you may proceed as you see fit.

TESTIMONY OF DR. RAYMOND T. HOLDEN, CHAIRMAN, BOARD OF TRUSTEES, AMERICAN MEDICAL ASSOCIATION; DR. EDGAR T. BEDDINGFIELD, MEMBER OF THE HOUSE OF DELEGATES, AMA; AND HARRY N. PETERSON, LEGISLATIVE COUNSEL, AMA

Dr. HOLDEN. I am Raymond Holden of Washington, D.C. On my right is Edgar Beddingfield and Mr. Harry Peterson of our legislative department.

In the interest of time, I ask your indulgence to eliminate the amenities and say we are pleased to be here and we view today's subcommittee activity as a welcome move toward rectifying many abuses which have arisen in the rulemaking process of administrative agencies.

More particularly, it appears to us that these abuses though potentially inherent in many agencies have become more obvious to us in the health agencies during the past 10 years.

It was during that period that Congress enacted a variety of major health programs, aimed at problems which it identified. These programs, because of the complexity of the solutions inherent, were often mere skeletons. In its haste to provide operational programs, Congress has often allowed executive agencies and bureaus to add the flesh.

Allowing the agencies and bureaus to fill out and to complete the congressionally established programs has often resulted in a body which in many of its parts is unrecognizable in the original law.

To carry the allusion a bit further, we find instances in which an arm or a leg has been severed from the body through intentional nonconformance with either congressional intent or statutory language, in which the body becomes swollen and corpulent from an insatiable appetite for more regulation, in which the body contracts a fever or illness and runs amock by attempting to regulate any activity which touches upon, influences, or is affected by the congressional program.

We observe instances in which the agency appears to possess two different characters. In one role it will scrupulously follow the Administrative Procedures Act when it has little or no apparent desire to regulate an activity. In its other role, it will use the APA in a perfunctory method.

It may propose regulations and subsequently directly change the thrust of the regulations on final promulgation. It may change the program indirectly by filling in its own purposes by establishing rules by means of general notice, by means of statements of agency policy, or by contractual relationships with other parties, all of which are undertaken outside of the present APA ruling and rulemaking procedures.

Mr. Chairman, we believe that it is long overdue to put a stop to regulatory abuse.

In fact this association has publicly expressed its concern over the abuses and the need for their elimination.

Repeatedly over the past years the AMA house of delegates has stated its concern over the unfairness of procedures often followed by regulatory agencies in rulemaking and the abuses which have resulted. As recently as its annual convention in June, our house of delegates called for legislation to correct regulatory abuses.

On June 12 and on September 19 the AMA in testimony presented to the House Ways and Means Subcommittee on Health pointed out

the need for control of the flagrant regulatory abuses by administrative agencies. We stated then that we recognized the need for promulgation of administrative regulations, given the nature of enacting statutes, in filling the void too often left by the statutes.

We also poined out that the APA itself, enacted in 1946 placed only minimal requirements on rulemaking, that agencies commonly interpret the APA itself to their own advantage, and that the APA can be used to establish an aura of legality to a regulation while denying due process to the regulated parties.

As you know, our major concern with the regulatory process is in the areas of those agencies which promulgate rules pertaining to Federal health programs. We believe that instances of regulatory abuses in these programs can serve as examples of reasons for our concern. Therefore I would like to cite for you at this time a few of those examples.

Our first example is the regulation on utilization review promulgated by Social Security. As you know this was the subject of a successful AMA lawsuit.

These regulations were based on sections 207 and 237 of Public Law 92–603, passed in October 1972. Regulations were first proposed by HEW in January of 1974. Those proposals were extremely objectionable in that they would have required physician certification of all (other than emergency) hospital admissions prior to admission. The AMA objected strongly to this proposed requirement and urged deletion of it.

Furthermore, AMA requested that any modification in the rules be republished as proposed rules.

Although the elimination of preadmission certification was announced by HEW, no other publication of proposed rules was made.

In November 1974 final rules were published. These rules were substantially changed from the proposed rules but were equally objectionable. Aside from the objectionable violation of the procedural method of the promulgation, substantive provisions of the basic law were improperly invoked.

HEW imperiously used section 207 (a medicaid provision requiring certain compliance by a State medical assistance plan in order for the State to receive its Federal participating share) to establish an ill-founded utilization review mechanism.

HEW then used section 237 (a medicare provision) which allows a State utilization review plan judged by HEW to be superior to that of medicare to be utilized in medicare as well. Invoking section 237, HEW simultaneously with the creation of the medicaid plan determined it was superior to that of medicare and then directed that medicare adopt the plan.

The result was that HEW tried to accomplish indirectly what it could not do directly.

The AMA brought suit and was successful in obtaining a preliminary injunction which was upheld on appeal.

Another example of abuse by regulatory agencies can be shown in regulations based on section 224 of Public Law 92–603. The proposed regulations were first published 2½ years after enactment of Public Law 92–603.

The statute establishes an economic index which arbitrarily limits the prevailing charge level of physicians' fees recognized by medi-

care. As published in proposed form HEW made it clear that it intended to utilize a national index that it intends to base the index on identifiable, nonmedical economic criteria, that it would apply the index on a procedure by procedure basis, and that it would not include the economic index in its regulations.

The proposed regulations were sketchy at best. They were inconsistent with the statute and with language of congressional reports, which spoke in terms of regional indices, medical economic criteria, aggregate amounts and sophisticated indices (with an example given as to how an index might be constructed).

The April 14, 1975 publication of the proposed rules was viewed by us as establishing a program having great impact upon the medical profession participating in medicare and potentially affecting the availability of care for beneficiaries.

Therefore, we requested an extension of 30 days for the time to comment beyond the limited period of 30 days fixed by HEW. We could not ascertain the status of our request until just prior to the close of the comment period. Our request for an extension was formally denied by HEW by letter, dated May 15, the day after the close of the comment period.

The reason given for the denial was that the regulations had to become effective July 1. Thus it is clear that our reasonable request for an extension of time to comment on these highly significant regulations was denied because of the dilatory tactics of the agency.

On June 16, the final regulation was published with very little change from the proposed format. However, published simultaneously in the form of a notice was the economic index along with the relative values assigned to the components of the index. The index became effective on July 1, 1975.

No opportunity was given the public for comment on any substantive portion of the index. Comments submitted on the proposed regulation were largely rejected by HEW. The significance of the HEW action quickly became evident to the profession, the public, and the Congress.

The House Ways and Means Committee on Health has held two hearings on this and other regulatory procedures of HEW. That subcommittee has now approved proposals to correct the hardships resulting under the economic index regulations. With greater deliberation and with greater understanding of the need for expert input into regulations, the Federal agency could have avoided these consequences.

Another recent example of agency abuse is shown by the Food and Drug Administration proposal to publish its own administrative practices and procedures.

The procedures were published on May 27 and consisted of 96 pages of three column print. However, since they were viewed by FDA as merely establishing, "procedures governing the ongoing activities of the agency," it therefore concluded that there are compelling public interest reasons why these regulations should be made effective as final rules on the date of initial publication.

FDA did magnanimously allow public comment until the operationally effective date of July 28, stating that the final rules could always be changed afterwards if the FDA felt its comments warranted.

On June 20, FDA published a notice that time for submitting comments had been extended until August 27. However, it restated that the rules were still final and the effective date remained set at July 28. In July we submitted a request for extension of the effective date until at least August 27 and also pointed out that in our opinion the rules constituted substantial new material which should first be published as proposed rules.

On July 25, FDA published a notice that it denied any extension of the effective date of the regulations (except as to two sections of the regulations FDA recognized as significant changes to its administrative procedures and practices).

As a result of another lawsuit, on July 28, FDA published a notice that a preliminary injunction against the regulations had been granted by the U.S. district court in the District of Columbia. The injunction had been issued on the grounds that the rules had been published "without notice of rulemaking."

On August 4, FDA published notice that its rules were stayed until further notice, pursuant to a permanent injunction ordered by the district court. A copy of the order was published in the Federal Register of August 6.

On September 3, the FDA published virtually the identical rules of May 27, but this time as proposed rules. FDA allowed only 30 days for comment on this controversial issue. Ironically the proposed regulations, which in their content set forth an FDA policy to allow 60 days for comments, themselves permitted only 30 days.

In addition, FDA announced a policy which it proposed to follow in the future as to comments received from the public. In its commentary accompanying the proposed regulations, FDA stated:

> On several occasions the Commissioner has been flooded with thousands of form letters, each making the identical point, and often in identical words. The Commissioner advises that such repetitive comments would be given no more weight than a single comment, relying upon sound data and information would be given far greater weight than a large number of form letters which simply support or oppose a proposal in conclusory terms.

At the time of our comments on these proposals we pointed out that such a policy would in effect impugn the character of many people who might have strong opinions but who, because of time limitations or inability to communicate in FDA desired formats, may not develop comments significantly different from others to the satisfaction of FDA.

By what right should a public agency in this manner state that many similar comments may have no more weight than a single, differing comment?

On the other hand, to the credit of FDA rulemaking process we can cite their action on the IUD regulations proposed on July 1. Final comments were to be received by September 2. On October 15, FDA published a notice in the Federal Register that since many interested parties did not obtain knowledge of the proposals until the latter part of August—and this through a separate FDA publication—the comment date would be extended until November 14.

It is interesting, however, that the FDA has used the same vehicle for publishing this extension as was found to be deficient in carrying the first message.

Although many more examples during the last year can be cited, I will mention only one final case.

On January 4, 1975, the National Health Planning and Resources Development Act was signed into law. In brief the act is intended to mandate a national system of health planning which will have a controlling impact upon all facets of health—health facilities, health manpower, and health resources.

One provision of the act allows demonstration projects for rate-setting in six States and requires notification by a Governor submitted to the Secretary. On July 3, the Secretary published a notice that such requests must be submitted by July 4.

Although there was included in the notice a copy of a letter which was referred to as having been sent to all Governors on June 9, the July 3 notice was the first notice to the general public.

On September 17, the Secretary published as final rules the regulations for a State seeking a grant for rate regulation. No proposed rules had been published.

On October 17, the Secretary published proposed rules for the health systems agency, the basic operational unit in the national health planning concept and one of great significance.

Those units will be the ones responsible for planning and for approving and denying health facilities and services, for carrying out its plan in the area. Their impact will be extremely great on health care. However, only 30 days are allowed for comment on these highly important regulations.

Mr. Chairman, we could continue referring you to other examples of regulatory abuse in the areas which are of primary importance to our association. As indicated, instances occur in which regulatory agencies have issued regulations in contradiction of clear statutory language, in which the agency has broadened the legislative language to bootstrap itself into a position of broader power, and of attempts to ignore the mandates of the statute.

We see the need to control the regulation, and we see that the time is now propitious. As evident by these hearings and the number of pending bills, Congress has realized the need and is now, we hope, moving toward a solution of regulatory abuse.

We are indeed heartened also by recent statements of the President recognizing the unfavorable results from overregulation.

However, we are concerned that the attempt to monitor regulatory agencies not be overzealous itself and create a mechanism which may strangle the good intentions of remedial legislation.

At this point, in order to expand upon this thought, I would like to call upon Doctor Beddingfield to continue our presentation.

Dr. Beddingfield. In the interest of time I would like to summarize the thrust of our position. We have the concern about what we believe to be the frequent abuses of the present method of carrying out the regulatory rulemaking process.

We share the concern of the committee. We have studied the two pending bills, S231 and 3658 and our position is somewhat I think midway between the administration witness that you heard this morning and some of the advocates of the two proposed bills.

Certainly corrective measures are needed. We share the concerns that have been expressed by other witnesses, concerns of a very practical nature of implementing the present proposed bills.

We also share some of the constitutional concerns. Because of the concerns which are detailed in our written testimony here, it is our belief that the method advocated in these bills should not be adopted. Should only certain bills be refered to Congress, Congress would not have oversight to other rules which could be injurious to the problem.

There is another way and perhaps a better way of meeting this problem.

First, we do have concern over the mixing of powers to be exercised by the legislative branch and the executive branch. We discern potential problems inherent in allowing the legislative branch to pass upon the desirability of rules promulgated by the executive branch to implement the law.

Recognition of a determination by either House of Congress alone, although no more than a determination that the rules should not be promulgated, without the necessity of following the procedure otherwise required for passage of an act, should be closely examined.

Second, as provided under certain proposals, one body of the Congress could interpret the intent of Congress. Regulations might be referred to committees of Congress initially for study.

Third, we must point out the potential burden created in order to monitor rules and regulations. We have earlier alluded to the volume of paper which could be generated in review. Some 60,000 pages in the Federal Register are anticipated in 1975.

Fourth, would passage of either of the other major bills solve the problems of the APA? Would the provisions for substantive change through notice or perfunctory publication be solved? How will adequate time for allowing public comments or clearer procedures for promulgating rules be assured?

Mr. Chairman, we believe that H.R. 10301 will correct regulatory procedures and achieve a goal which we are seeking. I would now like to analyze H.R. 10301 briefly and to amplify its provisions.

H.R. 10301 would amend that portion of the APA which exempts rulemaking requirements from those matters pertaining to public property, loans, grants, benefits, or contracts. The bill would delete those exemptions and thus include them within the rulemaking process.

We are aware, of course, that certain instances in which an agency carries out a program call for an allowance of technical or other necessary changes pertaining to public property, loans, grants, benefits, or contracts. Every change should not, obviously, be forced thorugh rulemaking for each technical variance.

As to the section in H.R. 10301 referring to the process for proposed rules, four major changes are suggested. First, H.R. 10301 would insert a clause which would establish that a final rule could not be published until it first met the requirements of a proposed rule.

This inclusion is to clarify the presently ambiguous language of the APA which allows presently the publication of a rule as proposed and which, without additional publication after a comment period, can be made effective at the end of 30 days.

In essence, we conceive the need for a distinct time period for a proposed rule, allowing adequate period for comment, and then a separate distinct publication as a final rule carying a minimal time period before it becomes effective.

The second change would be to delete the exemption from rulemaking procedures for interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.

We have earlier referred to the abuss which we have observed under this present exemption. Deletion of this would require such agency actions, which have a direct bearing upon substantive rights of the public, to comply with the same rulemaking process as would any other substantive rule.

The third change would be to require a full statement by the agency for not submitting certain of its regulatory activities to full rulemaking procedures. Presently, there is only required a brief statement for not complying. Too often a brief statement becomes a perfunctory statement.

The fourth modification would provide a limitation as to the reason which the agency can use to ascertain that certain activities will not be subjected to rulemaking. Presently an agency may avoid the procedure of first proposing a rule if it finds that to do so is impracticable, unnecessary, or contrary to public interest.

The word unnecessary would be deleted inasmuch as necessity is too often easily justified by the agency subjectively on the basis of its own past activities. We believe that the other two conditions, impracticable or contrary to public interest, when linked with the full disclosure by an agency, are adequately objective and have ascertainable standards sufficient to allow an agency this type of exemption.

The provision in reference to the opportunity for public comment has been completely rewritten to reflect concerns over past agency activities in failing to allow sufficient time for public comment on complex regulations. Presently the APA requires only that the public be given opportunity to submit comments.

Later the agency is required only to adopt a concise general statement of the basis and purpose of the rules.

More realistically H.R. 10301 would require a minimum of 60 days for comment on proposed rules. In addition any interested party may request and obtain a public hearing by the agency on the merits of the proposed rules. Furthermore any time for submissions of comments on proposed rules would be extended by 30 days at the request of any interested party unless within 10 days of the request the agency:

1. Finds that such an extension is contrary to public interest;
2. Makes such a finding in writing: and
3. Transmits the refusal to the party and to both Houses of Congress.

In addition, H.R. 10301 would propose that the agency response to comments received include the rationale in accepting, rejecting, or accepting in modified form the comments received from the interested parties. This requirement is to assure that the agency not indulge further in its practice, often utilized, of rejecting out of hand comments which it does not agree by merely making a statement that the comments are not relevant, are ill founded, or are of little effect.

A new subsection (d) would be inserted in section 553 of the act. Presently agencies have often followed the practice of publishing proposed rules, allowing comments for the minimum 30 days now

recognized, and then publishing final rules which may be substantially different from the proposals.

The agency in effect avoids the procedure for public comment on crucial issues newly incorporated in the final version. It is our belief that if the agency were required to make its actions open to public view during the entire rulemaking process allowing comment on all proposed rules, that this would more nearly assure fairness and would protect the rights of the public, which after all would and should be the sector which is of interest to governmental activities.

The proposal would thus require that any final rule substantially changed from its proposed form would have to go through the process as a proposed rule. This would be fair to the public and to the regulated parties.

The section of the present act which refers to publication of a final rule requires only that it be published at least 30 days prior to its effective date, with certain exceptions including interpretive rules and statements of policy. The present section can be read to mean that publication under this section can be satisfied if it is first done under the proposed rule section.

Final publication could then occur 30 days later and be effective at publication.

The change which H.R. 10301 makes is to delete the exemption of interpretive rules and statements of policy for reasons as I explained earlier. We see no reason to exempt these rules which affect many people in a program. In addition, H.R. 10301 would make it clear that the 30-day publication prior to making a rule effective can only occur after the publication and procedures required under the proposed rule sections.

As a final amendment to the act, H.R. 10301 would add additional requirements to that section which provides to an individual the right to seek a change in rules by way of a petition.

It presently provides that such agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. The added amendment would provide that whenever a petition was denied, that denial must be forwarded to the individual and both Houses of Congress, giving the reasons for the denial with citations to the appropriate legal authority upon which the agency relies.

Mr. Chairman, this is a brief explanation of what the amendments would seek to accomplish.

I would like to reiterate our belief that many of the problems presently encountered under administrative actions are due to the act itself and our belief that if the act can be appropriately amended the rights of parties subject to regulation will be better safeguarded. We believe that it would be better to proceed in this fashion rather than to adopt a procedure for congressional review of all regulations. We urge your favorable consideration of H.R. 10301.

We would be pleased to answer any questions which the subcommittee may have.

Thank you very much.

Mr. FLOWERS. Thank you both for being with us. Noting who the sponsor of H.R. 10301 is, I am going to call on Mr. Kindness for the initial questions here.

Mr. KINDNESS. Thank you, Mr. Chairman. I greatly appreciate your testimony here this morning, gentlemen.

I don't really have any questions, except that I am a little bit concerned that the matter of language in 553(a)(2) of the Administrative Procedures Act which reads "a matter relating to any agency management or personnel." The personnel part does not bother me so much, but "agency management" is a fairly broad term.

I am wondering whether there is any consideration that you may have been given to that terminology, as possibly needing revision in line with your comments about H.R. 10301?

Dr. BEDDINGFIELD. Well, one of our principal concerns is with the contracts. I would like to defer to Mr. Peterson.

Mr. PETERSON. Thank you.

Mr. KINDNESS. I am thinking for example that ERDA deals or will be dealing with its functions largely in terms of contracts.

When the overall program activities of ERDA is considered "agency management" in a broad sense, it may also have a whole lot to do with contracts and grants. Would you care to comment on that?

Mr. PETERSON. Mr. Kindness, I can't relate directly to the other legislation. I think our consideration here related to our experiences in the health field and with the health agencies.

If there are additional problems with respect to other agencies, other fields, I refer the attention of the committee to that. Our main concern here was in the area of contracts. It was referenced in our testimony this morning that the experience of transmittal letters from health agencies has been a cause of serious concern for the profession and with respect to modifications of benefits as they affect the public generally.

As we look at agency management and personnel and tying those two together, we thought this would perhaps refer to organizational types of activities within the agency rather than as they might affect the substantive areas outside the agency itself. We would like to look at that again.

As to whether this would be broader in scope, we would not want to suggest language here which would introduce new problems.

Mr. KINDNESS. I foresee, for example, the possibility that agency management might be construed to include the contract forms to be filled out, questionnaires or applications or what have you. Perhaps this is something that we ought to look at a little bit more closely while we are into this area.

I welcome any views you have on that matter at a later date.

Mr. PETERSON. I will be glad to comply.

Mr. FLOWERS. Gentlemen, we thank you for being with us. Your proposals and comments will be carefully considered by the subcommittee in its deliberations.

Dr. HOLDEN. Thank you, Mr. Chairman.

[The prepared statements of Dr. Holden and Dr. Beddingfield follow:]

STATEMENT OF RAYMOND T. HOLDEN, M.D., OF THE AMERICAN MEDICAL ASSOCIATION

Mr. Chairman and Members of the Subcommittee, I am Doctor Raymond T. Holden, of Washington, D.C., Chairman of the Board of Trustees of the American Medical Association. Participating with me in presenting the comments of the

American Medical Association on this important matter before you is Doctor Edgar T. Beddingfield, of Wilson, North Carolina, Vice Chairman of the AMA's Council on Legislation. Accompanying us today is Harry N. Peterson, Director of our Department of Legislation.

We view your Subcommittee's activities today as a welcome move toward rectifying the many abuses which have arisen in the rule making process of administrative agencies. More particularly, it appears to us that these abuses, although potentially inherent in many agencies, have become more obvious to us in the health agencies during the past 10 years.

It was during that period that Congress enacted a variety of major health programs, aimed at problems which it identified. These programs, because of the complexity of the solutions inherent, were often mere skeletons. In its haste to provide operational programs, Congress has often allowed executive agencies and bureaus to add the flesh.

Allowing the agencies and bureaus to fill out and to complete the Congressionally established programs has often resulted in a body which in many of its parts is unrecognizable in the original law.

To carry the allusion a bit further, we find instances in which an arm or a leg has been severed from the body through intentional non-conformance with either Congressional intent or statutory language, in which the body becomes swollen and corpulent from an insatiable appetite for more regulation, in which the body contracts a fever or illness and runs amock by attempting to regulate any activity which touches upon, influences, or is affected by the Congressional program. We observe instances in which the agency appears to possess two different characters. In one role it will scrupulously follow the Administrative Procedure Act (APA) when it has little or no apparent desire to regulate an activity. In its other role, when it desires to regulate an activity as broadly as possible, it will use the APA in a perfunctory method. It may propose regulations and subsequently directly change the thrust of the regulations on final promulgation. It may change the program indirectly by "filling in" its own purposes by establishing rules by means of statements of agency policy, or by contractual relationships with other parties, all of which are undertaken outside of the present APA rule making procedures.

Mr. Chairman, we believe that it is long overdue to put a stop to regulatory abuses.

In fact this Association has publicly expressed its concern over the abuses and the need for their elimination. Repeatedly over the past years the AMA House of Delegates has stated its concern over the unfairness of procedures often folowed by regulatory agencies in rule making and the abuses which have resulted. As recently as its Annual Convention in June, our House of Delegates called for legislation to correct regulatory abuses. On June 12 and on September 19 the AMA in testimony presented to the House Ways and Means Subcommittee on Health pointed out the need for control of the flagrant regulatory abuses by administrative agencies.

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These regulations were based on sections 207 and 237 of P.L. 92-603, passed in October, 1972. Regulations were first proposed by HEW in January of 1974. Those proposals were extremely objectionable in that they would have required physician certification of all (other than emergency) hospital admissions *prior* to admission. The AMA objected strongly to this proposed requirement and urged deletion of it. Furthermore, AMA requested that any modification in the rules be republished as proposed rules.

Although the elimination of pre-admission certification was announced by HEW, no other publication of proposed rules was made.

In November, 1974, *final* rules were published. These rules were *substantially changed* from the proposed rules but were equally objectionable. Aside from the objectionable violation of the procedural method of the promulgation, substantive provisions of the basic law were improperly invoked. HEW imperiously used section 207 (a Medicaid provision requiring certain compliance by a state medical assistance plan in order for the state to receive its Federal participating share) to establish an ill-founded utilization review mechanism. HEW then used section 237 (a Medicare provision) which allows a state utilization review plan judged by HEW to be "superior" to that of Medicare to be utilized in Medicare as well. Invoking section 237, HEW simultaneously with the creation of the Medicaid plan determined it was superior to that of Medicare and then directed that Medicare adopt the plan. The result was that HEW tried to accomplish indirectly what it could not do directly.

The AMA brought suit and was successful in obtaining a preliminary injunction which was upheld on appeal.

Another example of abuse by regulatory agencies can be shown in regulations based on section 224 of P.L. 92–603. The proposed regulations were first published *2½ years* after enactment of P.L. 92–603.

The statute establishes an "economic index" which arbitrarily limits the prevailing charge level of physicians' fees recognized by Medicare. As published in proposed form, HEW made it clear that it intended to utilize a national index, that it intended to base the index on identifiable, *non-medical* economic criteria, that it would apply the index on a procedure by procedure basis, and that it would not include the economic index in its regulations.

The proposed regulations were sketchy at best. They were inconsistent with the statute and with language of Congressional reports, which spoke in terms of regional indices, medical economic criteria, aggregate amounts and sophisticated indices (with an example given as to how an index *might* be constructed).

The April 14, 1975 publication of the proposed rules was viewed by us as establishing a program having great impact upon the medical profession participating in Medicare and potentially affecting the availability of care for beneficiaries. Therefore, we requested an extension of 30 days for the time to comment beyond the limited period of 30 days fixed by HEW. We could not ascertain the status of our request until just prior to the close of the comment period. Our request for an extension was formally denied by HEW by letter, dated May 15, the day after the close of the comment period. The reason given for the denial was that the regulations had to become effective July 1. Thus it is clear that our reasonable request for an extension of time to comment on these highly significant regulations was denied because of the dilatory tactics of the agency.

On June 16, the final regulation was published with very little change from the proposed format. However, published simultaneously in the form of a "Notice" was the economic index along with the relative values assigned to the components of the index. The index became effective on July 1, 1975.

No opportunity was given the public for comment on any substantive portion of the index. Comments submitted on the proposed regulation were largely rejected by HEW. The significance of the HEW action quickly became evident to the profession, the public and the Congress. The House Ways and Means Subcommittee on Health has held two hearings on this and other regulatory procedures of HEW. That Subcommittee has now approved proposals to correct the hardships resulting under the economic index regulations. With greater deliberation and with greater understanding of the need for expert input into regulations, the Federal agency could have avoided these consequences.

Another recent example of agency abuse is shown by the Food and Drug Administration proposal to publish its own administrative practices and procedures.

The procedures were published on May 27 and consisted of 96 pages of three-column print. However, since they were viewed by FDA as merely establishing "procedures governing the on-going activities of the agency," it therefore "concluded that there are compelling public interest reasons why these regulations should be made effective" as *final* rules on the date of initial publication. FDA did magnanimously allow public comment until the operationally effective date of July 28, stating that the final rules could always be changed afterwards if the FDA felt the comments warranted.

On June 20, FDA published a notice that the time for submitting comments had been extended until August 27. However, it restated that the rules were still final and the effective date remained set at July 28. In July, we submitted a request for extension of the effective date until at least August 27 and also pointed

out that in our opinion the rules constituted substantial new material which should first be published as proposed rules. On July 25, FDA published a notice that it denied any extension of the effective date of the regulations (except as to two sections of the regulations FDA recognized as significant changes to its administrative procedures and practices).

As a result of another lawsuit, on July 28 FDA published a notice that a preliminary injunction against the regulations had been granted by the United States District Court in the District of Columbia. The injunction had been issued on the grounds that the rules had been published "without notice of rule making".

On August 4, FDA published notice that its rules were stayed until further notice, pursuant to a permanent injunction ordered by the District Court. A copy of the order was published in the *Federal Register* of August 6.

On September 3, the FDA published virtually the identical rules of May 27, but this time as proposed rules. FDA allowed only 30 days for comment on this controversial issue. Ironically, the proposed regulations, which in their content set forth an FDA policy to allow 60 days for comments, themselves permitted only 30 days.

In addition, FDA announced a policy which it proposed to follow in the future as to comments received from the public. In its commentary accompanying the proposed regulations, FDA stated:

". . . on several occasions the Commissioner has been flooded with thousands of form letters, each making the identical point, and often in identical words. The Commissioner advises that such repetitive comments would be given no more weight than a single comment, and indeed that a single well-reasoned comment, relying upon sound data and information would be given far greater weight than a large number of form letters which simply support or oppose a proposal in conclusory terms."

At the time of our comments on these proposals we pointed out that such a policy would in effect impugn the character of many people who might have strong opinions but who, because of time limitations or of inability to communicate in FDA desired formats, may not develop comments significantly different from others to the satisfaction of FDA. By what right should a public agency in this manner state that many similar comments may have no more weight than a single, differing comment?

On the other hand, to the credit of FDA rule making process we can cite their action on the IUD regulations proposed on July 1. Final comments were to be received by September 2. On October 15, FDA published a notice in the *Federal Register* that since many interested parties did not obtain knowledge of the proposals until the latter part of August (and this through a separate FDA publication), the comment date would be extended until November 14. It is interesting, however, that the FDA has used the same vehicle for publishing the extension as was found to be deficient in carrying the first message.

Although many more examples during the last year can be cited, I will mention only one final case.

On January 4, 1975, the National Health Planning and Resources Development Act was signed into law. In brief, this Act is intended to mandate a national system of health planning which will have a controlling impact upon all facets of health—health facilities, health manpower, health resources.

One provision of the Act allows demonstration projects for rate setting in 6 states and requires notification by a Governor submitted to the Secretary. On July 3, the Secretary published a notice that such requests must be submitted by July 4. Although there was included in the notice a copy of a letter which was referred to as having been sent to all governors on June 9, the July 3 notice was the first notice to the general public.

On September 17, the Secretary published as final rules the regulations for a State seeking a grant for rate regulation. No proposed rules had been published.

On October 17, the Secretary published proposed rules for the health systems agency, the basic operational unit in the national health planning concept and one of great significance. Those units will be the ones responsible for planning, for approving and denying health facilities and services, and for carrying out its plan in the area. Their impact will be extremely great on health care. However, only 30 days are allowed for comment on these highly important regulations.

Mr. Chairman, we could continue referring you to other examples of regulatory abuse in the areas which are of primary importance to our Association. As indicated, instances occur in which regulatory agencies have issued regulations in contradiction of clear statutory language, in which the agency has broadened the

legislative language to bootstrap itself into a position of broader power, and of attempts to ignore the mandates of the statute.

We see the need to control the regulation, and we see that the time is now propitious. As evident by these hearings and the number of pending bills, Congress has realized the need and is now, we hope, moving toward a solution of regulatory abuse. We are indeed heartened also by recent statements of the President recognizing the unfavorable results from over-regulation.

However, we are concerned that the attempt to monitor regulatory agencies not be overzealous itself and create a mechanism which may strangle the good intentions of remedial legislation.

At this point, in order to expand upon this thought, I would like to call upon Doctor Beddingfield to continue our presentation.

STATEMENT OF EDGAR T. BEDDINGFIELD, M.D., OF THE AMERICAN MEDICAL ASSOCIATION

Mr. Chairman and Members of the Subcommittee, the American Medical Association, as Doctor Holden has previously pointed out, has been concerned with the Administrative Procedure Act and how administrative agencies have utilized that Act to advance their own ideas of what is best for the public.

We note that many of the bills presently pending at this hearing in some manner would refer some or all regulatory rules to Congress before they become final. Generally, either body of Congress would then have an opportunity to disapprove any rule or regulation as being contrary to statutory language or Congressional intent. A mechanism is provided whereby direct action can be taken specifically approving the regulation. Upon failure to take any action, the regulation would become operative after a certain period.

It is our belief that this method of rule making should not be adopted. Should only certain rules and regulations be referred to Congress, as proposed in some bills, Congress would then not have oversight of other rules and regulations which can be equally injurious to the public.

If all rules are referred to Congress, we believe that this would only establish another bureaucracy just to review the *Federal Register*. You have already heard, and we will reiterate concerns over the volume of the *Federal Register* at this time. The output of the publication covers nearly 60,000 pages annually. Almost every page consists of small print of three columns per page.

If every proposed rule is referred to Congress, each rule will have to be analyzed in order to ascertain whether it complies with the statute or the intent of Congress. Someone would then have to analyze the regulations on behalf of Congressional members in order that action can be expedited on a rule or regulation.

We would contend that this undertaking should not be undertaken as the appropriate function of Congress, and that if Congress should take on this tremendous task it would create a cumbersome regulatory process and divert its capacities from its principal legislative function.

As you consider those bills which would refer regulatory rules and regulations to the Congress we would urge you to consider several questions:

How would Congress deal with the great volume of regulations?

Would the public be allowed to continue to submit comments to the Agencies on the proposals,—to submit comments to Congress also?

If the public is to submit comments, who will review the comments?

Would Committees hold hearings to determine intent?

How would the Congress determine the "intent" of legislation upon which regulations are based, particularly when the legislation was passed many years in the past?

Should one body of the Congress express the other body's intent?

How do these bills otherwise affect the present Administrative Procedure Act?

These are only a few of the questions which quickly come to mind, aside from questions of a constitutional nature. Moreover, it should be kept in mind that Congress presently has the means of reviewing the regulatory process through its oversight authority.

However, there is presently pending another bill, H.R. 10301, which we urge as a more acceptable answer to the problem. That bill would provide for remedial changes in the Administrative Procedure Act without referring proposed regulations to the Congress. Before describing this bill we would like to state briefly some of our concerns with the legislation forwarding regulations to the Congress for review.

First, we do have concern over the mixing of powers to be exercised by the legislative branch and the executive branch. We discern potential problems inherent in allowing the legislative branch to pass upon the desirability of rules promulgated by the executive branch to implement the law. Recognition of a determination by *either* House of Congress alone, although no more than a determination that the rule should not be promulgated, without the necessity of following the procedure otherwise required for passage of an act, should be closely examined.

Second, as provided under certain proposals, one body of the Congress could interpret the intent of Congress. Regulations might be referred to Committees of Congress initially for study.

Third, we must point out the potential burden created in order to monitor rules and regulations. We have earlier alluded to the volume of paper which would be generated in review.

Fourth, would passage of either of the other major bills solve the problems of the APA? Would the provisions for substantive change through "notice" or perfunctory publication be solved? How will adequate time for allowing public comments or clearer procedures for promulgating rules be assured?

Mr. Chairman, we believe that H.R. 10301 will correct regulatory procedures and achieve a goal which we are seeking.

I would now like to analyze H.R. 10301 briefly and to amplify its provisions.

H.R. 10301 would amend that portion of the APA which exempts rule making requirements from those matters pertaining to "public property, loans, grants, benefits, or contracts." The bill would delete those exemptions and thus include them within the rule making process.

We are aware, of course, that certain instances in which an agency carries out a program call for an allowance of technical or other necessary changes pertaining to public property, loans, grants, benefits or contracts. Every change should not, obviously, be forced through rule making for each technical variance.

As to the section in H.R. 10301 referring to the process for proposed rules, four major changes are suggested. First, H.R. 10301 would insert a clause which would establish that a final rule could not be published until it first met the requirements of a proposed rule. This inclusion is to clarify the presently ambiguous language of the APA which allows presently the publication of a rule as proposed and which, without additional publication after a comment period, can be made effective at the end of 30 days. In essence we conceive the need for a distinct time period for a proposed rule, allowing adequate period for comment, and then a separate distinct publication as a final rule carrying a minimal time period before it becomes effective.

The second change would be to delete the exemption from rule making procedures for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." We have earlier referred to the abuses which we have observed under this present exemption. Deletion of this would require such agency actions, which have a direct bearing upon substantive rights of the public, to comply with the same rule making process as would any other substantive rule.

The third change would be to require a "full" statement by the agency for not submitting certain of its regulatory activities to full rule making procedures. Presently, there is only required a "brief" statement for not complying. Too often a "brief" statement becomes a perfunctory statement.

The fourth modification would provide a limitation as to the reason which the agency can use to ascertain that certain activities will not be subjected to full rule making. Presently an agency may avoid the procedure of first proposing a rule if it finds that to do so is "impracticable, unnecessary, or contrary to public interest." The world "unnecessary" would be deleted inasmuch as "necessity" is too often easily justified by the Agency subjectively on the basis of its own past activities. We believe that the other two conditions, "impracticable" or "contrary to public interest", when linked with the "full" disclosure by an agency, are adequately objective and have ascertainable standards sufficient to allow an agency this type of exemption.

The provision in reference to the opportunity for public comment has been completely rewritten to reflect concerns over past agency activities in failing to allow sufficient time for public comment on complex regulations. Presently, the APA requires only that the public be given opportunity to submit comments. Later the agency is required only to adopt a "concise general statement" of the basis and purpose of the rules.

More realistically, H.R. 10301 would require a minimum of 60 days for comment on proposed rules. In addition, any interested party may request and obtain a public hearing by the agency on the merits of the proposed rules. Furthermore any time for submissions of comments on proposed rules would be extended by 30 days at the request of any interested party unless, within 10 days of the request, the agency: (1) finds that such an extension is contrary to *public interest*; (2) makes such a finding in writing; and (3) transmits the refusal to the party and to both Houses of Congress.

In addition, H.R. 10301 would propose that the agency response to comments received include the "rationale . . . in accepting, rejecting, or accepting in modified form the comments received from the interested parties." This requirement is to assure that the agency not indulge further in its practice, often utilized, of rejecting out of hand comments with which it does not agree by merely making a statement that the comments are not relevant, are ill-founded, or are of little effect.

A new subsection (d) would be inserted in Section 553 of the Act. Presently, agencies have often followed the practice of publishing proposed rules, allowing comments for the minimum 30 days now recognized, and then publishing final rules which may be substantially different from the proposals. The agency in effect avoids the procedure for public comment on crucial issues newly incorporated in the final version. It is our belief that if the agency were required to make its actions open to public view during the entire rule making process allowing comment on all proposed rules, that this would more nearly assure fairness and would protect the rights of the public, which after all should be the sector which is of interest to governmental activities.

The proposal would thus require that any final rule substantially changed from its proposed form would have to go through the process as a proposed rule. This would be fair to the public and to the regulated parties.

The section of the present Act which refers to publication of a final rule requires only that it be published at least 30 days prior to its effective date, with certain exceptions including "interpretative rules and statements of policy." The present section can be read to mean that publication under this section can be satisfied if it is first done under the proposed rule section. Final publication could then occur 30 days later and be effective at publication.

The change which H.R. 10301 makes is to delete the exemption of "interpretative rules and statements of policy" for reasons as I explained earlier. We see no reason to exempt these rules which affect many people in a program. In addition, H.R. 10301 would make it clear that the 30-day publication prior to making a rule effective can only occur *after* the publication and procedures required under the proposed rule sections.

As a final amendment to the Act, H.R. 10301 would add additional requirements to that section which provides to an individual the right to seek a change in rules by way of a petition. It presently provides that such agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. The added amendment would provide that whenever a petition was denied, that denial must be forwarded to the individual *and* both Houses of Congress, giving the reasons for the denial with citations to the appropriate legal authority upon which the agency relies.

Mr. Chairman, this is a brief explanation of what the amendments would seek to accomplish.

I would like to reiterate our belief that many of the problems presently encountered under administrative actions are due to the Act itself and our belief that if the Act can be appropriately amended the rights of parties subject to regulation will be better safeguarded. We believe that it would be better to proceed in this fashion rather than to adopt a procedure for Congressional review of all regulations. We urge your favorable consideration of H.R. 10301.

We would be pleased to answer any questions which the Subcommittee may have.

Mr. FLOWERS. Thank you again, gentlemen.

We will adjourn for the day and reconvene at 9:30 tomorrow morning in room 2141.

[Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., Thursday, October 30, 1975.]

STATEMENT OF CARL L. SHIPLEY, SENIOR MEMBER OF SHIPLEY, SMOAK & AKERMAN, WASHINGTON, D.C., PRESIDENT OF WILLIAMS COUNTY BROADCASTING SYSTEM, INC., AND INDEPENDENT BROKER-DEALERS' TRADE ASSOCIATION

Mr. Chairman, enactment of HR 3658 or some similar bill embodying the same principle would be very much in the public interest. When Congressman Levitas of Georgia introduced HR 3658, he explained his bill by saying, "Whenever an administrative rule is adopted by an agency under procedures of the Administrative Procedure Act—Section 553 of Title V, U.S. Code—and a violation of the rule could result in a criminal sanction, then either House of Congress would have 30 days in which to pass a resolution disapproving of the adopted regulation. Passing of such a resolution by either House will have the effect of preventing the regulation from becoming operative."

In explaining the bill, Congressman Levitas further said that the bill "commends itself to those who are concerned about the place and plight of an individual in the face of a vast and sometimes unresponsive bureaucracy."

In my experience as a lawyer for nearly 30 years, representing from time to time individuals, large corporations, small companies, and others in the field of federal government regulation, I have become increasingly concerned with the fact that various agencies of the federal government have in effect usurped the law-making power, which our Constitution placed exclusively in Congress. Congressman Levitas in his February 25, 1975, remarks in the Congressional Record respecting this legislation made the point that "no person should be deprived of liberty or property without someone elected by and answerable to the citizen being involved in the adoption of a decree that can place him in jail or impose a fine upon him."

That is why the founding fathers provided in Article I, Section 1 of the United States Constitution that "All legislative power herein granted shall be vested in a Congress. . . ." The Supreme Court has reaffirmed the exclusive nature of the legislative process vested in Congress. In *U.S. v. Shreveport Grain and Elevator Company*, 287 U.S. 77 (1932), the Supreme Court held:

"One of the subtle maxims in constitutional law is that the power conferred upon the legislative to make laws cannot be delegated by that department to any other body or authority."

This decision simply restated earlier Supreme Court rulings such as *Field v. Clark*, 143 U.S. 649 (1892) holding, "That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Yet all too often federal agencies actually legislate by way of rules, rather than filling in the details of legislation passed by Congress.

Nearly 40 years ago a lawyer by the name of J. O. Boyd, who was a lawyer in Iowa, made a speech to the Iowa State Bar Association which is reported in 5 Iowa Bar Review 25 (1938–1939), which has been cited by textbook writers, which is well worth reflecting upon in connection with the pending legislation. He said:

"Government by bureaucracies has all the weaknesses of an autocracy and few of its advantages. Continued growth of bureaucracy will mean the doom of democracy, the destruction of all progress, the complete bankruptcy of free government, and eventually will lead to fascism or some form of totalitarianism."

This same lawyer went on to put his finger on the fallacy of thinking that ultimate judicial review somehow preserves the protection of the Constitution:

"From the decisions of such boards and bureaus there is no place to which a real appeal can be directed. The appeal that is usually provided in the statute is of little or no value, as the court to whom the appeal is directed must take the facts as found by the bureau. The members of the various boards or bureaus are never elective officials. They are not responsible to the people. . . . Eventually they become either benign tax-eaters, public parasites, or, if they are aggressive, they set up a little totalitarian empire for the governmental functions entrusted to them and become as autocratic as a Stalin or a Hitler."

The proliferation of federal agency rules has been the subject of criticism by the courts, which suggests that the time is long past when Congress should seek to regain its exclusive responsibility for the exercise of "all legislative power" as intended by Article I of the Federal Constitution.

Indeed federal judges have been warning us for years that the federal bureaucracy is running wild. For example, in *Reynolds* v. *Lovett*, 201 F. 2d 181 (1952), the late U.S. Court of Appeals Judge Bennett Champ Clark, formerly a U.S. Senator, had this to say:

"Counsel for appellee stated that the statute was not followed because 'the Secretary of the Navy had changed his policy.' The Secretary changed his policy, forsooth. Not one word was forthcoming as to any change in the policy of Congress, which is the law. In my judgment, the defiance of the law and disregard of the will of Congress on the part of the administrative bureaucrats is a greater menace to our institutions than the threat of the atomic bomb."

If legislation embodying the principles of H.R. 3658, the proposed "Administrative Rule Making Control Act," becomes law, interested persons can bring to members of Congress flagrant cases of "defiance of the law and disregard of the will of Congress on the part of administrative bureaucrats," and Congress can in effect veto or nullify any proposed rule or regulation which gives rise to the exercise of arbitrary power, or exceeds authority legislated by Congress.

The principle of a congressional veto of administrative action is not at all new. For example, the Reorganization Act of 1949 (5 U.S. Code 901–913) authorizes the President to reorganize various agencies of the government, but further provides that a reorganization plan will not become effective until 60 days after it has been submitted to Congress, during which time either House may pass a resolution stating in substance that that House does not favor the reorganization plan.

Congress has made a similar provision retaining a veto power over the enactment of ordinances by the government of the District of Columbia, in the exercise of its responsibility under the Federal Constitution to exercise exclusive legislative authority over the Nation's capital.

The importance of H.R. 3658 or some version thereof such as H.R. 7979 cannot be overemphasized. When Congress enacted the Administrative Procedure Act in 1946 (5 U.S.C. 551, et seq), it provided in Section 553 that federal agencies must publish a general notice of proposed rule making giving the time, place and nature of the proceedings, the legal authority on which it was based, and the substance of the proposed rule. That law requires each agency to give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. It also requires rule making proceedings to be conducted "on the record," when so required by statute. Congress has required in that law that the proponent of a rule has the burden of proof, and that no sanction may be imposed or rule issued except on consideration of the "whole record" supported by "reliable, probative and substantial evidence."

In order to make administrative procedures more consistent with the basic rules of fair play, Congress went so far as to define "rule" for purposes of the Administrative Procedure Act as meaning any agency statement of general or particular applicability and future effect designed "to implement, interpret or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." It included "agency rules" within the definition of "agency action," which makes the whole rule making process subject to judicial review (5 U.S. Code 704). However, these intended safeguards have been studiously evaded or avoided by federal bureaucrats over the years by a resort to such subterfuges as "guidelines," "no action letters," "interpretations," "policy statements," etc., all of which they contend are not rules and are simply informal advisory actions to guide citizens in trying to weave their way through the forest of red tape which regulates every citizen from the cradle to the grave. However, because of fear of administrative enforcement proceedings and the serious injury caused by the adverse publicity such proceedings provoke, citizens forego their rights and avoid challenges to arbitrary bureaucrats. H.R. 3658 will help protect the citizen from wrongheaded bureaucrats when they exceed their authority.

And one of the consistently worst sinners in the field of abuse of administrative discretion is the Securities and Exchange Commission. A way back in 1935, the Supreme Court in *Jones* v. *SEC*, 298 U.S. 1, took the Securities and Exchange Commission to task. In sending the SEC a message, I suppose the Supreme Court intended to send every bureaucrat a message, and it might be helpful to quote from the Supreme Court's opinion:

"The action of the Commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—, because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy."

In *Jones* v. *SEC*, the Supreme Court went on to warn us about what lays at the end of the road:

"And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

Perhaps the greatest message from the Supreme Court in the Jones case was this observation:

"The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government."

Every American should consider thoughtfully the statement of Congressman Elliott Levitas upon introducing the present legislation when he said, "We have too many examples of administrative excess and zeal, going far beyond any congressional intent. Congress now has the responsibility of facing up to a reexamination of the necessity of congressional control over the administrative process. When an act of Congress contains the pithy section which reads something like this: The Secretary shall have the power to promulgate regulations to carry out the purposes of this act . . . Then the citizen is at his peril."

No more egregious example of this type of unconstitutional delegation of legislative authority to the federal bureaucracy exists than that contained in one of the federal securities laws (15 U.S.C. 780–3(b)(9), by which Congress has authorized a private trade association, the National Association of Securities Dealers, Inc. to be registered with the Securities and Exchange Commission. In a kind of compounding of what many consider an unconstitutional delegation of legislative power, Congress has provided that in order to be registered as a self-regulatory association, a private and nongovernmental trade group must have the following power:

"The rules of the association (must) provide that its members and persons associated with its members shall be appropriately disciplined, by expulsion, suspension, fine, censure . . . or any other fitting penalty, for any violation of its rules."

It is one of the curiosities of the law that Congress passed the above referred to Maloney Act authorizing the SEC to register private associations on condition that their rules include the power to levy fines on their members, when the Supreme Court has firmly held such delegations of regulatory power to private persons to be unconstitutional. In *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1935), the Supreme Court held that the delegation of federal regulatory power to a private group in the coal industry was unconstitutional, saying:

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form: for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business . . . in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertaken an intolerable and unconstitutional interference with personal liberty and private property."

And this was not the first time the Supreme Court has ruled that it is unconstitutional to delegate governmental power to private persons to exercise over their neighbors or competitors. (*Eubank* v. *City of Richmond*, 226 U.S. 137 (1912).

Enactment of HR 3658 may give affected persons an opportunity to bring to Congress for review various SEC and NASD rules which have proliferated to the point of stifling competition in the securities industry through the threat of fines or imprisonment. The very problem Congressman Levitas has discussed exists in this area of the law. Under federal securities laws, any violations of a rule or regulation of the Securities and Exchange Commission, and this includes violation of the rules promulgated by NASD and approved by the SEC, can result in fines of up to $10,000 and imprisonment of up to two years in jail, or both.

I have cited the situation involving federal securities laws simply because I happened to be familiar with it. Similar examples are to be found in every federal regulatory agency. Similarly there are Supreme Court decisions condemning abuses of power by bureaucrats in various other federal agencies.

Most knowledgeable people accept the fact that Congress can legislate a "primary standard" in a statute and delegate to federal administrative agencies the duty to bring about the result pointed out by the statute. (*Butterfield* v. *Stranahan*, 192 U.S. 470 (1904). This is a necessary aspect of representative government.

But as the years have passed, administrative officials have become the executives and lawmakers, and the principle of separation of powers is withering away.

In the checks and balances which make our government function, common sense tells us that after Congress has legislated an intelligable principle to which the federal agency authorized to act is directed to conform, that agency officials can properly "fill up the details." *U.S. v. Grimaud*, 220 U.S. 506 (1911) ; *J.W. Hampton, Jr. & Co. v. U.S.*, 276 U.S. 394 (1928). However, the Supreme Court has not hesitated on occasion to hold that Congress cannot delegate legislative power as such to a federal agency. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) ; *Schecter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935). Enactment of HR 3658 will let Congress itself determine whether a given rule violates an agency's authority without requiring a citizen to risk a fine or jail to challenge an agency.

In considering the need for an "Administrative Rule Making Control Act" as embodied in HR 3658, members of Congress could well keep in mind comments from academic writers in the field of administrative law. Professor Walter Gellhorn of Columbia University in his outstanding case book entitled "Administrative Law, Cases and Comments" (6th Ed., Foundation Press), advises us that, "One of the fundamental concepts of our form of government is that the legislative, as representative of the people, will maintain a degree of supervision over the administration of governmental affairs . . . For many years British statutes delegating powers to make regulations of general applicability have mostly but not always required the subsequently promulgated regulations to be laid before Parliament for 'negative' or 'affirmative' action."

In his book he tells us that some states such as Connecticut, Nebraska and Michigan have moved toward requiring that administrative regulations be laid before the legislature for approval or disapproval, in accordance with the practice that has proven so successful in Great Britian over the years. It would appear that public sentiment is such that now is the time for Congress to act affirmatively in this area. Not long ago, President Ford announced that he would like to "free the business community from bondage" and "clean the cobwebs from our government regulations", explaining that "federal regulations have entangled far too many aspects of our economic system. In far too many cases, government regulations have become counterproductive . . ." (Time Magazine, July 7, 1975, page 37.) Indeed President Ford has gone so far as to set up a list of administrative agencies which "act as accuser, judge and jury all at one time" for total reorganization to cut the federal agencies back to their proper role.

Enactment of the Administrative Rule Making Control Act would be a long step toward restoring the confidence of our citizens in the institutions of government. Recent polls show that public support for the federal bureaucracy has deteriorated to the danger point. Congress, which is the policy making branch of our government, should now reassert its responsibility by subjecting all administrative regulations to the same "oversight" it has reserved to itself in the case of Presidential Reorganization Plans. HR 3658 will accomplish that goal.

There is another serious administrative law problem which is not covered by the proposed Administrative Rule Making Control Act, but which should have the serious consideration of Congress. It was called to the attention of Congress at page H6381 of the July 18, 1975 Congressional Record by Congressman Robert G. Stephens, Jr. of Georgia in a discussion of the Federal Rules of Criminal Procedure. Congressman Stephens said:

"With the proliferation of Federal regulatory agencies over the past quarter century, Congress has delegated enforcement authority and prosecutorial discretion to many persons not subject to the checks and balances of appointment by the President and confirmation by the Senate of the United States. I am increasingly concerned with the potential abuse of prosecutorial discretion by administrative agency officials in the course of their enforcement activities."

In explaining this problem, Congressman Stephens went on to quote the late Supreme Court Justice Robert A. Jackson, who, when he was Attorney General of the United States, delivered a talk entitled "The Federal Prosecutor", saying:

"Justice Jackson reminded the Federal prosecutors in his talk that the power to prosecute 'has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American tradition preserved.' But, said Jackson:

" 'Because of this immense power to strike at citizens, not with mere individual strength but with all the force of government itself, the post of federal district attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation of the senate of the United States.' "

In summing up the problem, Congressman Stephens said:

"It seems to me that the time is at hand when it may be desirable for Congress to inquire into the possible abuse of prosecutorial discretion by non-Presidential appointees in administrative agencies. We have Federal rules of criminal procedure applicable to Federal court procedures, but we have no similar Federal rules applicable to administrative procedures."

A glaring example of a well intended statute which has given rise to much abuse is Section 20 of the Securities Act of 1933 (15 U.S. Code 77t). In this law, Congress has provided that:

"(b) Whenever it shall *appear* to the Commission that any person is engaged or *about to engage* in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States . . . to enjoin such acts or practices . . ."

It is basic to the system of law under which we live in the United States that people are presumed to be innocent, not guilty, that they do their best, not their worst, that they try to abide by the law, not violate it, and that they try to be good and law abiding citizens. These ideals are embodied in our Federal Constitution in what we call "due process", and our Constitution lays upon all officials the burden of fair play. A judge will not issue a search warrant except upon "probable cause", and all through our law the great machinery of law enforcement can only be triggered by a preliminary finding of "probable cause". And yet here we have an act of Congress that authorizes the Securities and Exchange Commission to proceed on speculation or mere suspicion, not founded on any evidence or any probable cause or even any basis for unleashing the destructive engines of administrative enforcement machinery against a citizen and taxpayer. Congress could well amend this section of the law to insert the phrase "upon probable cause" after the word "appear" in Section 20b of the Securities Act of 1933, and make one small step toward curbing the basis on which one Federal agency relies in undertaking administrative actions for violation of administrative rules which can lead to fine or jail, but which are not based on probable cause. The Administrative Rulemaking Control Act might well include a provision that no rule or policy of any federal agency shall authorize any enforcement proceeding except upon a preliminary determination of probable cause supported by substantial evidence. This change would shift the emphasis from government by suspicion to agency enforcement action based on reasonable cause.

CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

THURSDAY, OCTOBER 30, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:45 a.m., in room 2141, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Mazzoli, Moorhead, and Kindness.

Also present: William P. Shattuck, counsel; Jay T. Turnipseed, assistant counsel; Alan F. Coffey, Jr., associate counsel; and David Minge, consultant to the subcommittee.

Mr. FLOWERS. We will call the meeting to order. Our first witness will be Mr. Robert V. Zener, General Counsel of the Environmental Protection Agency. We welcome you and appreciate your being here.

Proceed as you see fit.

TESTIMONY OF ROBERT V. ZENER, GENERAL COUNSEL, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. ZENER. Thank you, Mr. Chairman.

I would like to read a fairly brief prepared statement and make a couple of additional remarks and proceed from there.

I am Robert Zener, General Counsel of the Environmental Protection Agency. I am pleased to be here this morning to present the comments of EPA on two bills, H.R. 3658 and H.R. 8231.

These bills would provide a mechanism for congressional oversight of regulations promulgated by administrative agencies. Briefly summarized, the bills would provide that regulations promulgated by agencies would not become effective for a specific period of time while Congress is in session.

During this period either House could prevent the regulation from becoming effective by adopting a resolution indicating its disapproval of the regulation.

I will skip over the detailed analysis of the bills. While we recognize the legitimate congressional concern for oversight of a regulatory agency's implementation of Federal statutes, we do not believe that these bills provide an effective mechanism for providing that oversight. The role of administrative agencies is a necessary one to carry out and implement the more detailed aspects of congressional policy.

Certainly the regulations which they adopt will have a strong influence on the overall impact of any particular piece of legislation.

It is essential that the Congress continually assess and review regulations to assure that the legislation is having its desired effect and that the public interest as determined by Congress is being served.

These bills would allow Congress to assert a more direct influence in the regulatory process than it does at the present time. They present, however, significant problems to the successful functioning of the regulatory process and are not in our view necessary for adequate and effective congressional oversight.

The bills' most obvious impact would be to delay the applicability of regulations beyond the time which they may now take effect. Since the 30- and 60-day periods in the bills refer to days while Congress is in session, the potential delays in terms of calendar days are much longer.

Such delays may conflict with statutory or court-imposed deadlines, which are commonplace with respect to the statutes administered by EPA and will, of course, defer ultimate compliance by the affected industry or other regulated person. Neither of the bills appear to provide mechanisms for modifying the requirements in emergency situations.

The second major problem that we foresee is that the bills do not provide for any specific guidance to the agency regarding the reasons for disapproval. There is no provision for instructions to the agencies on how regulations could be modified to be consistent with the statute and meet the criticism which resulted in disapproval.

H.R. 8231 attempts to establish criteria for disapprovals while H.R. 3658 does not. However, these criteria are extremely general and are essentially the same as those the courts presently use to evaluate regulations under the present provisions of the Administrative Procedures Act.

Thus, we believe that neither of the bills provide an effective mechanism for insuring that proper direction is given to the administrative agency for the reissuance of a disapproved regulation.

This also leads to the third problem that I wish to mention involving regulations which are specifically required by statute as most of ours are. The normal course of events is for the agency to issue proposals for public comment and then promulgate final regulations.

Normally those regulations are then reviewed by the courts and depending on the judicial determinations some modifications or reassessments of the regulations is done by the agency in accordance with the court order.

Under the new Administrative Procedures Act it is the role of the judiciary to review the conformity of regulations with the letter and intent of the authorizing statute. H.R. 3658 and 8231 would interpose Congress into the review process prior to any judicial examination and would establish Congress as the initial interpreter of compliance by the regulations with the statute.

EPA promulgates a large number of regulations each year, most of them required by statute. These often include extremely complex standards based on extensive scientific and factual records. It would be an enormous task for the Congress to review all the data necessary to make an informed decision regarding the correctness of the regulations.

Judicial review on occasion takes an extremely long time, due to the volume of the underlying data. This problem would be as serious for any congressional review. Because of the time restrictions in these bills, it would be even more difficult to have a comprehensive analysis.

Many of our regulations are developed pursuant to court orders, with respect to their timing as well as their substance. Establishing a mandatory congressional oversight would on some occasions create a direct conflict between the judiciary and the Congress.

Congress might diapprove a regulation because of its content which was mandated by a court order. Such a situation would result in the agency being in violation of another branch of the government to which it is legally responsible. This would create an intolerable state of confusion.

Where Congress disagree with a particular regulation it always has the necessary vehicle for voiding the actions of the regulatory agency—amendment of the authorizing legislation.

Or, in some cases, riders to appropriations acts, both of which techniques have been used for EPA. The Congress, on several occasions, has exercised an effective oversight on EPA implementation of its statutes such as the regulations involving transportation control plans.

It has been able to work through its committees with the agency and by amendments to effectuate its desires. We are of the opinion that the congressional oversight of agency actions can best be accomplished by the continual exchange of information between the agencies and congressional committees and by prompt consideration by Congress of amendments to the statute where it believes that an agency's regulations do not comply with congressional intent.

This approach will certainly avoid the problems I have discussed above and preserve the traditional and complementary roles of the three branches of Government.

The laws which EPA is attempting to administer are quite complex and represent initial efforts by Congress to enter areas of regulation previously unaddressed by Federal legislation.

Because of this, many of our regulations involve measures which are necessary to accomplish the goals specified in those statutes but which were possibly not anticipated by Congress at the time it passed the legislation.

EPA has in the past attempted to brief the appropriate congressional committees prior to the issuance of regulations and it will continue to do so.

Where there is disagreement which cannot be worked out in the normal rulemaking process, then prompt action to reassess and, where appropriate, amend the underlying legislation would be instituted.

H.R. 3658 and H.R. 8231, we believe, would insert an unnecessarily confusing and disruptive element into the administrative process. For these reasons we oppose the enactment of H.R. 3658 and 8231.

Thank you for providing the Agency the opportunity to present its views to you. I will be glad to answer any questions you might have.

Let me add a few words about the transportation control plans. As I understand the discussions which have led to these bills, the transportation control plans have been a leading example cited of administrative arbitrariness which requires this kind of oversight mechanism.

Mr. FLOWERS. That question will probably arise later on.

Mr. ZENER. So I am taking the bull by the horns. It seems the transportation control plans are a prime example of the present process actually working. We have had two changes to our basic legislation as a result of congressional objections to these plans.

In the spring of 1974 there was an amendment to the Clean Air Act which prohibited parking surcharges and our appropriations act was amended to prohibit regulation of parking facilities.

Even before these amendments were adopted we saw them coming and withdrew the relevant portions of the transportation control plans. So that is an example where congressional review has been working.

Mr. FLOWERS. Let's stop there just a minute, please.

Mr. ZENER. Yes, sir.

Mr. FLOWERS. Is it working efficiently and effectively when you had a controversy over something like this which is a part of the launching of this kind of regulation?

I think EPA has done a lot of good in this country but it still raises a lot of resentment in people's minds when you mention regulation which affects directly a man's business or a company's business operations. If the Environmental Protection Agency has only the consideration of the environment and not all of the other cost-benefit kind of arguments that other agencies must meet it appears you are going to continuously have this kind of problem.

Should we rely on legislation in the Congress, perhaps in the appropriations process, to place limitations upon regulatory activity?

Is that really a reasonable way to provide oversight or review of agency action?

Mr. ZENER. Mr. Chairman, I think it was in this case. Basically what you are dealing with, I think, is that there has been some change in the political climate of the country. We were operating under the 1970 Clean Air Act passed at the height of the environmental movement.

That act did require transportation control plans. I am convinced of it. Indeed, in promulgating those plans, we were acting under court order. We attempted to postpone the date we had to do those plans and the District of Columbia Circuit held that we could not do that.

So we were kind of dragged into the venture reluctantly. We were doing it under the 1970 Clean Air Act. Since 1970 there has been some degree of change in the political climate, some degree of feeling that there ought to be more consideration of social and economic factors that you mentioned.

Really, the controversy engendered by the plans is a reflection of that change and it is appropriate that the change be registered through a change of the law, which is what happened.

Mr. FLOWERS. Do you think, Mr. Zener, that the basic law, the National Environmental Policy Act, is sufficiently explicit to convey to the regulators, in this instance EPA, congressional intent, or is it too vague?

I recall that there has been complaints that the laws that the rules and regulations of the various agencies are promulgated under, have been too vague.

Mr. ZENER. That is a difficult question. I would say that in many situations that we face, I don't see any practical way of making a law more specific. Let me give you a couple of examples.

One of our main pieces of business, you might say, is establishing standards, air quality standards, emission effluence standards. Those standards have to be set at the specific number, so many milligrams per liter, so many pounds, or what have you.

There is no way in the world that Congress is going to fix those numbers. The only instance I know of where Congress did set the specific number in a statute was the 90 percent reduction required in automobile emissions.

Congress obviously can't do it in every case. You can give us a set of instructions saying that we had—have to consider costs, environmental benefits and energy impacts and so on.

Mr. FLOWERS. Are you charged with consideration of those other matters?

Mr. ZENER. In the Federal Water Pollution Control Act, the setting of effluents, yes. In the setting of performance standards of new plants in the Clean Air Act, yes.

In the setting of the clear air standards, the directive is to consider only health. Congress can tell us the factors to consider, but the translating of those factors into a specific number is something the agency has to do and Congress can't very well do.

We have to be realistic about it. The translation of a set of factors into a specific number involves a tremendous range of choice. There is no way of getting around that.

Mr. FLOWERS. I can understand that. There is no way the Congress in basic legislation can deal in the specifics of the air quality of Birmingham, Ala. or Pittsburgh, Pa.

You have got to deal with on the spot determinations based upon complex information.

But I think the concern is more general than that. The Environmental Protection Agency in its zeal to make an impact on the environmental conditions simply fails to or refuses to recognize all of the other factors in the human environment.

These are social considerations, they involve factors involving quality of life other than the quality of air. Such as, whether or not you can put a firm out of business by putting such an onerous requirement on them that they simply cannot comply with it.

Mr. ZENER. Well, if you look at some of the regulations, for example, the one setting the discharge standards for steel plants under the Federal Water Pollution Control Act. There is a big impact on the industry, on jobs and so on.

If you look at our administrative records, when you do have studies of impact studies of costs and these factors, the industry will say you did not give them sufficient consideration.

Well, how is the Congress going to look at the specific regulation and decide whether we gave something sufficient consideration? You have a study which delves into the economic questions. There will always be room for controversy, however, as to whether we have given the social and economic factors sufficient consideration.

Mr. FLOWERS. Does your rulemaking process or procedure allow these affected parties to obtain detailed statements of the factual or legal authority for regulations?

Mr. ZENER. Oh, certainly. Sure. In the example I was talking about, the discharge standards under the Water Act, it is a very complicated

process but at every stage it involves EPA putting its studies out for comment even before we go into the Federal Register in the proposed rulemaking procedure.

We have a consultant such as Arthur D. Little or some similar engineering firm do a study of the industry and that study is circulated to the industry and to anybody else who wants to look at it for comment.

Then after we get the comments, we do an economic study.

The same thing happens. Then the thing is put in the Federal Register as a proposal. Again another round of comment. Again the industry looks at our technique and our technical and economic data. Only after all that, essentially two rounds of comment by the affected people, do you go to final.

Mr. FLOWERS. Is there any forum where the affected industries counsel or representatives have the opportunity to cross-examine the so-called experts or the technical data or question in open forum?

Mr. ZENER. We have conferences, but formal cross-examination, no.

Mr. FLOWERS. One of the things you mentioned was the Water Act. Have there been a vast number of appeals from some of these regulations?

Mr. ZENER. Yes, sir. There have been appeals in the case of the Water Act which are running at the rate of about 75 percent of the regulations getting appealed.

The judiciary in this area is taking an extremely active role starting with our regulations under the Clean Air Act and continuing. The judges are looking not only at the broad legal questions but also at the technical base for the regulations.

I think this supports my contention that the present system does work. Judicial review has been an extremely meaningful way to handle this. I have seen some statements that judicial review is an illusory thing. My personal experience is quite to the contrary.

One needs only to flip through some of the opinions that have been written on our regulations to see that the judges are really delving into the basis for regulations.

Mr. FLOWERS. Do you have any breakdown on how many of the appeals have been perfected—how they have been handled by the courts, how many have been upheld?

Mr. ZENER. I can supply that for you. Just off the top of my head I can tell you about transportation control plans because this is one of the controversial areas. Transportation control plans have been reviewed by the Federal Circuit Courts of Appeals in the First, Second, Third, Fourth, Ninth, and District of Columbia Circuits.

In every case, the court remanded—either held portions of the plan invalid or remanded to EPA for further consideration of portions of the plan involved.

Mr. FLOWERS. Does that tell you something? Do you get any message there? I think we are getting down to the nuts and bolts of this thing. Perhaps the EPA is not using all of the factors they ought to in reaching a determination.

Mr. ZENER. Well, it says that but it also says that the judiciary is playing an active role here. The review process there is having an impact.

Mr. FLOWERS. As long as we got enough Federal judges, I guess we are OK there. But I think that this is avoiding the issue on the legislation. The legislation is an attempt to impact the rulemaking process before it gets to that stage.

I don't think we can assume it is working simply because there are some rules getting set aside by Federal courts. This shows that at some point possibly—probably the early stages, some agencies might not be following the congressional intent or at least the letter of the law as they should.

Mr. ZENER. Well, Mr. Chairman, the problem is that I am not sure Congress with respect to some of these questions is really equipped to do the job and with respect to others it would seem to me the appropriate responses are legislative.

For example, take the transportation control plans. The reason we—in the Texas case, which is a good example, Judge Bell of the fifth circuit set aside a portion of the transportation control plan down there because he did not think it was valid for EPA to utilize some data that had been collected in the Los Angeles base with respect to the reactivity of hydrocarbon emissions from fuel storage tanks.

He thought that the Texas situation was sufficiently different so that we should have used data that was more pertinent.

This was following extensive review of the record. It is pretty clear to me that that is not the kind of review that Congress could have undertaken. On the other hand, let's take a question of the sort that has been addressed by three recent courts of appeal.

It is a broad statutory constitutional question of whether EPA in promulgating the transportation control plans can legitimately tell a State or locality that it must adopt a piece of legislation to implement the plan. It is a very profound question that the Supreme Court may well decide.

Congress might well address it. It would seem to me that that question would be appropriately addressed by legislation if Congress were to take it up. It is a question incidentally to which the courts of appeal are split. One has favored our view, one has favored our view partially, two have totally rejected our view.

So again it is a broad legal question, the kind of question where our view is not totally without merit since one circuit court of appeals, the Third Circuit Court of Appeals, has accepted it.

But it is a very, very difficult and profound question which would appropriately be addressed by legislation or perhaps by the Supreme Court. It seems to me in both situations I mentioned the existing procedures to establish the appropriate means of review.

That is either the judiciary delving into the technical basis for the regulation and deciding in one respect the evidence did not support it or in the case of a broad legal question of constitutional overtones, either the Supreme Court or the Congress addressing it through existing procedures.

I might add in both cases we are getting review. EPA's word is by no means the last word on this.

Mr. FLOWERS. I interrupted you a short while ago. Would you like to continue?

Mr. ZENER. I only wanted to mention two other points and that is to raise another example in an area that has been controversial and that has been discussed in connection with this legislation and that is the area of pesticides. Over the last several months there has been a lot of criticism of our actions in the pesticides area and as a result the House Agriculture Committee undertook an intensive oversight which resulted in some legislative proposals and the adoption of some legislation by the House.

These amendments are now before the Senate. Another example of an area that has elicited criticism and a process that may be leading toward a legislative result——

Mr. FLOWERS. How did the EPA stand on these changes? Did you oppose them in the Agriculture Committee or did you take the position that since this was congressional oversight that you ought to let the people's representative decide?

Mr. ZENER. Well, we opposed most of the changes but obviously the—we never challenged their right to decide, obviously. In addition, in response to criticism of some of our actions, specifically one of them being the most controversial one being the establishment of a pesticide hot line, we withdrew that without even legislation taking place.

Of course that is an example of an informal process that goes on all the time. When we issue regulations, we always talk to the staffs of the relevant committees. When there is criticism we certainly consider it. I think any intelligent agency would do that.

There are many instances I am familiar with where actions have been withdrawn or changed in response to sentiment that we ascertain through this informal process so that you don't even get to the formal legislation taking place.

Another problem that has been mentioned is there are too many regulations. We are the prime recipients of that criticism. Well, that is a fair criticism I think but I think that to some extent the problem here lies in the authorizing legislation, the statutes we worked under. They direct us to issue a very large number of regulations.

Just last night in thinking about this I pulled out a copy of our volume in the Code of Federal Regulations and went through it checking off the regulations which were required by law.

The count I came to was of the 110 parts in title 40 of the latest edition of the Code of Federal Regulations—this is the EPA volume—74 were specifically required by law. This is a case of an indication to me that if we are really going to make a meaningful dent in the volume of regulations, at least that EPA issues, we are going to have to review our legislative mandates which is something that we well might want to do.

But I think the problem is not one of overzealous bureaucrats just falling all over themselves to issue unneeded regulations. I think the problem is more basic. I might also mention that frequently, we find ourselves sued for failing to issue regulations required by the statute, allegedly required by the statute.

Just the other day I was required of a suit filed under the Noise Act to issue railway noise standards guidelines. The record is pretty clear that we are not falling over ourselves to issue regulations just for the fun of it. In most cases these regulations are required by law.

Mr. FLOWERS. Thank you very much. The Chair recognizes the gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. You have been referring to the need for bureaucratic expertise. Sometimes, you know, the experts come in conflict with each other. We were reminded yesterday, I believe it was, that the Department of Agriculture had a very important program to stamp out the fire ants. Yet, another regulation, put out by EPA, prohibited the use of the pesticide used to stamp out the fire ants—in accordance with the program of the Department of Agriculture.

So we are going to have fire ants over better than a third of the United States. Who is going to determine which bureaucrats really have the expertise in that situation?

Mr. ZENER. I think we may have worked out that particular controversy but the question still is a valid one. Well, within the executive department at least, there are mechanisms for working out controversies. But I doubt that Congress is really in a position to adjudicate or mediate all the interagency conflicts that arise.

Mr. MOORHEAD. I don't think the plan was for Congress to do any adjudicating. I think the plan was for Congress to have oversight and have the ability to pass on or reject regulations that might be contrary to the will of Congress.

Mr. ZENER. Mr. Moorhead, I should mention one thing that your questions raise and that is that administrative agencies act in a number of ways other than regulation. The reason I raise that is because the particular example you raise was not a regulation.

It is an adjudicatory proceeding under the Pesticides Act. Of course other statutes involve rulings, adjudicatory proceedings, and so forth in order to bring the particular proceeding you mention within the scope of judicial review, you would have to expand the statute to cover agency rulings.

The scope of the things become staggering.

Mr. MOORHEAD. And it is an example that experts can disagree even though they are bureaucratic experts?

Mr. ZENER. There is no question about this.

Mr. MOORHEAD. You expressed grave concern that the courts might not allow the time required by this procedure if Congress stepped in and had a 60-day period in which to pass on a regulation. You thought the courts might not be willing to wait.

Isn't it very likely that the courts would follow the law? That, if there was a law giving Congress that period of time, don't you think it is unlikely a court would go against the statute and require action prior to the time that period would elapse?

Mr. ZENER. They would have to allow that review period to take place. But you would get into trouble involving other statutory deadlines. For example, under the Water Act, all industries have to install best practical treatment by mid-1977, and the best practical treatment is defined by regulations issued by EPA.

Any substantial delays in the issuance of those regulations means the affected agency does not know what it is supposed to do and time passes and eventually there may be a situation where there is not enough time to meet that statutory deadline.

Obviously the actual process of review would be allowed by the courts. It is simply that they would involve conflicts with other deadlines.

Mr. MOORHEAD. Do you really think this 60 legislative days constitutes an unreasonable delay? Don't you have, in the rulemaking process, delays that are built in already?

Mr. ZENER. Sure. This would just be an additional one.

Mr. MOORHEAD. In terms of rules and regulations issued by your agency pursuant to the various statutes, can you estimate for the subcommittee approximately what percent of them carry criminal sanctions?

Mr. ZENER. Yes——

Mr. MOORHEAD. There is a difference between the two bills.

Mr. ZENER. Yes. I understand that, sir. I think the majority of them certainly understand the Clean Air Act and understand the Water Act, those regulations which impose requirements on industry could ultimately result in criminal sanctions.

Mr. MOORHEAD. What would your suggestion be concerning the placing of a time limit on the effectiveness of this legislation, say to give it a 3- to 5-year trial run?

Mr. ZENER. You mentioned 3 to 5 years. I think in 3 years you would find out whether it was working. In 3 years there would be a large volume of regulations—I think probably in 2 years you would have enough of a volume to get some sense of whether it was manageable.

Mr. MOORHEAD. You know, one thing—I have watched Congress for some time now. It has been my observation that while the Congress might step in in a few of these instances and take a part, there are not going to be as many of them as you believe that there will be.

There might be an occasion where—every few months when some regulation would be challenged. I very seriously doubt the volume would be as great as you and some of the other witnesses apparently feel it would be.

Mr. ZENER. Well, I agree. I don't think the volume of actions taken by the Congress would be great. But you are going to get an awful lot of paper dumped on you. The volume of stuff coming over would be immense. I think you have to recognize that.

Mr. MOORHEAD. Except for having to wait for a 60-day period for the regulation to become effective, I can't see how that would adversely affect you.

Mr. ZENER. Well—OK. That would be an adverse effect. I might mention also that as I read one of the bills at least, the proposed as well as the final rule goes over so that you are dealing with a double period.

You are talking about the 120 days.

Mr. MOORHEAD. We have not adopted any of them yet. If you have a suggestion to take out any bugs that are in the bill, we would truly like to hear that also.

Mr. ZENER. That might be a bug.

Mr. MOORHEAD. There has been a suggestion in H.R. 10301, sponsored by Mr. Kindness, to require 60 days for public comment on proposed rules under the Administrative Procedures Act. Would your agency favor an extended comment period?

Mr. ZENER. I don't really have any strong feelings on that. Sixty days, if we have got time, if the court order we are operating under lets us do it, it is a reasonable period.

Mr. MOORHEAD. What you said gets down to the very point that is causing all the trouble. When you are sitting in an ivory tower some place or you are divorced from meeting with the actual people that are involved, it is easy to say that their right to comment is of no real importance.

We think what we are doing is right. The people run this country and their right to comment and tell us how things are going to affect them is the most vital thing that there is.

Mr. ZENER. I am acutely aware of the problems in commenting on our regulations. I am the recipient of a lot of requests for extensions which we try to grant if we possibly can, especially dealing with some of our regulations where you have a detailed technical document supporting the regulations.

It is difficult to comment. Indeed, in some cases 60 days is short. As I say, we would not have any strong feelings on this.

Mr. MOORHEAD. When your program people are involved in drafting new rules and regulations, is there any contact between your people and the congressional committee or the committee staff to try to find out what the congressional intent was?

Mr. ZENER. There is no formal process but informally that does take place.

Mr. MOORHEAD. Is this frequent or something that happens once in a while?

Mr. ZENER. It depends on the area we are talking about because we are all aware that the congressional staffs have an interest in some areas and are not particularly interested in others.

As a general matter, yes, it is frequent.

Mr. MOORHEAD. We appreciate your comments. These are issues that are of vital concern to many, many Americans and, of course, they are to the members of this subcommittee.

Mr. ZENER. It has been worrying us a lot. There have been a lot of sessions over at EPA where we sit down with lists of regulations that are either out or in the process of being drafted and saying can we cut this line or that line.

Those sessions have resulted in some cuts. But I will tell you, it is extraordinarily difficult.

Mr. FLOWERS. These people do have a tough job. I heard that there was a group that wanted to help them reach a decision on this fire ant controversy that you mentioned. As I understand, they are going to start a colony of them somewhere out here on the mall and they don't think it will take long for them to reach a decision after that. [Laughter.]

I have a few more questions. I don't want to take too much more time. I think this is in the general area of delay about which apparently you have some concern and of course we do, too. We don't want to unduly delay the administrative process going into effect.

While in some instances, you have a court ordered period in which to act, but in most instances you act at your own pace and that involves not only your own in-house operations but, as in every other admin-

istrative agency, you have got to submit your proposals to the Office of Management and Budget and it is not clear who has control of the rulemaking process over there.

Do they review your rules before they are made public?

Mr. ZENER. Yes. Let me qualify that statement. They preside over a process of interagency review. It is really the other interested agencies which are doing the reviewing.

OMB is sort of sitting there in the role of a conduit—you might say a mediator. However, I want to qualify that further and that is that once the other agencies' comments come in, the administrator is in a position to accept or reject them unless he is—the matter could always go to the White House.

But it hardly ever does.

Mr. FLOWERS. Does this take a specified length of time?

Mr. ZENER. It normally is pretty fast, like a period of 2 or 3 or 4 weeks. You are not talking about much time in the normal case. When a matter becomes very controversial which is only a small percentage of the total—then it can take longer.

Mr. FLOWERS. Is this a helpful process or does this impede the rulemaking? What I am getting at is here is a delay that nobody mentions. Yet everybody comes in here and says the 30 days that is written into these bills would be an undue delay.

Here is a delay in the promulgation of rules and regulations of 2 weeks, 3 weeks, 4 weeks, longer, that nobody seems concerned about.

Mr. ZENER. Well, I won't say we aren't concerned about it, but it is a helpful process in the sense that it really forces us to take into account some of the social and economic concerns that other agencies in Government are going to be advocating.

Also the prospect of legislative review through amendments to statutes forces us to take into account legislative concerns under the present system.

Mr. FLOWERS. But this sort of review could be done during public hearing time as well, could it not?

Mr. ZENER. It could, yes.

Mr. FLOWERS. What is the difference between the promulgation of rules and regulations and reaching a decision by adjudication which you implied was a manner in which you came up with a ruling on pesticides for fire ants?

Mr. ZENER. Well, the statutory difference is simply that in the Pesticides Act we are directed by section 6 to issue a notice of cancellation. If anybody wants to appeal that, that is an adjudicatory hearing with an administrative law judge who rules to contentions with respect to the appeals.

It is technically not a regulation. The reason I mention that is because that is just an instance of where we act by adjudication. Other agencies have similar procedures. Unfair labor practice complaints from the NLRB and one can go on. My general point is simply that there is a large volume of administrative action which can be terribly important which is not done by regulation.

Mr. FLOWERS. Which would not be covered by these proposed bills as drafted?

Mr. ZENER. That is right.

Mr. FLOWERS. That is a good point and we have observed that previously. I have, Mr. Zener, some specific questions which I would like to submit to you and ask you to answer them at your pleasure in the reasonable future.

Mr. ZENER. I appreciate the opportunity to appear here, Mr. Chairman. I have learned a lot.

Mr. FLOWERS. Excuse me. One of our other members is here, Mr. Mazzoli, from Kentucky.

Mr. MAZZOLI. I apologize to the gentleman for being late. I did not hear your testimony or my colleagues' questions.

On page 5 of your statement, you describe your position which is that the amending process which we have available to us should take care of most of the problems so long as there is prior consultation and discussion and communication between the agencies and the Congress.

I wondered if the gentleman is aware that one of the parade of horribles passing through the committee recently was the parking ban that EPA would have established with its regulations? Do you believe there was a way that the Congress could have handled that by way of amendment?

Mr. ZENER. This is an example of where the amending process actually worked. What happened was that a section was added to our appropriations act prohibiting us from regulating parking facilities.

Mr. MAZZOLI. Is that the amending process that you really have reference to?

Mr. ZENER. Yes, sir.

Mr. MAZZOLI. In other words, you think that that is good legislation?

Mr. ZENER. My position on the substance of legislation really has not any bearing. The fact is that Congress had every right to pass that provision and the Congress passed the provision.

Mr. MAZZOLI. I think it is pretty sloppy work myself. It seems to me that is exactly what we are forced to do as a Congress to try to get the so-called changes made in a very clumsy, heavy-handed fashion because there is no procedure that is really available in a more elegant fashion, if you will, to do it and a more select fashion to do it.

I was curious about that because it seems to me that we have got to set up some procedures that do a better job of making the changes than that. Mr. Chairman, again, I have no further questions.

I thank the gentleman for his statements.

Mr. FLOWERS. Thank you again, Mr. Zener, for being with us. We will submit further questions to you and we appreciate your answering.

Mr. ZENER. Thank you, Mr. Chairman.

[The reply of the Environmental Protection Agency to the additional questions is as follows:]

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Washington, D.C., December 4, 1975.

Hon. WALTER FLOWERS,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter of November 6 in which you sent me three additional questions regarding EPA's rulemaking activities. Your questions were:

1. Does the EPA's rulemaking procedure include the preparation of detailed statements of the factual and legal authority for a proposed rule?

2. If the answer is no, why are such statements not prepared?

3. If the answer to #1 is yes, are those statements available, as a matter of course, to the public?

It is EPA's policy to set forth a full explanation of the factual and legal basis of its regulations at the time of proposal and again at final promulgation. The information is generaly contained in the preamble or an appendix to the regulations published in the Federal Register. Sometimes the information is contained in a supporting technical document which is made available at the time a regulation is published.

The information presented to the public has become more detailed over the 5 year period of EPA's existence as the Agency has gained experience in its various rulemaking actions. Such full disclosure is, in our view, appropriate because of the requirements of the Administrative Procedure Act and as a matter of sound public policy.

Only in this way can we inform the public why we are taking certain actions, many of which are controversial, and secure effective public response, whether it is in the form of technical information rebutting our data or general comments on the wisdom of the action under consideration. We make a special effort to review all comments received and respond to them by changing the regulation or explaining at the time of final publication why we did not revise it.

We are, of course, constantly reviewing our rulemaking activities to determine ways in which we can be more effective in apprising the public of the rationale for our decisions. We consider this an extremely crucial element in our development of effective regulatory programs.

I trust this adequately responds to your questions. If I can provide any further information, please call upon me.

Sincerely yours,

ROBERT V. ZENER,
General Counsel (A-130).

Mr. FLOWERS. Our next witness is our friend, Claude Pepper.

TESTIMONY OF HON. CLAUDE PEPPER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. PEPPER. Thank you.

Mr. FLOWERS. We will be delighted to hear what you have to tell us about this legislation.

Mr. PEPPER. I am grateful for the privilege of being here before your distinguished committee and thank you my distinguished fellow Alabamian, whose friendship I value very highly.

In order to save the time of the committee, if I may, I will offer my statement for the record and I would briefly summarize.

Mr. FLOWERS. We will include your entire statement at the conclusion of your remarks.

Mr. PEPPER. There are at least three bills that I have noted here. The one that we are talking about is H.R. 3658 and then there are H.R. 3291 and H.R. 9235. I am a joint sponsor of 9235 and 8231. They are very similar, all of the three bills.

I will quote from my statement these data. In the last 30 years or so enormous growth of Federal Government activities and responsibility has been matched by a corresponding increase in discretionary administrative rulemaking. Today the volume of such rulemaking is absolutely staggering.

Last year alone 6,000 administrative rules were adopted by 67 Federal agencies, departments and bureaus. In most cases the consequences of violating these administrative rules is imprisonment, fine or both, at least some penalty to which the citizen may be subject.

These bills contemplate that before rules and regulations which have very significant effect for all practical purposes the effect of law shall take effect, the Congress shall be acquainted with the proposed

rule or regulation and shall have an opportunity to disapprove a proposed rule or regulation.

Now one of the bills provides for a 30-day waiting period before the rule or regulation takes effect, the other, 60 days. I would prefer the 30 days because that would give the Congress the time to take a look at it.

Perhaps with the authority of Congress, it could extend the time if it chose to do so by appropriate regulations. But that would tend to beat the objection of the agency and the departments that this is too much—this kind of legislation would too much hold up the effectiveness of necessary rules and regulations.

All of these bills relate to procedures by which the Congress may examine proposed rules and regulations before they take effect.

On the other hand, I think we would be remiss if we limit the congressional right of review just to proposed rules and regulations for the future.

I think Congress ought to have a recognized and asserted authority to disapprove, to bring about the voiding of any rule or regulation promulgated by any department or agency which the Congress considers inconsistent with the intent or the provisions of legislation the Congress has enacted or otherwise objectionable.

Mr. FLOWERS. I could not agree with the gentleman more, that if we are going to do this, it would be totally inconsistent to just strike a balance and say we are starting now and we can reject any rule in the future and not have a backward look to all of the massive rules that are on the books.

Mr. PEPPER. I thoroughly agree with the distinguished chairman. We have a mass of rules and regulations promulgated and in effect today that I think—and I think most of us agree—are totally inconsistent with the intent and the provisions of laws under which they purport to be promulgated. We must realize as a matter of fact that if we don't exercise some restraint, the departments and agencies can practically change the meaning and effect of legislation that we enact.

Then there is nobody but the court to go through a laborious process of examination and review trying to find out from the legislative history of the legislation as well as the language that it contains as to what the intent of the Congress was.

If Congress simply called the agency to account before an appropriate committee and brought up this question and passed an appropriate resolution saying we don't consider this regulation at all in the spirit of or consistent with the provisions of the legislation to which it relates.

I think this is a very important matter, Mr. Chairman and members of your distinguished committee, that you are considering here. Most of these rules and regulations are promulgated, prepared in secret. Nobody, not even the Congress and certainly the people, don't know what they contain, ordinarily, until they are promulgated in the Federal Register and just the day before yesterday my Subcommittee on Health Maintenance and Long-Term Care of the House Select Committee on the Aging had a joint committee hearing with the appropriate committee, the Long-Term Care Committee of the Committee on Aging of the Senate.

We were considering regulations that they were about to promulgate in which they were all of a sudden to say that the proprietary com-

panies could render home health care services to the elderly, we thought and we still think without the States having the right to license these providers of this kind of care and without adequate criteria being laid down governing the provision of that sort of care.

That is being done under medicaid legislation that the Congress has enacted. It has a very important effect upon the application of this law.

A little bit ago, I was holding some hearings on behalf of my subcommittee with my subcommittee members in Miami when word came to us that HEW was about to promulgate a resolution reducing very seriously the number of visits that could be made to elderly people under medicare who had been in a hospital.

The rules and regulations promulgated previously allowed 100 visits. They were very sharply curtailing the number of visits that could be allowed. Well, that vitally affects the meaning of the law. So we requested—I sent a wire, and maybe others did also, to the distinguished chairman who by that time was our distinguished fellow Alabamian, Dr. Mathis, asking that the effectiveness of this regulation be held up so that further consideration could be given to it.

The Secretary of HEW did hold up and allowed a lot of people very much interested in this matter to have an opportunity to be heard. That is an example of how important it is to people as well as to the Congress to have an opportunity for the review of these regulations both before and after they are promulgated.

That is about all I have to say about it, Mr. Chairman. I think this is extremely important legislation. I hope you will extend it to give positive review right as well as previous review right of proposed rules and regulations as—or promulgated rules and regulations.

Mr. FLOWERS. I appreciate your comments. I think it would be an incomplete act on our part to pass legislation which is prospective. I call upon the gentleman from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. I would like to welcome and extend personal appreciation to the gentleman for his eloquent statements in this regard, and to assure him that the Members of Congress that appeared before this panel as well as many other witnesses, have endorsed what you said and that is that there is a need for some kind of proper routine or predictable routine procedure.

Too often, the agencies, perhaps innocently, have not put out the regulations which seem to be consonant with the intent of Congress in passing the legislation. The gentleman has stated what many have done earlier in today's hearings as well as others.

Mr. PEPPER. Thank you.

Mr. FLOWERS. Thank you.

Mr. PEPPER. Thank you, Mr. Chairman. I am grateful for the privilege of being with you.

[The prepared statement of Hon. Claude Pepper follows:]

STATEMENT OF HON. CLAUDE PEPPER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

IN SUPPORT OF H.R. 3658, AND RELATED BILLS, THE ADMINISTRATIVE RULEMAKING CONTROL ACT

Mr. Chairman and distinguished members of the Subcommittee, I am grateful for this opportunity to testify in support of H.R. 3658, and related bills, which provide the Congress an effective means of considering administrative rules.

In my opinion, no other single legislative proposal before the 94th Congress affecting the operation of the Federal Government is more urgently needed, or has more potential for improving public confidence in our Government.

I doubt that there is a single Member of the House or Senate who has not had anguished pleas from constituents who find themselves the innocent victim of agency rules and regulations that are arbitrary, contradictory, or hopelessly confusing. All of us are aware of cases where citizens have been threatened with various penalties, including loss of their livelihood, for failure to comply with a regulation that was no longer even in existence, or which was capriciously applied in a way never intended by the Congress when the applicable law was passed.

In the last 30 years or so the enormous growth of Federal Government activities and responsibilities has been matched by a corresponding increase in discretionary administrative rulemaking. Today, the volume of such rulemaking is absolutely staggering. Last year alone, 6,000 administrative rules were adopted by 67 Federal agencies, departments, and bureaus. In most cases, the consequence of violating these administrative rules is imprisonment or fine or both.

The secrecy surrounding much administrative rulemaking raises a legitimate question of accountability. In some cases, if may be virtually impossible to determine who made a particular decision, or why, or on what authority. The citizen who wishes to challenge such a decision has virtually no recourse except the courts—a process that is expensive, time consuming and frustrating.

The volume of Federal rulemaking is such today that it has long outgrown our capacity for adequate oversight and review under the present system arrangements.

Equally, the potential has grown for agencies to circumvent the intent of Congress, for abuse of their authority, and for undue influence by the interests supposed to be regulated. Some political analysts believe that the discretionary rulemaking authority, as it is exercised by various departments and agencies, has granted them sufficient independence to qualify as a "fourth branch of government," which is accountable neither to the President, nor to Congress. Certainly it is not accountable to the average citizen who must comply with all the rules and regulations. He cannot vote the bureaucrats out in the next election.

The fact is that, over the years, the Congress has delegated a great deal of administrative discretion to the Executive Branch via the administrative rulemaking power, and that the use and abuse of this power is now getting out of control. Naturally, administrative agencies must have some discretion to promulgate rules and regulations in order to perform their functions efficiently and effectively. However, the Congress has an obligation to insure that the rules are promulgated fairly, openly, and in accord with Congressional intent. We also have an obligation to make sure that the rules are administered fairly, not arbitrarily or capriciously, and with due regard for the rights of individual citizens.

HR 3658, which I am cosponsoring, would provide the means to reassert Congressional authority over the administrative rulemaking of Executive agencies. It would enable Congress to exercise more effectively its oversight responsibilities, and it would make the rulemaking process more accountable to the American people through their elected representatives in Congress.

What this bill does is to establish a procedure for Congressional review of proposed administrative rules to determine, in advance, whether they comply with the intent of Congress or exceed the legislative authority granted by the Congress. Its enactment would have a number of beneficial consequences.

First, it would encourage Federal agencies to draft their regulations in consultation with Congressional committees, thus avoiding innumerable confrontations between Congress and the Executive Branch over whether or not a particular rule constituted an abuse of authority or violated Congressional legislative intent.

Second, Congressional review of proposed regulations would substantially reduce the present burden on the courts, in their attempts to assess the validity of challenged regulations. Public records from committee hearings and floor debate would provide the courts with clear guidance on the relationship of a particular regulation to the intent of Congress. The availability of such guidelines contained in a formal record should result in a reduction of Federal court suits challenging specific administrative rules and procedures.

Third, the disapproval of potentially abusive and arbitrary rules before they take effect will avoid considerable controversy and conflict in the future, along with the volume of constituent service demands such rules generate. It will allow Congress to exercise better foresight, instead of having to respond to a crisis which could have been avoided, with much less time and trouble for all concerned.

Finally, Congressional review of proposed administrative rulings will enable Members and committee staffs to increase greatly their knowledge of agency operations and perform their oversight responsibilities more effectively.

The provisions of H.R. 3658 are carefully designer to allow the Congress sufficient time for adequate study of a proposed regulation, without impeding the efficiency or effectiveness of agency operations. It provides that resolutions of disapproval may be introduced, though they need not be referred to an appropriate committee. If a resolution to disapprove a proposed rule or regulation is not referred to a committee, the Congress would be given 30 days in which to act on it. If a resolution is referred to a committee, the Congress would have 60 days in which to complete its analysis and deliberations. Exempted from Congressional review are rules and regulations pertaining to agency management or personnel, public property, loans, grants, benefits, or contracts.

Mr. Chairman, this measure and similar proposals have very broad, bipartisan support in both Houses of the Congress, with nearly one hundred sponsors and cosponsors. Today there is widespread agreement among Members of all shades on the political spectrum on the need for placing more democratic controls on the power of administrative agencies to promulgate rules and regulations which have both the force and the effect of law, and which directly influence the life of virtually every citizen of the United States. The power to legislate, perhaps the most important power in our democratic system of government, simply cannot be delegated to any body which is not accountable directly to the people by constitutional mandate.

Mr. FLOWERS. Our next witnesses are from the Department of Health, Education, and Welfare, Mr. Stephen Kurzman, Assistant Secretary for Legislation. Welcome to the subcommittee. You have with you some other people from your Department. We likewise welcome them. I am sure you will identify them for us.

TESTIMONY OF STEPHEN KURZMAN, ASSISTANT SECRETARY FOR LEGISLATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ACCOMPANIED BY DARREL J. GRINSTEAD, OFFICE OF GENERAL COUNSEL, HEW

Mr. KURZMAN. Thank you, Mr. Chairman.

Mr. FLOWERS. I have a special welcome to you because my good friend, Dr. Mathews, is now Secretary of Health, Education, and Welfare. I believe the Federal Government is well served by having his services.

I know that members of your Department must all agree with me that we will see, certainly, a good administration under Dr. Mathews as Secretary of HEW.

Mr. KURZMAN. Thank you very much, Mr. Chairman. Secretary Mathews, when I told him I was appearing before his Congressman this morning, asked me to extend his best wishes and respects to you.

Mr. FLOWERS. Thank you very much. Please proceed.

Mr. KURZMAN. I have on my left Mr. Darrel J. Grinstead from the Office of General Counsel and I will identify the others as needed.

I appreciate the opportunity to appear before this subcommittee to express the views of the Department of Health, Education, and Welfare with respect to H.R. 3658 and H.R. 8231, bills which would pro-

vide a means for the Congress to review proposed rules and regulations of Federal agencies and disapprove those rules and regulations under certain circumstances. H.R. 3658 relates only to rules and regulations for which a criminal penalty would be imposed, whereas H.R. 8231 relates to all rules and regulations proposed by any agency.

Since H.R. 8231 is the broader bill and would encompass the provisions of H.R. 3658, I will restrict my comments to H.R. 8231.

H.R. 8231 would require all rules and regulations proposed by any Federal agency to be submitted to each House of Congress along with a full explanation of the proposed rule or regulation.

The proposed rules and regulations could not become effective until 60 legislative days after they are submitted to Congress. Either House of Congress could disapprove a rule or regulation by the adoption of a resolution within the 60-day period; however, the Congress could shorten that period if it specifically approves the rule or regulation by concurrent resolution before the expiration of 60 legislative days.

The Department of Justice and other agencies have testified or will testify concerning the serious constitutional questions raised by H.R. 8231 and similar bills. I will not repeat the concerns expressed by those agencies except to say that we at HEW share fully their views that these bills exceed the constitutional authority of the Congress.

My statement will basically be limited to the administrative problems that would result from the enactment of H.R. 8231. Certainly one of those problems is the excessive delay in the promulgation of necessary regulations that would be caused by the bill.

Frequently, new programs or changes to existing programs are adopted in the middle of a fiscal year. Once appropriations are made available for those programs, the Department may have only a few months before the end of the fiscal year in which to develop and promulgate necessary implementing regulations.

The delay of 60 legislative days (which may be as many as 120 or more calendar days) would, in many cases, prevent the implementation of a program before the end of the fiscal year and thus would cause the available funds to lapse.

Even where sufficient time is available, H.R. 8231 would delay the necessary program planning and implementation activities at not only the Federal, but also State and local levels.

In order to put the effect of H.R. 8231 into perspective, I would like to give you a general overview of the Department's regulatory processes. Each year the Department publishes in the Federal Register approximately 800 notices (proposed and final) which relate to the more than 300 programs administered by this Department.

By the way, we answer to 40 subcommittees. This figure is increasing at a rapid rate due to the increase in the amount of legislation and the tendency of Congress to delegate rulemaking functions to the Department. The number of such notices published by each agency of the Department in fiscal year 1974 is as follows:

Public Health Service	45
Food and Drug Administration	480
Education	73
Social and Rehabilitation Service	70
Social Security Administration	96
Office of Secretary	32
Total	796

Most of these notices are of a routine, noncontroversial nature. However, the expeditious implementation of these proposed rules and regulations is necessary for the efficient operation of the Department's programs.

Very few of these proposed rules and regulations are of such a controversial nature that close congressional scrutiny other than by the regular oversight process would be warranted. To subject every proposed rule and regulation to this inordinate delay, would be to hold the entire operation of the Department hostage while the Congress actually scrutinizes only a very small number of controversial proposals.

By way of demonstrating the problems that the enactment of this bill would cause for the Department in the administration of its programs, I would like to describe some of our experiences under similar legislation already enacted.

The Department is currently operating under a number of provisions, more limited in scope, than H.R. 8231, but which give Congress certain review and veto authority over the promulgation of regulations for some of our programs.

Section 431(d) of the General Education Provisions Act currently provides a 45-day congressional review period for all Education Division rules and regulations and authorize the disapproval of these rules and regulations by concurrent resolution. While the Department has continually objected to this provision, it should be noted that in the past year during which section 431(d) has been in effect only one regulation—the title IX sex discrimination regulation, which was extremely controversial—has drawn any attention from Congress via the section 431(d) review procedure.

In that case a resolution of disapproval was actively considered by one committee but was not reported favorably by the committee.

Under the basic educational opportunity grant program, not later than February 1 of each year the Commissioner of Education must submit a schedule of expected family contributions to the Congress at the same time it is promulgated in the Federal Register.

If either House of Congress adopts a resolution of disapproval prior to May 1 of any year, the Commissioner must publish a new schedule which must take into account any recommendations made in connection with the resolution of disapproval.

Since this requirement was enacted in 1972, we have submitted four schedules of expected family contributions to the Congress. Although a resolution of disapproval has been introduced in the House on each of those schedules, consideration of those resolutions has never gone beyond the subcommittee level in either the House or the Senate.

Moreover, then, while hearings have been held on the schedules in those subcommittees, the bulk of the interplay between the Department and the Congress has been in the form of communications with individual Congressmen and staff members; and any changes to the schedules that could be said to have resulted from the congressional review procedure have actually been the result of these communications.

The most significant outcome of this interplay has been to delay the promulgation of rules which are necessary for the Department to make grants to millions of college students and to make them on a cycle.

These delays have not been at the insistence of the entire Congress but in most cases have resulted from the concerns of a single Congressman or more frequently a staff member.

While the affected committees have agreed this year to ignore the May 1 date provided in the statute and are trying to reach accord by November 1, we in the executive branch are faced with the possibility that a single member or staff person may force us to test the hand of the Congress, thereby precipitating a delay in the promulgation of a final schedule.

Such a delay in the promulgation of a final schedule would be intolerable to millions of students in this country who need to know how much financial aid will be available to them at the earliest possible date.

A further problem would result from the fact that, under H.R. 8231, one House of Congress could disapprove the agency's regulations. With regard to the more controversial aspects of any legislation, certainly in our Department, there is unlikely to be unanimity among Members of Congress as to the implementation of the legislation.

The possibility that either House could disapprove a regulation would result in the possibility that the agency could be whipsawed between the views of the responsible committees and their staffs as to the proper manner in which to implement the controversial legislation.

This has in fact been our experience with the family contribution schedule for the basic grants program and the effect is to delay further and confuse the already almost hopelessly complex process through which an agency implements legislation.

From our experience with the above described congressional review provisions, it seems clear that measures such as H.R. 8231 are not likely to result in full consideration by the Congress even of the most controversial proposed regulations.

Instead the bill would undoubtedly result in special interests attempting to delay or subvert the implementation or the enacting of legislation through pressure brought on individual Congressmen and their staffs, who in turn would use the threat of veto to accomplish changes in regulations, changes which in many cases would not reflect the views of the entire Congress.

Thus a well meaning measure designed to improve the ability of Congress to insure the correct implementation of legislation would in fact result in delays and confusion in that implementation and could well result in an oversight process under the control of a small segment of Congress rather than the entire Congress, as is presently the case.

The foregoing is not to say that once a bill is enacted the Department ignores the Congress in its promulgation of implementing regulations. In fact we have made every effort to insure that the views of Congress are taken into account in the development of regulations.

For example in the case of the Education Amendments of 1974, appropriate staff members from the Department met in an exhaustive series of approximately 20 meetings over the course of a month and a half after the bill was enacted in order to take the views of congressional staff members into account prior to the beginning of the regulations drafting process.

In the case of the Rehabilitation Act of 1973, we also held extensive meetings with congressional staff members, and their views were given serious consideration in the drafting of our regulations. Likewise in the case of the title IX sex discrimination regulations, we discussed the regulations frequently with Members of Congress during the extensive period of their development, and briefings were held for the Congress prior to the issuance of both the proposed and final regulations.

These are just a few examples of how we have attempted to obtain the views of Congress before implementing particular legislation. We have a regular practice of anything we think our subcommittees might have an interest in is flagged before it goes to the Secretary so that when he makes his decision, we can brief the subcommittees interested or respond for that regulation.

In the case of every proposed regulation the Congress is able to present its views during the public comment period, and in the rare occasion when these views are provided, every effort is made to accommodate those comments in the final regulations.

We are also concerned with the effect that H.R. 8231 would have on the role of the judiciary in adjudicating challenges to the validity of agency rules. Under the Constitution, the judicial branch is the final arbiter of the means by which the executive branch puts laws into effect.

The determinations which a single House of Congress would need to make under H.R. 8231 in order to disapprove a regulation—that it contains provisions contrary to law, inconsistent with the intent of Congress, or beyond the mandate of the underlying legislation—are all functions of the judicial branch.

Furthermore, if Congress feels that the executive branch is improperly administering a statute, it is free to pass corrective or clarifying legislation or to call back the delegation of rulemaking authority which it provided to the executive.

I can provide specific instances in which the Congress has done that. That is the proper way in which we think it should operate.

Mr. FLOWERS. What are some of those?

Mr. KURZMAN. We have had legislation enacted to change provisions in the Social Security Amendments of 1962, which must have had several hundred provisions in it and called for issuance of hundreds and hundreds of regulations.

Congress has amended that on four or five occasions to change provisions which it later thought better of, and the House Ways and Means Committee is currently considering a bill to change four more of those provisions in P.L. 92-603.

The Congress has modified the title IX sex discrimination regulations which were so highly controversial to include the Boy Scouts, Girl Scouts, fraternities, and sororities.

Title XX enacted this January has already been amended. It happens constantly, Mr. Chairman, in our case. We welcome that. We would welcome much more careful attention to the statutes before they are enacted in the first place.

We argue that more hearings should be held or in some cases some hearings. We are engaged in a conference in the Older Americans Act where we are seeking an extension of the act and most of the pro-

visions of the bill. The first two titles of the bill are not troublesome. But the implications of title III constitute a huge scheme against discrimination in Federal programs against people of any age. We are arguing they have not held one hearing on that provision. It is in the House version, not in the Senate. The Senate calls for a study by the Civil Rights Commission.

Title IX said thou shalt not discriminate in educational institutions on the basis of sex. How do you get from here to there? Did it include athletics or didn't it. Athletics, Boy Scouts, Girl Scouts? What did it include? A great deal of what the Members and the public are complaining about and these bills are addressed to it seems to us could be resolved if more care were given in the first instance in the enactment of these vast new programs and vast new regulatory schemes without what we think is the appropriate proper consideration and detail of the issues and facing the hard issues.

What we find instead is our committees often will devote their attention to these policy issues with things like organizational structure so we are tied up in knots in the Department in trying to administer this welter of legislation we get from something like 40 different subcommittees, no one subcommittee looking at what the others are doing.

Basic policy issues don't get faced like the ones I have mentioned which have had to be fixed after the effect of legislation.

Therefore, instead of following one of the two means provided by the Constitution for the correction of abuses by the executive, which I mentioned earlier, H.R. 8231 would provide a new hybrid procedure which would seriously erode the authority of both the judicial and executive branches and in our view would inject the legislative branch deeply into the affairs of the executive.

Thus under this bill the doctrine of the separation of powers would yield to rule by one House of Congress and a principle of Government which has been vital to the survival of our democracy would be, in our judgment, seriously threatened.

For all of the above reasons we join the other agencies which have testified before this subcommittee in strongly opposing the enactment of H.R. 8231 and similar bills. We hope that the problems we have related to you which we have experienced under similar legislation of more narrow scope already in effect will persuade you that such legislation not only is ineffective in accomplishing its desired goals but results in a serious threat to the orderly and efficient operation of Government.

In a way I do not think the legislative branch has the capacity to handle this. We are winding up with programs expiring in 1, 2, 3, 4 years and running around continuing resolutions for more years because the subcommittees are so tied up that they can't address themselves to reauthorizing those programs.

This is proposing to add 800 resolutions of disapproval to that load of work which the Congress has really imposed upon itself by fragmentation of these things into so many subcommittees and so many separate programs.

I thank you, Mr. Chairman. I will be happy to try to answer any questions.

Mr. Flowers. Thank you, sir. Speaking for myself, I appreciate your very frank criticism of some of the activities of the Congress

on a lot of basic legislation. We may in the past have been sloppy and perhaps at times derelict.

I hope we will be more precise in the future. It seems to me that the general tone of your statement is that the Congress might have—at least on the part of some individual Members—there might be some implicit threat of some sort if the individual Member's views are not heeded.

Mr. KURZMAN. If I may interrupt. I certainly had no intent to inject a note of malice or anything of that sort. It is a policy disagreement.

Mr. FLOWERS. The record just does not reflect that, Mr. Secretary, that in the basic pieces of legislation now that do require or allow congressional review of rulemaking, we have seen very little activity.

But that in and of itself does not militate against having an across-the-board provision for congressional review, of rulemaking. In fact, the minimum amount of activity in this field would indicate that it might be all right to have such a general provision, I think.

Mr. KURZMAN. Mr. Chairman, I think what we are trying to explain is that you are quite right. The visible portion of the activity by Congress, the actual dealing with a resolution is and has been almost nil. But the effect is creating confusion and conflicting pressures upon us—granted these are not malicious.

They are genuine expressions of policy considerations, in many cases considerations which were known at the time the act was passed and in which the losing party is trying to get their side of the issue to prevail in the regulations issuance process, by pushing us and threatening us—and that is a legitimate threat—with the enactment of a resolution of disapproval.

A staff member can call up the agency head and say the Congressman wants it this way, and another staff man calls up for another Congressman and says the Congressman wants it the other way. One House tells us we want it one way and the other, another way.

These are genuine areas of discretion that have been granted the Department by the legislation in which the Congress deliberately in most cases, it seems to me, or occasionally simply because it has not paid enough attention to the legislation in the first place, has not made the policy decision.

It said you decide how best to do it. Then we get second guessed when we have a provision like this in which individual Members and staff members, not expressed through subcommittees actually meeting and voting or full committees actually meeting and voting or either House actually meeting and voting and never by definition both Houses meeting together and voting.

The entire constitutional process is thrown down the drain, and you find yourself being whipsawed by individual Members at best, usually individual staff members, behind the scenes not seen by the public on policy issues.

Mr. FLOWERS. I did not realize I had that much power over HEW. [Laughter.]

Mr. KURZMAN. We normally don't come before this subcommittee, but we do before 40 other subcommittees.

Mr. FLOWERS. One of the reasons for that is the jurisdiction of your Department is so widely encompassing from education to welfare, health. It almost involves everything that the Congress does.

Mr. KURZMAN. That is correct.

Mr. FLOWERS. Everything the Federal Government does in terms of agency action, and this is a separate issue, relates to whether the problem is in the massiveness of your agency as opposed to the division of congressional jurisdiction.

Mr. KURZMAN. Mr. Chairman, those two are interrelated. It seems to us that in part, what often happens here is that we are large and complex because the subjects we deal with are large and complex in a very large and complex society. They are interrelated. We wish the Congress would get itself together in dealing with us. One of our problems here is that one pair of subcommittees, House and Senate, will be responsible for a piece of legislation and the other pair of subcommittees that also have a legitimate interest in the subject matter don't pay a great deal of attention to it because they are tied up with their own programs.

They discover what they have participated in enacting only after the fact, only after we have issued regulations do they come to grips with the fact that it is out there. In fact, that is true of our constituencies. They often don't realize that they are about to be regulated in new ways because these things are happening at such a fantastically accelerated pace.

But just the sheer volume of the legislation—I grant you, Mr. Chairman, we are big and we are complicated. But I think one of the values of our regulation process—one of the reasons also it takes so long for us to issue regulations—is that all those elements in the department, most of them mandated by statute to be separate elements, have interests in just about everything we do.

We try to bring that process to bear, to get those other elements in to comment upon the development of regulations even before we ask the public to comment upon them so that everybody is sensitized to the impact and cross impact of program against program.

Of course, that also tends to sensitize the constituents of those other agencies so that when it does go out for comment, those interest groups and constituencies come in and comment on them. We try to do the same thing, to the extent my office can, in sensitizing the different subcommittees to what is being issued under legislation handled by other committees.

But it is unbelievably complex when you are talking about five legislative committees in the two Houses plus two appropriations subcommittees. When you take in the special select committees and the other standing committees that we occasionally come before, it comes to something like 40 subcommittees.

Mr. FLOWERS. On page 3, you state the number of notices published by your agency during 1974 and frankly I am a little surprised that it is as few as 796, more than half relating to the Food and Drug Administration which would not normally be the kind of thing that we would be going into anyway under this legislation.

Does this relatively low number, as it appears to me, anyway, indicate that many of the kinds of things that this legislation would appear to be trying to get at would come under some other kind of process other than the rulemaking process of the Department of HEW?

Mr. KURZMAN. No.

Mr. FLOWERS. Such as guidelines, such as adjudication, other areas having the impact of regulation without going through the formal rulemaking process?

Mr. KURZMAN. I would say, Mr. Chairman, that given the policy the Department has adopted since 1971 when Secretary Richardson issued regulations to the effect that we would voluntarily waive the waiver in the APA for rules on grants and contracts, that virtually everything in the Department now does come under the rulemaking process except things like social security cases which are obviously adjudication.

Those areas where we are issuing something which gives a range of examples of how something can be done but does not mandate that any particular one has to be used, it is that kind of thing for which we are now restricting the issuance of guidelines.

Anything else that directs behavior and says this is the way you are supposed to do it is done through the rulemaking process with public comment and informal discussion with our committees.

Mr. FLOWERS. You said in 1971, Secretary Richardson voluntarily waived section 553(a) exception for the rules governing grants, contracts and loan programs, is that correct?

Mr. KURZMAN. That is correct, Mr. Chairman.

Mr. FLOWERS. Would the Department—if you are not prepared to answer this now, I will be glad to receive the answer later—would the Department object to the deletion of this language?

Mr. KURZMAN. I would like to go back and confer on that. We are doing it voluntarily now.

Mr. FLOWERS. Under the present leadership I was not suspecting you would change that. There is no sense in not setting the record straight. Our proposal would be to delete that exception. I would appreciate the comment of the Department.

Mr. KURZMAN. I would be happy to, Mr. Chairman.

Mr. FLOWERS. I am going to recognize the gentleman from Kentucky at this point.

Mr. MAZZOLI. I thank the chairman. I am going to have to leave very shortly and I appreciate the chance to refresh a friendship with Mr. Kurzman that extended back 4 years to the Education and Labor Subcommittee and the many times the gentleman appeared before us on these bills.

I understand the frustration in having to come back and come back to 40 different subcommittees. We have the same kind of frustration. We hear from constituents at home whether it deals with a grant program, EPA or OSHA, they say we don't fault the idea of safe work places or better educational programs or clean air and water but this is just ridiculous.

This flies in the face of good sense. Under the circumstances I would maybe ask the gentleman if there is a limited kind of review, one that may not pursue each and every regulation because there are hundreds:

Obviously there are only two, three, or four that we think important enough to become controversial. Do you have any thoughts as to where we can go? I think the gentleman would recognize from the number of cosponsors to this bill, something like over 150 to the Clawson bill and Mr. Levitas has many cosponsors on his bill—indicates that Congress feels that something has to be done.

Mr. KURZMAN. It is nice to see you again, too, sir. I would say there are really two things that we would recommend based on our experience with this. We think that first the authorizing committees really ought to take a much more careful look at authorizing legislation than they do.

By that I mean avoid, if at all possible, adding provisions upon which no hearings have been held. That process has accelerated in our case to a point which, as I pointed out with the example about the Older Americans Act pending in conference now, has gotten totally beyond belief. We have had added to the program enormous regulatory responsibilities by either full committee amendment or floor amendment, to the whole of title IX.

There were no hearings in either House, no legislative history. If that could be resisted—and the temptation is great—until hearings have been held, then we would find out that what the implications are to the best of our ability before we actually lay these huge responsibilities on the executive branch.

Second, I think the answer lies in part in legislative oversight: The fact that every possible problem that can be conceived of, or virtually any problem that anyone brings to our subcommittees, results in a new categorical grant program has gotten beyond the capacity of the committees to reenact them.

That is why we are forced to operate on continuing resolutions for 2 or 3 years because the subcommittees can't get around to even renewing existing programs. That ties in with my next observation. I think a lot more value would come from our subcommittees spending time in oversight hearings with us instead of these legislative hearings.

If we were not on this constant treadmill of creating some new legislative response to meet every individual problem which comes up without consideration to what can be done with what is already on the books to meet the emerging new problems, we could do a much better job in meeting the kinds of congressional interests which arise before a program normally comes up for reenactment.

Instead, we are on this legislative treadmill in which what is actually happening now is that the subcommittees don't have time to fully consider all issues involved. Most of the testimony taken is from groups coming in and saying they want a new program added on top of everything else instead of asking how can you respond to this under existing law and how can we go through your regulations process and accomplish it, or what have you done in your regulation process that is frustrating the constituency?

In other words I think the initial legislative process is out of control in our case and second in part because of that, the oversight process is not being used the way it should be. Instead, we find the committees that are using oversight are very concerned about finding some huge scandal somewhere and not in whether the programs are really working.

Mr. MAZZOLI. This brings up an interesting point because the former Secretary Caspar Weinberger, upon leaving Government, addressed his valediction to this whole question of increased Government, the whole morass.

Yet thereafter, I think then in the Wall Street Journal, or some newspaper they dissected what the Secretary had said and calculated how many more people had come into the Department of Health, Education, and Welfare, how many more programs, how much more money, and they found that there might be some slip twist cup and lip between what you say and what is done.

I only would mention that there is a certain empire syndrome that we have, whether it is in the Congress or the departments. Can these be reconciled?

Is there really the true devotion or dedication in HEW or XYZ to really make this thing function?

Mr. KURZMAN. I submit, Mr. Mazzoli, there is. I think those comments that were presented regarding former Secretary Weinberger's valedictory were very unfair because if you took the testimony that this Department presented during the years of his stewardship and during the years of former Secretary Richardson's stewardship—and he had a similar valedictory when he left the Department—we were urging consolidation of programs, urging simplification, urging subcommittees to work together too so there was cross recognition of problems that affected more than one subcommittee.

We have been trying for 3½ years now to get the allied services bill through which was very, very much a first step toward trying to pull our programs together. We tried repeatedly to say no we don't want our bureaucracies to expand.

The Congress turns around repeatedly and says you will expand. They have turned down every rescission that we have proposed. We have had overruns on our budget and our appropriations committees have had overruns on our employment ceilings again and again and again.

Most of our subcommittees attack us daily for not having put enough people on, for not having asked for enough money, for not having made a bigger bureaucracy of it. It is unfair to say our deeds don't match our words.

Our deeds are not under our control. They are under the control of the 40 subcommittees.

Mr. MAZZOLI. I appreciate your testimony.

Mr. FLOWERS. Thank you. You know there is another person who has been making some comments around the country lately about the massive Federal bureaucracy and the fact that he could not get a handle on it sounds very similar to some of the statements that have been made by sponsors of this legislation.

I wondered if the Secretary knows who I am talking about? He is a former Member of the House of Representatives.

Mr. MAZZOLI. His name will come to me in a second. [Laughter.]

Mr. FLOWERS. I think that we have all got a real problem here and I think we better start thinking about it here in the Congress and the agencies and the White House, too. We are saying one thing and we are doing something else. I was back in my State Wednesday and I told

them that we have got to do something about the expanding Department of Health, Education, and Welfare.

It may be that an Assistant Secretary for Legislation is here speaking what he really feels and believes, but the bureaucrats back at the Department are busy trying to expand their own little bailiwicks.

It appears that we have too many people doing too many things. I think maybe the problem is that people, our constituents, yours—have asked too much in recent years from a government. Now the buzzard has come and gone to roost. I have constituents who feel what we really ought to do is wipe the slate clean. Let's repeal all legislation and start all over again.

That might not be a bad idea. We would have an unemployment problem for awhile for sure but we would have an interesting time reenacting some of these programs. I think they would be done a lot differently.

I am going to yield to staff for a few questions, Mr. Secretary. I really don't have anything further to ask you myself.

Mr. Minge?

Mr. MINGE. I would like to pursue two lines with you, if I may. The first relates to the sex discrimination rules and the experience which you had with congressional review at the time those rules were promulgated. Did anything occur during that review to indicate that the proposal presently pending ought to be changed in some regard?

Mr. KURZMAN. I think the only comment I can make about that is what I previously indicated, the Congress could not effectively deal with it in that mode. It was shown that it could not.

One subcommittee ordered a report with a resolution of disapproval regarding several items in the regulations. It went to full committee which referred it back to a different subcommittee—I think two different subcommittees. It was like reconsidering the legislation all over again which is our view of how it ought to be done if enough members feel that the regulations are wrong.

The lesson was one of delay, and clearly out there in the regulated world, they were in a considerable state of confusion. We make the argument, and I should say I think it is a perfectly valid argument, that such confusion and uncertainty is compounded when the Congress acts under this kind of technique.

Face this for a moment. Suppose the Congress had acted and had adopted a resolution of disapproval. Persons out in the regulated world—potential beneficiaries of those original regulations who liked our regulations and disliked the resolution of disapproval and the way it changed or purported to change the regulation, would bring suit in Federal District Court.

They would wind up having a say, and you would have to go through the entire court process anyway with a great uncertainty during that entire process of what constituted the law.

We would be arguing that the resolution of disapproval was illegal under the Constitution and a nullity under the Constitution, and therefore our regulation would be the law.

If they did not follow our regulation, they would be in jeopardy. Whereas others who liked the resolution of disapproval would be arguing just the opposite.

Mr. MINGE. One lesson would be that courts should be clearly authorized to stay the effectiveness of regulation pending litigation.

Mr. KURZMAN. They clearly have that power. There were several hundred provisions with no hearings. The courts clearly were effective to do that. They felt it was beyond congressional power, in fact, to have enacted that statute. As far as I understand the decisions so far in that utilization review case——

Mr. MINGE. Did anything occur to totally frustrate the review process?

Mr. KURZMAN. I compare with it the Rehabilitation Act case which I mention in my prepared statement. There were very controversial issues there and we worked with our subcommittees over a period of some months in an informal way to make sure that they made their input.

I think they have felt in general that their input was taken seriously and those regulations were better because of it. They had to participate in the delay that occurred with us.

The delay is the same whether informally or formally. I think if you do it formally you are going to have this problem of what is the validity of the resolution. You are going to have that tested in the courts and all that terrific uncertainty of who complies with what during that period.

As far as we can see, the critical point here is that once we go through this process of alerting our subcommittees to controversial regulations and get their input, going through the process again through having formal hearings and consideration formally of a resolution of disapproval does not unearth anything new. Even if the process were carried out to its fullest, it does not unearth anything new.

Mr. MINGE. Suppose Congress uses it very sparingly. I suppose it would have the value of allowing some sort of legislative review of rules which may have been poorly advised at their initial adoption. Disapproval would not have to result in this wholesale review.

Mr. KURZMAN. The problem is we would have to go through the process every time. We would have to submit them and wait every time. Whether they were of the nature you described or not, what we have tried to do in our informal way is to sort out those that do have controversial aspects to them, make sure our committees know about their issuances before actually publishing them for public comment, get the committee comments prior to the 30-day comment period, and invite their comments publicly during the 30-day period—which we have made longer for controversial issues—and we invite congressional input through that process.

We just don't see how laying the process proposed by this legislation on top of it, even if it were constitutional, would improve that in any way or regularize it in any way. In the cases we have on the books, it has not worked that way. What has happened is that we get pressured to do things in an individual way with no formal action taken and no group action taken.

The way the process really works is totally outside the prescribed manner. If you make it formal and add HEW's 800 notices on top of the legislative caseloads those 40 subcommittees have, the subcommittees are not going to have the time to consider those regulations.

Instead it is going to be a staff person making an individual input to us.

Mr. MINGE. The other line I wanted to pursue is the Office of Management and Budget review of some agency regulations. Does this occur in connection with regulations issued by some of the constituent parts of your department?

Mr. KURZMAN. No; we——

Mr. MINGE. Do you submit any rules and regulations to them for interagency review prior to their——

Mr. KURZMAN. They are not required to be routinely submitted to OMB. We are required to do so in two kinds of cases and we regularly do in those cases.

No. 1, where they involve a substantial expenditure of funds, obviously OMB has a role in that, and No. 2, where they have an impact on other departments and agencies' programs. Obviously OMB had a coordinative role with regard to that.

That is a very small fraction.

Mr. MINGE. About how long would you estimate their review takes?

Mr. KURZMAN. It varies. We have had so few cases and they have been so highly controversial it probably does take time. But our own process takes time.

Mr. MINGE. If you compare that to the amount of time that these bills would take, would the time be more or less?

Mr. KURZMAN. It tends to be less. The OMB's piece of it tends to be less than what we already spent. The time we spend varies depending upon the complexity of the issues. Generally only a couple of months is required to get out routine guides, and that is what most of these are about.

Mr. MINGE. One of the bills before us proposes 30 legislative days as an initial time period and then an additional 30 days if a resolution of disapproval was introduced.

Mr. KURZMAN. Our experience is that since there is a great likelihood no resolution would be issued except in a very rare case, the full time would have to elapse. Thirty legislative days is going to be many more calendar days. If you do it, it ought to be within the shortest time possible because the uncertainties are aggregated every day it is extended.

We think the Congress has the remedies to achieve this purpose.

Mr. MINGE. Thank you.

Mr. FLOWERS. Thank you.

Mr. Coffey?

Mr. COFFEY. If I could just take a minute, I would like to follow up on a question that has been explored by both the chairman and Mr. Minge. Your testimony indicates, at least with respect to your experience with section 431(d) that really the argument can be turned around to show that the Congress would be selective in utilizing the legislative veto. Perhaps, the primary value of this legislation would be the deterrent effect it might have on those drafting the regulations more than anything else.

I would welcome any comment you might have on that observation.

Mr. KURZMAN. Well, part of what I am trying to say is that really the use of resolutions of disapproval is only the tip of the iceberg. What really occurs and what really shapes the agency's view of how the Hill will react to a piece of regulation are these informal contacts which are occurring anyway and occur in any case in which we have any reason to believe the regulation is going to be controversial.

The question is should we have to go through the deferral period of waiting and should our constituencies and should our programs? Many of our grant programs are on cycles in which the constituency is waiting for those grants to come out and for regulatory action in order to make it possible for them to apply for those grants.

In the case of basic opportunity grant programs, students are waiting to get their funds to go to school for the next year. It seems to us to be a great mistake for the Congress to have the degree of interference in that process that they jeopardize our getting the answer out in time.

That is what has happened in the BOGS case. That is why the Office of Education is disregarding its own statutory deadline this time in order to try to correct the problem caused by the delay.

All I am saying to you is the fact that a resolution of disapproval is relatively infrequently used formally is not very satisfying to us because what that does not tell you is that it is used informally as a weapon, as a whip, and it is used in a way that does not involve the entire Congress.

It is used on the part of individual staff people. It will be more and more used that way if you add that enormous caseload of 800 notices from our department alone to the caseload those committees and subcommittees already have with legislation.

Mr. COFFEY. If Congress reaches an impasse and does not act on a resolution, then after 60 legislative days the regulation would go into effect anyway. That is not really an unreasonable delay.

Mr. KURZMAN. In many cases it really is unreasonable, particularly when you consider the amount of time required to compile the regulation and get the approval of all of the elements in the department which necessarily have to be taken into consideration because their programs are affected, and then receiving the views of the public.

After all, we are putting them out for public comment, too. We don't immediately act after the comment period closes. Instead we usually will have a 30-day period and in many cases we have extended that.

If anybody comes in—a Member of Congress or a member of the public—and asks for a further extension, we are very liberal in applying further extensions. Moreover, we rarely come out with a final regulation until at least 2 months after the comment period has closed.

If many comments have been filed, it often takes even longer. Taking those into account, making changes, digesting those, takes time. Then you have to reclear the regulation because you may have affected other agencies which we have repeatedly said to the outside world and to the Congress do not worry.

If you have not got your comment in during the comment period, file it with us anyway. If we are not at the point of publishing final regulations yet, we will take any comment into consideration. All that is going on, all the testing of how the regulations will look to the Congress and the constituents affected is going on. We think it works. We think where it doesn't work you have two remedies.

You have the courts and you have the legislative process. Lord knows based on our experience, Congress is not shy about changing our statutes. We have literally dozens of enactments every year affecting our programs. To say that you have to have this new procedure and

"what difference does it make if you just wait another 60 days" is, in our judgment, not recognizing the realities at all. Instead it is creating a new and disruptive mechanism that is going to complicate and frustrate even more than the present process.

Mr. COFFEY. One cosponsor indicated that the 60-day period would not begin to run until a final rule has been adopted by the agency.

Mr. KURZMAN. That is not our reading of the bill.

Mr. COFFEY. Mr. Clawson testified that his intent was not otherwise.

Mr. KURZMAN. We would respectfully urge that you act on it that way, that you change it to make it clearer than it is. It is prospective and that normally means notice of proposed rule.

Mr. COFFEY. Thank you.

Mr. FLOWERS. Thank you very much, Mr. Secretary, and those that you brought with you today. We will adjourn until 9:30 tomorrow morning, in this location.

Thank you again, gentlemen.

Mr. KURZMAN. Thank you, Mr. Chairman.

[Whereupon, at 11:50 a.m., the subcommittee adjourned, to reconvene at 9:30 a.m., Friday, October 31, 1975.]

[Subsequent to the hearing the following correspondence was received for the record:]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
Washington, D.C., December 4, 1975.

Hon. WALTER FLOWERS,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of November 7, 1975, regarding the views of the Department on a proposed amendment to 5 U.S.C. 553 to delete the exception to rulemaking requirements in the case of public property, loans, grants, benefits, and contracts.

As I am sure you understand, it will be necessary for me to clear the Department's position on this legislative policy question with other agencies of the Executive Branch. I have asked for that clearance process to be expedited, and I will respond to this request as soon as possible.

You have also asked how this Department determines whether to announce a particular policy as a formal rule subject to the rulemaking requirements of 5 U.S.C. 553. The basic principle we apply in determining when to issue a formal rule is that a requirement of general applicability which is intended to have legal consequences and to be legally enforceable on recipients and other affected parties will be issued via the rulemaking procedures in section 553. Moreover, in former Secretary Richardson's announcement of October 12, 1970, that the Department would hereafter comply with those procedures regardless of the exceptions in section 553, he instructed the Department to use only sparingly the authority in that section to waive rulemaking where such procedures would be impracticable, unnecessary, or contrary to the public interest. A copy of that announcement is enclosed.

This Department issues a large volume of policy announcements each year which vary in legal significance. Such announcements might include a recitation of examples of means by which programs can be implemented, interpretations of certain terms, and formal rules. The determination of whether these announcements (other than formal rules) should be published as rules in the Federal Register depends on a number of administrative and management considerations such as the bulk of the document, the speed with which it must be issued, and the relative importance of the matter. Clearly, a program manual giving detailed guidance as to means by which a particular program may be administered is not appropriate for issuance as a rule. On the other hand, some interpretations and other policy issuances which are not intended to be legally enforceable may, because of their importance or their relationship to the formal rules for a program, be issued via the rulemaking process. But directives which are generally applicable and which can be enforced through the imposition of sanctions are clearly subject to the rulemaking requirements of section 553.

There is undoubtedly some misunderstanding on the part of the public, the Congress, and even the courts as to the legal effect of various issuances of the Department. In some cases in the past this may have been the result of a lack of clarity by the issuing office in describing the purpose of the issuance. Confusion may also have resulted from the fact that Congress has imposed requirements on some agencies of the Department which differ from those in the Administrative Procedure Act. For example, section 431 of the General Education Provisions Act imposes publication requirements on material issued by the Education Division that are more stringent than those of the APA. In any event, the Office of General Counsel attempts to review all documents formally issued by the Department to ensure that those which are intended to establish rules of general applicability and which are to be legally binding on affected parties are promulgated in accordance with 5 U.S.C. 553.

I hope this information is helpful. As I indicated, I will be back to you on your first request as soon as I can.

Sincerely yours,

STEPHEN KURZMAN,
Assistant Secretary for Legislation.

Enclosure.

Memorandum

U.S. GOVERNMENT,
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
October 12, 1970.

To: Assistant Secretaries and Agency Heads.
From: The Secretary.
Subject: Public Participation in Rule Making.

Generally, before rules and regulations are issued by Government agencies, the Administrative Procedure Act (APA) provides that notice of the proposed rule making must be published in the Federal Register and interested persons must be given an opportunity to participate in the rule making through submission of data, views or arguments.

The APA exempts from this requirement matters relating to public property, loans, grants, benefits, or contracts. Legislation has been introduced to repeal this exemption. The Administrative Conference of the United States has recommended, however, that Government agencies require public participation in accordance with the APA provisions when formulating rules in the five exempt categories listed above, without waiting for the statute to be amended.

Our implementation of the Conference's recommendation should result in greater participation by the public in the formulation of this Department's rules and regulations. The public benefit from such participation should outweigh any administrative inconvenience or delay which may result from use of the APA procedures in the five exempt categories.

Effective immediately, all agencies and offices of the Department which issue rules and regulations relating to public property, loans, grants, benefits or contracts are directed to utilize the public participation procedures of the APA, 5 U.S.C. 553. Although the APA permits exceptions from these procedures when an agency for good cause finds that such procedures would be impracticable, unnecessary or contrary to the public interest, such exceptions should be used sparingly, as for example in emergencies and in instances where public participation would be useless or wasteful because proposed amendments to regulations cover minor technical matters.

Questions relating to implementation of the policy set forth in this memorandum should be directed to the Office of General Counsel.

[The following statement commenting on the foregoing testimony was subsequently filed for inclusion in the record:]

SUPPLEMENTAL STATEMENT OF REPRESENTATIVE JAMES G. O'HARA, MICHIGAN

Mr. Chairman, when I appeared in person before this Subcommittee on November 7, I had read the testimony presented on October 30 by Mr. Stephen Kurzman, Assistant Secretary of HEW for Legislation, and I asked and was given, unanimous consent to file this supplemental statement in response to that testimony.

I regret the need for filing this statement, but I feel Mr. Kurzman's testimony contained several assertions which were not supportable by the facts, and silence

on the part of the Subcommittee might be interpreted as equivalent to a *nolo contendere* plea on the part of the Subcommittee.

Mr. Kurzman chose to use, as one of the examples of the evils he believes would flow from Congressional review of Executive Branch regulations, the manner in which my Subcommittee has dealt with its responsibility to review the annual proposal by HEW of the following year's "family contribution schedule" under the Basic Educational Opportunity Grant Program—a major portion of our student financial aid program.

By law, every student's entitlement to a Basic Educational Opportunity Grant is determined by subtracting from $1,400 a "reasonable family contribution," which is calculated on the basis of a formula devised annually by the Office of Education and presented annually to the Congress for review.

Mr. Kurzman has made three statement about the experience OE has had with this procedure, and as much as I regret to say it, Mr. Chairman, Mr. Kurzman's charges in each case are wholly without foundation in fact. I must assume that he has been misinformed by somebody in his Department.

Mr. Kurzman's first incorrect statement was his assertion that "The most significant outcome of this interplay has been to delay the promulgation of rules which are necessary for the Department to make grants to millions of college students and to make them on a cycle."

This, Mr. Chairman, involves two blatant misstatements of the fact.

His third charge is implied in his statement that ". . . the affected committees have agreed this year to ignore the May 1 date provided in the statute and are trying to reach accord by November 1 . . ."

The implication of this statement is that this year, for the first time, the Committees have reluctantly consented not to drag out the process to its last extreme. This is directly contrary to the facts.

The fourth charge, which appears throughout his testimony is the suggestion that the staffs of the Subcommittees have been acting as though they were members of the Executive Branch, and have been, like members of that branch, trying to substitute their judgment for that of persons elected to make public policy.

Mr. Kurzman may, understandably, assume that our Subcommittee functions like his Department, but in this case as in the others he is mistaken.

Let's look at the record on this issue, Mr. Chairman.

There have been, as Mr. Kurzman correctly states, four annual family contribution schedules submitted to the Congress. Let us examine the time involved in each one of them, and see whether anyone can be blamed for delay, or whether, indeed, there has been any delay anywhere except in Mr. Kurzman's imagination.

The law provides for certain deadlines in this process. Under the law, the Office of Education must present its proposed family contribution schedule to the Congress not later than February 1st of the year when that schedule is to go into effect.

For the first year of the program—which was only enacted into law on June 23, 1972—the Office of Education met that deadline exactly. I say that with considerable admiration, because they had to get a new program into operation, let contracts for the development of the processing mechanism and develop a family contribution schedule, and they did so in a little over seven months. No one in the Congress faulted them for waiting until their statutory deadline to submit the first schedule.

The schedule was submitted on February 1, 1973, and the Subcommittee began its hearings on February 6th. Numerous questions about the schedule were raised by numerous members of the House—and those questions reflected the concerns of a large segment of the affected public. It took us well into March to work out with the Office of Education the changes which even minimally reflected those concerns, but on April 3rd, we were able to table the resolution of disapproval, and advise the Commissioner of Education that he could move ahead with the implementation of the program. That date, Mr. Chairman, was substantially in advance of the deadline afforded by statute, and was also substantially in advance of the appropriation of funds for the carrying out of the program.

In short, Mr. Chairman, it is absolutely correct that there was delay in the initial implementation of the BOG program in its first year of operation. But that delay was not caused by the six weeks or less time that the Congress had the family contribution schedule before it, nor was it caused, in my judgment,

by the seven months it took the Office of Education to write the proposal. The first year's program got off to a late start because it had inadequate lead time.

When we voted to lay the first resolution on the table, the Subcommittee at its own initiative requested the Office of Education to submit the next year's schedule ahead of the deadline. This request was not what Mr. Kurzman would suggest—acquiescence with the Department's wish. It was originated by the Subcommittee, and in a wholly nonpartisan manner, with both myself and the ranking minority Member signing the letter requesting the early submission, a copy of which follows:

APRIL 3, 1973.

Hon. JOHN R. OTTINA,
Acting Commissioner of Education,
Office of Education,
Washington, D.C.

DEAR COMMISSIONER OTTINA: We have been directed by the Subcommittee to advise you that H. Res. 204, a resolution of disapproval of the proposed BOG family contribution schedule, has been laid on the table, and that as far as this Subcommittee is concerned, the Office of Education is free to proceed with the implementation of the schedule and the program, subject, of course, to action by the Congress in appropriating needed funds.

We are also authorized to say, in the name of the Subcommittee, that your cooperation and willingness to engage in a constructive dialogue with the Subcommittee on the proposed schedule has been deeply appreciated.

We would like to make two suggestions, also at the direction of the subcommittee.

First, we would like to request that you make every effort to have the proposed family contribution schedule for next year in the hands of the Subcommittee substantially earlier than you were able to do so this year. You met the statutory deadline this year, and the Subcommittee is aware of the problems involved in the first draft of regulations for a new program. So there is no criticism implied in this request. But next year's schedule will obviously be based in substantial part on this year's schedule, and we feel that you will be able to get it to us earlier; and that it would be helpful to students, their families, the institutions, and to the Subcommittee if we had more time to deal wih the details of the proposed schedule next winter.

In addition to this procedural recommendation, we would urge upon you a very careful and intensive analysis of the impact of this year's family contribution schedule upon the students involved, with a view to developing hard data on the issues as yet unresolved, notably, but not exclusively, the treatment of assets under the first year's schedule. It was more than evident at the meeting today that there was and remains considerable dissatisfatcion with the manner in which the proposed schedule treats assets. Our unanimity in voting to table the resolution expressed a unanimity in wishing to see the program go foward, but should not be read as an enthusiastic endorsement of present guidelines.

With our best personal regards.

Sincerely,

JAMES G. O'HARA,
Chairman.
JOHN DELLENBACK,
Member of Congress.

The Office of Education complied with the letter of our request and the letter of the law, Mr. Chairman, but it did not comply with the spirit of the law or the intent of the Congress.

The second annual submission, which came to us on September 25, 1973—about six months in advance of the statutory deadline—came to us, not in the form of a new proposal for the coming academic year, but in the form of the previous year's schedule, which the Congress was told would be further modified after the public had looked at it, but on the basis of which we in the Congress were at once expected to pass judgment. In other words, Mr. Chairman, we were given the "opportunity" to decide whether or not we would disapprove what we had not disapproved the year before—but the real family contribution schedule would be developed whenever the Office of Education got around to it.

I introduced a *pro forma* resolution of disapproval on that same day, Mr. Chairman, and I advised the Commissioner of Education, by letter and in the Congressional Record that we would look at the family contribution schedule as soon as he sent up the real thing.

On November 6th, we began hearings on the Basic Grant Program. On November 30th—approximately five weeks after he was asked to do so, the Commissioner finally submitted a serious proposal for a new family contribution schedule. Following some very speedy negotiation with the Commissioner and Members of the Subcommittee, the Commissioner made some further adjustments to bring the contribution schedule closer into accord with the intent of the law, and on December 18th, he presented his final proposals to the Subcommittee. One day later, Mr. Chairman, the Subcommittee again tabled the resolution of disapproval and so advised the Commissioner, permitting him to move ahead with the implemenration of the progam.

In the third year, we went through the same charade. The Office of Education once again submitted the previous year's schedule—this time on July 2, 1974. Once again, the Subcommittee advised OE that it would proceed when it had a real family contribution schedule proposal before it, and once again, the Office of Education took about two months to come up with a real proposal, sending it to the Subcommittee on September 23rd. Hearings on this schedule began on September 30th, and on October 8th, fifteen days after submission of the schedule, the ranking minority Member and I were able to poll the Subcommittee by phone and advise the Commissioner by letter, that the resolution of disapproval would be tabled. The formal action tabling the resolution was taken on November 19th, but the commitment to do so was made, and made publicly, on October 8th. Once again, the few days the Subcommittee took to review and withdraw its objection to the schedule was certainly less of a factor in the bureaucratic delay than the nine months the agency took in carrying out its duties under the law.

The most recent exercise of this procedure was a far more satisfactory one from the point of view of compliance with the spirit of the law.

The proposed family contribution schedule—and it was a real proposal, suggesting real changes in the previous year's proposal—was submitted to the Congress on August 8th, while the House was in recess. When the House returned after Labor Day, a hearing date was set for October 2nd, the hearing was held, and after further informal discussions and examinations of the statistics surrounding other formulations, the Subcommittee was polled and the Commissioner was notified by letter that the resolution would be tabled, and that he was free to move ahead. While the Commissioner had originally asked for a deadline of December 1, his supplementary request that it be moved up to an earlier date was easily met. November 1st was a Saturday, and the Commissioner was notified of the Subcommittee's action on the following Monday.

In summary, Mr. Chairman, I find Assistant Secretary Kurzman's assertion that the review procedure has caused delay in the implementation of the BEOG program to be wholly contradicted by the recorded facts. The Subcommittee has been prompt in its handling of the review procedure—far prompter, in fact, than the Office of Education has been, either before or after the review process has been undertaken.

Further, the review process has done far more than affect the time schedule. It has been through the review procedure, and only through the review procedure, that the Office of Education has been dragged, kicking and screaming every inch of the way, into making improvements demanded by the public and for which it now claims full credit.

The review process has been the only reason for a liberalization of the treatment of Social Security income—a change in the regulations which the Administration now has joined everyone else in suggesting be enshrined in the law itself. The review process has been the only reason the treatment of assets has been given slightly more realistic handling by the Office of Education.

The review process is solely responsible for the introduction of an automatic Cost-of-Living Adjustment in the family contribution schedule.

In short, Mr. Chairman, the review process which Mr. Kurzman asserts has only caused delay has, in plain documentable fact, caused considerable improvement in the substance without contributing as much delay as we experience in getting someone in Mr. Kurzman's Department to return a telephone call.

Mr. Kurzman's third assertion is that the Department has sought to achieve advance consideration of the schedule, and only this year has the Subcommittee agreed. This is, also, clearly at variance with facts. It has been the Subcommittee which has repeatedly sought early submission of the schedule, and the Department which has repeatedly, until this year, tried to avoid any submission at all until after the review process was completed.

The last assertion, which permeates his testimony, is that individual Members or even worse, "staff persons" have sought to use the review process to achieve their own individual goals, or to give voice to their own hang-ups.

Only two Subcommittees—the Subcommittee on Postsecondary Education of this body, and the Senate Subcommittee on Education have been actively involved in the review process. It would not be either appropriate or possible for me to speak for the Subcommittee in the other body, but I believe the facts are the same on both sides of the Capitol.

Neither can I speak for the minority staff of the House Committee, but from my close observation of that staff during three years of working on this process, I can assert that I cannot conceive of that group of staff people believing they have the right to translate their own preferences into the policy process.

I can, however, Mr. Chairman, speak with assurance about my own Subcommittee staff, whom I have chosen, and who are thoroughly convinced of the desirability of doing things *my* way. The members of that staff have strong personal beliefs, but the one they hold to most firmly is the belief that the hired hands of government—a category into which they and Mr. Kurzman both fit—are not authorized to assume the role of elected officials.

I would hope the bureaucracy, for which Mr. Kurzman speaks, would begin to apply that same kind of self-restraint, and realize that they, like staff members of the Congress, have been hired to carry out policies which are to be made by those elected to do so—and that's what this hearing is all about, Mr. Chairman.

CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

FRIDAY, OCTOBER 31, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:45 a.m., in room 2141, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee], presiding.

Present: Representatives Flowers, Danielson, Mazzoli, Pattison, Moorhead, and Kindness.

Also present: William P. Shattuck, counsel; Jay T. Turnipseed, assistant counsel; Alan F. Coffey, Jr., associate counsel; and David Minge, consultant to the subcommittee.

Mr. FLOWERS. We apologize for being delayed.

Our first witness this morning is Mr. Robert Lewis, General Counsel of the Federal Trade Commission. We are delighted to have you with us this morning. You may proceed as you see fit. I also apologize to both you and Mr. Conklin for putting you off last week over to this week.

We appreciate your patience with us.

TESTIMONY OF ROBERT LEWIS, GENERAL COUNSEL, FEDERAL TRADE COMMISSION

Mr. LEWIS. Thank you, Mr. Chairman.

I appreciate this opportunity to offer the unanimous views of the Federal Trade Commission on H.R. 3658 and H.R. 8231.

The Commission is in full accord with the apparent basic purpose of this legislation—to enhance the accountability of government and to arrest the long trend of government toward the overregulation of our economy and the lives of our citizens.

However, the Commission seriously doubts that enactment of either of these bills would facilitate the achievement of these goals.

H.R. 8231 would require all proposed rules and regulations of any Federal agency to be submitted with an explanatory statement to both Houses of Congress. Either House would be empowered for a period of 60 days thereafter to adopt a resolution disapproving the proposal on one of three alternative grounds. That it—

1. Is contrary to law;
2. Is inconsistent with the intent of Congress; or
3. Goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used.

The 60-day period could be reduced by the adoption of a concurrent resolution approving the proposed rule. Unless so approved or disapproved within the 60-day period, the proposed rule would become effective at the end of the period.

H.R. 3658 would impose a similar review process but is narrower in scope. It would apply only to proposed rules which meet two criteria—first, that the rule is subject to section 553 of the administrative Procedure Act, and, second, that violation of such rule would subject the violator to a criminal penalty.

In addition, H.R. 3658 provides no standards upon which disapproval would be based, but merely authorizes the adoption of a resolution by either House that such House "does not favor the rule."

Since the Federal Trade Commission is not authorized to issue rules which contain criminal sanctions for their violation, H.R. 3658 would have no application to Commission rulemaking.

For this reason, and because the broad concept of congressional review is the central theme of both bills, the comments which will follow will focus on H.R. 8231.

Congress created the administrative agencies and Congress clearly has the right to modify the administrative process in any way it chooses—within the confines of the Constitution. In fact, less than a year ago Congress mandated significant changes in the FTC procedural authority by enactment of the Magnuson—Moss warranty—Federal Trade Commission Improvement Act. However, before enacting legislation such as H.R. 8231 or H.R. 3658, we suggest that Congress examine the following considerations:

First, the burdens imposed upon Congress and the costs of further delay may not be justified by the uncertain benefits of case-by-case review.

Second, existing judicial review may well be adequate to curb agency excesses.

Third, while adding to the existing problem of administrative delay, the proposed legislation would add little to the basic oversight and legislative powers of Congress.

Fourth, an arbitrarily selected period of time—such as 60 days—may not represent a reasonable period for examination of the universe of administrative activity which ranges from the mundane to the momentous.

Fifth, the legislation could disrupt the salutary features of the administrative process.

THE COSTS OF CONGRESSIONAL REVIEW

Although the Commission supports efforts to improve the accountability of executive and independent agencies, the Commission believes that H.R. 8231 would be likely to create more review, more paperwork, and more delay without enhancing the present ability of Congress to control the activities of these agencies.

Legislative review of the proposed rules and regulations of every executive and independent agency would involve Congress in the same kind of burdensome detail that caused it to create administrative agencies in the first place.

Because of the sheer magnitude of the actions which would be subject to review, it would be very difficult for Congress to provide overall meaningful review. The best it could do would be to select an occasional rule for its full attention and, of course, Congress is fully able to do that now.

Mr. Chairman, as previous witnesses have testified, a large part of the 45,000 pages which comprise the Federal Register for over year—1974—pertains to matters which would fall within the scope of H.R. 8231. The complexity and variety of these regulations correspond to the almost unlimited subject matter dealt with by the various Federal agencies.

Assuming that Congress would wish to examine the complete administrative record in conducting its review, Federal Register material represents only the tip of the iceberg. For example, the FTC proposed rule on disclosure requirements and prohibitions concerning franchising is based on proceedings extending from 1971 to 1975 and a public record of over 30,000 pages. This is still merely a proposed rule and has not yet been finally adopted by the Commission.

Based upon the initial public response, the franchising rulemaking record may well be matched and exceeded in both length and complexity by several rulemaking proceedings recently announced by the Commission.

THE ADEQUACY OF JUDICIAL REVIEW

Section 706 of title V of the United States Code provides that reviewing courts may set aside agency actions which are found to be (*a*) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (*b*) contrary to constitutional right, power, privilege, or immunity; (*c*) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and (*d*) without observance of procedure required by law.

The Commission believes that these standards, which are more inclusive than those set forth in H.R. 8231, should be adequate to curb agency excesses. The omission of any review standards—as in H.R. 3658, for example—would scarcely be an improvement—at least from the viewpoint of an agency trying conscientiously to implement its statutory mandate.

From a reviewing court's standpoint, H.R. 8231 would pose an additional problem: Should the failure of Congress to veto agency action imply congressional approval? If so, why should there be any need for judicial review at all, except for the examination of Constitutional questions?

The Commission agrees with the conclusion of Prof. Robert W. Hamilton in his study of May 8, 1972, which was prepared for the Committee on Rulemaking of the Administrative Conference of the United States, entitled "Procedures for Adoption of Rules of General Applicability:"

> Legislative review of rules appears to be less desirable than judicial review. Of course, rulemaking of itself is administrative legislation, and abstractly, review by Congress, the delegating authority, may seem appropriate. However, there is doubt as to the constitutionality of such statutes to the extent they omit approval by the President, or involve approval by a committee or a single branch of Congress. Further, there is no machinery for effecting such review, and the experience of legislative review of administrative or executive actions in other areas, for example, reorganization plans, does not indicate that such review provides a full and careful reappraisal of the substantive decisions by Congress. Judicial review, with its long tradition, appears to provide a more desirable type of review by agency action.

BASIC CONGRESSIONAL AUTHORITY

Since agency activity is already clearly subject to congressional review and reversal by enactment of overriding legislation, it would appear unnecessary to submit each agency rule individually to Congress. Publication in the Federal Register of such rules, both when proposed and when finally effective, provides notice of each to Congress as well as to the public.

Congress on many occasions has exercised its veto authority over administrative regulation, by adopting legislation cancelling or modifying such action.

For example, legislation is presently pending in Congress which would reverse the effect of a Commission complaint now pending against soft drink manufacturers and bottlers charging them with illegally restricting the marketing territories of intrabrand competitors.

Since this agency activity involves administrative adjudication, it would not be covered by either H.R. 8231 or H.R. 3658.

Nonetheless, it provides an example of the ability of Congress to address agency action when it wishes to do so. And, although an agency may oppose such overriding legislation, as the Commission staff has opposed the so-called bottlers legislation, the Federal Trade Commission certainly does not contest the basic authority of Congress to reverse agency action through legislation.

H.R. 8231 would enable one House of Congress to accomplish by resolution what can now be accomplished only by legislation. Quite apart from constitutional questions, Congress may wish to ponder whether one House should be empowered to veto Government action considered lawful and necessary by the other House or by the President.

THE 60-DAY PERIOD

The 60-day waiting period which is prescribed by H.R. 8231 poses a two-dimensional problem. It would incorporate into every rule or regulation a delay which might be unjustified in many instances.

On the other hand, as to the rules and regulations selected by Congress for full, substantive review, this period might be too limited to afford adequate congressional scrutiny. This would be particularly true of regulations and rules involving complex and controversial issues, or rules such as the FTC's franchising rule, already mentioned, which are based upon a voluminous record of proceedings.

THE ADMINISTRATIVE PROCESS

Finally, Mr. Chairman, the most fundamental effect of H.R. 8231 would be to diminish the effectiveness of administrative rulemaking as a useful tool of modern government despite its many shortcomings.

By routinely injecting a legislative review procedure in the rulemaking process, the bill would once again involve Congress in the maze of administrative details which necessitated their delegation by Congress to the various administrative agencies over the past 75 years.

The wholesale retrieval by Congress of the authority it has delegated should be considered only after other alternatives to remedy regulatory excesses have been examined.

OTHER APPROACHES

It is certainly no secret that the American public is dissatisfied with its Government. The public is dissatisfied with government because there is too much of it and because what it does is often costly, counterproductive, and confusing.

Instead of resolving these problems, however, H.R. 8231 might only make them worse. We believe that there are better alternatives.

Much can be done by agencies themselves to improve their processes and to increase public accountability. At the Federal Trade Commission over the past few years we have tried to accomplish this by reducing administrative delay, by increasing agency openness, by applying cost-benefit analysis to agency decisionmaking, and by restructuring our activities on a programatic basis so as to provide a better foundation for planning and evaluation by the Commission and for oversight by the Congress.

Earlier this year, Mr. Chairman, the Commission actually proposed rescinding 61 of its 150 trade practice rules or guides, thus lightening by at least a few pages the bulk of the Code of Federal Regulations.

More specifically, with respect to agency rulemaking the Commission has published rulemaking procedures which are designed to maximize public input without sacrificing prompt decisionmaking.

These procedures include notice, opportunity for public comment, opportunity for an informal hearing including limited rights of cross-examination, and the promulgation, as part of the final rule, of a statement of basis and purpose including a statement as to the economic effect of the rule taking into account the effect on small businesses and consumers.

As this subcommittee knows, these procedures were mandated by the Magnuson-Moss Warranty Federal Trade Commission Improvement Act of 1974. Nonetheless, these procedures have been recognized and employed by the Commission for several years, and the Commission is in complete accord with the purpose of section 202 of the Magnuson-Moss Act—to enhance Government accountability by maximizing public participation.

The Magnuson-Moss Act also requires the Commission along with the Administrative Conference of the United States to conduct a study and evaluation of the effect of these new rulemaking procedures and to submit a report of its study to Congress.

Naturally, the Commission will provide a copy of its report to this subcommittee.

With respect to the growing problem of overregulation, the Commission has previously urged congressional reexamination of governmental regulatory policies with a view toward substantial revision or even repeal of these policies where warranted.

In particular, the Commission has urged that all Government economic activity should be judged, not only by its alleged benefits, but also by its often hidden costs. Basically, the Commission believes that meaningful regulatory reform can be accomplished much more effectively by such broad review, rather than by piecemeal after-the-fact examination of every regulatory action of every Government agency.

The House Judiciary Committee has already addressed one example of unwarranted Government restraint by recommending repeal

of the anachronistic fair trade laws. This recommendation has been adopted by the full House and is currently pending in the Senate.

This salutary action is a prime example of cost-benefit analysis providing the consuming public with one less impediment to a free market and lower prices, and it is fully supported by the Federal Trade Commission.

As this subcommittee knows, the Federal Trade Commission is currently directly involved in improving consumer welfare by eliminating anticompetitive regulation. One example is the Commission's proposed prescription drug trade regulation rule which, if adopted, would have the effect of nullifying restrictive State laws.

By making it an unfair practice to restrict or prohibit the advertising of prescription drug prices, this rule is concrete proof that Government is capable of self-generated deregulation.

In conclusion, the Federal Trade Commission is seriously concerned with the problems of Government over-regulation and accountability. We are strongly inclined to the view, however, that regulatory excesses can best be resolved, not through ad hoc congressional review of every regulatory action, but instead by a systematic review of the basic regulatory policy of each agency.

We look forward to cooperating with the Congress in such an endeavor.

Thank you.

Mr. FLOWERS. Thank you very much, Mr. Lewis. I personally like very much the tone of your remarks and I am not sure you are not doubling as President Ford's speechwriter with some of the things you said.

I only hope that those principles will be implemented because not only in the Federal Trade Commission but throughout the Government I think we need to do the kind of things you are talking about. I note with approval the fact that at least 61 matters will not burden us and to paraphrase remarks made a few years ago by somebody else, one small step for the Federal Trade Commission but one giant step for the bureaucracy.

I think we need to move in that direction. Of course that is the impetus for these hearings and the many, many cosponsors we have for this legislation.

I am not sure personally that the approach of these bills is necessarily the only correct approach but I do feel that we need to set into formal practice something that will help the agencies and help the Congress so that we have better communications, so we know where each other stand and we can prevent the kind of evil that may be imagined or it may be real in terms of excesses or rules that contravene the intent of the Congress.

I think the tone of your remarks heads in that direction and I appreciate it.

Mr. LEWIS. Thank you, Mr. Chairman. Having been in Government for 5 years or so, I can atttest to my belief at least that some of the practices are more real than imagined.

Mr. FLOWERS. You know a lot of us have constituents that urge us to pass one law to abolish all other laws and start once again. I wondered how long it would take us to accumulate the many thousands of

regulations and acts we have on the books? Now on page 8 of your statement, Mr. Lewis, in your words of—concerning what the FTC is now implementing and trying to do to clean up its own shop, I would ask you if you could give more specifics to what you are doing to cut down on administrative delay or increase agency openness or to apply the cost-benefit analysis which I think is absolutely imperative that we do it now in all agencies and departments?

Mr. LEWIS. Mr. Chairman, I would be glad to respond. Over the past 2 or 3 years the FTC has taken a number of steps to clean up its own shop as you suggest.

First of all, with respect to reducing administrative delay, the Commission earlier this year eliminated one step in its adjudicative process by doing away altogether with the so-called part II settlement procedure which we estimated generally added a period of several months to the processing of each Commission complaint without producing very much in return.

In addition, the Commission has proposed rules which would revise its discovery rules for adjudication and these have been out for public comment. The Commission has not yet taken final action.

With respect to Commission openness, the Commission has tried to increase the accountability of Commission actions by first of all announcing along with every Commission action the vote of the five Commissioners on each action which had not been done previously, at least not across the board.

In addition, the Commission now announces the opening of industry-wide investigations when they are opened. Previously the Commission had announced such activity only after it was ready to bring an administrative complaint.

With respect to cost-benefit analysis, the Commission, through its office of policy planning and evaluation, is attempting to force the operating bureaus whenever they propose any kind of action—whether it is rulemaking, or whether it is adjudicative action—to weigh the proopsed benefits to the consuming public against the costs in dollar terms of engaging in the activity.

This is a very difficult process, one which is going to be a very slow process and one which is impeded by our lack of precise economic data on the effect of various Commission activities. One thing we are trying to do to improve our economic base which you may be aware of, is the proposed line of business reporting program whereby we are asking the 400 or 500 largest companies in the country to give us data based on line of business reporting rather than just overall company reporting. This sort of information ought to enable the Commission to bring cases which will be specifically directed towards improving benefits from the consumer standpoint.

Finally, as a management matter, the Commission over the past year has instituted a program budget so that now when we submit our budget to the Office of Management and Budget and to the Appropriations Committees of Congress, we provide them with not merely line items—travel, how much for telephones—but how much we are spending on various programs such as competition in the food area, competition in the energy area, how much we will be expending in condominiums and land sales, and laying this out so Congress can see exactly where the taxpayers' money is going.

If the Congress wishes they can tell us how they would prefer to see this money spent. This has happened over the last year, in fact.

Mr. FLOWERS. Very good. How many people are employed by the Federal Trade Commission?

Mr. LEWIS. Nationwide, approximately 1,700.

Mr. FLOWERS. What is the operating budget on an annual basis at this time?

Mr. LEWIS. Our 1976 budget which is the fiscal year we are in right now is $46 million, approximately.

Mr. FLOWERS. I think one mistake that all of the people who oppose the legislation before us have made is in assuming that every proposal or regulation would be subject to congressional review.

I don't feel that would be the case even under these bills as they are presently written. I think that only those proposed rules and regulations that attract the ire of a sufficient number of the American people to elevate it to national concern would ever get to this status.

Based on my experience in the several years that I have been in Congress, I have been trying to think of which regulations involving FTC would have gotten to that stage. About the only thing I can think of would be the bottlers adjudication which you say was an adjudication and not a rule promulgated as such and therefore it would not be subject to these legislative attentions.

Mr. LEWIS. That is correct, Mr. Chairman. As a matter of fact, to the extent we have congressional interest in our rulemaking, criticism is usually directed at the Commission because we are not moving fast enough.

Two days ago, hearings were held in the other House on a proposed piece of legislation which would require octane posting on gasoline pumps. The Commission proposed 4 years ago a rule which would cover this. The rule has been thrashing about in the courts, including the Supreme Court, ever since and finally has gone back to the district court on remand for a consideration of the substance of the rule itself, the question previously having been the basic authority of the Commission to engage in rulemaking at all.

Ironically, the Commission is being asked, when are we going to get this rule, and our answer is, as soon as we can get court approval.

Mr. FLOWERS. Counsel has just reminded me that the cigarette advertising rule, of course, was subject to congressional action.

Mr. LEWIS. That is correct. The Congress was heavily involved in that development, all along.

Mr. FLOWERS. Thank you, Mr. Lewis. I recognize the gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Lewis. It is a fine statement. I don't agree with all of it but I think you have done an outstanding job in presenting the problems to us.

One thing that concerns me is the opportunity of the people to have a voice in some of these regulatory processes and the fact that bureaucratic regulators and the courts are all very far removed from the people.

To me this makes it necessary that Congress play some role in this thing, because they have no one else to go to. We had a gentleman testify yesterday and he really played down the importance of the

people having an opportunity to look at the rules before they were finally adopted. He said that was just something you did when you had time.

I am much concerned about that attitude because that is too autocratic. Where problems exist, people don't have an opportunity to have them changed even if they are going to be contrary to the best interests of their industry or their way of life.

How are you going to do that without giving Congress some kind of a review of the type that is proposed in this legislation?

Mr. LEWIS. Well, this is certainly a basic question. I certainly disagree with the attitude that the public should not have a role in rulemaking. As I mentiond in my statement, what we are trying to do at the Commission with respect to our rulemaking activities is to provide the maximum possible public exposure of our rules as they go through the rulemaking process.

As I indicated our rules now provide, in addition to the section 553 rulemaking procedures, for opportunity for a hearing on each and every rule under the Magnuson-Moss Act as well as a limited right to cross-examination by parties with a legitimate interest in rulemaking efforts and activities.

So by the time a proposed rule comes back to the full Commission for consideration and final action, the rule should have been exposed to every possible public viewpoint and every effort will be made by the Commission to see that it is.

It is only by such a process that the Commission is going to be able to act in the public interest.

Mr. MOORHEAD. There is a feeling by many that the regulatory process should be removed from any kind of political pressure.

I am sure that that is the point of view of many who feel that this legislation is the wrong approach to take. But if you remove it from political pressure, how then is the voice of the people of our democracy going to be heard?

Mr. LEWIS. Well, I don't think that the bureaucracies could or should be insulated from public exposure and from pressure and comment from its elected representatives. Of course, in addition to the points which I made in my testimony with respect to our inviting public comment at the agency and our inviting congressional review—which started this past week, at least over on the Senate side—of regulation across the board, certainly I think it has been our experience at the Commission that a combination of our oversight committee activities on the Hill and the appropriations process provide an excellent opportunity for Congress to take a look at exactly what we are doing and to express its views, with a view towards enactment of legislation if warranted.

Mr. MOORHEAD. You indicated that you felt that judicial review, perhaps, was better than the congressional review.

Mr. LEWIS. I think we need both.

Mr. MOORHEAD. What is proposed in this legislation is a 60-day period. Judicial review usually requires the violation of a regulation, the risk of going to jail in many instances, and paying a big fine in order to get the review.

The time and the cost involved is so great that many people can't afford either of them. Their business can go broke in the 3 or 4 years

that it takes to get full judicial review. If their business is not broke, they would run out of money for attorney's fees unless they were a very big organization.

Do you feel that situation provides for an adequate review?

Mr. LEWIS. I think, at least with respect to our activity, that it does. Our rules are subject to challenge as soon as they are finalized. Our statute specifically provides for review and specifically provides for review standards.

Mr. MOORHEAD. I feel as you said that your organization is much smaller than many of them that we are talking about. Perhaps it does not have as many problems that touch people as closely as some of the other regulatory agencies. Do you feel that the 60-day period is in this legislation and the number of regulations that might actually come under scrutiny would be such that you could really say that it adversely affects bureaucratic regulations?

Mr. LEWIS. The administrative process despite its many defects has many salutory effects, namely the ability of the bureaucracy to impose upon a particular problem its expertise, its staff and I think that this is a good effect. This is the way it should work.

Efforts ought to be made to improve that process itself without inducing what would amount to one more layer of review which would unnecessarily delay the rules.

But I suggest 60 days might not be long enough for Congress with its limited staff to be able to take a look at, for example, our proposed rule on creditors remedies which has been in progress for several years and which involves some 9 or 10 specific kinds of prohibitions.

For Congress to get into this kind of thing, I thing, would defeat the very purpose of the administrative process.

Mr. MOORHEAD. I agree. If Congress was getting into every single regulation, it would be more of a job than Congress could handle. There would be delays that would be unfortunate and that would be more harmful than good.

But it would seem to me that you have to have some kind of an agency closer to the people who can in the most delicate situations, have some voice.

This legislation may not be the way the Congress can exercise that in the best manner but we have to try some kind of a method where that voice and that control could be exercised.

Mr. LEWIS. With respect to the Congress, I firmly believe that an awfully lot more could be done through oversight I know that with some agencies, oversight hearings are not held that often. We have had the good experience over the past few years of having oversight hearings fairly frequently, at least on an annual basis by on House or another, where what we are doing can be exposed to Congressional scrutiny.

With respect to the courts, if you have an abuse of power, there is always an opportunity for an injunction to stay such action until the adjudication takes its course.

Mr. MOORHEAD. Do you have any idea what percentage of your agency's regulations involve a criminal penalty?

Mr. LEWIS. None.

Mr. MOORHEAD. None of yours?

Mr. LEWIS. None at all.

Mr. MOORHEAD. Thank you for your testimony.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. Thank you for your testimony.

Mr. FLOWERS. Thank you, Mr. Lewis.

Next we have our distinguished colleague, Ralph Regula. Ralph, we will be delighted to receive you and to hear your remarks on the pending legislation.

Welcome to our committee.

TESTIMONY OF HON. RALPH S. REGULA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. REGULA. Thank you, Mr. Chairman. I appreciate the chance to be on the schedule and I am particularly impressed with the promptness with which you scheduled hearings on this matter.

I think it is one of great concern to the American people and one of great concern and great frustration to them and therefore bringing this matter for early hearings is important to those that we represent. I won't take a lot of the committee's time. I have a statement that is being passed out that I will submit for the record and just summarize.

Mr. FLOWERS. We will receive it, Congressman Regula, and thank you very much.

Mr. REGULA. As I in a short tenure in this Congress view this body, two great problems are lack of time to deal with all the challenges that confront us as members and secondly, it is a weakness that we have in oversight.

This includes a lot of things. The previous witness mentioned the fact that this does provide an opportunity for oversight. I think it is oversight with a substantial amount of clout as we provide it in this bill.

It appears to me that one of the roles that Congress must exercise more in the future is oversight not only as to the rulemaking power of the agency but also directly having oversight of the agencies themselves. I proposed a bill that would establish a zero base budget concept.

The result of this would be if it were enacted would be to require all agencies to at least once every 6 years come into the appropriating committees on the basis of zero and justify their entire budget and not just the new portion of their proposed budget increases.

It would accomplish in terms of the agency what we are trying to do here in terms of oversight of rulemaking and all of us go out and give speeches to high school groups and all kinds ofgroups and we urge people to participate. I think that has been perhaps accelerated by the post-Watergate era in which we all say to our constituents, "Write to us, sound off, participate in this process. It is your government." Yet when people attempt to participate, they come up against the fact that much of what impacts their lives is not legislative but rather the result of an action by an agency.

So in effect they are being impacted by action which has all the thrust of legislation and yet in which they have no direct voice because we as their representatives did not in effect enact the thing that is causing some of their problems.

I must say in all fairness to the agencies, my observation as a Member is that we tend to be ambiguous oftentimes in legislating to avoid some of the tough decisions and dump the problem in the lap of agencies.

If we enact this action, we are inviting some tough decisions that will come our way that we now leave to the agencies and say in effect, you do it.

We are going to give you a broad mandate and from there on you can take the heat. So, we are guilty in a sense of legislating ambiguously and thereby inviting the kinds of rules that we are talking about today.

I would hope that the committee would continue the hearings on this and attempt to develop workable legislation that will provide two things: the opportunity for the public to be better heard in terms of this action which does have a legislative impact on their daily lives, and second, some type of program or some type of technique that will cause the agencies to be more responsive through the elected representatives, namely, the Congress.

I would be interested—I don't know if there has been any evidence presented—how often the so-called administrative procedures hearings are ever held outside the city of Washington?

I doubt if it is very often. The result is that people really don't have an opportunity to participate. Not many get the Federal Register and really know what is happening until suddenly one day this rule that comes along and they are expected to comply with it and they write to us and say what happened.

We start tracing it back and discover we did not really have a direct voice in making that happen.

Mr. Flowers. Could I interrupt you a minute? I see our distinguished chairman, Pete Rodino. I welcome you, Mr. Chairman, to our subcommittee. We are delighted to have you. I always feel a little ostentatious sitting in this chair here which you so capably occupy during our full committee meetings.

Chairman Rodino. Thank you. I don't mean to intrude but I have a European visitor, and I am showing him our committee facilities.

Mr. Flowers. You are welcome.

Mr. Regula. I won't take more of the subcommittee's time. I emphasize that I think you are doing a great service to the Congress and the people by hearing this matter promptly and attempting to work some solution to the frustrations that result from the absence of the people's voice then in matters that have such an impact on their daily lives.

Mr. Flowers. I appreciate those comments. I am speaking for myself but I think the other Members, too, we appreciate this as a high priority item. Although I personally do not feel drawn to any approach at this time, I think we need to air it fully and maybe find out that the processes that are being utilized now are not the monster that we perceive them to be.

Perhaps in some respects—and I harken back to the previous witness—the agencies are trying to do a better job now. Maybe we can say that is because there is more Congressional oversight than there has been.

I think we are definitely in the oversight business now in this Congress. It has been one of the really good fallouts from the Watergate syndrome. I think you and others, sponsors of this legislation, feel that way, too.

Mr. Moorhead?

Mr. MOORHEAD. You have expressed the point of view that most of us have about the dangers of having a group of regulators who are not directly responsive to the people, and who are without any kind of ability to overturn something that the majority of the people are against.

We don't know exactly what we can do or how this legislation will come out in the best interests of everyone. We don't want to destroy the incentive of the agencies to do the very best job possible.

At the same time we would like to have a voice so that people who are endangered can be protected. I think you expressed it very well.

Mr. REGULA. I think it will have the salutory impact of forcing the agencies to examine their techniques and we as members by having a hearing such as this.

Mr. FLOWERS. Mr. Mazzoli?

Mr. MAZZOLI. I would like to welcome Ralph to the subcommittee and to point out what I think you really put your finger on too, and that is that we ourselves as a Congress are quite often the culprit because we have given this broad mandate and dumped it in their laps. It is true. That means let them take the heat, the problems, the political fallout from their actions.

If we are to pass such a bill as this or anything akin to it which would cause us to be in the business of overseeing these regulations, you are going to find a lot of guys trying to dive under the table.

But if we are going to be putting our money where our mouth is, we really have to be prepared to take the heat because if we do, we will be responsible more to the voice of the people. I appreciate your being here.

Mr. FLOWERS. Thank you very much, Ralph.

We appreciate your testimony and as I stated earlier we will include your complete statement in the record at this point.

Mr. REGULA. Thank you, Mr. Chairman.

[The prepared statement of Hon. Ralph S. Regula follows:]

STATEMENT OF HON. RALPH S. REGULA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Chairman and members of the subcommittee, I am grateful to have this opportunity to discuss with you today perhaps the most important issue which can lead to the restoration of public confidence in government—accountability. It seems to me the key element in each of the measures before this subcommittee is the notion that those responsible for government decision making must be accountable to the public they serve.

A review of the record of these hearings clearly demonstrates the sometimes arbitrary and capricious rule-making generated by administrative departments and regulatory agencies. I do not wish to occupy the subcommittee's time with more "horror stories" of regulatory abuse. However, I want to emphasize the need to assure that civil servants and appointed staff be responsible to the millions of taxpayers who pay their salaries.

I believe that Congress is the appropriate branch of government to accept this responsibility. Regulations result from a direct grant of authority by the legislative branch. They have the force of law without so much as a subcommittee hearing. The rule-making procedures proscribed by the Administrative Procedures Act permit bureaucrats to "write" law without the possibility of Executive veto, or the scrutiny of the Congress. The effect of rules and regulations is often prospective, as such they are akin to legislation. In short, Congress grants legislative power without any check on the misuse of the delegated discretion.

Representative Elliott H. Levitas said it well in his testimony before the subcommittee on October 21, 1975, ". . . the most telling and important characteristic of the Congressional (as opposed to undemocratic) legislative process is that it is engaged in by legislators elected by the people they govern, responsible to the people they govern, and subject to rejection by the people they govern."

Congressional review of bureaucratic rule-making is the best way to restore public accountability to this law-writing process. Because rule-making is a delegation of Congressional legislative power, the final step in the development of federal regulations ought to include review by the Congress to assure that these bureaucrat-made "laws" do not exceed the scope of the legislation which they are designed to implement. Such a review would return to Congress full responsibility for *all* federal law writing activity.

In recent years the issue of government accountability has received favorable treatment in the Congress. This body has taken major steps to curb abuses of power, and to improve its own processes and procedures. There has been a recent steady and healthy return of powers that were delegated or usurped away from the legislative branch over a period of time. Congress has taken action to check abuse and revitalize its jurisdiction over a number of matters. The War Powers Act and the Budget Impoundment and Control Act are examples of measures designed to return rightful authority to the Congress. Another measure, which I have proposed, the Zero-Based-Budgeting Act, which would require Congressional review of federal programs at least once every six years, is intended to improve Congressional authority over government programs.

I believe that Congress is ready to check abuses in federal rule-making power. I recommend H.R. 8231 as the vehicle by which the Congress may prevent the adoption by the Executive Branch of rules or regulations which are contrary to law or inconsistent with Congressional intent or which go beyond the mandate of the legislation which they are designed to implement.

This bill provides that whenever any officer or agency in the Executive Branch of the Federal Government (including any independent establishment of the United States) proposed to prescribe or place in effect any rule or regulation to be used in the administration or implementation of any law of the United States or any program established by or under such a law or proposes to make or place in effect any change in such a rule or regulation, such officer or agency shall submit the proposed rule, regulation or change to each House of Congress together with a report containing a full explanation.

The proposed rule would become effective sixty legislative days thereafter or at such later time as may be required by law, or specified by the rule, regulation or change itself or the report submitted with it, unless within that time either House of Congress adopts a resolution of disapproval because it is contrary to law, inconsistent with Congressional intent or goes beyond the mandate of the legislation it is intended to implement. The bill permits the adoption of a concurrent resolution specifically approving the rule, regulation or change. Adoption of any such concurrent resolution would cause the rule, regulation or change to become effective immediately or as soon thereafter as is permitted by law.

It is important to remember that the vast majority of federal rule-making does not abuse discretion, what is needed is a system to permit Congressional consideration of those rules that appear to fall outside the intent of Congress or the mandate of the law.

Those rules and regulations that are controversial or place undue burdens on the public are the ones that will be most likely to be brought to the attention of the Congress. Certainly, the affected parties will seek Congressional relief from rules they believe are unjust. Congress will be asked to make the hard policy decisions. This is as it should be.

Yet, H.R. 8231 limits the Congressional review of rules to abuses of administrative discretion that are contrary to law or inconsistent with Congressional intent.

The establishment of Congressional review will serve as a deterrent to abuses of bureaucratic rule-making power. It is my hope that the existence of Congressional veto power will reduce the need for legislative interevention by assuring that the bureaucracy is more responsive to the public in the first instance.

In those instances where the bureaucracy over-reaches its authority, this legislation would restore accountability.

Mr. FLOWERS. Our next witnesses are with the Occupational Health and Safety Administration of the Department of Labor, Mr. Bert

Concklin, Deputy Assistant Secretary, Occupational Health and Safety Administration, Department of Labor, and Mr. Benjamin Mintz, Associate Solicitor.

Gentlemen, I repeat what I said to Mr. Lewis earlier. We appreciate your being with us today. We apologize for putting you off last week.

TESTIMONY OF BERT CONCKLIN, DEPUTY ASSISTANT SECRETARY, OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION, DEPARTMENT OF LABOR, ACCOMPANIED BY BENJAMIN MINTZ, ASSOCIATE SOLICITOR, OSHA

Mr. CONCKLIN. Thank you very much, Mr. Chairman and members of the subcommittee. I would like to express my appreciation for this opportunity to discuss H.R. 3658 and H.R. 8231, bills which would establish procedures under which administrative regulations could be prevented from coming into effect by resolution of either House of Congress.

Accompanying me today is Benjamin W. Mintz, Associate Solicitor of Labor for Occupational Safety and Health.

Other witnesses have gone into a detailed analysis of the bills presently under your consideration. I will not go over that same ground again. I will instead address myself to the bills only as they would impact on the Occupational Safety and Health Administration. However, the practical consequences and implications of these proposals are clearly not limited to OSHA.

H.R. 8231 appears to cover virtually all rulemaking of administrative agencies and the executive branch. Even the more narrowly drawn coverage of H.R. 3658 would seem to apply to a number of Department of Labor programs in which criminal penalties may result from violation of regulations.

Aside from OSHA, these could include programs under the Farm Labor Contractor Registration Act, the Employee Retirement Income Security Act, the Fair Labor Standards Act, and programs under the Manpower Administration; still other regulations under other Department of Labor programs might be covered by H.R. 3658, depending on the meaning of the language of the bill.

For instance, would a violation of a regulation which results in a court injunction or order to comply with the regulation subject the violator to criminal penalties, since violation of the court's order could result in criminal contempt sanctions?

In any event, there are a substantial number of other Departmental programs carried out under a number of statutes, each expressing a different scheme and legislative policy.

In focusing upon the relationship between OSHA and these bills, it would be worthwhile to examine the procedures under which occupational safety and health standards are developed and promulgated.

While there are other aspects of the OSHA program which might be affected by the proposed legislation, standards setting is the central and primary rulemaking activity with which OSHA is concerned, and OSHA standards would appear to be covered by H.R. 3658 as well as by H.R. 8231, since under section 17(e) of the OSH Act, a willful violation of a standard which results in the death of an employee is punishable by fine or imprisonment, or both.

Under section 6(b) of the Occupational Safety and Health Act, a detailed rulemaking process is set forth. Standards setting is initiated on the basis of information from many sources, public and private. The Secretary may request the assistance of an advisory committee in developing recommendations for a standard.

The advisory committee has by statute as much as 270 days to make its recommendations. The Secretary is required to publish a proposed rule regarding the new or modified standard in the Federal Register, affording opportunity for public response and comments.

Any interested person may file written objections to the proposed rule and request a hearing. The statute requires a hearing to be held, if requested.

After the hearing the standard may be issued, with whatever modifications are developed during the hearing process, or the Secretary may determine not to issue the standard. A period of delayed effective date, up to 90 days, may under the statute, be contained in the rule promulgating the standard in order to provide affected persons time to familiarize themselves with the standards and come into compliance.

Certain statutory criteria are provided for development of a standard. Standards may be based on research, demonstrations, experience, and such other information as may be appropriate.

In addition to the criterion that standards attain the highest degree of health and safety protection for employees, the statute provides that other factors be considered in setting standards. These include the latest available scientific data in the field, the feasibility of the standard, and experience gained under OSHA and other safety and health laws.

Any person who may be adversely affected by a standard may, within 60 days after the standard is promulgated, challenge the validity of the standard in the appropriate U.S. Court of Appeals.

The statutory test of court review is substantial evidence on the record as a whole.

The foregoing represents only an outline of the basic statutory scheme for promulgating an occupational safety or health standard and for review by the courts.

There are of course additional internal administrative and technical review measures undertaken during the development of a standard. These review procedures vary with the nature and kind of standard in question.

For example, there are health standards which are initiated upon receipt of criteria documents from the National Institute of Occupational Safety and Health which is under the jurisdiction of the Secretary of Health, Education, and Welfare.

NIOSH submits recommendations on a specific substance for which OSHA is considering the development of a standard, and also to solicit pertinent data from public and private sources. Review of available scientific information on the subject of the criteria document is undertaken.

Since criteria documents are related solely to the scientific aspects of the health consequences of exposure to a given substance, OSHA makes a separate determination as to technological feasibility of the standard and environmental impact attendant to a standard at this stage.

Following review of pertinent scientific and technical information, submitted in response to the notice of rulemaking, and the criteria document, a draft proposed standard is prepared.

The draft is circulated within the Department on this for critical technical comments, and legal sufficiency.

When the hearing is completed, all comments and testimony received at the hearing are evaluated and a draft of the final rule is prepared. To give the committee a general idea of the magnitude and complexity of a single hearing on just one standard, let me give you some statistics.

Our recent hearing on the proposed modification of OSHA's existing noise standard lasted 22 days. It involved about 150 witnesses, 100 exhibits, close to 1,000 written comments and almost 4,000 pages of transcript.

That as I said was only for one standard's modifications. In the last few weeks OSHA published six proposed standards involving approximately 1,200 paragraphs in the Federal Register.

Recently an additional factor has been incorporated into the standards setting process. In late 1974, Executive Order 11821 was issued requiring all regulatory initiatives to be accompanied by a discussion of attendant inflationary impact.

We are also required by law in some cases to publish a final environmental impact statement regarding the standard. It is the foregoing procedures and provisions of the Occupational Safety and Health Act to which the proposed legislation would apply. The implication and consequences of these bills, as they would relate to OSHA standards, should be carefully considered.

In the first place the bills represent proposals for a substantial change in the relationship and role of Congress relative to OSHA standards.

Added to the carefully maintained oversight function performed by interested committees of Congress would be a role involving the possibility of affirmative action by either House or Senate to prevent a standard from coming into effect.

Assuming that both bills apply to rules promulgating a standard in final form, a proposed resolution disapproving the standard would be dealing with the end result of a long and complicated process.

The subject matter of the standard would ordinarily involve highly technical subjects, specialized knowledge, and the results of considerable scientific research. The standard would have undergone development and review from many quarters, private and public.

Counting the time invested in scientific or engineering research and that led to the proposed standard in the first place, literally years of calendar time may be involved. Informed assessment of the standard, for purposes of a resolution by a single House, would require review of a complex and extensive administrative record.

In addition to that review, a congressional committee considering the resolution might well desire to develop its own record or call additional witnesses, in considering whether the statutory criteria and the congressional intent had been carried out.

A process that has taken many man-years of developmental effort, and sometimes several calendar years of time, would be reviewed within at most 60 legislative days or days of continuous session.

While this 60 days of legislative time may be considerably longer in terms of calendar time, it still remains a very short period in which to give any such standard the kind of consideration necessary for appropriate action. Yet it may also constitute a substantial additional delay in the promulgation of essential safety and health standards.

Moreover, it is not entirely clear that H.R. 8231 would apply only to rules published in final form. It is reasonable to assume that H.R. 8231 is intended to apply to rules which are ready for implementation, but the bill expressly includes the term "all proposed rules", and rules an agency "proposed to prescribe".

If the bill is intended to set into motion congressional machinery at the proposal stage, this would be premature, in the case of OSHA standards, because the rule adopted after hearings—if one is adopted—may be materially different from that which was originally proposed. The anomaly is fairly obvious.

After enacting any statute, the Congress should be concerned that it is properly implemented. It is this congressional concern which is the basis for the oversight function of the congressional committees.

In this connection, Labor Department officials have testified on OSHA matters on numerous occasions before various congressional committees. In addition, this Department submits certain reports to the Congress, pursuant to the requirements of the Occupational Safety and Health Act and responds to a great many congressional inquiries related to OSHA.

Further, in enacting the Occupational Safety and Health Act, Congress included specific statutory criteria to which OSHA is required to adhere in exercising the rulemaking responsibilities Congress has delegated to us.

In addition, the act contains procedural safeguards in connection with our rulemaking activities. I am referring to the public notice and hearing requirements as well as to the provision for judicial review of the standards.

It should here be noted that in reviewing OSHA standards, Federal courts are very concerned that a standard is in accord with the legislative intent. In this connection, we believe these bills would improperly impact upon the exercise of the judicial function in reviewing and interpreting standards as well as construing the Occupational Safety and Health Act itself.

While the congressional oversight function is very important in implementing any program, we believe it is undesirable and impracticable for the Congress to legislate an across-the-board mandate putting Congress in the position of having to make judgments, involving the complexities of the day-to-day rulemaking process of the executive agencies.

For the foregoing reason, we oppose this legislation.

I would now be pleased to answer any questions you may have.

Thank you.

Mr. FLOWERS. Thank you very much, Mr. Concklin, for being with us and giving us your statement. I would have to take issue with a part of it. I don't think you intended to imply that all of the rules and regulations promulgated by OSHA are highly technical in nature that require days and days and weeks and weeks of background study.

A lot of them it is my understanding apply to things that even a lay person would have an idea about. I understand you have even

gotten into the business of regulating toilet seats, and a whole raft of other commonplace things.

Quite frankly speaking—and I don't want you to take this personally—a lot of the impetus for this kind of legislation seems to come from the horror stories that have come from OSHA.

We had the EPA here yesterday. I would say that of the whole scene of the Federal bureaucracy EPA and OSHA at least currently appears to be the ones that are creating the biggest problems around the country in terms of new regulations and activity in just the last couple of years. This has served to change the mode of operations of a large segment of industry and business life in this country.

I think the legitimate complaint is that you may have interpreted your legislative mandate too broadly and attempted to regulate in too great a detail the mundane activities of American business and industrial life.

This is part of why I think that many of our fellow citizens feel that the Government today is encroaching more upon their lives than ever before. I am sure that is the case. Do you have any comments?

Mr. Concklin. Yes, sir. I would like to make several comments if I may. I have only been with OSHA 4 months so I would not take anything personally or have any predisposition to be defensive.

OSHA historically no doubt has been guilty in some cases of undue preoccupation with trivial and inconsequential safety matters in the main as opposed to health matters. I would respectfully submit to you that by and large those kinds of episodes are behind us.

I think they are happening with much less frequency.

Mr. Flowers. Do you mean they are behind you in the sense that they have already been promulgated and you don't have to issue further standards on toilet seats because you have already got them on the books?

Mr. Concklin. They are behind us in two important ways. One, the organization is not attempting to receive compliance with those trivial areas with an occasional transgression, but very occasional. No. 2, we are engaged in an effort to clean up or otherwise expunge from our regulations——

Mr. Flowers. Why don't you just take that off the books? That would be like the 61 regulations FTC has reduced. If OSHA would start with that one and it would be possible to document many more, I think you would find that your public rating would go up enormously.

Mr. Concklin. I agree. We are in the process of looking at that one and all such other ones that are inconsequential in terms of their relative importance of protecting workers from injury.

Mr. Flowers. I would be interested in knowing—and I think it is highly important—if there is in any one area that has caused us to schedule this hearing today it is some of the trivial regulations issued by the Occupational Health and Safety Administration in the last several years.

I would be interested in knowing which ones you are looking at and knowing what the status of the examination is and when some final action might be taken in this regard.

Mr. CONCKLIN. I would be pleased, Mr. Chairman, to submit to you a description of the program and the schedule that we are embarked on with respect to eliminating the trivialities.

[The material referred to follows:]

U.S. DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
OFFICE OF THE ASSISTANT SECRETARY,
Washington, D.C., December 23, 1975.

Hon. WALTER FLOWERS,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CHAIRMAN FLOWERS: First of all, I would like to thank you and the other members of the House Judiciary Subcommittee on Administrative Law and Governmental Relations for the opportunity to appear before you on October 31. I trust that our discussion concerning the Occupational Safety and Health Administration was as profitable for you as it was for us. Following up on some of the issues raised by the Subcommittee, I am submitting the following information for the record.

STANDARDS IMPROVEMENT

Since the occasion of the hearing, I have reviewed OSHA's progress in appropriately dealing with those standards considered to be either inconsequential or which have no relationship to occupational safety and health. Your subcommittee was particularly interested in OSHA's standards relating to sanitary facilities. I was pleased to find that a number of standards were either revised or revoked in late 1972 and early 1973. Enclosed is a list of these standards and the action that was taken on each.

You will note that under the category of sanitary standards, the split toilet seat regulation was revised to exempt existing facilities as of May 3, 1973, but stipulated that toilet seats installed after June 4, 1973 be of the split variety. This change, as with many others, was made in the spirit of reasonable compromise. While it was recognized that the configuration of toilet seats was and is not a determining factor in reducing occupational accidents and illnesses, such facilities are still regarded by an accepted body of medical opinion as a sound public health practice. For this reason, the requirement was retained for new installations. However, when firms are found to be out of compliance with the regulation, they receive a de minimis notice, rather than a citation, and no penalty is assessed.

As I mentioned at the hearing, the process of changing such standards is a continuous one. The majority of requirements cited as trivial are derivatives of national consensus standards. The consensus approach afforded by section 6(a) of the Act allowed OSHA to quickly establish a nationwide minimum level of occupational safety and health, but it also gave rise to many of the problems at issue here. In the process of establishing that base-line, requirements that were irrelevant to employee safety and health, unclear, protective of a population greater than employes alone, or otherwise troublesome were introduced into OSHA's regulations. Changes such as those mentioned previously and in the enclosure have been made, but a new program to better address this problem will be announced in January 1976. This program, while incorporating the procedural requirements for rulemakings as provided by section 6(b), will provide increased opportunity for public participation in the revision of these consensus standards as summarized below.

1. Entire subparts of OSHA's "general industry" standards (Part 1910) will begin to be published together with a notice in the Federal Register in the form of an Advance Notice of Proposed Rulemaking. The currently enforced standards will be published in columnar fashion and, in an adjacent column, a section-by-section analysis of petitions for revision will be included. Comment will be solicited on all provisions of the standards included in those subparts.

2. To encourage the widest public participation, the Notice will also provide for a series of fact-finding meetings at various locations, specifying the dates and sites of the meetings. Individuals will be able to present oral testimony and exhibits in support of their particular positions.

3. Based upon the record developed during the comment period and testimony received at the fact-finding meetings, as well as other relevant data, a

proposal will be developed and published in the Federal Register at which time the procedures set forth in section 6(b) will be invoked.

This program is designed to achieve several objectives. First, it will provide the opportunity for public comment on entire subparts which for the most part are consensus in origin and, subsequently, have not been subjected to the constructive and thorough scrutiny of public rulemaking.

Second, it will provide OSHA with a more definitive basis for proceeding to rulemaking. It is hoped that both supporters and opponents of the standards will participate in this preproposal stage through the submission of comment, testimony, and relevant data. Finally, it will serve as an integral part of a balanced occupational safety and health program.

OSHA'S IMPACT ON FIRMS

Turning to another area of concern, I would like to clarify the Department of Labor's position on OSHA's alleged contribution to business failures. As I stated at the hearing, we have no documented evidence that would lead us to believe that the enforcement of the Act is responsible for closing down businesses. Concerning the estimate quoted by Congressman Moorhead representing those businesses forced to close by OSHA, I have found that it was containd in a letter from W. F. Grattan to Congressman David Towell and submitted as part of the record of oversight hearings on OSHA held during the 93d Congress by a House Education and Labor Subcommittee. The only possible documentation for this "estimated" figure of 7,209 appeared to be a vague reference to a Wall Street Journal article. When we checked with the Journal, however, we learned that no article containing such data appeared in that publication prior to the date of Mr. Grattan's letter.

In addition, the figure listed by Mr. Grattan as the number of staff employed by OSHA in 1974 is aproximately 103,000 over the combined number currently employed in both our National and field offices. Employment for OSHA as of November 30, 1975, is 2,126. Because of these discrepancies, we seriously question the credibility of Mr. Grattan's data and hope that undocumented information such as his will not in the future be used to judge the OSHA program.

TRAINING FOR OSHA INSPECTORS

We are now developing curriculum which will substantially revise the basic courses for incoming compliance officers, tailoring the program more to the expertise each individual brings with him or her and placing particular emphasis on the human relations aspects of conducting workplace inspections. This new program will be ready for implementation at the OSHA training institute this coming spring.

SMALL BUSINESS POLICY

OSHA is in the process of initiating a broad policy study regarding its approach to small business. There is no intention or desire to exempt small businesses or otherwise take actions which would result in diminished protection to workers in small business workplaces. We are however, committed to exploring policy and program changes which would make it easier for small businesses to understand and carry out their obligations under the Act. One element of this policy analysis will involve a survey of an estimated 1,500 small businesses to determine the attitude of the small business community toward OSHA, why people feel the way they do about the program, the problems they have encountered with it and suggestions of ways these problems can be eliminated, or at least diminished.

I hope the foregoing information will be useful to you and the other members on the Subcommittee. If I can be of further assistance with respect to the occupational safety and health program, please contact me.

Sincerely,

BERT M. CONCKLIN,
Deputy Assistant Secretary.

Enclosure.

1972–73.—REVISIONS AND REVOCATIONS OF CONSENSUS STANDARDS CONSIDERED TO BE LUDICROUS

September 22, 1972.—Revision of regulations for construction of toilet rooms. 1910.141(c)(2)(ii) was revised from specifications stipulating that partitions must be greater than 6 feet from the floor at the top and less than 1 foot at the bottom to a simple requirement that the top of the partition be sufficiently high to provide privacy.

April 10, 1973.—1910.141(f) was revoked to eliminate the requirement for retiring rooms for women.

May 3, 1973.—A number of revisions and revocations affecting the 1910.141 sanitation standards were published. These included:

(*a*) Removal of specific prohibition against expectorating (spitting) in the workplace.

(*b*) Allowed ice in drinking water as long as ice was made from potable water and handled sanitarily.

(*c*) Removed specification for minimum fixed distance from work area to drinking water and toilets.

(*d*) The requirements for number of toilets and lavatories per employee were reduced, and the ratio between lavatories and toilets in toilet rooms was increased.

(*e*) Removed requirements for separate toilet facilities for men and women where single occupancy toilet rooms are available.

(*f*) Reduced height of waterproofing tiles.

(*g*) Removed requirement for hot and cold running water, introducing tepid water as an alternative.

(*h*) Removed general requirement for open front (split) toilet seats. However, required that all seats installed or replaced after June 4, 1973 be of the open front type.

Mr. FLOWERS. You would agree, likewise, I trust—and I have not done a detailed study—that there are many instances of countervailing opposing type regulations that place a business or industry in the unfortunate position of not being able to do one thing because there is something else that is sniping at your other side there.

I don't know whose example this is but I have heard that for instance—maybe you can correct me if I am wrong—there was a requirement that on a construction site that the large trucks use noise devices when they throw them into reverse.

Then they found out that this was unlawful to do because it created too much noise. I don't know whether this is all OSHA's doing or somebody else's but here the construction foreman or the business owner could not operate without the noise devices and he could not use the noise devices because it made too much noise.

Mr. MINTZ. Mr. Chairman, in that respect our construction standard does have alternatives which are available to protect employees from trucks that are backing up.

For example, we have the use of a flagman to warn employees that there is a danger. That is one of the strategies we have adopted, namely, the use of alternate devices for protection. The Occupational Health and Safety Administration is also moving quickly toward the so-called performance standards rather than specification standards.

The performance standards would contain less detailed requirements imposed on the employers. Rather, they would set forth the ultimate goal to be achieved leaving more flexibility in compliance.

Mr. FLOWERS. Well, I think that is a laudable thing to do, sir. When you say you are moving toward it, how fast are you moving?

Mr. MINTZ. Sir, the standards that the Department of Labor are now promulgating differ significantly from those standards to which you are referring. If I may refresh your recollection, under the OSHA Act, the Department of Labor promulgated a large body of so-called national consensus standards back in 1971.

Those were the standards that had been adopted by OSHA as part of a body of voluntary industry standards and which are the subject of much of the ridicule and dispute.

Currently we have been developing and adopting different kinds of standards. These so-called performance standards are examples. Much

of our work at the present time is in the area of health standards. Within the last month, we have had some six proposals regulating toxic substances in the atmosphere. So the whole thrust of our standard activity has changed since the original group of promulgations of industry's voluntary consensus standards in 1971.

Mr. CONCKLIN. If I may, Mr. Chairman, just in final response to your original statement, in my judgment, regulations—and I am talking largely about our revised or new standards—that will be published or proposed subsequently will be by and large quite technical in nature.

In other words, I made the point that we are consciously and deliberately eliminating the trivia. Most of the important subjects both on the health and the safety side tend to be quite complex. I believe that there won't be many simple standards; standards that would be readily understandable.

Mr. FLOWERS. I would hope those simple rules would abolish some of the trivia. I worry that they are taking too long coming about. I don't see why you need to have a whole lot of hearings on whether to do away with that toilet seat standard now.

Mr. CONCKLIN. The so-called split seat standard was revised in May of 1973, exempting firms with existing facilities but requiring new installations to be of the open end or split configuration.

Mr. FLOWERS. It is illustrative of the kind of thing that I am talking about that really—I can't overemphasize this—for good or for evil, it gets the Federal bureaucracy in a lot of trouble with the American people.

I hope your agency understands that. How many people are employed at the Occupational Health and Safety Administration?

Mr. CONCKLIN. 2,079 as of September 30, 1975. Approximately 449 in Washington and the balance of 1,530 in the field which is constituted largely of inspectors, a laboratory that analyzes health samples and a training center.

Mr. FLOWERS. Your annual budget is how much?

Mr. CONCKLIN. I believe the 1976 budget is in the vicinity of $116,025,000.

Mr. FLOWERS. Well, it is really hard to figure out 2,000 people can create that much of a problem. It is there in my constituency and I know from talking to other Members, it is there in theirs.

It is not an issue of whether you support health standards which I do and I voted for the basic act. I don't think we ought to repeal it but I think we ought to improve its implementation. It could be that the committees of the Congress who have jurisdiction are not doing their job. I can't tell you that.

But I have not seen coming out of the House Education and Labor Committee the kind of evidence of oversight of OSHA that I would like to see. Whoever is in charge over there needs to do a better job unless they are doing an awfully lot of work with you people in the background that does not come out on the House floor, anyway.

Mr. CONCKLIN. I wanted to broaden my response to what I considered to be your legitimate consternation over OSHA. There are two fundamental things that we have got to do to still the kind of resentment that you allude to. One is to expunge from our standards these trivial items that cause us so much grief.

The second thing is to look very carefully—I don't know the answer here—at our posture with respect to small business and see if there are improved ways of dealing with small business that do not compromise basic missions.

Mr. FLOWERS. If you don't, we may not have any small business. We all make pronouncements in favor of protecting the small businessman and yet the Government puts such onerous burdens here on him that we find him going out of business every day.

Thank you very much.

I call upon our colleague from California, Mr. Moorhead.

Mr. MOORHEAD. Thank you, Mr. Chairman,. I join our Chairman in most of his comments because it is a rare day I don't get a letter from people talking about OSHA. In some cases, it has been so oppressive on small businesses in my area, that many of them have been put out of business and many people have been put out of jobs under the guise of giving them a safer place to work.

It just hasn't worked the way it should. I was very pleased that you made the comment that you have about small businesses because I have before me a document we have that was put out by the Congressional Library with statements from your particular department about regulations of small business.

It states: The Department of Labor indicated in June 1975, that they were conducting economic impact studies on all major standards promulgated under section 6(b) of the Occupational Safety and Health Act, and are developing procedures for complying. But, they cautioned that these studies are geared toward determining financial impact on affected industries, not specific establishments within those industries, and that were they to permit varying degrees of compliance for small businesses there would be a very real problem.

You know in that big, big factory where you have thousands of people employed, a defect could be very harmful to many people.

But in the small establishment, where everyone knows every square foot of the place and has lived with these defects over many years—the employees would rather have their job than they would have a whole new building built, which would put the company out of business.

Are you basically changing that approach?

Mr. CONCKLIN. I would say, Mr. Moorhead, that first of all we have new leadership at OSHA which has been in the process of coming on board in the last few months. Dr. Corn is on the verge we believe of confirmation.

I would simply say with respect to the piece you quoted that you could legitimately add to that the statement I made earlier about deliberate policy examination which is ongoing right now to look at the special circumstances of small business.

Mr. MINTZ. Congressman, if I may add on the subject of small and large business, we appreciate your comments on the special burdens regarding small business of OSHA standards.

At the same time, we have to keep in mind the history of the OSHA Act and its particular legislative history. All attempts made to differentiate in terms of coverage between small and large businesses were defeated by the Congress. The major thrust of the legislation was that all employees are entitled to adequate protection whether they work for a small employer having 2 employees or an employer having 2,000 employees.

In all events the employee has a right to a safe and healthy work place. In enforcing OSHA we want to keep the special problems of small business in mind but we do have to make certain that the salutary purposes of the act are put into effect.

Mr. Moorhead. I would rather see there be no OSHA at all than to have these small businesses be put out of business and our people unemployed.

Mr. Concklin. I don't mean to be contentious.

Mr. Moorhead. Regardless, I want you to bring out your point.

Mr. Concklin. In terms of OSHA's current posture and policy, we believe that small business experiences a set of problems which are unique to small business relative to bigger business and we intend to look at that problem very carefully.

We are committed within 3 months to get back to the Congress and report on it. However, with respect to your point or your suggestion that businesses have been put out of business because of OSHA or unemployment has occurred, we find no evidence of that.

I think we have talked with our worst critics. I met with Mr. Johnson of the National Federation of Independent Businesses 2 weeks ago. They are very candid and very forthright about our shortcomings.

I don't think they would assert that we have put anybody out of business in terms of OSHA's regulations.

Mr. Mintz. Congressman, if I may add another brief point, many of the OSHA standards have included in them the concept of feasibility. Feasibility includes both economic and technological feasibility. So that if the compliance required by the standard is not feasible, there would be an escape valve.

An employer would not be required to comply totally or in part with the standard if this compliance was not feasible.

Mr. Moorhead. I understand that 30 days are normally given by OSHA for the public to comment on proposed rules. Do you think that 30-day period is adequate?

Mr. Mintz. In some cases the 30-day period for comment is not adequate and we have not hesitated to extend the period to 60 days or even longer where necessary.

Of course the 30 days written comment period is not the only opportunity for the public to comment on our standard. If there is a request for a public hearing, the hearing is automatically granted. That hearing takes place some weeks further along after the written comment period and anyone who wishes to appear at the hearing can present his views.

There are various ways in which public views are incorporated into our process.

Mr. Moorhead. Large companies like General Motors have no trouble learning of these hearings and being able to express their point of view. But the little guy that may have anywhere from 5 to 10 to 100 employees, he is busy making a living.

Regulations may be promulgated that would be very, very harmful, but he does not have time to hear about it, or go through the notices, and then comment in the time that is available.

Mr. Mintz. Our notices of hearing are not only printed in the Federal Register which admittedly has a small subscription list. We issue press releases and provide information for groups such as trade associations about our hearings.

Our experience has been that there is a wide representation of different kinds of interests, both individual employer and association, represented at these hearings. We have had many expressions of view on our proposed standards.

Mr. CONCKLIN. Also, Mr. Moorhead, we have on occasion, an example being agriculture, taken hearings outside of Washington where you have many diverse and small entities that need to be heard from.

Mr. MOORHEAD. Appearing in the record of a hearing, conducted by the House Committee on Education and Labor, is an assertion that 7,200 small businesses closed as a result of the Occupational Safety and Health Act. Is that an accurate figure?

Mr. CONCKLIN. We can't confirm that by any information or data we have.

Mr. MOORHEAD. I am not being critical of you. But this is a key area. These legislative review bills were prompted, in part, by the activities of agencies like OSHA and the Environmental Protection Agency.

Earlier, you stated there are six standards that took up 1,200 paragraphs that were recently adopted. That is an awful lot of reading.

Mr. CONCKLIN. I do not say that with any pride, nor to overdramatize. We simply made that point to indicate the size and complexity of the particular standards. The standards referred to are health standards. They are admittedly highly complex scientific instruments.

Mr. MOORHEAD. Don't you think it is pretty ridiculous for the Federal Government to tell people how to behave when a truck is backing up?

Mr. CONCKLIN. If we now change the subject to trucks, we are talking about the issue of safety, not health, of course. I think there is probably a record which could be provided to you of a substantial number of accidents of people being injured or killed by backing trucks on construction sites.

Mr. MOORHEAD. And by trucks going forward, too. I wondered whether you have stopped to think about the possibility somewhere down the line of bringing an end to this standard activity that you are going through and letting people adjust to the vast amount of regulations they are already having to live with.

I think perhaps if you would take the deadwood out of your present regulations and allowed businesses to adjust, before you continually pile more and more regulations on top of them, people would become better satisfied.

Mr. CONCKLIN. We have to proceed with a certain amount of humility and pragmatism in terms of what we, the system and society, can do. By the same token we do have a legislative mandate. Let's talk about health, if I may. We have a mandate to protect workers from disease.

To the extent that responsible medical science says that a certain substance is potentially a source of cancer, that certainly poses a dilemma in terms of how many more regulations and the degree of complexity and responsibility you can impose on employers versus your obligation to protect employees.

That is a very substantial kind of tradeoff to have to make.

Mr. MOORHEAD. In any kind of a complex society you run across those situations. It is harmful to smoke cigarettes—it is not very healthy to work in a coal mine. Yet, I don't know how we can avoid that particular undertaking in this energy-scarce world.

Mr. Concklin. I am not sure I can argue that with you other than on philosophical grounds. Again, to my mind, how we conform to and discharge our legislative mandate is a very serious question.

The legislative mandate and intent are pretty explicit.

Mr. Moorhead. How many of your regulations have criminal penalties?

Mr. Concklin. Mr. Mintz?

Mr. Mintz. Under the OSHA Act, willful violations of a standard which causes the death of an employee is subject to a criminal violation so that all of our standards are subject to criminal penalties. However, the main vehicle for enforcement of our standards are civil penalties of generally up to $1,000.

We have had, so far, a handful of criminal violations which have been brought in the Federal Courts, some six or so. So, it would be fair to say that violations of OSHA standards are generally enforced by civil sanctions.

Mr. Moorhead. Thank you very much for coming to testify. I know that you would like to cooperate with us in meeting this particular problem. If you have any suggestions that you feel would be helpful in giving the Congress a handle on this thing, we would appreciate that.

Mr. Flowers. Mr. Mazzoli?

Mr. Mazzoli. I welcome the gentleman today. It is no secret that I would reiterate everything said before that I think OSHA single handedly has given the Government the blackest of black eyes. I have never seen anything like it from people whom I consider to be reasonably astute. They completely go off the deep end about the way your people come on about like the Gestapo.

Did you all train any of your people before you sent them out to do the job?

Mr. Mintz. All compliance officers of the Occupational Safety and Health Administration are trained in an OSHA institute located in Chicago. They have an initial period of training before they go out in the field in the first instance and they are required to take refresher courses periodically to make certain they are up to date on our standards.

Mr. Mazzoli. Did you give them any kind of training in that school of yours in human relations, manners, courtesy?

Mr. Mintz. We try to emphasize it.

Mr. Concklin. I would like to answer that because I have been on inspections and I have monitored the performance of inspectors and it does vary as you correctly suggest. It is inherently a difficult problem which does not excuse not doing it, to train field personnel be they IRS, OSHA or any other field personnel in matters of human behavior and style.

We have not historically put sufficient emphasis on the style aspects of how you deal with a businessman as an inspector when you come to his workplace at 8 o'clock in the morning. I can assure you we are going to do it.

Mr. Mazzoli. OSHA has been on the books since 1970. How come you have not done it already?

Mr. Concklin. I can't account for my predecessor.

Mr. MAZZOLI. The fact that your predecessors are your predecessors may mean they were not doing their job and they got sacked. I don't know. But I am surprised. It does not take any great powerful intellect to come to the conclusion that some of your men and probably women who went out on the jobs really gave such a terrible accounting of themselves that OSHA of course came into disrepute.

The Congress came into disrepute. The whole idea of Federal Government and bureaucracy did. I wondered why it is taking 2 or 3 or 4 years to emphasize that to the people.

Mr. MINTZ. I would be humble on that point. It should have been done.

Mr. MAZZOLI. Humility doesn't fit the Associate Solicitor. What do you think? Why is it taking so long?

Mr. MINTZ. It had not been a matter of sufficient awareness.

Mr. MAZZOLI. Could it possibly have been that you were not going to do it until Congress raised sufficient hell?

Mr. MINTZ. If I may speculate, the OSHA standard involved technical matters. There was a great deal of interest in safety and health. It was felt that the primary purpose of the training should be the technical training in the safety and health matters, teaching the officers how to sample toxic substances, how to make judgments on proper guarding of machines and so forth.

It was assumed perhaps erroneously that people going out in the field would have sufficient maturity to have proper relationships with people being inspected.

As Mr. Concklin indicates, it is in the process of being corrected.

Mr. CONCKLIN. I am talking about the creation of a course that will deal with the behavioral aspects which will include such things as literal workshops where you are dealing with intransigent employers.

Mr. MAZZOLI. Some of my friends tell me that the OSHA inspector always comes on the premises at 7:30 or 8 o'clock in the morning and they are standing there intruding upon and becoming an impediment to the course of the daily business. If they come at 10 o'clock in the morning, it would solve at least part of the problem.

By that time people are psychologically more attuned to the idea of what is wrong with their place of business. You said earlier in response to a question at no point when there was effort to differentiate between small and big business that never succeeded because Congress defeated it. Am I not correct that somehow this was always dropped in conference?

Mr. MINTZ. I was referring to the legislative debates that preceded the original enactment of the act. The act includes all employers. It is correct that during—subsequent to the act, in the annual appropriations process that various riders were enacted by one or another of the Houses.

None has in fact been enacted into law because of actions of the conference committee rules or Presidential vetoes.

Mr. MAZZOLI. The reason I brought that up was because I am sure there was no differentiation made originally but subsequently we have seen how there is a differentiation between small business and the GM's of the world.

The votes in the several Houses while they have not been made law I think have probably been evidence, clear cut evidence to the folks in your Department that there is a difference.

Maybe you may not realize it but there seems to be.

Mr. MINTZ. In one respect there is a difference between smaller and larger employers and that is in the recordkeeping requirements.

The act does say that special consideration should be given to smaller businesses for recordkeeping purposes. By regulation OSHA exempted employers of seven or fewer employees for recordkeeping requirements except those used by the Bureau of Labor Statistics.

Mr. MAZZOLI. What do you think might be the outcome of the examination of the small business problem?

Mr. CONCKLIN. I would be willing to suggest some of the kinds of measures might be altered. We have as you know a penalty structure which by the way does take account of the size of the business in terms of the severity of the penalty. But that is a subject for possible alteration. We have experimented with a number of different forms of education and consulting to employers.

In my judgment we have got to stop experimenting and begin quickly producing a package of education consulting delivery systems that are germane to and responsive to small business uniquely. We are moving to do that.

There are various kinds of what—I don't like the term—ombudsman functions that we are going to contemplate with respect to small business.

Mr. MAZZOLI. Let me urge you if this study is still under formation——

Mr. CONCKLIN. It is.

Mr. MAZZOLI. Let me urge you to try to accomplish something along the lines of allowing for consultations before citations. One of the great problems we have had is this guy comes on and something was out of place and he sits out and writes me a ticket and while the penalty can vary and the penalty depends on the intent and proximity, once you are cited you are cited.

You can't remand the citation. There ought to be some way a guy can come on then from OSHA and say I am not the avenging angel but a representative of the group that has the best interests of everybody at heart.

If I come back after making suggestions and these things are not reasonably attended to, we may have some problems. Why can't you do that now?

Mr. MINTZ. Congressman, a bill authorizing Federal onsite consultations without sanctions was reported out by the House Labor Committee yesterday. The Department of Labor supported that bill. That bill specifically says that special consideration would be given to small business in responding to requests for onsite consultations.

Mr. MAZZOLI. That would be where I have enough foresight or interest or plain because I am intimidated, I call you people and you inspect people. What happens if I am a random selectee? Is there not some opportunity that you can consider that first visit to be a questioning visit?

Mr. CONCKLIN. In the array of possible adjustments, that is one of them.

Mr. MAZZOLI. Let me suggest that I hope it is not just one of the ones you consider but one actually put in. I think this would certainly reduce a lot of the problem. More than that, and I must say in all candor

it astonishes me it has taken this Government of ours 4 or 5 years to reach the point of view where we believe what we have now heard from the people.

For a long time we said you are one of those people who wants to exploit your workers. We know your kind. You have an unsafe workplace on purpose.

That was not the fact. These were people not very adept at understanding all the latest scientific improvements but they were trying to run a business. Now better late than never, we have come to the point of view that they were for real.

Let me ask you another question. Someone talked about the toilet seat and there is always the parade of horribles and that is always one of them mentioned along with the bell that tells you when you are backing up and the ear plugs so you can't hear the bell that tells you you are backing up.

How would this regulation come to be on the books if your procedures you pointed out take place?

Mr. MINTZ. A large number of standards were adopted the first year of OSHA's existence, without the usual rulemaking proceedings. These standards have been in existence as national consensus standards for some years. Some of the provisions such as the toilet seats, ice in the drinking water, which is another horrible which already has been eliminated, were part of that body of standards.

There were no rulemaking proceedings for those standards. At the present time we have to go through the full rulemaking proceedings and those horribles do not exist in the standards we are now adopting.

Mr. MAZZOLI. Are any of the horribles being taken out?

Mr. CONCKLIN. As I said before, we have a project underway to eliminate the residual horribles.

Mr. MAZZOLI. In that procedure, are all being examined? Because what you consider to be a horrible, I may not.

Mr. CONCKLIN. In doing that either in an informal or a formal way, we will bring into that dialog actual small businessmen both in an association and in the individual sense and other parties at some interest.

We will not do it in an isolated Washington situation.

Mr. MINTZ. OSHA regularly receives petitions asking for exchanges in a standard.

Mr. MAZZOLI. I have long exceeded my allotted time but let me ask you this question. Mr. Concklin, on page 8 you mentioned but OSHA's six new standards. This is the enlightened OSHA, the OSHA after the initial spate of regulations which says there may be a difference between small and big business.

This is the OSHA which has come to Congress many times in oversight hearings and so forth, yet this OSHA has issued 1,200 paragraphs to explain 6 rules.

Have we come very far?

Mr. CONCKLIN. In my judgment the simple answer is yes. I would respectfully submit to you once again in the realm of health, you are dealing with scientifically profound and voluminous material.

Mr. MAZZOLI. Could we be repeating the error of 4 years ago when we issued the first spate of regulations?

Mr. MINTZ. Congressman, a large part of those paragraphs referred to in the testimony are the preamble to the standard. When we propose a regulation reducing the limits of a particular toxic substance, we feel a responsibility to set out the scientific and regulatory basis as to why we are doing it. This preamble becomes the subject of the rulemaking proceeding and gives the public something to direct their comments to.

Many of those paragraphs are for the precise reason of allowing the widest possible dialog in the public arena.

Mr. MAZZOLI. Assuming that I have a business that involves the use of some of this, do you think that I, with a degree in law and a bachelor's degree in college and so forth, could I read these and understand them right now, do you think?

Mr. CONCKLIN. I would say based on the simple English language which we have attempted and I think succeeded reasonably well in constructing in the preamble, yes, with the stipulation that you might have to consult a chemist if you have one in your corporation.

Mr. MAZZOLI. I could understand?

Mr. CONCKLIN. Yes, sir.

Mr. MAZZOLI. That was done with design? It was intentionally set forth in language that people might be able to reasonably understand?

Mr. CONCKLIN. Yes, sir.

Mr. FLOWERS. Mr. Danielson.

Mr. DANIELSON. I will yield back my time having missed the earlier portion.

Mr. FLOWERS. Mr. Minge, our counsel, wanted to direct a question to you.

Mr. MINGE. I would like to ask a question on a subject not pertaining to the pending legislation. This subcommittee is also interested in pursuing the problems of backlog and delay in the administrative process.

It is my understanding that at OSHA, your work ends once a citation is issued and at that point if a person objects to a citation he appeals your decision to the Occupational Safety and Health Review Commission.

Mr. CONCKLIN. Yes, sir.

Mr. MINGE. So I would assume it would not be a possibility of backlog or delay problems in connection with your activities, at least in connection with your enforcement activities?

Mr. MINTZ. If I may quibble for a moment our work does not completely end with the contest to the Review Commission. We represent the Secretary in the proceedings before the Commission and we present the case supporting the citation before the Commission.

The employer has his opportunity to present his case as do employees. We are subject, however, to the rules of the Commission and we must meet the timetables of the Commission for the filing of briefs, presentation of evidence, and hearings.

Any backlog in the decisional process of the Commission would not be attributable to us, however.

Mr. MINGE. That would occur at the Commission level?

Mr. MINTZ. Yes, sir.

Mr. MINGE. At the Commission level we have been informed there is a significant backlog problem not so much with administrative law judge Commission problems but more with Commission review.

Would you make any comments on that?

Mr. MINTZ. I would point out that within the last several months a new Chairman has been appointed to the Commission. I know, having spoken to him and having heard his public statements, that he is extremely interested in removing any backlog and delay in the Commission decisional process. I understand that steps are already underway to eliminate that delay.

Mr. MINGE. From what you have said, I take it there is somewhat of a backlog problem.

Mr. MINTZ. I don't have specific statistics. I have not studied it but it is my impression that there have been some backlog problems.

Mr. FLOWERS. I thank both of you gentlemen for being with us. This will conclude our hearings for today. I speculate we will require 1 additional day to finish hearings on this matter and I invite members of the subcommittee as well as others to suggest what further witnesses we might require.

The Chair has some in mind at this time.

Thank you, gentlemen, for being with us this morning. This concludes today's hearing.

Mr. CONCKLIN. Thank you, Mr. Flowers.

Mr. MINTZ. Thank you, Mr. Chairman.

Mr. FLOWERS. We stand in recess.

[Whereupon, at 11:40 a.m., the subcommittee adjourned subject to call of the Chair.]

CONGRESSIONAL REVIEW OF ADMINISTRATIVE RULEMAKING

FRIDAY, NOVEMBER 7, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 219, Cannon House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers, Jordan, Mazzoli, and Moorhead.

Also present: William P. Shattuck, counsel; and Jay T. Turnipseed, assistant counsel; Alan F. Coffey, Jr., associate counsel; and David Minge, consultant to the subcommittee.

Mr. FLOWERS. We will call the meeting to order.

We are glad to have our distinguished colleague from Michigan, Jim O'Hara, with us today.

This is legislation designed to give congressional veto over rules and regulations promulgated by the various agencies. You have a wide range of experience in the Congress on many matters, but you have particularly had to wrestle with one over recent months.

Without regard, really, to the subject matter so much as the form that the problem has taken, it occurred to us that your comments on your own experience with procedures similar to that proposed in the bills before us could be very helpful to us. I do know that you have some broad concepts that we want to hear about.

We certainly welcome you here this morning and appreciate your taking the time to add your words to the testimony we have already received. You may proceed as you see fit.

TESTIMONY OF HON. JAMES G. O'HARA, REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. O'HARA. Thank you very much, Mr. Chairman.

I think you are dealing with the most important subject in this country, the question of who makes the laws and are they responsive to the people.

During the past 3 years, I have accumulated much direct experience with legislative review mechanisms as a result of my position as chairman of the House Subcommittee on Postsecondary Education.

One of the first activities of the subcommittee after I became chairman was to exercise its statutory obligation to review regulations for

the determination of a family's ability to pay for postsecondary education under the basic educational opportunity grant program.

This program, instituted as a result of the Education Amendments of 1972, is subject to a statutory requirement that proposed regulations for the family contribution schedule must be transmitted to the Congress at least 3 months before they may become effective.

The regulations must be redrafted if either House disapproves them by resolution. Each time the family contribution schedule has been submitted, I have introduced a pro forma resolution of disapproval.

The subcommittee has then held hearings which have pinpointed the effects of the administration proposals and served as a forum for exploring alternatives that would improve the operation of the program.

The administration has generally responded by modifying their proposals to reflect some of the concerns expressed by the subcommittee.

The process has culminated in the subcommittee tabling the resolution of disapproval, thus permitting the administration to prepare for the processing of student applications for grants to be awarded in the ensuing academic year.

On the whole, Mr. Chairman, this process has not only been effective in assuring that Congress is informed about the program, but it has also helped to produce the type of program that the Congress was thinking about when the Education Amendments of 1972 were enacted.

Mr. Chairman, with respect to that particular question, I understand Mr. Kurzman of the Department of Health, Education and Welfare gave some testimony which I consider to be at variance with facts having to do with the review by the committee of the family contribution schedules.

So, I would like to ask unanimous consent, Mr. Chairman—I am preparing a statement concerning that. I would like to prepare a separate little statement. I ask unanimous consent that it appear after his statement in the record of hearings.

Mr. FLOWERS. I have no objection. We invite you to do that.

Mr. O'HARA. Thank you, Mr. Chairman. I will submit that to the subcommittee.

Mr. FLOWERS. Please do.

[The prepared statement of Hon. James G. O'Hara follows:]

[See p. 458 for supplemental statement.]

STATEMENT OF HON. JAMES G. O'HARA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, I very much appreciate this opportunity to appear at this hearing which I understand is the last of a series called to hear testimony on H.R. 3658 and H.R. 8231. These bills both propose changes in the Administrative Procedure Act that would permit the Congress to review and possibly reject proposed regulations issued by executive agencies for the implementation of statutes enacted by the Congress.

During the past three years, I have accumulated much direct experience with legislative review mechanisms as a result of my position as Chairman of the House Subcommittee on Postsecondary Education.

One of the first activities of the Subcommittee after I became chairman was to exercise its statutory obligation to review regulations for the determination of a family's ability to pay for postsecondary education under the Basic Educa-

tional Opportunity Grant Program. This program, instituted as a result of the Education Amendments of 1972, is subject to a statutory requirement that proposed regulations for the family contribution schedule must be transmitted to the Congress at least three months before they may become effective. The regulations must be redrafted if either House disapproves them by resolution. Each time the family contribution schedule has been submitted, I have introduced a *pro forma* resolution of disapproval. The Subcommittee has then held hearings which have pinpointed the effects of the Administration proposals and served as a forum for exploring alternatives that would improve the operation of the program.

The Administration has generally responded by modifying their proposals to reflect some of the concerns expressed by the Subcommittee.

The process has culminated in the Subcommittee tabling the resolution of disapproval thus permitting the Administration to prepare for the processing of student applications for grants to be awarded in the ensuing academic year.

On the whole, Mr. Chairman, this process has not only been effective in assuring that Congress is informed about the program but it has also helped to produce the type of program that the Congress was thinking about when the Education Amendments of 1972 were enacted.

During the Education and Labor Committee's consideration of the legislation which ultimately became the Education Amendments of 1974, I offered an amendment, which was subsequently enacted, as section 431(d) of the General Education Provisions Act. This provision of law delays the effective date of regulations promulgated to implement various education programs for a 45-day period. During the 45-day period, the Congress, by concurrent resolution, may disapprove the regulation if it is inconsistent with the law. As you know, Mr. Chairman, this like all other proposals for legislative review has incurred unanimous condemnation of executive branch officials whether they view it from the heights of 1600 Pennsylvania Avenue or the depths of 300 Independence Avenue, Southwest.

Why do the bureaucrats rage? They say its because these proposals violate the Constitution!

They claim that they are protecting the separation of powers so wisely created by the framers of the Constitution. But are they?

We all understand what motivated the men who wrote the Constitution. They were the practicing politicians of their day; they had served in the Colonial legislatures; and they were witnesses to the abuse of power by kings and colonial governors. So they knew from bitter experience that the authority to make law—an authority which derived from the people, themselves—had to be kept in the hands of those who could be held responsible to the people.

In doing so, I don't believe the founding fathers assumed that the Congress would be necessarily possessed of greater wisdom, more benevolence, greater understanding or more selflessness than bureaucrats or judges. I am persuaded they gave the legislative power to the Congress because it is the Congress, alone, that is answerable—and at very frequent intervals—to the people from whom all government power is borrowed, and to whom its use must always be accountable.

This fundamental constitutional concept of separation of powers is what has been under attack by the administrative law-makers. I am not suggesting that this assault on the Congressional prerogative has ever risen to the level of outright confrontation. Quite the contrary; it has been an insidious assault, carried out with excessive politeness and a great outward show of deference—and all the while the bureaucrats have been taking the laws and have been busily writing their own versions of these laws—explaining the provisions of these laws to their satisfaction, defining to their own satisfaction terms already defined in the laws, adding their exemptions and explications and explanations, until what the public is told to do by their regulation bears only a general resemblance to what the law passed by the Congress told the public to do.

We are always assured that the regulations are only what is necessary. We are frequently assured that the only goal is to carry out the "intent of the Congress." And we are constantly assured that, in any event, the regulations are so desirable, so righteous, so necessary that they transcend the need of mere legality—the legality, in this case, being who has the constitutional responsibility for writing the laws.

As Members of Congress, we must recognize that the Congress has accommodated the Executive by consistently passing the law-making responsibility to the agencies it has created to execute the law. When confronted by complexity or controversy we have all too often included boilerplate language such as

"subject to regulations of the Secretary" or "the agency shall prescribe regulations to carry out the purposes of the Act" in the statutes which we have enacted.

After a beleagured citizen has been zinged by a ludicrous regulatory requirement he takes his complaint to the Courts and is told that his challenge must fail because the broad regulatory power granted to the agency by the Congress sanctions the rule.

The Supreme Court has expressed its reluctance to step into the quicksand of broad statute and even broader administrative rule as follows:

"Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning* v. *Family Publications Service, Inc.* (411 U.S. 356, 369 (1973)), *Thorpe* v. *Housing Authority of the City of Durham* (393 U.S. 268, 280–281 (1969)). See also *American Trucking Assns.* v. *United States* (344 U.S. 298 (1953)).

Part of the remedy for this affliction is for the Congress to avoid as much as possible statutory language which would further enhance the lawmaking power of the bureaucracy.

I think that this Subcommittee should give serious though to amending the Administrative Procedure Act to prohibit the bureaucrats from promulgating a rule unless the authorizing statute specifically requires a rule on a subject. Mr. Chairman, I believe that many of the statutes that have been held in limbo until a complex regulatory scheme has been developed could have been enforced months and even years sooner.

A case in point is Title IX of the Education Amendments of 1972. Title IX prohibits discrimination on the basis of sex in federal education programs or activities. The Congress made Title IX effective on June 23, 1972. Nearly three years later on June 4, 1975, the Department of Health, Education and Welfare published its final regulations for the implementation of Title IX in the Federal Register. The Subcommittee on Postsecondary Education held a week of hearings to take testimony on the question of whether the regulations were consistent with the statute.

Caspar Weinberger who was then Secretary of HEW testified at our hearing and like the bureaucrats who have appeared before you, he told us that three years to develop a regulation was absolutely necessary while at the same time he bemoaned the unconscionable delay caused by a 45-day period for Congressional review of the regulations. When asked why it had taken so long to develop the regulations, Mr. Weinberger told the Subcommittee that "it has been extraordinarily difficult first, to interpret the intent of Congress, and secondly to accommodate the concerns of a wide diversity of interest groups and individuals."

It has always been my view, Mr. Chairman, that this responsibility for accommodating diverse concerns of the body politic was our responsibility here in the Congress. Yet the Secretary of HEW, in devising a set of regulations designed to carry out the law, and deriving all of their authority from the law, felt that he had the power to exercise the separate legislative function of trying to accommodate the "concerns of a wide diversity of interest groups and individuals."

Followed to its illogical conclusion, this bureaucratic attitude suggests that the only real law in town is the regulation, and that until some GS–15 has explained the statute and issued regulations, there is no real law out there to concern anyone. The theory seems to be that the Congress may propose and the President may endorse, but until the bureaucracy has acted there is no law worthy of the name. And the fact of the matter, Mr. Chairman, is that in pursuit of this theory, the bureaucrats have written rules and regulations in instance after instance that extend far, far beyond the requirements that were contained in the law when it left the Congress and when it was signed by the President.

Requiring the bureaucrats to lay the rules they intend to enforce before the Congress is I believe one of a number of ways that Congress can begin to reclaim its lost legislative power.

Like the bureaucrats that have appeared before the Subcommittee, Mr. Weinberger told us that the proper response for Congress when it finds a regulation to be in conflict with a statute is for the Congress to amend the statute rather than having the agency amend the regulation. I submit that this exemplifies the arrogance inherent in unbridled administrative lawmaking.

Congressional review of administrative rules is one way to restore the balance in our Constitutional system that was so carefully developed in Philadelphia in the summer of 1787.

This device will create an awareness among the bureaucrats that the Congress is watching and that the rules which exceed the limits of the statute may be stricken before they can be inflicted on the public.

Mr. Chairman, I do, however, believe that there are weaknesses in Congressional review of administrative rules. First, of course, is the staggering increase in work that will be created for members, their staffs, and the various committees. The Congress would only be physically capable of reviewing a limited number of controversial rules at the tip of the iceberg while many questionable rules would become effective even though they contravene the law.

Secondly, my experience indicates that when the Congress begins meaningful review processes that there is an almost overwhelming tendency to argue the issues of whether the law or the regulation is desirable rather than focusing on whether the regulation implements the law.

In addition to Congressional review and statutory limitations on the power to promulgate regulations there seem to me to be other methods for curbing the enormous power to make law that has accumulated in the Executive Branch.

At the present time section 553 of the APA requires each rule to be followed by a reference to the legal authority under which each rule is proposed. I would urge that this requirement be expended to require an explanation by the agency of their reasons for concluding that the rule is required by the relevant statute.

Another way of checking the power of the bureaucrats is to amend the APA to include requirements that each rule must be forwarded to the Comptroller General who will examine the rule for statutory consistency and if he finds that the rule is inconsistent to authorize him to bring suit in the U.S. District Court of the District of Columbia. This process could be required to be handled in an expedited manner to insure that unlawful rules are not permitted to exit simply because there is no plaintiff with standing to sue who is able to expend the time and money necessary to challenge the rule in the Courts.

I very much hope that these suggestions will be of some assistance in your deliberations on the operation of the administrative process. I, of course, will be happy to lend whatever cooperation I can in efforts to avoid our succumbing to the maxim of Ancient Roman law that: "What pleases the Prince has the force of law."

Mr. Chairman, what pleases the Prince does not have the force of law in this country—not as long as this Congress sits, and not as long as a free people are able to tell our "princes" that they are wrong.

Mr. O'HARA. During the Education and Labor Committee's consideration of the legislation which ultimately became the Education Amendments of 1974, I offered an amandment, which was subsequently enacted, as section 431(d) of the General Education Provisions Act.

This provision of law delays the effective date of regulations promulgated to implement various education programs for a 45-day period. I was pushing for a 60-day period, but that was forced back to the 45-day period.

During the 45-day period, the Congress, by concurrent resolution, may disapprove the regulation if it is inconsistent with the law.

As you know, Mr. Chairman, this like all other proposals for legislative review has incurred unanmous condemnation of executive branch officials whether they view it from the heights of 1600 Pennsylvania Avenue or the depths of 300 Independence Avenue SW, HEW.

Why do the bureaucrats rage? They say it is because these proposals violate the Constitution. They claim that they are protecting the separation of powers so wisely created by the framers of the Constitution. But are they?

We all understand what motivated the men who wrote the Constitution. They were the practicing politicians of their day; they had served in the colonial legislatures; and they were witnesses to the abuse of power by kings and colonial governors.

So, they knew from bitter experience that the authority to make law—an authority which derived from the people, themselves—had to be kept in the hands of those who could be held responsible to the people.

In doing so, I do not believe the Founding Fathers assumed that the Congress would be necessarily possessed of greater wisdom, more benevolence, greater understanding or more selflessness than bureaucrats or judges.

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And we are constantly assured that, in any event, the regulations are so desirable, so righteous, so necessary that they transcend the need of mere legality—the legality, in this case, being who has the constitutional responsibility for writing the laws.

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After a beleaguered citizen has been zinged by a ludicrous regulatory requirement, he takes his complaint to the courts and is told that his challenge must fail because the broad regulatory power granted to the agency by the Congress sanctions the rule.

The Supreme Court has expressed its reluctance to step into the quicksand of broad statute and even broader administrative rule as follows, and this is critical:

> Where the empowering provision of a statute states simply that the agency may "make such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."

That is a quote from a decision in the case of *Mourning* v. *Family Publications Service, Inc.* That is awfully broad, "reasonably related to the purposes of the enabling legislation."

Part of the remedy for this affliction is for the Congress to avoid as much as possible statutory language which would further enhance the lawmaking power of the bureaucracy.

I think that this subcommittee should give serious thought to amending the Administrative Procedure Act to prohibit the bureaucrats from promulgating a rule unless the authorizing statute specifically requires a rule on a subject.

Mr. Chairman, I believe that many of the statutes that have been held in limbo until a complex regulatory scheme has been developed could have been enforced months and even years sooner.

A case in point is title IX of the Education Amendments of 1972. Title IX prohibits discrimination on the basis of sex in Federal education programs or activities. The Congress made title IX effective on June 23, 1972.

Nearly 3 years later, on June 4, 1975, the Department of Health, Education, and Welfare published its final regulations for the implementation of title IX in the Federal Register. The Subcommittee on Postsecondary Education held a week of hearings to take testimony on the question of whether the regulations were consistent with the statute.

Caspar Weinberger who was then Secretary of HEW testified at our hearing and like the bureaucrats who have appeared before you, he told us that 3 years to develop a regulation was absolutely necessary, while at the same time, he bemoaned the unconscionable delay caused by a 45-day period for congressional review of the regulations.

When asked why it had taken so long to develop the regulations, Mr. Weinberger told the subcommittee that "it has been extraordinarily difficult first, to interpret the intent of Congress, and secondly, to accommodate the concerns of a wide diversity of interest groups and individuals."

Mr. FLOWERS. He should have stopped with the first one, I would say.

Mr. O'HARA. He certainly should have. This responsibility for accommodating diverse concerns for the body politics was our responsibility here in the Congress. Yet, the Secretary of HEW, in devising a set of regulations designed to carry out the law, and deriving all of their authority from the law, felt that he had the power to exercise the separate legislative function of trying to accommodate the concerns of a wide diversity of interest groups and individuals.

Followed to its illogical conclusion, this bureaucratic attitude suggests that the only real law in town is the regulation, and that until some GS–15 has explained the statute and issued regulations, there is no real law out there to concern anyone.

The theory seems to be that the Congress may propose and the President may endorse, but until the bureaucracy has acted, there is no law worthy of the name.

And the fact of the matter, Mr. Chairman, is that in pursuit of this theory, the bureaucrats have written rules and regulations in instance after instance that extend far, far beyond the requirements that were contained in the law when it left the Congress and when it was signed by the President.

Requiring the bureaucrats to lay the rules they intend to enforce before the Congress is, I believe, one of a number of ways that Congress can begin to reclaim its lost legislative power.

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Mr. Chairman, I do, however, believe that there are weaknesses in congressional review of administrative rules. First, of course, is the staggering increase in work that will be created for Members, their staffs, and the various committees.

The Congress would only be physically capable of reviewing a limited number of controversial rules at the tip of the iceberg while many questionable rules would become effective even though they contravene the law.

Second, my experience indicates that when the Congress begins meaningful review processes that there is an almost overwhelming tendency to argue the issues of whether the law or the regulation is desirable rather than focusing on whether the regulation implements the law.

In addition to congressional review and statutory limitations on the power to promulgate regulations, there seem to me to be other methods for curbing the enormous power to make law that has accumulated in the executive branch.

At the present time, section 553 of the APA requires each rule to be followed by a reference to the legal authority under which each rule is proposed. I would urge that this requirement be extended to require an explanation by the agency of their reasons for concluding that the rule is required by the relevant statute.

Another way of checking the power of the bureaucrats is to amend the APA to include requirements that each rule must be forwarded to the Comptroller General who will examine the rule for statutory consistency and if he finds that the rule is inconsistent, to authorize him to bring suit in the United States District Court of the District of Columbia.

This process could be required to be handled in an expedited manner to insure the unlawful rules are not permitted to exist simply because there is no plaintiff with standing to sue who is able to expend the time and money necessary to challenge the rule in the courts.

I very much hope that these suggestions will be of some assistance in your deliberations on the operation of the administrative process. I, of course, will be happy to lend whatever cooperation I can in efforts to avoid our succumbing to the maxim ancient roman law that: "What pleases the Prince has the force of law."

Mr. Chairman, what pleases the prince does not have the force of law in the country—not as long as this Congress sits, and not as long as a free people are able to tell our "princes" that they are wrong.

Now, Mr. Chairman, I do have a little more, a few other things that we could do. For instance, in the definition of rule in section 551, I think we might define rule a little bit differently.

Right now in that definition in 511 of APA, "rule" means the whole or part of an agency's statement of general or particular applicability and future effect designed to implement, interpret, and so forth.

I think we might remove the word designed and say a statement of general or particular applicability and future effect authorized and required by law and necessary to interpret or describe.

Mr. FLOWERS. In other words, not give them the latitude that they now have?

Mr. O'HARA. Yes.

Mr. FLOWERS. I think that is a good suggestion.

Jim, I appreciate very much your comments here. I will be happy to read what you have to say in response to what the gentleman from HEW had to say.

I think maybe this thing is broader than we perceive. In the course of these hearings we have had people from Occupational Safety and Health Administration, Environmental Protection Agency, HEW and others before us and we have tried to enlist comments from them relative to the complaints concerning governmental actions in specific cases which have caused many Members of Congress to feel they have issued regulations that contravene the law.

I have observed that at times almost every agency of this Government apparently feels that they have, as you say, the authority to issue any regulation they want to and that it is desirable to follow the law, this is not too serious a consideration.

Yesterday, I had a long talk with several of our colleagues. A gentleman from the National Guard Bureau, a two-star general, the head of the National Guard Bureau was there. We were discussing a peculiar situation where the Governor of my State has appointed a now lieutenant colonel to be assistant adjutant general of Alabama.

The regulations issued by the Department of the Army say that in order to get a star, you have to serve a certain amount of time as a full colonel and do certain other things. The law of the land as passed by the Congress of the United States provides a specific exception which provides that this requirement shall not apply in the case of State adjutant generals or assistant adjutant generals.

The exception for State adjutants or their assistants is as clear as anything that could be written. There is no fuzzy language whatsoever. Yet the Department of the Army, because they do not think that is right—and that is the only excuse they could offer—has issued a regulation that directly contravenes that law.

I think this is more pervasive than any of us really realize. Maybe the law might be challenged, but I agree with you that it should not be done by the regulation process. Apparently they think that the law ought to be changed to fit the regulation. The Army, HEW and other agencies seem to follow this completely unjustifiable course. Your comments of what Mr. Weinberger said are directly relevant. As I recall when he left the Department, he took a blast at the bureaucracy. Yet, in the instance you cited, he was practicing bureaucratic rulemaking at its worse when he was there.

Mr. O'HARA. I had a lot to do with writing title IX of the Higher Education Act, which is a prohibition on sex discrimination, so I am very familiar with the drafting of it.

What we did, we took title VI of the Civil Rights Act of 1964. It prohibits discrimination in any federally-assisted program or activity and provides for a cutoff of funds in the event there is discrimination in any federally assisted program or activity.

We took that language and we just boilerplated it. We took that identical language, word for word and wherever the word race appeared, we put in the word sex.

Then we wrote a few exceptions that applied only to education, that exempted certain educational institutions. But, other than that, the operative language of title VI and title IX are identical, word for word, except one deals with sex and one deals with race.

In both cases, the same enforcement language, the same remedy, cutoff of funds. Ten years ago, when title VI came out, that was the only remedy provided in the regulations. When title IX regulations came out, they said yes, there shall be a cutoff of funds.

In addition, every recipient agency, every school district in America, every college in America, has to in addition to avoiding discrimination and suffering discrimination and suffering a possible fund cutoff if they do, has to establish an internal grievance procedure for settling complaints of discrimination on the basis of sex and every institution, every school district, has to in addition establish a system of self-evaluation in which they review all of their past practices and keep records of this available to the secretary.

I think those are both good ideas, maybe not for the real small institutions but you see, rather than do it themselves, the Office of Education should have come back to us and said Congress, we like what you have done and we are prepared to enforce it.

We think we could enforce it better if you would provide for internal grievances procedures, at least for institutions of a certain size. We think we could enforce it better if you required self-evaluation. We could have considered it and very possibly enacted it. I would have been for it.

Mr. FLOWERS. This process was never used under title VI?

Mr. O'HARA. Never used and it isn't to this day. It tells you how far this thing has come in 10 years. What they did not think they had the authority to require 10 years ago under the identical language, they now think they do have the authority to do.

We have been going downhill, Mr. Chairman.

Mr. FLOWERS. I think clearly then in that 10-year period, probably, Jim, the agencies have moved from assuming that if it was questionable not to take the authority to know clearly if there is any question or if a question can be made, assume they have the authority and go with it.

Mr. O'HARA. That was the basis by the way of my resolution of disapproval of those two title IX regulations. I did not think they were authorized by the statute.

Mr. FLOWERS. Under your 1972 Education Act, you have this 45-day period in which your committee can move. But this is not general law.

Mr. O'HARA. Just with respect to education programs.

Mr. FLOWERS. Would you think that to provide something like that by general law would be helpful?

Mr. O'HARA. Yes; I do because at least they understand that they may at the very least be put on the grill for any outrageous administrative lawmaking. But I do think you have to accompany it with some sort of prior restraint. By amending APA to try to limit the ambit of rulemaking, as I found out, you just take that enforcement example that I gave you.

That is the one I introduced my resolution of disapproval on. I got into a terrible flap over the question well, wasn't it a good idea to have internal grievance procedures?

Yes; I think it is a good idea. I am one of those that agrees with that. I think that might replace a lot of the mechanism we now have that lets HEW interfere in every little decision. But it just is not the law. I ran into the notion that if administrative rulemaking is a good idea, why are we trying to disapprove this regulation?

You get tangled up in the merits of a specific regulation and it prohibits the Congress from being effective.

Mr. FLOWERS. I recognize our colleague from California.

Mr. MOORHEAD. I thank you for coming this morning. I think the information you have given us has really been helpful. If we would pass a general legislative veto bill, how do you think we should deal with the congresisonal veto provisions that are already in existence, those that apply to education and others?

Do you think they should be amended to conform?

Mr. O'HARA. I think that you should—I suspect they would be repealed by implication. But I think maybe you ought to put in the report at least that you intend this to replace the existing provisions.

Because I do think that we ought to have a uniform review provision.

Mr. MOORHEAD. One thing I was thinking——

Mr. O'HARA. That review of the family contribution schedule, that is kind of a different beast in a way. But for instance my amendment to 431(d) of the General Education Act would be completely displaced by your general review provisions.

Mr. MOORHEAD. If there are provisions in effect at the present time that are working exceptionally well, even though somewhat different, do you think they should be meshed into the new law?

Mr. O'HARA. If you have any that are working very well like this review of the expected family contribution schedule, that is working pretty well, maybe you can specifically exempt it.

But I don't think many of them are working especially well.

Mr. MOORHEAD. How would you suggest that we deal with the problems of staff needs under a general procedure for congressional review of rulemaking? Do you think there are changes that would be necessary there?

Mr. O'HARA. I think you would need a lot of additional staff. The question is where would you put the staff? Would you have a separate office of regulations review in the House or would each committee staff beef up their oversight functions to include review of regulations?

Obviously it would be a lot of work and it would take a good deal more staff.

Mr. MOORHEAD. Do you think that any legislation that is passed in this area should be prospective only?

Mr. O'HARA. I think it would be awfully tough to keep up with the new ones, much less go back to the old ones. I bet you could fill this room with Federal regulations.

Mr. MOORHEAD. I am sure that you could. I think we are all having the same troubles where our people are complaining and blame us for the laws that they have to follow and in many instances they are Federal regulations that we have had very little voice in.

Mr. O'HARA. I have to advise the gentleman from California that on a couple of occasions before I became fully aware of the extent of this thing, when my constituents would come to me and complain about some Federal regulations, I would question their veracity. I would say "Oh, that is ridiculous. You must be mistaken. Surely they are not doing that. I remember that law well. We specifically decided not to require that.

"You can't tell me the agency is requiring it."

Then I would suggest—go back to Washington and look it up and discover that that is exactly what they were doing. In many of these cases we can remember the fight that went on within the Congress as to whether or not we should do a particular thing and we finally decided not to only to find that the agency had done it by regulation.

Mr. MOORHEAD. I think in some of these instances we can blame ourselves for the situation wherein for delegating too much authority and not paying a little more attention to the details.

Mr. O'HARA. I don't know what ever hapened to the old constitutional rule. It fell into disuse. If you try to delegate too much, that the statute was invalid because it constituted an invalid constitutional delegation of legislative power.

I have not seen a case in a long time that went off in that direction.

Mr. MOORHEAD. Thank you very much.

Mr. FLOWERS. Ms. Jordan?

Ms. JORDAN. Thank you, Mr. Chairman, and thank you for your testimony. That was very helpful. On page 2 of the testimony that we have, in your recommendation, this subcommittee should give serious thought to amending the APA to prohibit the bureaucrats from promulgating a rule unless the authorizing statute specifically requires a rule on the subject.

How are we to know at the time we pass an authorizing statute whether a rule will be required on all of the subjects dealt with in that authorizing statute?

Mr. O'HARA. I guess I worded that not quite as well as it should have been. You see what has happened to our existing requirement that there must be in each rule a reference to the legal authority under which the rule is proposed, all they refer you to is the general power to make rules under the Administrative Procedures Act and the particular section of the statute usually found at the end which says the Secretary shall have power to make such rules.

I think what we really intended when we enacted this law was that they set forth the statutory basis for this rule, not simply a grant of authority to make rules, but that this rule was necessary to carry out the provisions of section 203(B) which require lenders to do thus and so or whatever.

You try to make them tie their rule to some substantive provision of the statute saying this rule is designed to carry out the intent of the Congress as expressed in a particular section.

Ms. JORDAN. What you really mean by this statement is that in our authorizing legislation we should require the bureaucrat to state specifically that portion of the legislation which he cites as authority for promulgating the rules?

Mr. O'HARA. That is right, in addition to the section which says they shall have power to make rules.

Ms. JORDAN. You don't really mean we should prohibit the bureaucrat——

Mr. O'HARA. No, that they should go back to the substantive law and say we are promulgating this rule because it is required to effectuate the provisions of this section.

Ms. JORDAN. I understand. Do you think for us to take each rule that may be the subject matter of disagreement and try to pass a resolution of disapproval, do you see any problem with the clutter of congressional scheduling?

Mr. O'HARA. I do. I think that is one of the two great weaknesses with the procedure. I am supporting that procedure because I think we have to do something. The weaknesses are one, the schedule.

It is the amount of additional work we have created. We would be chasing our own tail all the time. You enact the statute and then you review the regulation and disapprove them and review the new ones. The committees would be terribly burdened.

Then the other weaknesses is that you get into the merits all the time. Well, is the regulation a good idea whether or not that is something—it is something we would have done if we had thought of it?

That should not be the question. The question is, What did we do and does this regulation carry it out?

Ms. JORDAN. Do you envision any agency exemptions from this process?

Mr. O'HARA. I had not really thought about that.

Ms. JORDAN. I know we need to get a handle on this and I don't know any better way than what you are recommending and what others have recommended in terms of congressional action. Do you know of any instances where the matter of rule interpretation has gone to the courts and the courts citing the constitutional authority of the Congress only to make the law?

I am not familiar with the case history on that subject.

Mr. O'HARA. Well, the courts have been—there have been a lot of cases that have gone to the courts on that issue. But the decisions have been all over the lot. Sometimes they hold that the rule was beyond the authority of the agency, and sometimes they hold that they are not.

But since the decision in the case of *Morning* v. *Family Publications* which was a 1973 Supreme Court decision, it seems to me that was given the broadest possible grant of authority to date. I cite a sentence from that down in the lower half of page 2 of my testimony.

I really think that that sort of puts the courts out of the ballgame to a large extent unless we do something to change the law. I am particularly concerned that we do something in the Administrative Procedures Act to impose some prior restraint on the agencies to say, as we discussed, to limit their authority to issue regulations rather carefully and to make it clear to the courts that we are not—we do not think that the agency has such expertise that it is authorized to supply the omissions of the Congress and correct our work.

We do insist that the regulations follow the law rather stringently.

Ms. JORDAN. At one point in your testimony you talked about requiring the bureaucrats to lay before the Congress the rules they intend to promulgate. Jim, as you well know, we pass legislation around here and we don't know what it is intended to do in a very definitive way because we are weak on the followthrough.

In many instances, don't you think that that sort of destroys the practicability of requiring the bureaucrat to lay before us the rules they intend to promulgate since we don't know whether before the fact that rule is something which should be the subject matter of our consideration?

Mr. O'HARA. Well, that is a problem. The point at which they lay them before us is another problem. One of the fights I have had with HEW has been when they put their proposed rules before us.

You know it is customary for them under the APA to publish their proposed rules and then invite public comment and review. What they would like to do and the way they would like to interpret our statute is they give us the same opportunity to comment as the public has under the APA.

What I am talking about is after they have received all the public comments, after they have made their final decision on the regulations, that they then give us an opportunity to review at that point.

Ms. JORDAN. Before they finalize them?

Mr. O'HARA. Before they become effective, but it is their final version that comes to us, not their tentative or original version that comes to us. Secondly, we must have a provision in the statute because of the tremendous workload problem that you have foreseen, to say that then if the Congress fails to pass a resolution of disapproval, that shall not be taken as congressional imprimateur on the regulations.

It may be that we just didn't get around to it. That is one of the things that they cite. I recall some constituents of mine coming in to complain about some regulations and I sent them over to the appropriate people in the Department of Labor in that instance.

The Department of Labor had the effrontery to say, well, the Congress approves of our regulations. They said they knew about it and they did not do anything to change it. All of a sudden we were made accomplices in this outrage.

Ms. JORDAN. Approval be default?

Mr. O'HARA. Right.

Ms. JORDAN. Thank you, Jim. Thank you, Mr. Chairman.

Mr. FLOWERS. Jim, of course we can hardly get away from the court having some role in this thing. In fact you suggest in some respects an enlarged role if the Comptroller General is given the responsibility of review and then authority for taking it to the District Court of the District of Columbia. However, I gather that you are suggesting that in connection also with our other suggestion that you have the prior restraint, you limit the authority by general law and this would kind of make it in a different sense than we have now in which the court has practically thrown the gate open through the morning decision here?

Mr. O'HARA. Right.

Mr. FLOWERS. Would you have any suggestions—I agree with you that if we are going to take away from the administration the right

to decide whether they like the law or not, that, if the Congress is going to have another bite at the apple through a review of the rule, the Congress should not rehash the merits; that is, the examination should not extend to the determination of whether or not we like the law.

We ought to be talking about whether the rule follows the intent of the law that has already been put on the books. Do you have any idea of any technique we might use to restrain ourselves, you might say, later on when we take a look at the rule?

Mr. O'Hara. No, I don't, not in the real hard cases. I think it is fairly easy when you don't have—when you are not dealing with critical social problems where you have got organized interest groups involved in the question.

Mr. Flowers. Your title IX situation was a typical one.

Mr. O'Hara. There is no one ever separating that out.

Mr. Flowers. The merits just get into it.

Mr. O'Hara. That is right. On the other hand, if there is something where you did not have that kind of passionate cause involved, maybe the Congress could separate itself a little bit from the merits of the issue and look at the question of whether or not it was authorized.

Mr. Flowers. It occurs to me that the real key to our job here in the Congress is getting more and more into oversight. I think this Congress is more involved in that business than any previous Congress that I served in.

Mr. O'Hara. I would agree. We are doing a better job but we have a long way to go.

Mr. Flowers. We know that when we pass legislation that is really the beginning of it. We have got to look at the way it has been utilized by the executive branch and we have also got to be ever thinking about possible amendments to improve the legislation.

Oversight is the key.

I wondered if there might be some manner in which through general legislation we could bring our colleagues more to their oversight functions? I don't know that this committee would have any authority to require another committee to exercise better its oversight functions, but we probably now—I don't know for sure—but we probably are even now attacking our oversight responsibility in a piecemeal fashion.

Your subcommittee is doing an excellent job. Others are, but then there must be some that are just still carrying on as they did before.

Mr. O'Hara. We now have of course in the law requiring the committees to report what they are doing in the way of oversight but I don't see that that has had any impact. I think if we adopted a statute like those before us in which we specifically gave to the Congress the responsibility to review regulations and their implementation maybe that would get the Congress more into oversight.

Mr. Flowers. I agree with that. One other complaint that the executive branch with a single voice has made is a rather ludicrous one—and I am glad you brought out the example of the 1972 effectiveness of the sex discrimination statute. When an agency action consumes a period of 3 years in promulgating regulations it is inconsistent for that agency to complain about a 45-day waiting period for congressional review.

They have been a single voice which said that we can't stand the thought of 30 more days before we implement our rules. That is so

ridiculous an argument that I don't think it will have anything to do with our determination here. But another complaint that they make might be a better one and this again embodies the fact that we will have another shot at it and get into the merits of the legislation. Another potential question is whether we in the Congress would tend to be even less exact, even less explicit, and be less exact in legislation in shifting the burden of the hard decisions off to the agencies because we know we would have another bite at the apple later on?

Mr. O'Hara. I don't see how we could be any more irresponsible. [Laughter.]

Mr. Flowers. That is one record we would not want to improve upon.

Ms. Jordan. I move to strike that from the record.

Mr. Flowers. Present company excepted of course.

Mr. O'Hara. Let me take an example and I am embarrassed by it because I am one of the sponsors of the bill. The bill we put forward to accelerate public works construction as a countercyclical job producing thing, economic stimulus.

Many of us were sponsors of that. It said the fund shall be distributed and divided among the various local jurisdictions in accordance with rules and regulations adopted by the Secretary of Commerce period.

We made no effort whatsoever to set up how those funds were going to be distributed, among the local governments. It was an astonishing piece of legislation, maybe the worst I have ever seen.

But I felt so strongly that some economic stimulus, particularly in the depressed construction industry was so badly needed that I went along with it.

Mr. Flowers. I am in the same boat with you on that because I joined in the same legislation and we found problems later on.

But you know, so often we head into a piece of legislation with two opposing sides and when finally the ultimate compromise takes place and everybody gets together we are all so happy that we have got something that both labor and business are for or both the administration and the NEA are for, that we just accept it.

Mr. O'Hara. We sort of postpone the day of reckoning.

Mr. Flowers. When we pass that buck to some secretary or the administrator of some regulatory agency, we really get what we deserve.

Mr. O'Hara. I think we could be stopped from doing that if the courts revised to some extent the doctrine which I think was badly misused in the 1930's, the doctrine that if the Congress tried to delegate too much, it was an unconstitutional delegation of legislative authority under article 1 of the Constitution.

If they restrained revival of that doctrine and that line of approach, I think it would serve to cause us to be more particular in what we did.

Mr. Flowers. I was also interested in your suggestion that we assign a role to the Comptroller General here. It would be a rather significant role, under your suggestion, which would undoubtedly require many more people in GAO than they now have.

Mr. O'Hara. I kind of like that proposal as you might suspect. [Laughter.]

It involves—it takes—I think that the Comptroller General would be less inclined to get involved in the substantive merits than either we are or the regulation writers are. Then the court serves as an economic check on him because all we authorize the Comptroller General to do is to bring suit.

And then some expedited procedure for handling the suit. There you have involved first a review mechanism that is associated with the Congress, not ongoing anything to the administration and not relying upon them in any way or on the Bureau of the Budget or what have you.

First you say to them you review it but at the same time they are pretty independent. Then if you think it is wrong, you don't have the authority to overrule it but you do have the authority to take it to court.

We have an expedited procedure for that. I think that is a way to do this.

Mr. FLOWERS. That is something I would like to look at more specifically and I think it does have merit. Mr. Mazzoli?

Mr. MAZZOLI. Thank you, Mr. Chairman. I am sorry I was late. Jim and I are former colleagues on the Committee on Education and Labor and he also made a good contribution there.

Let me ask you on page 3 of your statement at the bottom talking about alternatives to congressional oversight you mentioned the second point is that our problem if we were to review all the procedures would be that we would tend to decide them on the basis of their desirability rather than perhaps on the basis of whether they implement the law.

In your study, how many of these rules and regulations have caused us problems because they have in turn caused our constituents problems? How many of them have been because they ignored the intent or coverage of the law and how many have been undesirable as our people feel the law is desirable?

Mr. O'HARA. I think that we in the Congress are guilty of some dissembling on this point. Occasionally we will say even about a regulation that does in fact carry out the congressional intent, we will try to pass the buck to the regulatory agency and say "Well, you know, we can't trust those fellows to do the right thing." But I do think that while there is some of that, I think for the most part the regulatory agencies have greatly extended the scope of the statute and sometimes gone against or gone into areas where there was no intent to legislate and legislate with their regulations.

You know, your question sort of brings this issue up that the chairman referred to. We are doing a better job but honestly one of the reasons we are doing a better job is because we have the Congress that is in control of one party and administration in control of the other.

Congress tends to be more suspicious of the regulation writer than they would be if they were both the same party. That is true. That is something I can recall doing during Democratic administrations, you know. I used to shake my head sometimes at what I saw happening in terms of regulations writing.

But it was for the most part going in the direction I wanted it to go so I would say to them privately, remonstrate, I don't think you fellows really have the authority to do this nice thing. [Laughter.]

I guess maybe because I have been here awhile I finally have decided that I ought to swear off administrative lawmaking completely, whether it is good stuff or bad stuff. I think it is such a pernicious business and I think it is growing in its scope under both Democratic and Republican administrations.

If we want to keep our Government accountable to the people, we are going to have to stop it whether it is something we agree with or not. In title IX, I would—I was in a meeting with some of the women's organizations before the regulations were promulgated, who said one of the ways we ought to then attack this problem is with internal grievance procedures. We ought to pass a law that requires internal grievance procedures and all said they thought it was a good idea.

The next thing I know I saw it in the regulations. We had not passed the law but we had short circuited the process. So I said well, I do think it is a good idea but I don't think that is the way to do it.

Mr. MAZZOLI. That is the thing that has been troubling me about the oversight we would exercise with passage of either of these bills. To what extent would we limit our search to whether or not it is in keeping with the statute, or whether or not we say it is unpopular with a bunch of people and on that basis alone we overrule it.

Is there any way in our judgment we could write a protection for ourselves?

Mr. O'HARA. I have proposed that we do a couple of other things, that we amend the Administrative Procedures Act in a couple of ways to make it—to impose a little more restraint on the regulation writers in terms of what they can do and prior restraint and also invite the courts in to give it a little closer scrutiny.

Also we should involve the Comproller General in reviewing these and give him the right to go into court.

Mr. MAZZOLI. Do you think that we would be better advised as a committee to focus our attention on the alternatives here to these bills, or do you think that we should be working on both fronts at the same time, the improvements to the regular APA as well as these bills?

Mr. O'HARA. My feeling is that you ought to be doing both but if you have to take a choice my own experience with congressional review tells me I would rather try the prior restraint approach. I think it might work better.

Mr. MAZZOLI. Thank you.

Mr. FLOWERS. Jim, thank you very much for coming before us.

Mr. O'HARA. I have enjoyed this session very much. I know it is old hat now.

Mr. FLOWERS. No, it is very helpful. Your experience in this field will help us very much. Thanks, Jim.

The subcommittee now stands adjourned. Thank you all very much.

[Whereupon, at 11:10 a.m., the subcommittee adjourned subject to call of the Chair.]

[Subsequent to the hearings the following statement was submitted for the record:]

STATEMENT OF HOWARD I. GROSSMAN, ADMINISTRATIVE JUDGE, TO THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS, COMMITTEE ON THE JUDICIARY, ON THE ADMINISTRATIVE RULEMAKING CONTROL ACT (H.R. 3658)

I am an Administrative Law Judge with the Social Security Administration. In this capacity, I am primarily concerned with the adjudication of individual cases rather than with rulemaking. However, since Administrative Law Judges are required to take cognizance of agency rules in our disposition of cases, we have a direct interest in their content and in the rulemaking process.

The fundamental concern of the Administrative Rulemaking Control Act—agency rules contrary to the Congressional purposes—is one which the Adminis-

trative Law Judge must face whenever he has a particular case governed by a rule contrary to a statutory mandate. Under present Law, this conflict must be resolved in the first instance by the Administrative Law Judge. Any statute which tends to resolve this conflict, and clarify the legal precepts governing a particular case, will be of great assistance in the adjudication of cases.

I support the general principles and purpose of H.R. 3658, to make the administrative agencies more responsive to the will of Congress.

However, I recommend that the bill be strengthened by removing several exceptions which unnecessarily restrict its applicability. Thus, the following language should be deleted:

(1) In section 553(a)(2), the words "to agency management or personnel or," so that the subparagraph reads: "(2) a matter relating to public property, loans, grants, benefits, or contracts."

The recommended deletion would subject agency management and personnel actions to the Congressional overview provided by H.R. 3658.

(2) Subparagraph (A) of subsection 553(b).

The recommended deletion would subject to Congressional overview an agency's interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice, even though notice or hearing is not required by statute.

(3) Subparagraph (2) of section 553(f).

The recommended deletion would subject a rule to the procedure mandated by H.R. 3658, even though violation of the rule would not result in a criminal penalty.

The deletions urged in recommendations (1) and (2) are necessary because the existing exceptions permit agencies to defeat the Congressional intention, as set forth in a statute, by actions which are said to be "management" or "personnel" decisions, and by "organizational" and "procedural" rules.

Such efforts in the past have required remedial action by Congress. In the Rehabilitation Act of 1973 (Public Law 93-112), for example, Congress found it necessary, in section 3(a), to prohibit the Secretary from approving any delegation of functions of the Commissioner to an officer not directly responsible to the Commissioner, without submitting same to Congress, and to require the Secretary to expend funds "only for the programs, personnel, and administration of programs carried out under this Act." These statutory provisions followed extensive committee hearings which indicate their necessity. Under present law, the agency would argue that Congress was improperly concerning itself with a rule concerning "agency organization," which is excluded from review under H.R. 3658.

Similarly, a rule or regulation ostensibly dealing with "personnel" matters may contravene or defeat the intention of other sections of the United States Code. Thus, the Code provides for adjudications by Administrative Law Judges who are intended to be independent of agency controls. However, an agency may thwart a statutory objective by requiring its Administrative Law Judges to adhere to substantive and procedural rules issued under the authority of 5 U.S.C. 552(a)(1), which are actually contrary to the statutory mandate. It may accomplish the same general purpose by withholding or denying critical budgetary, clerical and other logistical support for the Administrative Law Judges. Other agency action with the same result includes the labeling of agency employees, who are actually subject to agency controls, with the title "administrative law judge," "judge," or similar appellations, thus denigrating the independence and title of those individuals to whom the title properly applies, and defeating the Congressional objective of a truly independent decision.

There is no good reason why "interpretative" or "procedural" rules, and "general statements of policy," should not be subject to H.R. 3658. A general statement of policy concerning the meaning of a statute, issued authoritatively by an agency head, can be just as destructive of the Congressional will as a duly promulgated rule. Thus, an agency opposed to a program which it is charged with administering—a benefits program, for example—can defeat the Congressional intent by announcements of general policy overstating the requirements for eligibility, or by specifying onerous and exhausting procedures, thus discouraging potentially entitled individuals from filing applications. As Judge Learned Hand stated, the substance of the law is secreted in the interstices of procedure.

In similar manner, a regulatory agency can deter a businessman from taking certain action he deems advisable, by "policy" statements suggesting that such action may be prosecuted under the statute.

There is no justification for the exclusion of "interpretative" rules from the procedures mandated by H.R. 3658. A leading expert on administrative law, professor Kenneth Culp Davis, writes as follows:

"Interpretative rules are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law. Interpretative rules usually interpret the statute, but sometimes they properly go beyond the statute, and when they do they are still called interpretative rules even though they are not interpretative in the literal sense. Interpretative rules have all degrees of authoritative weight, varying from an approximation of zero to full force of law, depending upon (a) the degree of the court's agreement or disagreement with the rule, (b) the extent to which the subject matter is within special administrative competence and beyond general judicial competence, (c) whether the rule is a contemporaneous construction of the statute by those who are assigned the task of implementing and enforcing the statute, (d) whether the rule is one of long standing, and (e) whether the statute has been reenacted by legislators who know of the content of the rule." [1]

It is clear that H.R. 3658 will not perform its function as a "rulemaking control" bill if it excludes from its purview interpretative rules which not only have the "full force of law," but which also "go beyond the statute."

With reference to recommended deletion (3) above, subparagraph (2) of subsection 553(f) unnecessarily limits the scope of the bill. Agency efforts to impede the Congressional purpose are not limited to rules involving criminal sanctions. In entitlement cases, for example, a "general policy" statement or even a duly promulgated rule may simply negate the intended benefit—although no criminal sanction is involved.

Further, subparagraph (2) of this subsection [553(f)] is not consistent with other language in the bill. Thus, in the prefatory language, Congress finds that executive agencies should be more responsive to the intent of Congress in their administration of "any" law, not merely those involving criminal penalties. Congress also finds that the agencies have often exceeded the Congressional intent in the manner in which they have administered "various" laws. Although reference is also made to rules containing criminal sanctions, the prefatory language is not restricted to such rules (sec. 2).

In its attempt to guard against capricious agency action, Congress should not concentrate exclusively upon protection of individuals who may be charged with criminal conduct, and at the same time ignore individuals who may be denied a benefit intended by Congress. In either case, an agency rule which flouts the legislative intent should be equally subject to Congressional overview.

With the recommended changes, I endorse H.R. 3658, and urge the subcommittee to report it out favorably.

HOWARD I. GROSSMAN,
Administrative Law Judge.

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[1] *Administrative Law Treatise*, Kenneth Culp Davis, Vol. 1, p. 358 (West Publishing Co., St. Paul, Minn., 1958).