S. HRG. 103-122

INTERBRANCH RELATIONS

HEARINGS

BEFORE THE

JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

INTERBRANCH RELATIONS

JUNE 22, 24, 29, 1993

Printed for the use of the Joint Committee on the Organization of Congress

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[Authorized by H. Con. Res. 192, 102d Congress]

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TUESDAY, JUNE 22, 1993

UNITED STATES CONGRESS,
JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS,
Washington, DC.

The committee met, pursuant to call, at 2:00 p.m., in Room HC–05, The Capitol, Senator David L. Boren (co-chairman of the committee) presiding.

OPENING STATEMENT OF HON. DAVID DREIER, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. DREIER (presiding). The Joint Committee on the Organization of Congress will come to order.

We are beginning our process of dealing with the issue of Legislative and Executive Branch relations. Our first panelists for this afternoon's hearings are John Marsh and Edward Derwinski.

John Marsh served as Secretary of the Army from 1981 to 1980.

Mr. MARSH. 1989.

Mr. DREIER. To 1989. I knew it was a little longer than that, Mr. Secretary.

And for part of that 10 years served concurrently as Assistant Secretary for Defense for Special Operations, Low-Intensity Conflict. From 1963 to 1971 he served in the U.S. House of Representatives. He was Assistant Secretary of Defense for Legislative Affairs, Counsel and Deputy Chief of Staff for President Ford. He is currently a member of the law firm of Hazel and Thomas.

Edward Derwinski served as Secretary of the Department of Veterans Affairs. He was a Member of Congress, and I should say that I had the privilege of serving with him in the early 1980s, from Illinois, serving from 1959 until 1983 and was the Ranking Member of the Foreign Affairs Committee from 1977 until he left the Congress.

We are pleased to have both of you here today and anxiously look forward to hearing your testimony.

Mr. Secretary?

STATEMENT OF EDWARD DERWINSKI, FORMER SECRETARY OF THE DEPARTMENT OF VETERANS AFFAIRS

Mr. DERWINSKI. Often the Republican is allowed to come forward anyway. The comments I would like to make, if I may, are based obviously on my 24 years of House experience as well as the assignments I had in the Executive Branch.

When you look at reform of Congress, it includes of necessity the more effective relationship to the Executive Branch. Now, in the 24 years I served in the House, and I went to battle with departments and agencies or the White House over constituent matters, I always had the feeling in the pit of my stomach that as a Congressman, and therefore my colleagues were in the same boat, that we were more of a pain in the neck than an accepted member of a team when dealing with the Executive.

When I moved over to the Executive Branch at the State Department, I found that, if anything, that was an understatement on my part, and that there is a very definite institutional resentment in the Executive Branch against what they would consider intrusion from the Legislative Branch, and which in turn the Legislative Branch Members considered their right either through committee jurisdiction or representing their constituents to do battle with the Executive.

So I think that is there. It is out there, there is nothing much you can do about it. The legislative oversight process, in my judgment, is the most effective weapon that the Congress has to effectively work with the Executive. But it has been my judgment that that is the one that the Congress underutilizes or mishandles.

As the Secretary at the VA, for example, I found that the oversight committees were interested only in chasing a scandal after the story had broken. And they were not willing to sit down with us in advance and work on procedures or work on legislation that might correct weaknesses in the system.

The second problem that was very clear was the parochial pressure, the legitimate parochial pressure that Members of Congress exercised. For example, in the VA, again, the Congressmen or the Senators who have VA hospitals in their States and districts were the ones I was continually hearing from. They weren't interested in the department as a whole. They were interested in the institution in their district or State.

Now, that is legitimate parochialism. But there is a thin line between legitimate parochialism and overkill when it comes to management procedures. I can give you some horror stories, Mr. Chairman. I will just give you two in particular.

There is one case where a Senator held up for nine months the confirmation of two of our Assistant Secretaries because we had a plan to consolidate offices in which 10 employees would have been moved out of his State. And he was not going to allow that.

We had another case where, again, the consolidation, reorganization plan was going to require that 38 people, 38 staff people be moved out of Dallas, Texas. And I was called before the Texas delegation to explain and justify the terrible, terrible decision by which 38 jobs would be taken out of the State of Texas. I could give you other examples, but those come to mind easily.

The other issue I saw in the Legislative Branch was, again, the tendency for Members to focus, and I say this, again, legitimately so, on the matters within their state and district.

I would commend the Members of the House and Senate who had the foresight to impose the conditions in the base closing legislation, military base closing legislation, I wish we had something like that at the VA so we could go over the institutions and the

facilities that we have, streamline then, improve them, improve the operations, and then submit the plan to Congress on a take-it-or-leave-it basis the way you do with base closure. I say that knowing I ran into a brick wall when I proposed it, but it would in fact make for much better management and much better government.

I also believe that as the power in Congress has shifted rather dramatically to the Appropriations Committee and subcommittees, that the authorizing committees ought to be redefined to almost exclusively function as an legislative oversight panel, not after the fact, and not chasing headlines after some individual episode has been revealed as mishandled, but in a constructive, positive way, working with the members of the Executive Branch.

I also believe, Mr. Chairman, that the Congress could play a much more effective role if legislative oversight rather than dollars were the first concern of Members, because it is one thing to throw dollars at it, it is another thing to come along much, much later, after damage has been done, and take a look at what had happened.

I find a major gap between the legislative process, the authorizing process, the appropriation process, and then much, much later, and usually much too late, is the legislative oversight. I also recommend, and this is falling back on my experience as a Member, that if there is a practical way that could be devised to somewhat limit membership on committees, there are too many committees that are much too large, even so large that even a hearing turns into a rather ineffective use of time, because when you are sitting there in a House committee with 30 Members, they get a chance to ask one or two questions, you give them one or two bland answers, you really haven't had a very effective hearing. Yet the sheer size of the committee dictates that.

Shorter, streamlined committees, more emphasis on oversight, more and more of the base closing, military base closing commission procedures to apply across the board in government, would be very obvious processes that I could see.

And last but not least, what we really need, and I put my old congressional hat on, I really think there ought to be some way to devise and select a congressional panel to look at the long-term responsibilities and challenges facing government, not just the annual appropriations and not just the immediate crises and problems, but to be able to isolate, actually a committee that could isolate itself from the day-to-day pressures, from the current problems, from the parochialism and the other factors we know exist there, and take a look at the long-term interest.

I have no precise solution for that other than the feeling, especially as I saw it in my secretarial post at the VA, that something like that in the Congress would be an asset to a management in government, and it would be an area where we could bring together our mutual interest in improving the efficiency of the Executive Branch, its use of the funds you have appropriated to us, and at the same time permit us to do it without any abnormal interference from logical congressional parochial interests.

Thank you, Mr. Chairman. I will yield to Mr. Marsh at this point.

Chairman BOREN (presiding). Thank you very much. I apologize I was not here when we began.

I welcome you both on behalf of the committee. We are certainly, I think, privileged to have two witnesses who have had experience both in the Executive Branch and certainly in the Legislative Branch as well, as both of you came from the Congress before going to your Executive Branch responsibilities, you at the Department of Veterans Affairs, and of course earlier the State Department, and Mr. John Marsh earlier at the Department of Defense and then as Secretary of the Army. I had the privilege of working with Secretary Marsh in both of those areas during my time chairing the Intelligence Committee.

So we are certainly privileged to have both of you with us today. I appreciate your comments very much. As we began these three days of hearings on Executive-Legislative relations, let me announce to our colleagues as well that our last hearing will be tentatively on July the 1st, and I am pleased to announce that we invited former Vice President Mondale to be our final witness, sharing his perspective both from his experience in the Executive Branch and the Legislative Branch. He has agreed to be our final witness, so he will be with us on July the 1st.

We have a couple of other invitations outstanding to those who served at the highest levels of our government, and we will know shortly whether any of them will be joining us.

Mr. Marsh, again, we welcome you and we appreciate the fact that you have taken time to be with us.

STATEMENT OF JOHN MARSH, FORMER SECRETARY OF THE ARMY AND FORMER MEMBER OF THE U.S. HOUSE OF REPRESENTATIVES

Mr. MARSH. Thank you very much, Mr. Chairman, and Members of the committee.

I have prepared a written statement which I will endeavor to summarize, if I can just put the statement in the record.

Chairman BOREN. That would be fine. We will put your full statement in the record.

Mr. MARSH. I think yours is an extraordinarily important task. I would cite that your Staff Director, Kim Wincup, is an extraordinary selection for this post, because I have observed his service in the Executive Branch of government and it has been very distinguished.

As I begin I would tell you as a former Member of Congress and serving in the Executive Branch, I had no complaints about the manner in which I was treated ever by either the committees or Members of the House or Senate. It was enormously helpful. And I will tell you that my experience of having been a Member of the House of Representatives in my view was a cornerstone for other service in the Executive Branch, both in the White House where I was a counsel to the President and Deputy Chief of Staff and also several different posts in the Department of Defense, including in the Department of Army as Secretary.

It has also caused me to reflect upon and have certain observations about how these two branches relate to one another. And I

not only chaired the Committee for Streamlining the Pentagon at the direction of Secretary Cheney on legislative reform, but I also chaired, after I went into private practice, the Institute of International Studies, particularly for the Department of Defense.

I will tell you my first observation is, I think one of the great things we have lost in recent years is comity, that courtesy that exists between the branches. And there is a breakdown in the failure of comity. Anything this committee can do to restore that relationship, its courtesy between the branches, it is a lubricant I think that makes the wheels of government turn smoothly.

I would say to you that I think the issues that you are having to deal with are really much broader than just reform, and I would suggest to you, and I view as the scope of what you are seeking to do, the effectiveness in a total sense of the Federal system, because the rest of the Federal system will hinge in my view upon an effective Congress.

The cornerstone of our Republic is the Congress of the United States, and a more effective Congress will produce a more effective government. And in the Executive Branch, both in the White House and the Department of Defense, I have seen instances where government is not effective. And I commend you for what you are seeking to do. It is not going to be an easy task. But it is absolutely essential, in my view.

Power is never easily surrendered, and when it occurs changes in power are usually associated with war, depression or other trauma. I see the demand across the country for term limitations as being a reflection of public unrest that is demanding a revolutionary type of change. And I am convinced that if this committee does not come forward with meaningful reform, and if those reforms are not adopted by the Congress, I predict surely the term limitation amendment will be adopted, because there is public unrest.

Now, the last time that you addressed congressional reform in the most meaningful way, although there has been several since that time, is 1946. In those years since World War II, we have seen the population of this country increase by 100 million. We have added six departments of government. We have created agencies like the CIA, the NSA. We have had a population explosion but we have also had an explosion of information. And we have been able successfully to have man walk on the moon. But there has not been, in my view, a corresponding significant change by the Congress, and I think it is absolutely essential.

I agree with what my colleague, Mr. Derwinski, said. We served in the House together. I came to have a high regard for him, and I know of his effective service in the Executive Branch.

I would make the observation, and I think that Ed Derwinski would too, I believe I could be a much more effective Member of the Congress today than I was when I was a House Member back in the 1960s and the early 1970s, because of my Executive experience, which has been very helpful.

When I look at the United States Congress, I always point out to people and remind them that the American revolution was actually fought without an Executive Branch of government. The American revolution was prosecuted by the Continental Congress. It cre-

ated the Army, it selected its Commander in Chief from one of its members.

Out of that experience would come several conclusions, I believe, from those who framed the Constitution. One, that it was absolutely essential that we have an Executive Branch of government, and an effective one. But I also think there were certain vestiges and heritages of congressional involvement in the conduct of national affairs on the Executive side which were very helpful and which continue to this day.

These are reflected, I believe, in the manner in which the Congress plays a very active role in foreign affairs. And so there has always been, I think, a quasi-interest in the Congress in the Executive Branch.

But it is very important to remember, and I think this is often forgotten by Members of Congress, that we created an executive form of government and not a parliamentary form of government. And therefore the role for the Member of Congress in that system is one that I think becomes very frustrating, because ultimately I am of the view that Members of Congress want to become more deeply involved in the structuring of policy. And I agree with what Mr. Derwinski said, and I would commend to this committee that you seek ways for the Congress to become more involved in the front-end.

I believe that Congress needs to be more involved in the development and the planning of national policy and less involved in the execution. If you will look at Article 1, Section 8 of the Constitution, and the enumeration, the broad, extensive enumeration of the powers of the Congress, and compare that to the Article 2, powers of the Executive Branch, there is no comparison. The power of the government is vested in the Congress.

But I believe that over a period of years, as our government has evolved, that we see a greater assertion of the role of the Executive, and its emphasis on policy, and less of an assertion by the Congress. This is the bully-pulpit theory of Teddy Roosevelt, where the Executive Branch takes the leadership.

Consequently, as a Member of Congress, I found that the Executive Branch proposes and the Congress disposes. The Executive Branch acts and the Congress reacts.

Now, I think we need to change that. If you look at the—and this can be done, I believe, by the Congress in the manner in which it asserts its jurisdiction under Article 1, Section 8.

Our Constitution had a dual purpose: one, to establish a representative form of government for the protection of civil liberaties, and a government that was for both Federal and State. But secondly, our Constitution created an entity that could engage in foreign affairs, that could deal with foreign governments, that could engage in diplomacy, which you could not do under the Articles of Confederation.

Now, I believe that at the heart of what you are seeking to do is really a question of separation of powers. I believe that if you look at the history of the American government, you will see that there has been a cyclical relationship between the Executive and Legislative Branch. There are periods of assertion of legislative authority, and then the pendulum swings away.

There was enormous assertion of Executive authority in the American Civil War. In the period following the war, you would see the assertion of Legislative power. That would be reversed in World War I. And then the pendulum would swing away again and we would move toward Executive power in the Depression, and then with the enormous efforts of World War II.

As a Member of Congress in the 1960s and 1970s, I always had the feeling that the Congress lacked the resources to come to grips with the Federal Government on the Executive side. A favorite whipping boy was the Office of Management and Budget, OMB. You felt that the Executive Branch dealt with a certain authority and a disregard which would really cause a great deal of anger.

But a lot of those things have changed. And I believe the pendulum has swung now in a way that Congress must seriously address the issue of separation of powers to see whether there has not been an overextension and a tipping of that balance and an encroachment in the Executive function by the Congress.

I think three events came into confluence in the early 1960s and the 1970s. One is philosophical. There has been in our country a debate and discussion about the centralization of power. We saw that evidenced in the New Deal days. But in the 1960s there was a confluence of the question of centralization of power, the Vietnam War, and third, the Watergate experience.

And when those three came into confluence, I think it changed very significantly the relationships. There was an erosion of power in the office of the Presidency, both created by Vietnam, but particularly it was created by the Watergate experience.

We would see in the 1974 elections a significant change. There would follow a series of sweeping legislative mandates: the Budget Impoundment Control Act, certain regulations that related to the intelligence community. You would see the Congress develop the Office of Technology Assessment and strengthen the role of the General Accounting Office.

I think that what this committee can do is to define the role of Congress and find ways to become involved in policy, and changing policy. I have listed in my statement a series of things which I have observed. One of those is legislative gridlock, gridlock which occurs between the House and Senate, between the appropriations and authorizing committees, that occurs between jurisdictional committees.

I would point out to you that the Congress itself lacks the capability really to govern. I make that observation based on the experience in 1974. The election in the House in 1974 really produced a veto-proof Congress in the ratios between the Democrats and the Republicans. But it didn't work out that way. And the reason it didn't work out that way is because the Congress could not agree on the issue that related to energy, which was the first one that President Ford had to address, because the issue of energy is not along partisan lines; it is along regional lines. It is not along philosophical lines; it is regional. It is not a partisan-type issue. And consequently the Congress was not able to coalesce on an energy policy in 1974 and 1975.

I have made comments here that Congress has become a full-time job. I recommend that this committee look at that and how

we can end the sessions shorter in order that Members can get back to their districts, in order that Members not have to be dependent upon getting reelected to Congress and having also to raise significant amounts of funds in order to do that.

Mr. Derwinski mentioned the base closure methodology, and I think he is exactly right. I think that has far broader application than just in the Department of Defense. I would point out to you that that concept is an all or nothing. Once the commission makes a recommendation, you must take it. It is an all-or-nothing proposal.

I have talked to you in the statement about legislation by label, that very frequently there is not the in-depth examination of many critical and controversial issues that you pass on, and Members do not develop the expertise to adequately pass on those. I have given you examples of that.

I cite that in the more technical fields, as you begin to address legislation that is highly technical and scientific, that you should be absolutely certain that your decisions are based on the best science that is available to you.

I would also point out to you that when you are measuring impacts of legislation, you borrow a leaf from industry and the Department of Defense, which is program analysis and evaluation, and look at what their impacts are, what the tradeoffs are, what the economic impacts are, in order to have a better understanding of what it will do to our government.

I mentioned to you the enormous growth of congressional staffs, and that has occurred in large measure because of the acquisition of additional information capabilities, it has occurred because of the complex subjects that you deal with.

I point out that I was beginning to find later in the 1980s that it was becoming more difficult to meet with Members personally. I think you have to be careful about the staff role. You have some extraordinary people here on Capitol Hill who render enormous service to the country as staff members. But you have to be careful that at times there is a misunderstanding or miscommunication because principals are not dealing with one another and you are dealing with staff.

And I recognize that very frequently accessibility of Members is sometimes a management style that accommodates the Member rather than an effort really to pass that responsibility to someone else.

I would suggest to you that you seriously consider the development of some type of a committee on staff, people who would establish staff guidelines, protocol and courtesy for staff, training for staff, and I would suggest to you that because there are so many people who that are enormously able, that annually Congress itself cite certain members of the staff of both Houses as examples of individuals who set a staff example for others to emulate.

One of the other things I mentioned to you briefly was post-congressional employment. I ask the Congress and I ask this reform committee really to make two audits. The first audit I would ask you to make, and which you have done, is to look at all of the committees and many subcommittees of the United States Congress

and what their jurisdictions are to determine what the overlaps are, and the duplication that occurs because of those.

And then the second audit that I would ask you to make is to go back and look at the legislation, significant legislation that has been introduced and adopted by the Congress on congressional sponsorship principally, that impacts on the Executive Branch of government, and ask the Executive Branch of government to come in and frankly tell you how that legislation is impacted.

I have mentioned, for example, the Budget Impoundment Control Act, the War Powers Act, the Freedom of Information Act, the Inspector General statutes, the statute that relates to acquisition of computers, that would be an example.

Now, I mentioned to you policy. I would like to emphasize what Congressman, Secretary Derwinski said. I would suggest to you that we need not just more hearings with members of the Executive Branch. They can become confrontational, adversarial.

I would recommend to you that there be greater consultation and meetings and discussions between the Executive and the Legislative Branch before legislative programs become hardened and formulated and introduced to the Hill.

I would like to see the Congress look at a national plan for this country and where you want it to be in the next century.

And I would suggest the creation—you can make other suggestions far better than mine—of four joint committees to address near-term, mid-term, and long-term objectives for the Congress, your plan of where this country needs to be. One would be in the field of national security and foreign affairs. One would be in the field of social services to include education, health, social security and welfare. One would be in the field of environment. And one would relate to finances, revenues, fiscal and monetary policy. They would not be from the committees.

The year 2000 is a benchmark year. It marks the close of a century and the beginning of a new age. It would seem to me that if the Congress would provide its broad overarching template of where they want America to go, then the President can add to that or take from or modify that broad congressional plan. But I don't see that broad overarching plan today coming from the Legislative Branch. And yet I think that you can do that.

There are a number of other comments that I make. I would single out to you what I think is the very fine work that is being done by the Office of Technology Assessment. One of the studies that they did called "Holding the Edge" is a very fine study which I think anyone on this committee would benefit by reading it.

I cite the need, in my view, of a line-item veto.

I give you my view on term lengths for House Members and term limitations, which I favor unless we can come forward with the kind of reform I am talking about. I would not go to a four-year term for House Members, and I explain why.

One of the things I ask you before you conclude your deliberations, will you please look at the question of Executive gridlock. You know how bills move through the Congress. But you need to look at how legislation that is proposed moves or doesn't move through the Executive Branch of government. It is a nightmare bureaucratic process. Getting proposed legislation to the Hill is one of

the most formidable, difficult tasks that any Federal executive can have.

And I described the Pentagon's efforts for procurement reform to be the Rock of Sisyphus. The Pentagon, in response to congressional mandate, has time and time and time again presented procurement reform to you. The problem is you cannot get agreement when you try to staff it through the Executive Branch of government.

Now, this is one of those situations, as you examine it you will find Pogo's enemies: "We have met the enemy and he is us." What happens is there are vested interests in other departments and agencies reflected in the Executive Branch that frustrate efforts to try to get reform legislation up here to the Hill.

And people will tell you in the Pentagon, they say, Okay, we can get the bill through, but it is going to be D.O.A. when it gets to the Hill. But this is an enormous, difficult situation.

And the best example that I can give to you is efforts that have been not successful over a period of years in procurement reform, notwithstanding constant recommendations for that that have come from succeeding administrations. And I would tell you that at this moment, as we speak, there are many, many people in the Department of Defense, now going back again, looking at procurement reform and rolling the rock up the hill.

I mentioned to you that it is very important in my view that we fill Executive posts rapidly, and the Congress can do something about this. And I am not pointing a finger at any administration, but all administrations for the last 30 years. The appointment of senior Federal officials is taking too long.

Only the Congress can resolve authorizations versus appropriation difficulties.

And in conclusion, I mentioned to you that the real issue that you must address, in my view, is that of separation of powers.

And I ask this committee to take the Federalist Papers and to read Madison's Articles 47 through 51, where he discusses in five articles separation of power and the philosophy and the concept of structuring the United States Constitution. In that he quotes Jefferson, and they point out that the most powerful branch, as it should be, of our government is the Legislative Branch, but that the restraint of power is absolutely essential, and how you exercise it.

I ask you to go back to the Federalist Papers, and I think it would be a very helpful guide to you, as you address your task, because what happens and has happened in this country in the last 200 years has had an enormous impact on this planet, and what you do or fail to do in this country or what we do or fail to do in this country is going to have an enormous impact in the coming age.

In conclusion, I would leave with you the comment that Alexander Hamilton made at the New York convention to ratify the Constitution, where Hamilton would remark in 1788, "Here the people govern." And if that can be your goal, and if you can achieve it, you will have rendered an enormous service to our country.

I appreciate the opportunity to be here, Senator Boren.

[The statement of Mr. Marsh is printed in the Appendix.]

Chairman BOREN. Thank you. Thank you very much, Secretary Marsh.

I want to thank both of you.

I was wanting to interject a time or two as I listened to you, as both of you underlined the need for us to be more involved in policy and less involved in discussion. One of the frustrating things that has been expressed by many of our witnesses is that we are so very often bogged down in what goes beyond, really, appropriate oversight, into very tiny details, and also spread very thin our membership on so many subcommittees that are developing into very minor issues, that the input into the major policy decisions themselves really doesn't take place, partly because we are so fragmented in our own lines in Congress that we don't have time to have that focus and have it take place, and also partly because we have not set up those mechanisms for informal consultation in particular between the Legislative and Executive Branch as decisions and recommendations are being made, only to come in after the fact to either complain or criticize or try to change decisions where there could have really been an impact.

I think your suggestion for some informal consultations in advance is a very important one, and one which I will come back to in just a minute when it comes my turn for questioning.

But I want to turn—has Mr. Allard gone to vote? There is a vote on in the House. We will turn first to Mr. Dreier.

Do you within the to go ahead? You may need to go vote.

Mr. DREIER. I just did. I snuck in and out.

Chairman BOREN. Senator Lugar?

Senator LUGAR. Thank you very much, Mr. Chairman.

Mr. Marsh, you sketched an idea that the President could add or subtract from an overall plan, a template that the long-range planning committee that might be set up could initiate in the Congress as an illustration of how policy can be developed.

I want to question you a moment, because this is so at variance with what recent history has seen. For instance, with the current administration, President Clinton is now involved in a massive attempt to bring about health insurance reform with a large task force under the direction of Mrs. Clinton, having done a good bit of work. Welfare reform, likewise the National Service plan, these are major initiatives that are from his campaign, and he is fulfilling at least objectives that he saw there.

And I am wondering if this has not been characteristic of most Presidential campaigns that were successful. Presidents offer plans and they begin to try to formulate a policy and bring it to the Legislative forum. That doesn't obviate consultation, but still the initiative has been clearly with the Executive, with the Presidential candidates.

Is it realistic to anticipate in the future that the Congress would have thought through what is going to happen, say, in foreign affairs or in the domestic scene for an intermediate or long-range period of time, and a President would be prepared simply at the margins to follow this? Do you follow the drift of my questioning?

How do you anticipate, even given the ebbs and flows that you suggest correctly occur in the Executive—is it really realistic for

Congress to be engaged in that degree of specific planning, that executives would simply tailor the template?

Mr. MARSH. What I would envision, Senator, would be more a broad statement of goals that would be determined by the Congress to be the national goals to address our national needs, both on the domestic and the foreign scene. That would harness a lot of the resources and the ideas that would represent both the regions of the country, and laying these out in a very broad template, not binding by law. And indeed the joint committees would meet and after they had made a report, they would disband, unless the Congress would want to reconvene them on a four-year basis.

I believe what has happened in the 200 years of our experience is that if you look at Article 2 of the Constitution on the Executive authority, it says the President shall make recommendations on legislation that he thinks will be helpful. If you look at Article 1, the enormous enumeration of congressional powers are set out there.

I believe that the Congress can harness the enormous talents and energies that it has here in 535 people to give us a very broad template of where the country needs to go.

The President would then draft his health plan, which may or may not agree with the various views that were contained or expressed by the Congress, and it would be composite views that would be expressed in the national plan. In a way it would be like the platforms of your two parties. But it would represent a blend that would occur because of the interface and the interaction between both parties in the Legislative Branch.

But in drafting the national plan, I think the Congress at that stage should involve very deeply the resources of the Executive Branch, including senior levels, cabinet officers, people below cabinet level, who are senior officials. I would incorporate at that time some of the views of the Executive Branch.

Senator LUGAR. Let me form up in this manner, because you mentioned the party platforms. What if the goals of a particular Congress dominated by a particular political party were sharply at variance with goals that might have been adopted by the opposition party?

For example, from time to time parties have stood on various domestic issues poles apart, and the long-range plan called for really the ideals of one party, but the country rejected that. So essentially you are back to square one in terms of what the goals are.

All I am suggesting, I suppose, is I think it is going to be very difficult for the Congress to deal in long-range planning in terms of goals that an executive might tailor. It seems to me the whole business in democracy is that change occurs rapidly, as expressed in elections, aside from overall goals such as full employment or growth each year of the economy, or hopefully there will be no dropouts in high school, these sorts of things.

I may not be doing justice to your idea. This is why I am trying to refine it in my question.

Mr. MARSH. I think that one of the problems that we have is because of the enormous impact of change, we have not developed the new ways and the new means to address a number of these issues. I think we are going to have to experiment.

One of the things I am convinced we have to do is have a greater discussion and dialogue between the Congress and the Executive Branch.

I believe that many people come to the Congress with a lot of ideas about things they want to do, and they become so absorbed in the day-to-day routines of the office and the demands, which are very great, that some of these broader, longer range things are overlooked, and some of this is forfeited to the Executive Branch. And I believe that Congress can play a greater role in getting these ideas out there.

The rejection of those are going to be determined ultimately by the electorate. The reason I am opposed to a four-year term for House Members is that I think there is a very valid purpose served by having a two-year election midterm in the President's administration, because that will be an expression of whether or not they agree with that President's direction. We saw that in the elections in 1966.

And so the electorate will respond to those goals, but right now I don't think that Congress itself as an institution is thinking about where this country or where they want it to be 10, 20, 50 years from now.

Senator LUGAR. Thank you.

Chairman BOREN. Thank you very much.

Senator Cohen?

Senator Kassebaum?

Senator KASSEBAUM. First, my apologies for missing your comments, Mr. Derwinski.

I think probably both of you would agree, and to explore just a minute Executive gridlock, because I think we understand Legislative gridlock—Senator Boren touched on this for a moment—one thing I have found that is really a growing problem is the regulatory process, and that I assume is what you were talking about as being part of the Executive gridlock, how we fashion a bill here that is fairly broad in scope, and then the different agencies that are responsible for it, whether it would be Defense or Veterans, to put together the regulations, and that may take a couple of years. And then to really know exactly what has been done, I think that goes back to oversight, which we don't do a very good job of.

Is this the kind of problem that you are addressing, Mr. Marsh, and that you both have seen?

Mr. DERWINSKI. Mr. Marsh made a reference to—I think he used term of rolling the rock back up the hill at the Pentagon. In is an issue that really neither of us directed ourselves to, we just touched on it briefly, that is the third and unseen force, which is the career people in the Executive Branch who operate regardless of who is President, and really have no interest in the Presidential view. They served under enough of them.

I think this may sound harsh and it may sound almost shocking, but I found the most difficult thing as a member of the Executive Branch was to bring the rank and file employees onto the same playing field and have them moving in the same direction. They just sit there and say, The Secretary will be gone in three or four years, the President will be gone in four or eight years, and we will still be here running the country.

And I think one of the major problems is to see that—and this is where the help from Congress to the Executive would be in order—to work with us to help us run the departments of government, not come in as Congress generally does after the fact and second-guess some isolated case or scandal or instance of mismanagement.

I am not saying we don't want that kind of oversight. I am saying that there needs to be advance cooperation in whipping the system into line.

If I can tell you one story, if I might, Senator, when I left the Congress I went to the State Department. I was there about a month and I ran into an old friend. He said, "How are you doing at the State Department?" I said, "Just great, meetings all day long, I am chairing this, that, and the other meeting." But I said I have noticed a pattern, all these meetings that I chair, the one decision we reach is, when we will meet again. That is the only decision we reach. And his answer was, "My God, you broke the code."

And I think John referred to it. There is turf consciousness, there are petty egos, all sorts of little things, and when you get to the top—when I was the Secretary I would get more cooperation from a little GS-5 than I could from the Senior Executive Service level people. It was a very frustrating situation.

And that is why I referred earlier to the advance consultation with Congress, where we can work together to do what you want to do and what we want to do, have a good, efficient, effective government using the money you gave us, using it properly, using it effectively, using it in a timely fashion. And our relations don't have to be adversarial.

Senator KASSEBAUM. I think that is a good point. One example is the child care legislation, which I think we passed two years ago, and some of those regulations aren't drawn up yet for implementation.

They are still out there and I think that this causes great confusion for those who have to be involved in the implementation at the State level. And yet here, unless you are closely following it, you don't really even realize what has or hasn't been done.

I think it is a problem, but it is one that I am sure we are all frustrated with on both sides.

Thank you.

Chairman BOREN. Senator Cohen.

Senator COHEN. Congressman/Secretary Marsh, Congressman/Secretary Derwinski, I heard just the latter part of your statement, Mr. Marsh, and you cited everything but Joshua Chamberlin as a hero. I might point out to the committee Members, it was largely due to the efforts of Jack Marsh that the residence of Joshua Chamberlin was in fact preserved, and a great landmark in Maine.

Mr. MARSH. A highway through the center of the military post in Georgia was named for him, too.

Senator COHEN. One of the problems we are trying to come to grips with is this phenomenon known as demo-sclerosis. It was described in a national journal article some months ago, and that is that in this democracy of ours, every—everything has created an interest group, every piece of legislation has its defenders, that there is not only no possibility of terminating programs, but not even an ability to modify them in a substantive way.

We have come into a sclerotic situation, and that reflects a loss of power. I once read about a character in a novel who lamented that everyone is in check in this system of ours, but no one is in charge. We don't have anyone in charge of virtually anything, not the President, not the House, not the Senate, not the Supreme Court.

We are all checking each other, but no one really has the power to move very much. One of the suggestions that you have recommended is the Base Closure Commission as a model.

It seems to me that reflects the failure of democracy, that we run up against these rock walls or we roll the rocks up over the hill, however you want to describe it, and the first thing we want to do, let's create a commission. We are unable to resolve these differences, so we have a commission resolve them for us.

Senator Dole, for example, has recommended that we create a base closure type of commission to resolve the issue of campaign finance reform or funding. Others have recommended it to deal with the Federal budget.

Virtually every problem that we face, and perhaps we will have one on health care reform, I think it reflects a failure of the system when we have to turn to an extra legislative solution in order to be able to go back to our constituents and say: Look, the devil or the commission made us do this. If I had my choice, I would have voted the other way, I had no choice under the circumstances.

So we—that is Senator Dole calling right now. We are moving, it seems to me, away from this responsibility that we are supposed to have. You also, I think, give a further indication of that, of your reluctant endorsement of term limitations.

It seems to me that once again is an accommodation of the laxity of the electorate. To give you an example, we say that narcotics are illegal in our society, but our country is drowning in a flood tide of illegal drugs. Therefore, one solution is let's just make it legal. We can't deal with it, so let's legalize it.

I think that this idea of term limitations as an ultimate solution is more or less a version of that particular attitude. We can't deal with this problem of Congress not being, quote, as you call it, "responsive to the American needs."

There is another argument that we are too responsive. One of the problems we have, we are so responsive, so accelerated in our response to the demands placed upon us, that is part of the, if not in full, one of the major causes of our demo-sclerosis. We are not simply drawing these broad strokes of what the national needs ought to be, and you put them in four categories. But we are like pointillist artists, putting in every single dot, that we are ombudsman.

We have done this to ourselves. We said you have got a problem, we have got a solution, please write, please call, we will do everything in our power to resolve that particular problem. As a result, even people like myself, from a relatively small State by way of population, average at least 2,000 letters a week and sometimes much more when there is a large issue at stake, that we have mobile offices, district offices, or statewide offices and we encourage people to come to us because they see us as the last resort, a breaking through the barrier of the bureaucracy.

So some would argue, and I think there is merit to this, that we have been overly responsive to what is perceived to be the Nation's needs. So I am just—I am not sure exactly whether these solutions that you have offered are the correct ones, but it seems to me to reflect a breakdown in the system or really a reflection or reaction to the loss of power.

The loss of power when you are talking about prior to Watergate, you had committee chairmen who could bring a bill to the Floor and they could pass that in a matter of a few hours. Today that is not possible, not in the House, it is not possible in the Senate.

So we have a loss of power, a spread of democratic reform in the House and even more so in the Senate, so that everyone does have a piece of the power as such and there is no sense of collective will. I am not sure whether we can do much to resolve that with these so-called reforms.

Mr. MARSH. In response to that, I would mention, Senator, before you came in, Mr. Derwinski referred to the base closure methodology also as a possibility in the field of veterans' affairs, and he may wish to speak to that. I am sure you realize the reason is that you go to the all or nothing approach in the Department of Defense. It is because if we go singly, if we would go singly after a base by itself, you would—you would have a Member that would be able to form coalitions and alliances, for one person, for one base, you would not—you would encounter guerilla warfare.

Senator COHEN. You make that argument on the budget and on campaign finance as well?

Mr. MARSH. I don't know that I would do that on the budget. I can see why Mr. Derwinski refers to it with Veterans' Affairs.

What you do in the base closure situation is everybody sees a common good of something that needs to be done, but it is a very tough bullet for the individual who is impacted to bite. So the rest of the Congress bites it for him. And you recognize that that individual whose base is being closed is going to put up an enormous fight and fuss, but they are going to lose. And they know they are going to lose, but their constituents, I think, think that they are making the good fight to try and win. That is the reason you do it. But in reference——

Senator COHEN. Let me just interrupt you for a second because I am way over my time. But it seems to me rather than giving the power to committees, what we are prepared to do is give the power to—I am sorry, a congressional committee, we are prepared to give it to a commission. That seems to me to be a major change in this democratic system.

I would far prefer us to go back to the committee system, where a Chairman and the Ranking Member could deliver his committee and go to the Floor and get the consent of the rest of the Members. Rather than saying, look, we no longer have the power to deliver the votes, let's get a commission to do it for us.

Mr. MARSH. To follow up on that, and Ed may wish to address this, too. But I would say to you the reason that I think the government has become so responsive or the Congress, is it has become a full-time job. And because it has a full-time job, you invite people to call on you and to do things for you. If it were a part-time job, I think some of that would go away.

Ed?

Mr. DERWINSKI. I would only say, Senator, that I would interpret the process that I think has been effective, the Base Closing Commission, as a testimony to the influence of Senators and Congressmen, not weakening, and for this reason. That as an ex-Congressman, I understood what it was like to be parochial. You had to be. You had to reflect your district, you reflect the economic, ethnic and other interests of your district and your State.

Now, the Base Closing Commission permits the entire procedure to be elevated to a national picture. In this way you could still cast your vote, you can still do your individual battle, but you can't conduct that guerilla warfare and snafu the entire process.

When I was at the VA, I asked for a commission procedure similar, not for closing, just for reorganization. I was denied that option. But it would have—we would have been maybe to make many, many more effective executive decisions, administrative decisions, and helped nationally the veterans' world, at the expense here and there of a local interest.

I think Congress has permitted that in the base closing, and I think it is one of the wisest and most effective things Congress has done.

Senator COHEN. Thank you, Mr. Chairman.

Chairman BOREN. Thank you very much.

Let me explain, we have a vote on the Senate Floor, and I will return right after that vote, because I do want to ask a couple questions. But I am going to turn to Mr. Allard in the meantime, and then Mr. Dreier, if he comes back in, and then I will be right back.

Mr. ALLARD. Thank you very much, Mr. Chairman.

I would like to take this opportunity to welcome both of you also to this committee. I am a relatively new Member to Congress, just in my second term, and so I find listening to both of your experiences fascinating and very informative.

You both talk about the balance of power. I am a firm advocate that Members of Congress ought to learn to live under the same laws as everybody else. One of you had mentioned Madison, and Madison, in effect, tried to apply that principle.

Both of you have served in the executive area and some sensitive intelligent areas, and how did you view some of the rules and regulations that might have been promulgated by another agency that would have had an impact on your agency and how was that handled?

For example, let me give you—see, one of the problems we have here in the House is that we may pass some legislation, promulgate rules and regulations, and they are afraid—some Members of the Congress are afraid that the bureaucracy and those regulators may come in and harass Members of Congress, and particularly if we get on some of the very sensitive committees, where you have, you know, the rules and regulations are sensitive areas that get applied back over into the House.

So I am—I am interested in comments that you might have on how we address this problem in the balance of power and that how do we have these rules apply under Members of Congress?

An example is minimum wage, we don't have to comply with minimum wage. You know, family—the most recent bill that was passed that creates an exclusion for Congress, in a manner of speaking, the Members of Congress don't have to appeal—don't appeal a case to courts, it just goes through a local committee, as the Family Medical Leave Bill, for example. So it is something that we are struggling with on this committee and we would like to have some of your comments or thoughts as far as this issue is concerned.

Mr. Derwinski?

Mr. DERWINSKI. If I understand you correctly, what you are really referring to is the tendency over many, many years for Congress to exclude itself from many provisions of law.

Mr. ALLARD. Since 1935.

Mr. DERWINSKI. Right. Now, I don't think—in each individual case, I think you probably justify much of it. The trouble is collectively it became something that—combination of commentary from the media, of political debate, the pendulum has swung against that kind of congressional maneuvering. At the same time, at the heart of it, and this isn't in your question but what I was reading into it, you always have to be careful that the individual Member of the executive branch, and the executive branch as a whole, is not subject to pressures either in form of coercion as to facilities closing or opening, the pork barrel kind of approach, or the threat by any executive at any time to turn loose Federal regulators against that individual Congressman, or say his constituent, if he is going to bat in a very difficult case.

I personally feel that the errors and weaknesses that the Congress has shown have been far, far outweighed by the necessary independence of and the necessary ability of an individual Congressman to fight battles for his or her constituents. And I look at all these rules, regulations, or the absence of applying them, in that sense. And when you get it under public scrutiny, as you do now, I think the corrections will come and they will be, hopefully, be done logically and not be stampeded.

But if you look at the resources of the executive branch, compared to the resources of Congress, I would say that the bloated size of congressional staffs borders on a national disgrace. Having said that, though, I think Congress needs those bloated staffs because of the bloated bureaucracy.

So I believe in streamlining the bureaucracy, and in the process of that perhaps then Congress could legitimately streamline it. I hope that was a proper interpretation.

Mr. ALLARD. Yes. And my thoughts are, you know, if you have Congress that has to live under the same laws as everybody else, they appreciate the impact of those laws on themselves as individual citizens.

It gets back to one of the comments of being a part-time legislator. If you are part-time——

Mr. DERWINSKI. Exactly like the minimum wage, et cetera, Congress should never have been exempt from that. But there are certain other provisions when you are doing battle with the executive, where Congress has to keep certain levers of authority and protection in its hands.

Mr. ALLARD. On the budget. I serve on Budget Committee and I noticed that as those figures have come through and we talked about those figures, is that nowhere tied in with those figures is the number of employees that we are talking about. And when I served in the State legislature, we frequently established accountability by knowing not only the dollar amount that was appropriated to an agency, for an entire department, but we also knew how many employees that we were talking about and calling them full-time-FTEs, full-time employee equivalents.

So I would like to hear any comments from either one of you or both of you on how you think applying that standard into the budget, that you will have a certain number of employees in the various departments, if it would help accountability, is it something that the executive branch of the various agencies could live with if we started to do that.

Mr. MARSH. I will try to respond first.

There are, of course, caps and numbers on employees in the Department of the Army and the Department of Defense. For example, there are—the numbers of civilian employees is established by law and it is capped, as is the strength of the armed forces. It is established by law.

I can't speak to the other departments or agencies of government, but I suspect maybe Mr. Derwinski can.

Mr. DERWINSKI. I will only speak from my experience at the VA, because it has to be unique. You see, the problem with any cap is that it clearly takes away effective management decisions. A cap is an arbitrary and artificial restraint.

Now, when I was at the VA, my logical concern, properly so, was the medical care to veterans. Now, a cap on doctors' salaries could be contradictory to improving medical care. A cap on the number of nurses is interference in management's ability to provide better care.

I would say that if Congress wanted to impose budget discipline, that a dollar cap rather than FTE cap, would be perhaps a more practical way to approach it.

Mr. ALLARD. Both of you have served in the House and now you served on the agency side, and I think both of you were here when they did a lot of the—had the five-year study to get ready for a lot of the congressional reform that occurred in the early part of 1970s. And I wonder if you have any comments on how you think that congressional reform that we had in the early 1970s, how that has evolved and what you see happening in the House, and see if some of those things have been beneficial or generally were we better—would we have been better without that reform movement at that time?

Mr. DERWINSKI. Well, I think you are referring to the reform movement that came after the Watergate election.

Mr. ALLARD. 1974.

Mr. DERWINSKI. Right, that was understandable. That was a political backlash at the time. We had a huge freshman class, just as the one you have now. You know, the very large freshman class has gathered momentum, a life, goals of its own. And politically there was also-it was also a partisan adjustment, and an attack on the old warlords of the Congress.

Looking back, I think it was an overkill. But that is in part a partisan comment, because as a Republican I am sort of the victim of the wave of ultra liberalism that came with that class of 1974. But again, it was an absolutely logical political correction. People had it up to here because of the whole Watergate episode, and they made a correction. And that is—you look back through history and each party at some time or another has suffered or benefited from that kind of correction.

Mr. ALLARD. That is all the questions I have.

Thank you, Mr. Chairman.

Chairman BOREN. Thank very much.

Let me just ask a brief question or two.

As I indicated earlier in my comments, I strongly agree with you about trying to find ways in which Congress is more involved in policy and perhaps a little less involved in execution. I think the amount of time that we spend on execution sometimes and trying to attempt to involve ourselves in that, not just overseeing but the actual execution while it is going on, sometimes leaves less time for policy involvement.

Let me just ask each of you to comment on two or three possible suggestions. One is the question as to whether or not we should have fewer committees and subcommittees, particularly subcommittees, so that Members can concentrate their time more on particular issues? We have cases where we have Members of the Senate that belong to more than 20 committees and subcommittees, so there is a great fragmentation of time.

Whether, in addition to that, we should set as a goal, trying to have one committee or subcommittee in each House principally responsible for a certain agency or function of government? We have had some studies, for example, that show, I believe, that FEMA reports to 37 different committees and subcommittees, in part in terms of its programs.

Would it be healthy if we had fewer committees so the Member's time is concentrated, subcommittees, less overlap, so that we attempt to identify the committee or subcommittee with principal jurisdiction and oversight over a particular executive branch agency so there is not so many committees looking over the shoulder of the same agency?

That we try then, once we have that in place, to have more informal contact between the Members?

I think we had a very unusual situation perhaps because the nature of what we dealt with, but as Secretary Marsh knows, we often had communication in the intelligence area, he had a lot of communication with Senator Cohen and myself when we were jointly chairing that committee. And I can remember several cases, I remember once during the arms control negotiations, I can't believe—I believe it was the Intermediate Range Treaty, when General Powell actually came out—I can't remember if he was the Chairman or if he was National Security Advisor to the President at that time, and I believe Judge Webster and one or two people from the Defense Department, those involved in negotiating the treaty ran into some difficulties that involved the oversight responsibilities of our committee. And we actually sat down together without concern about separation of powers, at that point, and worked co-

operatively to come up with one set of talking points that the negotiator would go back to the table with the then Soviet Union, say this is the joint request of the Congress and the executive branch of the United States, we are at one on this, we see it the same way, it had to do with the verification procedure.

The Congress insists upon it, we must insist upon it. And the treaty is going to be in trouble for ratification if it isn't done this way.

As I recall, we perhaps even signed some letters that our negotiators took back with them. But this was very much done together.

We also, from time to time, had retreats with leaders in the intelligence community in which we discussed long-range planning in the field, including the setting of major budget priorities and programmatic decisions. We didn't reach decisions at those meetings, but we really had a sharing of information.

So I wonder if we should be encouraging that. How do we do that without running into problems—since we were dealing with classified information, it was a little different situation. But in most cases, it would not be classified.

How could we do that without running into the perception that the executive branch and legislative branch people are meeting together, not in open meetings of committees or open public hearings, to have those kinds of discussions, that in some way we might be trying to do something improper?

So the number of committees, the parallel responsibility between the executive branch and Congress, the increase of informal and what has been called up-front and advance-of-decision-making consultation.

The biennial budget is something else that has been proposed. There has been a proposal from some of our Members that we should budget on a biennial basis. That would leave more time for consultation and appropriate oversight between the relevant committees. So those are three or four things that have come to us as suggestions.

I suppose the critics of the idea that just one or two committees ought to have jurisdiction over a particular agency of government, as opposed to many, as we now have, often with overlapping jurisdiction, and we should have informal contacts, there would be some concern as to whether or not cooperation would occur. Would the legislative branch get too cozy with the executive branch and would it end up being not an arm's-length transaction, one in which—over the years a charge has been levied at the Agriculture Committee, for example, that it has been too friendly with the Agriculture Department and that no one is really overseeing either one on an arm's-length basis.

How do you react to those criticisms and do you think any of these suggestions have merit?

I might just ask both of you to comment briefly.

Mr. DERWINSKI. Senator, I would like to look at things that I consider necessary in a realistic fashion. I think, yes, in principle, if you limited the number of committees and subcommittees that the Members served on, you know, in principle, they presumably would be forced to be more precise and do more homework in the given

field. But that runs against their natural interest, to cover every possible base that helps them serve their constituencies.

I would suggest that perhaps the way to partially meet it is to take the first two or three months of a new congressional session when there is very little action on the Floor, except a rare case like this where the President had the 100-day agenda, which I thought was ill-advised. I thought he was given bad advice. You just don't operate under a self-imposed artificial time frame.

But having said that, the first two or three months, when there was very little action here, you truly concentrated committee hearings without interference from, you know, sessions on the Floor, and saw to it that the Members—each party could see to it that its Members are there and ask the necessary questions, I think would be helpful. That would also get at the point that we have been making about the advance consultation.

Committee hearings could be a very good vehicle for advance consultation. When you get to something delicate like intelligence or defense, I remember as a Member, I would never be upset if I had a call from the State Department or Defense Department saying, look, you have asked this question, we can't answer, we can't put the answer in the record, but we will come to your office and brief you. I understood that.

There are just common-sense ways to do it. But I think that if you blocked out precise times early in the year—and not just hearings on the budget and policy, but also the kind of thing we have been talking about, areas of mutual interest, how can you help us, how can we help you, and that doesn't even have to be political. I think that President Clinton would be well-served if there was a little give and take that he would benefit from, because you could—in our political system, people we agree with one day, we battle the next, and vice versa. I understand that you are an expert at that. So the——

Chairman BOREN. I had some experience in recent days.

Mr. DERWINSKI. So there is no reason why we couldn't have maximum cooperation early on in the session, if we worked out that kind of a schedule.

Chairman BOREN. What about informal meetings; are these improper? I know some of things we used to do, we oftentimes had breakfast meetings, they were not formal sessions or open sessions but with the leadership of the committee, and sometimes we were invited to the agency involved, the executive branch; I am not just talking about intelligence, but otherwise.

I have seen this happen in many areas, just to sort of sit down and talk informally about general directions you hope to go in. Do you think that is a proper and a wholesome thing to have happen?

Mr. DERWINSKI. I think that is a reflection of common sense. I remember as a very young House Member being called into informal meeting with Speaker Rayburn, and there were glasses and there was a little bit of camaraderie and a few stories, and there was also business. And it was informal, yes, but it was productive and positive.

Mr. MARSH. Senator, I think it is absolutely essential that more of that be done. One, I think that the number of committees needs

to be reduced and I think the number of subcommittees needs to be reduced. I think that is very important.

You raised the issue of whether or not you are getting into a format that really brings us under the scope of some of the statutes, which for me comes back to the point that I think that you need to look at the impact of the laws that you have enacted. You really need to take an inventory of what you have done in the legislative field. And you need, in my view, to get some assessments of what the potential impacts of legislation are going to be before you adopt them.

This issue we are talking about is not limited to the executive branch of government. We are getting into some problems that get over into the judicial branch, an area that I suspect you are going to have to address at some time is the question of sentencing guidelines. And you have Federal—some Federal judges now that are indicating they don't want to hear particular cases because of sentencing guidelines. This may be—ultimately, that may not be able to be resolved except by the Supreme Court.

There is a—I think one of the things that has happened in the last 20 years, more in the last 10, and I think it is very helpful, that may provide these quasi nongovernmental forms, are the emergence and the development of what we call the "think tanks." And they provide a very helpful and useful function in providing the opportunities to get together.

The hearing process, in my view, is absolutely essential. But it is a—it is becoming a confrontational, adversarial thing.

One of the things that we have not talked about here, and you must—and we have to think about it, and that is the fourth estate. Absolutely essential, absolutely essential.

But I can tell you, in the executive branch of government with instant coverage of international events—and I have been with the President in situations where you are going to apply force, and what is happening is the electronic media and the instant reporting of international events gets inside your decision cycle. Because events are reported and are on the street, but you—the executive branch cannot react without—in order to make a response, you have got to coordinate with the Department of Defense, Department of State, you have got CIA, and that staffing process, even though it may move fast, a matter of just a couple of hours, it nevertheless is running behind the electronic media.

I think we have to look at the fourth estate and how—and how we can better translate through the media national policy that relates to very difficult and complex issues that are not really resolvable or fully understood by sound bytes and investigative reporting. One of the areas that the committee needs to look at, I think, is how do we communicate better in the new technology with the electronic media and the sound-bite era.

It causes a lot of problems in the executive branch. But it is absolutely—the fourth estate, absolutely essential, absolutely essential.

Chairman BOREN. Well, I want to thank both of you very much on behalf of the committee. We are fortunate, as I am sure those who have heard you today will agree, that we have had both of you in the legislative branch and in the executive branch in various re-

sponsibilities. The perspective that you bring to us is a very important one.

I often wish that everybody that serves in the legislative branch could have had some experience in the executive branch and vice versa. I think again when you talk about comity—and this is what has been missing, and you see less and less of it. It is rarer and rarer for an agency to sit down and say in a candid way, in any form, with a group in Congress, particularly if there are people there from both parties, which really is essential if we are going to get things done—here are four or five options we are considering, and laying them out in a candid way: What, do you think we ought to do? That kind of two heads are better than one sort of working together is all too rare. And I think we would have a lot more of it if we had people in both branches of government that had experience with the other.

So I think having the perspective from both of you is a very important one and we appreciate very much both of you coming today.

Mr. DERWINSKI. Thank you.

Chairman BOREN. Thank you very much.

I want to introduce and ask them to come forward at this time, our next panel—three others that have had broad experience in our government and in various areas of the life of our government and the work of our government; Dick Thornburgh, Paul Volcker and John Brademas, our second panel.

Dick Thornburgh was the U.S. Attorney General from 1987 to 1991, and of course prior to that served for two terms as Governor of Pennsylvania. He has been Assistant Attorney General for the Criminal Division at the Department of Justice, U.S. Attorney for the Western District of Pennsylvania, and for the past year has served as Under Secretary for Management at the United Nations, which is an additional very interesting perspective that he brings to us.

Paul Volcker served as Chairman of the Board of Governors of the Federal Reserve System for two terms, from 1979 until 1987, and prior to being Chairman of the Board, he was President of the Federal Reserve Bank of New York, principal operating arm of the system. He has also been Under Secretary of Monetary Affairs, for Monetary Affairs at the Department of the Treasury, and he is currently Chairman of the James D. Wolfinson, Incorporated, and Frederick H. Schultz Professor of International Economic Policy at Princeton; so both in the private sector and in education.

Senator COHEN. Mr. Chairman, he also has a Honorary Degree from Bates College.

Chairman BOREN. I knew there was a Maine tie there somewhere. From New York University, probably during the Brademas tenure, I would guess.

I was just getting ready to present John Brademas, who served as the U.S. Representative from the State of Indiana from 1959 to 1981. He was House Majority Whip for the last four years. While in the House, he was a Member of the Education and Labor, House Administration Committees, and let me say a person who spoke a great deal, has written a great deal, and gave tremendous amount of input into questions involving the organization of Congress or

perhaps the disorganization of Congress in terms of commenting upon it during his tenure in the House.

After his tenure in Congress, he became President of New York University until 1992. He is chairman of a number of boards and numerous organizations, including the National Endowment for Democracy.

So we can't think of three people who could bring more worthy perspectives to share with us as we begin our work, particularly trying to see how the organization of Congress needs to be considered in relationship to the work and organization of the executive branch.

So we welcome you all, and I think I will just go down in the order in which we introduced you and ask each of you to make opening comments. Then following opening comments from all three of you, then we will open to questions from Members of the committee that are here.

Mr. Thornburgh, we are very happy to have you with us today.

STATEMENT OF HON. RICHARD THORNBURGH, FORMER ATTORNEY GENERAL

Mr. THORNTON. Thank you, Mr. Chairman. I am delighted to be here.

I have given the proverbial prepared statement to staff members with attachments, but I think it would be more worthwhile if I perhaps tried to highlight some of the——

Chairman BOREN. Fine. We will receive all three of your statements fully for the record and ask that you summarize them.

Mr. THORNTON. I come here with a good degree of inspiration, having spent the last five days in Colonial Williamsburg treading where the former greats of this country trod and trying to resolve problems in the revolutionary times.

I commend you and your colleagues on taking an in-depth look at many of the problems that beset not just the Congress but in its relationships with the other branches of government. Prior to the coming to office of my former gubernatorial colleague, President Bill Clinton, I had the privilege of serving in the Justice Department under the previous five Presidents, and during that period of time, interacted frequently with the Congress. I would like to offer some views today on what I think is probably one of the more vexatious matters in relationships between the executive and legislative branches, and that is the request for documents, information, access to witnesses, in ongoing criminal investigations, and in matters that are impressed with a great deal of sensitivity.

It is here that the tension between the respective roles of the branches, I think, comes to a crescendo. Something I described during my hearing, confirmation hearing for Attorney General, as being the longest-running show in town. The back and forth that occurs between various committees and the Justice Department, in particular, with regard to information that is necessary. There are legitimate views on both sides.

I think it is important to acknowledge at the outset, I am not one of those who contests the oversight role of the Congress or the responsibilities to carry out investigations in areas where wrongdoing

has reached the attention of the Congress. What I would like to note, however, as a former prosecutor and having dealt with the criminal justice process over the last 25 years, is my serious concern about inquiries into ongoing criminal investigations and prosecutions and other matters that relate to the lawyering function of the Department of Justice.

The primary concern I think in criminal investigations, it is sometimes forgotten, is that the rights of individuals who may be targets or subjects of investigations can be seriously prejudiced by disclosure relating to the investigation or even identifying them as being connected with some kind of investigation into alleged criminal conduct. All citizens have rights of privacy and confidentiality that are seriously prejudiced by being exposed to public view. That is the theory of course behind Rule 6-E of the Federal Rules of Criminal Procedure that govern the privacy and confidentiality of grand jury proceedings.

There is another side to that concern from the point of view of the Department of Justice, and that is the prejudice that might result to the progress of ongoing investigations. Information is power in the back and forth that goes on between prospective criminal defendants or targets of an investigation and those who are relentlessly pursuing them. And any clue or any disclosure with regard to the direction in which an investigation may be going is a roadblock to the successful completion of that investigation.

Most often, these concerns arise in connection with disclosures to the media. I earned the undying enmity of the Washington Press Corps during my tenure as Attorney General for taking a firm stand against leaks and in trying to prevent the unauthorized disclosure in investigations to both protect individual rights and to preserve the integrity of our investigations.

I think that is an effort that is worthwhile and one for which I feel no remorse. The same potential, however, exists as many Members have had experience in unauthorized disclosures that might come from information furnished to committees of the Congress. Therefore, the stakes in dealing with these controversies over the disclosure of documents and information and the accessibility to witnesses are high indeed.

At the same time, I think it is important to note that most of these controversies are resolved amicably. Many of them that begin at a high fever pitch give way to the kinds of compromise that is inherent in our governmental system.

In the report done by the Administrative Conference of the United States, they referred to four frequently used methods of compromise, each of which I have seen in action and each of which is often a way around the confrontation that could otherwise result. That is, first, the timed release of information that may be requested with regard to an ongoing criminal investigation so that it does not interfere with particular stages of the investigation.

Secondly, is the release of information with protective conditions that are designed to maintain confidentiality during congressional inspection. Third is the release of requested information in redacted or edited form. And fourth, the release of the requested information in the form of summaries of the information requested.

It is, however, those few controversies that are not resolved that cause trouble to both branches of government. They are generally in high-profile cases. They generally involve a partisan difference in view or a partisan issue of equally high profile.

They are often undertaken, in my view, to score points one way or the other, either by the Congress in seeking to push the envelope of its oversight to investigative authority, or in the executive branch to draw a line in the sand with respect to executive power. I suggest that one more—one less noticed but more insidious factor of this is with regard to the second-guessing process that affects career prosecutors. Prosecutors who have their files made available and are then publicly second guessed as to whether or not a particular prosecution should have been undertaken are more likely in future events to go ahead and prosecute in cases where the exercise of that discretion might otherwise have prompted a different result for fear of having to be pilloried over a judgment call that was made in a proper way.

At its worst, of course, these kind of conflicts can result in the anomaly that transpired in the North prosecution, where the prosecution carried out at great length and with enormous cost and high publicity, and was aborted because of a failure to take appropriate safeguards with respect to immunized testimony. That, of course, is the kind of thing that we now know, thanks to the court's intervention, can be dealt with, but rushing as if in a mine field, or any number of these trip wires that can abort a criminal investigation, are often one of considerable importance to the national interest.

Therefore, from my vantage point, I want to concentrate today on suggesting that the Members of this committee consider ways of resolving these problems within a more rational framework. In fact, even looking to the intervention of outside parties to reach some impartial resolution of these kinds of controversies.

Referring to the July, 1990 report of the Administrative Conference, which I furnished to you, Mr. Chairman and Members, I think you can see a menu of possible alternatives that can be examined, scrutinized, discussed, and perhaps even adopted to help dampen this particularly vexatious interaction between the two branches.

One of the real quandaries that faces someone who wants to test in a legal way the proper availability of documents from the executive branch, requested by the legislative branch, is that the only method available is to be indicted and face criminal charges of contempt of Congress. And that is obviously an unattractive alternative to persons who think they are only doing their job within the executive branch.

Among the remedies suggested by the Administrative Conference are some kind of declaratory judgment procedure, which would give the judiciary a role, which they often understandably shun nowadays because of the perceived political nature of these differences. Secondly, the appointment through judicial intervention of special masters to make findings with regard to particular controversies.

The use, thirdly, of alternative dispute resolution procedures which are now commanding more and more attention in the pri-

vate sector and, indeed, form part of the package of civil justice reforms which President Bush recommended during his administration.

Finally, and perhaps the most basic and easiest to negotiate, would be some kind of written agreement and guidelines that would govern the conduct of committees seeking information, and those within the executive branch from whom the information was requested. If for nothing else than an appropriate starting point to begin the process of negotiation.

Now in my experience that process begins with every request, and as I say, happily most are solved. But those that aren't, I think, cast government, both executive and legislative branch, in a bad light. I think this is an appropriate challenge for this committee to take a look at. I think the dividends that would accrue from reducing these kinds of tensions would be good for all concerned.

I thank you for giving me the opportunity to share my experience and views with you today, Mr. Chairman.

Chairman BOREN. Thank you very much.

I know those thoughts are going to spark questions and very interesting ones we want to come back to.

[The statement of Mr. Thornburgh is printed in the Appendix.]

STATEMENT OF HON. PAUL VOLCKER, FORMER CHAIRMAN, FEDERAL RESERVE SYSTEM

Chairman BOREN. Mr. Volcker?

Mr. VOLCKER. Thank you, Mr. Chairman.

I have not considered myself a great expert in this general area of the committee's inquiry, although I have spent my share of time when I was in Washington dealing with the Congress one way or another. And in trying to think how I could be at all helpful to you, I thought maybe I would make two general points that occur to me both from my experience in the executive directly, and in the Federal Reserve, and my experience, perhaps, not having been in the Congress.

So I am looking at this from the standpoint of an agency responsible to the Congress, as well as an agency responsible to the President in the case of the Treasury. And I suppose what in a very general way has concerned me the most is in a feeling, from our viewpoint, of those that come before the Congress, of the lack of priorities on the part of the Congress, a lack of proportion, which you see in a number of different areas.

You see it in a tendency from the standpoint of the executive or the standpoint of the Federal Reserve, a tendency to overregulate in the sense of giving very detailed instructions about what to do. And it is particularly damaging in the personnel area, I might say, where we did not have that in the Federal Reserve, but of course you have it in the executive and I think the difference is quite apparent in terms of the professionalism and effectiveness of the staff over time.

There is a tendency towards a kind of micromanagement in the same area, often in the Congress. There is, I think, a lack of consistent oversight which is regrettable, because I don't think the bu-

reaucracy should be exempt from what I think of as intelligent oversight. And I see that in several directions.

I must say, it is quite frustrating for somebody dealing with the Congress to have to face sometimes, as we did in highly repetitive testimony before in the case of the Federal Reserve, perhaps a half a dozen different committees in the space of week or two. It is interesting the first two or three times, and you recognize you have to do it once in the Senate and once in the House, and that is useful, but by the time you are at the sixth or seventh testimony, you are getting kind of tired and you are not preparing, the committee is not preparing and the process kind of runs down.

And then at the same—at the end of all those hearings, you are likely to get that question from the chairman of the committee, from which you shrink, would you mind answering a few questions for the record? At which point, you are handed about 60 questions from the committee chairman, which nobody has read except the staff of the various congressmen and senators, which you in turn turn over to your staff. And they say: I didn't come to Washington to answer questions that nobody is ever going to read the answer to. But in my case, I felt I had to read the answer because I didn't know what the staff was answering and I wanted to know what the questions were and it takes a lot of time for very little output.

Now having said that, the question is, of course, what kind of remedies could arise. And I join in those and can very easily say from the other side of the table, the committees tend to be too big, particularly in the House, to be really effective. And I have great sympathy for particularly the junior Members of those committees that have a very difficult time in hearings lasting long enough to ask five minutes of questions, and to sustain interest.

But the committees are very large and I find the smaller they are, the more effective they tend to be. And too many committees, too many overlapping committees—it is easier to say than to deal with, I know, and I share the concern, which is absolutely matched by my concern on the executive side, that there are too many staff.

Congress has attracted extremely able staff over the years. I think they tend to attract more aggressive, young, bright people now than the executive does. I am not sure whether that is entirely in the interests of the most effective government. I think it is true, but I think there is a question of, however good they are, too many becoming too much, because it contributes to this lack of focus.

Senator COHEN. Chairman, if I could interrupt.

There is the second bell for votes in the Senate. I have a number of questions I would like to submit for Mr. Volcker.

Chairman BOREN. We hope you will rejoin us. We are not going to burden the witnesses today with written questions. But let me say, we do have a vote on in the Senate, but we will be coming in and out. It is not lack of interest.

Mr. VOLCKER. I also welcome the written questions when they are meaningful and thought about. Sometimes they get a little excessive.

Chairman BOREN. We will be in and out. I apologize this has happened, but Chairman Dreier will continue on in our absence. We will be right back.

Mr. VOLCKER. When I look at it from the other side and trying to look at your problems, I do think there is a tendency, which I can observe from being inside bureaucracies, of a kind of self-protective instinct and not wanting to reveal one sentence more than they have to reveal and not revealing anything unless they get asked precisely the right question, making the operation always look as favorable as possible and not being as open and frank as they might be about problems.

Then you get in a very difficult area that General Thornburgh has already referred to, what are the proper areas for confidentiality? And when there is not a proper area, I think it is a burden on the executive to be as open as possible, and you ought to press them to be open.

We have had problems, maybe not quite so sensitive as the kind the Attorney General runs into repetitively, but where is the proper borderline in investigating the competence of bank supervision and bank regulation and avoiding inquiries, the kind of inquiries into specific situations that I think really do violate questions of privacy and effectiveness of being able to investigate.

Obviously, we run into that question all the time in monetary policy, when we can have a lot of discussions about monetary policy. But when questions border on exactly what are you going to do tomorrow, you run into a different kind of question, where I, frankly, don't think there have been a lot of problems.

But we have had recurrent problems in defining the borderline between privacy of investigations and indeed defending more proper boundaries of legalities from legitimate inquiries. I think often the executive protects more than is necessary, and if we are going to have effective relationships in an area where there is bound to be tension and conflict, there is a burden on the executive to be as open as they can and that is not the natural tendency.

So let me just leave it at this point with those very general concerns and reservations.

Chairman BOREN. Thank you very much.

We will come back to questions in a minute, and turn to our colleague, Mr. Brademas.

Again, I apologize, we have had to go in and out for the Senate vote.

STATEMENT OF HON. JOHN BRADEMAS, FORMER MAJORITY WHIP, U.S. HOUSE OF REPRESENTATIVES

Mr. BRADEMAS. Thank you very much, Mr. Chairman.

I too am honored to be here, particularly with such distinguished public servants as Richard Thornburgh and Paul Volcker.

You are going to insert our prepared statements, I understand, in the record, so let me try to move as swiftly as possible through what I prepared.

At the outset, our theme is congressional executive relations, note that my own service in Congress spanned a tenure of six Presidents, three Republicans, Eisenhower, Nixon and Ford, and three Democrats, Kennedy, Johnson and Carter.

It seems to me, one cannot really discuss this issue thoughtfully without understanding certain fundamental factors: First, we have

a separation of powers Constitution; second, we have decentralized, undisciplined political parties; and third, over the last 20 years, at least, there have been significant changes in Congress and its operation that in an already fragmented system have further dispersed power.

People hear the phrase "separation of powers," but too few understand its meaning. Some think Congress exists to do whatever a President wants, but that, of course, is not what the founding fathers had in mind. And it is imperative to remember that Presidents, Senators, Representatives, are elected for different periods of service, have different constitutional responsibilities and are elected by different constituencies.

It is obvious that in our system not being a parliamentary one, the chief executive need not even come from a majority of the legislative branch, and of course the years of Presidents Reagan and Bush are dramatic witness to that prospect. I may say, it may be instructive in this respect if I tell you that in my own 14 races for Congress, I ran five times in presidential election years, but only once did the people of my northern Indiana district vote for the nominee of my party for President of the United States.

So the American way of governing was not really destined for or designed for peaceful coexistence between the executive and legislative branches, even when the two are controlled by the same party.

Then comes the issue of lack of highly disciplined political parties. I was, my last four years in the House as Senator Boren said, Majority Whip. Had I been the Chief Government Whip in the House of Commons, all I should have had to do would be to produce the bodies, because I would know how they would vote by and large. But that, of course, is not the arrangement in the American system.

I had to lead a group of about 50 Democratic Members, Assistant Whips, one of whom was the cochairman of this committee on the House side, just to find out how my colleagues of my own party intended to vote, and then urge them to support the position of the Speaker and the Leadership.

Mr. DREIER. It has changed dramatically since you left, Mr. Brademas.

Mr. BRADEMAS. I am glad to hear that.

Well, I remember, Mr. Chairman, on one occasion, I said to a Member, how should I put you down, yes, no? Leaning yes, leaning no, undecided? He said, John, put me down negotiable.

Now, our two major political parties in the United States have played very important roles, but for various—and forging consensus and important issues, but for various reasons, the ties of party have been weakened over the last generation. One of those reasons is that television has now become the chief instrument of political communication. And television is in turn in large part responsible for the escalating cost of running for office and for the enormous importance in American politics today of money to finance campaigns.

When I first ran for Congress in 1954—were you born, Mr. Chairman, in 1954?

Mr. DREIER. I was two years old.

Mr. BRADEMAS. There you are. I spent, as I recall, between $12,000 and $15,000. I got 49.5 percent of the vote.

The last time, in 1980, at least my memory tells me, I spent around $675,000 the year I was defeated. The imperative of raising campaign money, married to the increasingly significant impact of decisions by the Federal Government on society and the economy, has opened the door to very great influence on our political process of so-called special interest groups and campaign contributions from political action committees, and these are developments that impair the process which is very important in a complicated democracy like ours of accommodation and compromise.

To these fragmentizing forces have been added over the last two decades, the changes in the operation of Congress itself, especially in the House of Representatives, that further disburse power. I was part of those changes, aimed chiefly at curbing the power of autocratic full committee chairmen, opening up the system to respective participation and making the system more democratic and accountable. But as Ed Derwinski, my then colleague in the House pointed out to this committee, those changes have not necessarily made the House easier to lead or majorities easier to forge.

So if a President thinks he has problems in dealing with the House, he ought to look at the problems that a Speaker has. Here I think it important to note that Congress has been affected not only by the kinds of reforms I cited, but also by steps that Congress has taken to strengthen its function to its capacity to carry out its functions both as policymaker and as overseer of implementation of the laws.

The congressional budget process, 20 years old next year, is the most dramatic example of the way in which Congress has sought to enhance its capacity to do its job. Jack Marsh mentioned the Office of Technology Assessment. That is another instance of an effort on the part of Congress to strengthen its capacity to do a better job.

I speak of the Carnegie Commission on Science, Technology, and Government. I Chair the Committee on Congress of that Commission. The raison d'etre of this commission is to make recommendations for how the three branches of our Federal Government as well as the State governments can more effectively make judgments on issues with scientific and technological implications.

My committee has produced two reports, that is the Carnegie Committee has produced two reports on how Congress can improve access to science and technology advice. And we are working on a third, which happens to be the same subject as this committee is dealing with, improving the operation of Congress. And as you are undoubtedly finding, that is the toughest issue of all.

Now let me list a few reforms that I believe would significantly improve the capacity of Congress to play its deliberative, as well as representative role in our political system. First, I favor a four-year term for Members of the House. Such a term would enable Members of the House, without such unrelenting pressure to campaign and raise money, to focus more on long-range policy.

In this respect, I note that Jack Marsh and I are in agreement. The only difference is he favors a three-year term and I favor a four-year term, but both of us favor a referendum every two years.

He would favor doing it every three years—every two years, as I understand it, with a third of the House up. So far as I am concerned, you could split the House in half and do it every two years, stagger the terms.

Mr. BRADEMAS. Second, I think we need to reform the campaign laws. I was the author in the House of Representatives of the 1974 statute that provided for public financing of Presidential campaigns, and although that is not perfect—no such law is—it has gone a long way to keep the highest office in our country from being sold on the auction block.

And I favor now and have for some time public financing of House and Senate campaigns, not only as a way constitutionally to impose spending limits in campaigns, but still more important, in my view, to reduce the excessive influence of PACs and other special interest money on public policy making.

I would also like to see an encouragement to contributions to both our political parties, as avenues for forging consensus on important issues and encouraging more citizen participation in politics.

Those are a few changes I would like to see to not only help Congress to a better job, but would also increase the cooperation between Congress and the Executive, which is a question to which I now turn. This question is so broad I can only offer a few generalizations and a couple of concrete illustrations.

The best illustration I can make in response to all questions about institutional forces and individuals in the American political system is, it all depends. Because the state of Legislative-Executive relations varies with the time period, the policy, and above all with the configuration of political force: Is the President a Democrat or Republican, which party controls the Senate, which party controls the House, and by how many votes.

I remind you when Presidents Johnson and Carter took office, there were more than 290 Democrats in the House and 60 in the Senate, which is not the situation today. And as President Clinton has undoubtedly learned, having the Democrat majorities in both bodies does not mean automatic approval in his budget any more than Ronald Reagan found in 1981 that he had automatic approval by the Republican Senate of his first budget.

The Lyndon Johnson of 1965 was not the Lyndon Johnson of 1968. The George Bush of 1991 was not the George Bush of 1992. And if I may say so, the Clinton of two weeks ago is not the Clinton of last week, much, I am sure, to his satisfaction. In politics, although the same people may be in office, times change.

I sat on the Committee on Education and Labor during the Great Society years of Lyndon Johnson. Whether or not you agreed with the legislation he produced, nobody can say the Executive and Legislative Branches did not work together effectively. Yet it was Democrats in Congress who, because of the war in Vietnam, helped turn President Johnson out of office.

During the Nixon years, the Executive Branch had very little to do with making education policy. Democrats and Republicans on the committees did so. I make this point because we have become accustomed to thinking of Presidential lawmaking as the norm.

Now, because I was part of the congressional leadership during the Carter Presidency, let me offer a few comments on that. President Carter was new to Washington and had run for election in effect by running against it. He did not seem to have the zest for political combat as did Tip O'Neill, Hubert Humphrey and John Brademas. He wore his office like a burden, and that we had all been elected on larger margins than he was not lost on us.

He began to feel once he had begun to make his judgments on policy and shaped his legislative proposals and shipped them to Capitol Hill, he had done his job. He worked hard to prepare his proposals but not so hard in selling them. He did not like the horse trading and bargaining that characterizes much of the legislative process. He found it difficult, I think, to understand the way a Member of Congress, especially of the House, has to view the world, being up for reelection every two years.

Those at least were some of the ingredients President Carter styled in his first year. But his relations with Congress improved a great deal, and during his Presidency he built an impressive legislative record. The Department of Energy, Panama Canal treaties, Department of Education, Superfund, Ethics in Government Act, his own efforts on behalf of human rights and reaching the Camp David Accords, all that is not a bad record for a President and Congress who supposedly could not get along.

Now I want to turn to the attention of which my friend Paul Volcker has spoken and of which every President complains. The argument is that Congress, through legislation, committee reports and in other ways, ties in an inappropriate fashion the hands of the Executive in implementing the laws.

To this general charge I again respond: It all depends. Sometimes it is a fair charge and sometimes it isn't.

I knew that Paul Volcker would raise a complaint because he warned me last week at a dinner that he would do so, that there were too many people working on Capitol Hill. So I just did a little research. With the aid of congressional staff, I may add.

But as of March of this year, there were approximately 2,975,000 people employed by the Executive Branch of the Government of the United States, not including the Armed Services. Subtracting from that number, because they are included, 700,000 employees of the Postal Service, that leaves us with approximately 2,275,000 members of the Executive Branch.

How many people are working for Congress? I do not, Mr. Chairman, talk about the Botanical Gardens, on which I must say in 22 years in Congress I never—whose employees I never found it necessary to rely. It would be fine to put them in the Executive Branch.

There are 20,300, about 7,500 on the Senate side and 12,700 on the House side.

As I calculated, that is what, about 100,000 to one. And I think Congress does a pretty good job in holding its own against such odds.

Now, I want to say a word about the matter of micromanagement, because this comes to the most important point I want to leave the committee with. During the years of Richard Nixon, many Democrats like me—and I was a proud member of the White House enemies list—did not trust the Executive Branch faithfully

to carry out the laws, and of course we were right. Here I will tell you of one encounter with the executive with which, as some of my former colleagues of this committee are aware, I was directly involved.

Nineteen years ago this summer, following an abortive coup against then President Makarios of Cyprus, which they attempted by a military dictatorship which I strongly and openly opposed and U.S. arms to which I strongly opposed, and which subsequently fell, Turkish troops equipped with weapons supplied by the United States Government invaded and occupied the small island republic.

Because American law, the Foreign Assistance Act and the Foreign Military Assistance Act, expressly mandated immediate termination of further U.S. arms to any country using them for other than defensive purposes, several of us in Congress called on then Secretary of State Kissinger to insist he enforce the law and halt weapons shipments to Turkey.

My colleagues and I reminded him that even as Mr. Nixon was that very week on his way to San Clemente, he failed to protect the laws of the Constitution of the United States. In light of the willful refusal of the Executive Branch to impose the law of the land, Congress attempted to do so by imposing an arms embargo on Turkey.

Nearly 20 years later, Turkish troops still occupy the country and Presidents of both parties have failed to provide leadership. But it is not my intention to debate the pros and cons of Cyprus, but I make the larger point, particularly with reference to the issue of Executive-Congressional relations on foreign policy, a matter on which several Members of your committee are intimately involved, Mr. Chairman.

I cite but two examples to make my point. In view of the secret actions of the Reagan administration in trading arms to Iran for American hostages and using the proceeds in violation of law to buy arms for the Nicaraguan resistance, and in view of the actions of President Bush contrary to his representations in building up before the Persian Gulf War the war machine of Saddam Hussein, I believe the issue of relations between Congress and the Executive in foreign affairs to be a far more profound challenge to the American Constitutional system than the American people are even now aware. Because foreign policy is the life and death arena for the President and Congress, and unless there is a sense of trust between the two branches, we imperil the security of our country.

The co-chairman of this committee, my friend and distinguished former colleague from Indiana, now Chairman of the House Committee on Foreign Affairs, once put the point this way, and I quote him. I am speaking of Lee Hamilton, of course.

> "The object is to make the Constitution of the United States work. I do not see how that can be done unless those of us who are charged with that responsibility speak to one another the truth. The Congress cannot play its constitutional role if it cannot trust the testimony of representatives of the President as truthful and fully informed."

So I believe that it is imperative that between President and Congress, and as you are talking about Executive-Legislative rela-

tions, this is the life and death area, there must be an attitude if not always of harmony, of respect and, above all, trust.

A President who wants to be successful in conducting foreign affairs must be able to work honorably and straightforwardly with Congress. If he deceives or if he lies, ultimately he and the Nation will fail.

And, Mr. Chairman, based on my own experience of over 20 years in Congress and having served with, not under, six Presidents and having closely observed those in office since I left Washington, I must tell you that I have become increasingly disturbed over the last decade by what I believe is a widening gap between the principles at the core of the American Republic and the activities of American Presidents in foreign affairs.

I must also be critical of the failure of Congress, which for most of the years since I was first elected in 1958 has been controlled in both bodies by my party, to carry out the responsibilities in foreign policy the Constitution ascribes to it.

I hope with the election of a Democratic President and a Democratic Congress, there will be a renewal of trust between the two branches and accordingly a more effective American foreign policy. The opportunity which a united government, which we now have for at least four years, presents to overcome the institutional distrust that has characterized the foreign policy process in recent years must not be lost.

In concluding, Mr. Chairman, I return to the general question of how to improve cooperation between the two branches and overcome friction. It must be obvious from what I have said that I do not favor eliminating friction and disagreement, not only an impossible goal, but an unwise one, because sometimes obstruction by Congress of Executive Branch action is in the national interest. It is always a matter of judgment.

For example, I wish that in 1981 Congress had been more obstructionist, much more, and had effectively blocked President Reagan's huge tax cut and huge military spending buildup, because if Congress had blocked those actions America might not now be suffering a $4 trillion plus national debt and enormous annual budget deficits.

Certainly there are institutional structural changes that can increase the likelihood that both President and Congress can more effectively meet the Nation's problems. But in the final analysis, the answer to that question will depend on the quality of the leaders the American people choose, and so on the judgment, good or bad, of the American people. It all depends.

Thank you, Mr. Chairman.

[The statement of Mr. Brademas is printed in the Appendix.]

Chairman BOREN. Thank you very much, Mr. Brademas.

I turn first to Senator Sarbanes.

Senator SARBANES. I don't have any questions, Mr. Chairman.

Chairman BOREN. Senator Reid?

Senator REID. Mr. Chairman, this is one of the finest panels you have put together. I have not had the opportunity to read the statements or listen to the testimony. I will read the statements. I have respect for each of these gentlemen.

Chairman BOREN. Thank you very much.

As we have explained to the panel, we have a series of votes on the Senate Floor which causes Senators to be in and out, and now we have votes on the House Floor, which has led to a suggestion from one of the witnesses that we try to have parallel schedules between the House and Senate and also try to schedule our committee and our Floor time on a parallel path.

Mr. VOLCKER. That is the great frustration of those in the Executive. You are always voting. I don't know what to do about that.

Senator REID. We don't know, either.

Senator SARBANES. Except when we are not voting, the Executive is also frustrated.

Chairman BOREN. Let me go back down the line with a few questions. Again, I invite my colleagues to let these questions stimulate others.

In terms of the problems that sometimes exist between the Department of Justice and the Congress, as I recall there have been two or three occasions even where our committee was looking into things when I was chairing the intelligence committee, and we were told that answers would be forthcoming after certain periods of the investigation had been completed but couldn't be made during that time.

You talked about the possibility of undergoing dispute resolution or the declaratory judgment. Let me just make sure I understand that. For example, if our committee were to ask the Department of Justice or the subcommittee were to ask the Department of Justice about an ongoing investigation, whether it was being appropriately handled or not, the committee would not ask the question were there not some suspicion that it was not being properly handled. Your answer is, We can't tell you now, in the middle of the investigation, or it is a matter before a grand jury or some other reason.

I guess what you are suggesting then is that we either go to an appropriate third party, an arbitrator or someone in whom both sides would have confidence, or perhaps to a court for declaratory judgment, as to whether or not the Executive Branch agency is appropriately withholding the information at this stage of the proceedings as opposed to doing so perhaps for the purpose of covering up some legitimate line of congressional inquiry.

Is that in essence——

Mr. THORNBURGH. That is it in essence. I am not bold enough to suggest the specifics of the procedure that might be followed. What I am concerned about is that there must be a better way than the kind of food fights that occasionally occur between committee Chairmen and members of the Executive Branch over the availability of documents or the accessibility of witnesses. And it is kind of a continuum, Mr. Chairman.

In my view and my experience, it was often simply a matter of sitting down with the Member who was seeking information and explaining, without dealing with the specifics of the case, precisely what our objection was that would in fact jeopardize either the reputation of the safety of a witness or slow up or detour an investigation, and that was it.

Then you get to the next stage on the continuum where that has not worked, and some protracted discussion takes place, a grudging ceding of certain documents but not all of the documents, until you

eventually get down to the hard-core, and then that is when the confrontation occurs.

I guess what I am suggesting is that after all else has failed, there must be something better than a criminal contempt prosecution to test the validity. It is a judgment call.

There are legitimate interests to be served, without question, and I think it is with some reluctance that I suggest the intervention of the courts in this, but it seems to me some kind of dispute resolution mechanism other than these high-profile charges of coverup, charges from the Executive Branch of encroachment upon their prerogatives. I think it is realistic to think in terms of men and women in good faith on both sides of the fence sitting down and huddling to come up with something together.

Chairman BOREN. I know we have all been in those positions where it has been frustrating, the BNL case was a good example, during my last few months in my tenure as Chairman of the Intelligence Committee. I really had no way of knowing whether or not there is good faith in the Executive Branch or not.

As you say also, bits and pieces of information come to you, and you don't know whether they are really comprehensive or not, or whether they are giving you a distorted partial picture or a total picture.

So I think it would be very valuable for us, either through a declaratory judgment proceeding or a panel of arbitrators or some other kind of informal dispute resolution process, to look at that.

Mr. THORNBURGH. I think your mention of the intelligence committees is an apt one, because there a better way was devised, and in my experience that was a very useful way of dealing with some of the sensitive relationships we had in the Department of Justice.

Chairman BOREN. We usually found a way to resolve those amicably, but there are times when we weren't able to, when we did get into this BNL case matter, which really was a difficult one to resolve, and to know whether we were resolving it appropriately.

Mr. THORNBURGH. It is still a criminal prosecution to come.

Chairman BOREN. It is still ongoing. That is something I would like for to us look into.

Did you have much experience, and I gather it is probably a little different, the kinds of problems you outlined are probably the more convincing ones, but jurisdiction between the committees was really pretty much—you weren't subjected to fragmented jurisdiction so much, you were really dealing with the Judiciary Committee, weren't you?

Mr. THORNBURGH. Occasionally in the higher profile, more controversial areas, we would have to deal with other committees, but the Judiciary Committee, the strength of the Judiciary Committee insofar as the Justice Department is concerned is that we deal on a day-to-day basis, and I use that as a contrast with some of our forays into other areas where communications did break down and we had some kind of outlandish confrontations.

And that relationship, taken by what was referred to earlier as the desirability of reducing the number of committees and given a point of contact on things generally for Executive Branch departments, it seems to me that would add as well in the area I am concerned about.

Chairman BOREN. Let me ask both Mr. Volcker and Mr. Brademas this question. It goes back to the fragmentation.

Chairman Volcker, you talked about the lack of priorities. You were just confronted with a mass of questions and material without any sense of what it was that was really important, and without there being more or less a traffic cop on the congressional side to say, Look, here is the number-one issue that is of concern to Congress this week, if you have got a little bit of time answer a question or come back to us, this is what we want the information on.

And also, your comment in terms of micromanagement versus legitimate and intelligent oversight, which you deemed was needed. And I would address this same question also to John Brademas from his own experience.

One of the things that we have heard a great deal about is fragmentation. Senator Byrd has appeared before our joint committee and talked about the fragmentation in the lives of individual Members of Congress. You are on so many subcommittees, pulled in so many directions. We used to have rules restricting the number of subcommittees you could serve on. It is more honored in the breach than in the keeping of it. We have one Senator who actually serves on 24, maybe it is 22 committees and subcommittees. The average is now up to 12. That is an average.

The problem in the House isn't quite so severe, but it is increasingly severe. You talked also about the large size of some committees, which makes them unwieldy.

I wonder—and again, this goes back to setting priorities—the Intelligence Committee which I chaired, we didn't have subcommittees. We knew we had only so many hours a week to devote to the work of that committee, and it took an enormous amount of time, probably 20 hours a week on the average. By not having subcommittees, at least we were sure that the committee was spending its time on those matters that were most important.

I think if we had had 10 subcommittees, each one of the Members that had a subcommittee would have felt that he or she had to have hearings on something to justify the subcommittee, and maybe one subcommittee would have had the four most important subjects and the other subcommittee wouldn't have had any of the top 10, but if you had all those subcommittees, you more or less divided the time, each subcommittee got to have a hearing on something, and you might have hit two of your top 10 most important subjects before the committee, that you might have spent a lot of time on things that were in the next echelon of problems. So it becomes hard to set priorities.

The other thing that it seems to me is that it does lead to unnecessary duplication of hearings with the Executive Branch. If we had fewer committees and perhaps rules that if the same set of witnesses were going to be presented on the same subject, you have joint hearings, so that the Chairman of the Federal Reserve is not called eight times before eight different committees to give the same opening statement, respond to the same question each time with a little less interest and stimulation and learning going on than the previous one.

Also, it is so hard for us, and I think it has led to—this is the only point where I perhaps disagree with the President and Con-

gressman Brademas—I find that in a way, by having more and more committees looking over less and less, each one of them looking over less and less, each one of them fully staffed and so on, we are so fragmented we don't have time for important things.

I remember, as an example, a couple of years ago we were trying to resolve the civil rights bill, and there were four Democrats and four Republican Senators appointed by the two leaders to try to get together, work together with the then Bush White House, which vetoed our two versions of the bill. We tried to get a bill that would pass muster and be signed by the President and come to a decision on the issue.

It took about three weeks before we were able to set a time at which all eight of the Senators said they could be there at the same time, because they were on so many committees doing so many things. When we finally set the time, we met for an hour. I don't think there were more than two or three of the same people in the room at the same time during the course of an hour. Two or three people were there in the beginning, then they had to leave to go to a committee meeting, two or three in the middle, and then two or three in the end of, and we couldn't have any kind of deliberations because they were being pulled and tugged in so many different directions. So we had less to say to the Executive Branch and the Executive, less influence because we were split in so many different directions than we would have had if we had had less assignments and responsibilities.

I wonder if you think we would have been better off by imposing the rules on the number of committees and subcommittees our Members can serve on, trying to restrict that maybe to a couple of committees and two or three subcommittees, and limit them.

Some of our Chairmen have said they wish they could say, you can't have any more than two subcommittees or three. Everybody wants to say they are a Chairman of a subcommittee or Ranking Member of some committee. If we did that, we could probably reduce somewhat the number of staff and really focus our efforts and points of contact with the Executive Branch.

I wonder how the two of you would react to that, having seen this from both sides.

Mr. VOLCKER. You have been much more eloquent than I, Mr. Chairman, in making the kinds of points I was trying to make. It seems to me the thrust of what you are saying is very much in line with my own instincts. I recognize, however, it is probably a lot easier for both of us to say that than to actually do it, in the complexities of the real word where there are so many issues and all the rest.

But let me just say in supplement to what you said, I think there is something to be said for the continuity of this relationship. It is not just a question of size and number of meetings and all the rest, but I have always been worried in terms of the people arguing for term limitations that the Congress itself will lose a certain expertise among the Members, that is often extremely helpful in knowing, in having enough background about the operations of a particular agency that they know the kind of questions to ask, they know some of the background of the issues, they can probe more successfully and more constructively than can a, at the other ex-

treme, a freshman Member who may be full of new ideas and energy but doesn't have the same background. You need a mixture.

I would hate to lose the experience and continuity that the most experienced Members of Congress often bring.

Mr. BRADEMAS. I agree with what Paul Volcker just said about the adverse impact of term limits on the development of expert knowledge on the part of Members of Congress.

Beyond that, another reason for opposing it, and I could cite still others, is that it would represent a great shift of power away from Congress, from elected Members of the House and Senate to Hill staff, and to the Executive Branch of government, and to career civil servants and to politically appointed people. And I am a hot separation of powers champion in this respect.

The second point that should be made to which Paul Volcker in a sense alluded, when you talk about—I happen to agree with you, there are too many subcommittees, and I agree with you that membership should be restricted in terms of both committees and subcommittees. But let's not delude ourselves into thinking any such change is without cost. It is not a zero-sum game. You are talking about changing the configuration of power, because jurisdiction in this place is power.

Just a word on subcommittee staff. My last 10 years in the House I chaired the Select Education Subcommittee of the House Committee on Education and Labor. As I remember, we had jurisdiction over the National Arts Endowment, National Humanities Endowment, Museum Services Act, almost all the Federal library legislation, the vocational rehabilitation program, education of all handicapped children act, educational research, drug and alcohol abuse education, environmental education, child day-care legislation, and I could go on.

I had two professional staff people and three secretaries, three clerical people, to handle organizing the hearings on all the authorization and all the oversight. We did a lot of oversight.

And I am strongly of the view that Congress should be much more vigorous and aggressive in carrying out its oversight responsibilities. It is a great way to make a contribution to the public interest. Deal with all of the interest groups who would be after you, and handle the requests from your colleagues and the media.

Do I think we were overstaffed? I certainly do not think we were overstaffed. We worked very hard and needed more help rather than less.

Senator REID. Mr. Chairman, could I just interrupt?

The problem is, lots of other subcommittees have had the same jurisdiction.

Mr. BRADEMAS. No, they did not, with respect, Senator.

Senator REID. Just like we have FEMA walking in here, but they report to 22 subcommittees.

Mr. BRADEMAS. Not to the Select Education Subcommittee.

Senator REID. That is one of the few they don't report to.

Mr. BRADEMAS. That may well be. Were I still there I would have had absolutely no ambition to reach out, knowing what I do about it, to have anything at all to do with it.

Let me respond to I think an even more important question that Chairman Boren has put. That has to do with priorities. I always

said to myself, I will make a public confession, if I were elected Speaker—and I was third in line after Tip O'Neill and Jim Wright—then I would have wanted to move the House of Representatives toward creating some sort of analog of the policy planning staff in the Department of State, some entity, small in size, that could look over the horizon of the next two-year term, look beyond the life of a Congress, to a the next three or four sessions or Congresses at least, to make some judgments as to what kinds of issues would be likely to come up.

And I should think it would be wise, absent such an entity, even now, following what, Senator, you are perhaps suggesting, if the leadership of the House of Representatives would, working through—and I now speak of the Majority party, because they are in control—would work with the steering and policy committee, in this case with the Democratic Steering and Policy Committee, bringing in committee Chairmen, to talk about setting a schedule of priorities for the Congress upcoming, in two respects at least: policy, that is to say, authorizing work; and oversight, to get some general sense of what the House ought to be talking about.

And if the Senate were of the same party, which has been the case for some time now, after that exercise in the House, I would hope that a similar discussion could go on between the House leadership and the Senate leadership, where I should like to think an analogous process would have been going on. And that, here again, very important—you remember I said it all depends—if the President were of the same party as controls the House and Senate, that there would be the kind of consultations to which, Senator Boren, you were earlier alluding in your observations, with the President and his top people, so that there would be some sense of where each side stood, and try to put together some general outline of where we were going.

To some extent that does go on, on and off. I have been here, as I said, with Democrat Presidents and Republican Presidents, and if you are a Democrat it is a lot easier if the President is of your own party. But have in mind this. If you are in the House of Representatives and you are the Speaker, that your capacity to carry out such priority setting, Senator, to use your phrase, is limited by the two-year term of Members of the House, is limited by the lack of party discipline, is limited by the need of each individual Member to get himself reelected or herself reelected, and that means going out to raise campaign funds. And the present situation is one in which every Member of the House becomes an independent contractor, a many-political party, as it were.

When I was defeated in 1980, I frankly was having to raise most of the money to organize the get-out-the-vote campaign, the voter registration campaign, to finance the party headquarters, to bring in the outside speakers. The whole shmear. I was not only the senior elected Democrat from my State but I was the leader de facto of the party, because of the rise of television, the decline of strong party organizations.

I would make one other point that you have to have in mind, which goes to another reason for the existence of this committee. You cannot ignore in the process the relative roles of the budget

committees, the authorizing committees, and the appropriations committees.

So I applaud and endorse your suggestion that we need to move more toward priority setting. I simply have tried rapidly to indicate the configuration of elements that any priority setter has to take into account.

Chairman BOREN. How would you feel about—you mentioned the budgeting and the authorizing process. How would you feel about buying the old budgets in which those in favor have argued that you appropriate in one year and you oversee in the next? There is a certain sense to it, and that you also provide the ability to plan a little bit longer term.

Mr. BRADEMAS. I haven't decided, and we are debating that in the Carnegie Commission on Congress right now. Conceptually I am attracted to it. Practically I haven't seen it spelled out yet in a workable way.

Mr. VOLCKER. On that particular question I find myself conceptually attracted to it, but I knew I would find something to disagree with rather strongly with my friend John Brademas.

I will state the disagreement more strongly than it in fact exists, but for purposes of emphasis, I think the kind of approach he is suggesting that Congress ought to spend a lot of time trying to get together and establish broad priorities for work over a period of years on the policy side is wrong. That should be the strength of the executive. That is what they ought to be doing. They ought to be preparing and thinking about a coherent program, and you have a focus there in a President and his administration to do it. It simply doesn't exist in the Congress.

The Executive ought to propose and the Congress ought to dispose. The Congress is good at disposing. Their function is to pick holes in what is proposed, as a matter of emphasis. To review a lot of silly things that administrations are likely to propose without understanding the complexities of the real world and all the diffuseness of the United States, indeed all the political problems that exist, it seems to me that is the strength of the Congress.

And I have this kind of ideal vision in my mind that the system as a whole works best when the principal load is on the administration, any administration, to present a hopefully reasonably coherent program over a period of years, recognizing the different interrelationships, and Congress is there to pick holes in it. If it is crazy then——

Mr. BRADEMAS. Will Chairman Volcker yield for an observation?

I think it is revealing, I say to my beloved and distinguished friend, as we like to say around this place, that he said what he said about the role of Congress, because it is reflective, I do not say pejoratively, of the attitude of one who has never been elected to public office, including never been elected to the Congress of the United States.

Mr. VOLCKER. I agree with that.

Mr. BRADEMAS. I said earlier and I did not linger long on it, that during the Nixon years, the administration of President Nixon, and this was an area in which I was active legislatively, had nothing to do with education whatsoever other than to veto the bill that Fritz Mondale and I wrote. And the suggestion that Richard Nixon or

Ronald Reagan or George Bush, for that matter, because these get into the stuff of our two-party system, should have been able intellectually, morally, competently, to have come up with a thoughtful program in, let's say, the field of education, I say this more with respect to Reagan and Bush, even, than I would of Nixon, but I make the point generally, is beyond reason.

You must understand, Mr. Chairman, that Members of the Senate and the House of Representatives are intelligent, they have been elected by the people, and they are quite capable of developing major public policy initiatives and have done so throughout the course of recent years, and will continue to do so. And that Congress has staffed itself with the congressional budget operation and an Office of Technology Assessment and is moving in other directions to strengthen its capacity to legislate, makes my point.

I am not getting into whether you dislike or like it, but most policy was not invented in the White House or the other end of Pennsylvania Avenue, but here. But I reject the idea that all intelligence and competence for developing policy initiatives is with one man or even two, or two women, for that matter, who have been elected, and that the little such capacity exists on the part of the 535 people here.

Chairman BOREN. I am going to let Chairman Volcker respond. Then I am going to let General Thornburgh—we may engage in some informal dispute resolution on who will have the last word. Did you have another comment you wished to make?

Mr. VOLCKER. I yield to no one in my willingness to have Congressmen take the initiatives where they think it is important. But this vision of an overall setting of priorities for an administration over a period of time I don't think speaks to the strongest element in the Congress.

Mr. BRADEMAS. There I am more sympathetic.

Mr. THORNBURGH. I will bypass for the opportunity of a point-by-point examination of John Brademas's characterization of the Bush and Reagan administrations, both of which I served in.

As an aside, I just finished a year's service in the United Nations, an organization that has a biannual budget, to no perceived advantage that I saw. Of course, their budget procedures are kind of surreal in the extreme. But there wasn't any advantage that I saw in the biannual process there as based on my knowledge of the budget process.

The budget process is simply a matter of following it and making it work. I am sorry, gentlemen. But that is really what it comes down to.

Senator SARBANES. Mr. Chairman, could I just observe that historically speaking in this country, through much of our history, the moving party on policy was the Congress and not the President. Woodrow Wilson wrote his landmark book in 1905 entitled Congressional Government. He spent a good deal of time pointing out that through most of the 19th century, the impetus on legislation was really with the Congress, and the Executive was a massive actor in that whole process.

I don't mean that is the way it should be today, but just as a historical matter, this notion that the President proposes and the Congress disposes has a relatively recent origin.

Chairman BOREN. Probably with the re-creation of the modern Presidency with Roosevelt, he probably did as much to change that earlier——

Senator SARBANES. And Wilson himself when he became President. He thought the whole thing through, and he had some very definite ideas about what he wanted to do.

Chairman BOREN. Vice Chairman Dreier?

Mr. DREIER. Thank you very much, Mr. Chairman.

And thank you, gentlemen, for your very helpful testimony.

I first have to say to you, Chairman Volcker, I came here as a young man, as a freshman Member of the Banking Committee, and I always was thrilled as I sat on the first row, the last to be able to question you, and I could go and have lunch when the testimony began at 10:00 in the morning, I could come back at 1:30, quarter of 2:00, have the opportunity to ask my questions of the Chairman of the Federal Reserve. So I want to thank you for that.

But I do agree with you that I think we should deprive some of those newer Members of that, because as we look at this challenge of trying to have those who have been in the Executive Branch meet their responsibilities, constantly testifying before committee after committee is I believe a terrible waste of time and resources because of all of the staff preparation that has had to go into that process.

Now, the natural question, since we are all concerned with it is, what do we do as an alternative? We have before this committee 14 different proposed recommendations that have come from the Library of Congress, the Congressional Research Service, which have outlined ways in which we might make some changes.

Now, I hesitate to ask you to look at those after the hearing and respond to us, but I would like to ask you to look at some of the proposals that we do have for changing the structure of committees here and provide us with some sort of response, because I think that while I know many different Cabinet members had the opportunity to do that, my particular experience—by the way, I am no longer on the Banking Committee, I serve on the Rules Committee now, and we don't get any members of the Executive Branch to come before us, just my distinguished colleagues.

But let me say that I would like to have you provide us with your thoughts on some of the proposals that we have had.

I would like to ask our distinguished Whip about the Rules Committee on which I now serve. I have been making this case time and time again throughout this committee. Your last term here, 85 percent of the rules under which we considered legislation were open, and 15 percent were restricted, limiting in some form the opportunity for Members to offer amendments to legislation. I wonder if you would care to comment on that tremendous change which has taken place.

We have had no more than two or three open rules in the 103rd Congress. Here we are halfway through the first session of the 103rd Congress, and the 102nd Congress, 66 percent of the rules were restrictive, juxtaposed to that, 15 percent when you had your last term here, and I wonder if you might care to comment on that for us.

Mr. BRADEMAS. What you are talking about is a good example of an ongoing theme, subliminal, I think, that has to undergird the deliberations of your committee. It is the war between order and liberty, if you go back into Western political theory. It is the war between effectiveness and openness.

It is easy to attack the Speaker and the leadership of Congress for not getting the job done. Why can't they get those bills passed? Why do they have so much trouble moving ahead on legislation?

Well, one way to get the job done in terms of moving ahead on legislation is not to allow so many open rules, which contribute to the already existing barriers in our kind of system to the passage of legislation. But the minute you move away from wide open rules to restricted rules, there will then be sharp attack, normally on the Speaker and the House leadership, for gag rules, making it impossible for the Minority, sometimes—usually Republicans in the present situation, but sometimes conservative Democrats who say, We are not able to be heard, we are not able to have our views known.

Now you look over at the other body, at the Senate, and you see the analog of that kind of a situation, where there will be complaint in the press, why can't the Senate get to legislation, why can't they get to a vote on an important issue like campaign finance reform? Well, absent 60 rules for cloture, a determined Minority can make it impossible.

And I guess my response therefore is that, again, it all depends. It depends on what your goals are, and it depends in no small part on what your politics may be.

Mr. DREIER. With all due respect, I find that argument rather weak, especially as you look at the House. One of the problems that we have had this year is we have been looking desperately for legislation. We have had a tremendous lull, and even when we have had literally nothing to do during a week, we will still have a restrictive rule.

Mr. BRADEMAS. In that respect that has nothing to do with it.

Mr. DREIER. If you are talking about moving legislation through, it is not as if there is something at that is delaying the time around which you can consider that legislation.

Mr. BRADEMAS. The gentleman wholly misstates my argument. It is not a matter of your having nothing to do. It is a matter of whether or not you want to be effective in forging a majority to pass legislation.

It is not because Members of the House are sitting around fiddling their thumbs, and therefore why not have an open rule so they can offer as many amendments as possible. That is not my point. My point is rather the greater the extent to which you permit open rules—I generalize in response to the gentleman's question—the greater the difficulty the leadership and whatever committee may be managing the bill will have in putting together a majority for passing the bill.

Mr. DREIER. Under your leadership why did you have so many open rules?

Mr. BRADEMAS. I wasn't forging the rules at that time. The Speaker was putting together the rules. And the fact that you cite the number of open rules is really not all that persuasive to me,

unless we make a case-by-case analysis of the legislative bills to which those rules ran.

The importance of the legislation could have a great deal to do with whether or not the Speaker and the Rules Committee decided we are going to have an open rule or a restricted rule. And also, what was likely to be the set of amendments that would be offered in the event that you did not have a closed rule.

So I am very wary, I am trying to make clear, Mr. Dreier, of generalizations about these matters. I would like to see a case-by-case analysis of the rules. And I am not here campaigning against open rules. That is not the point. I am saying, it all depends.

Mr. DREIER. Thank you very much.

The time has run out on a recorded vote for me on the Floor, and I would, Mr. Chairman, appreciate you looking at those proposals.

Mr. VOLCKER. I will be delighted to look at it. I always welcomed questions you felt were important.

Chairman BOREN. Senator Sarbanes?

Senator SARBANES. I wanted to point out in my days in the House, the Ways and Means Committee reported bills, particularly on tax measures, invariably came out under a closed rule. You don't apply the closed rule unless a majority votes to do so. They can overturn it, of course, the theory being the committee sort of crafted a tax bill which was very complicated, involved a lot of tradeoffs.

I remember Wilbur Mills speaking to this point on many occasions, and that then to go to the Floor and have kind of little, discreet changes in the tax code offered could sort of unravel the basic symmetry of the tax bill, and that therefore it was reasonable to present it to the House on the basis of either a vote for or a vote against this package.

In the Senate, the procedure is so out of hand that you can offer on a bill any amendment whatsoever, even if unrelated to the substance matter of the legislation that is before you. So you get some legislation on topic A, and you will have amendments being offered on topic M that has nothing to do with topic A. It is a breakdown in the system. And so all of a sudden you find yourself dealing with a subject matter completely foreign to the subject matter of the legislation that has been reported out of the committee.

Actually, my impression from my days in the House—and John, we served together—many of the rules, the distinction between closed and open doesn't really cover the waterfront. We had many rules were sort of modified open rules, so to speak. The Rules Committee would sort through a number of proposals and make certain amendments in order, and those would then be considered in the course of considering legislation.

That seemed to me often to be a fairly sensible way of doing business. You could get the work done, you could consider major alternative courses of action. You weren't sort of done in constantly by a whole series of sort of minor amendments always picking at the thing. But you could get alternatives considered as well.

Chairman BOREN. Well, I think this is an area in which both bodies can learn something from each other, because obviously we are at the two extremes in the way we are functioning now. There are times on the House side when Members feel that significant al-

ternatives don't have a chance to be considered. But on the other hand, as Senator Sarbanes as said, with our total lack of germaneness on the Senate side, we vote on the same things over and over again.

We had a vote on the Floor very much like that today, on matters not related to the pending bill, and there is no way at all to set some sort of coherent framework in which to operate. There has to be some way we can have a procedure that will work better.

Senator SARBANES. I also want to make this observation. This is a very political observation, but I am prepared to stand behind it. I think one of the things that happened in the Congress in both the House and Senate is more and more amendments being offered not essentially to craft the legislation that is before you, but simply to make a political statement. These are the amendments that are being offered simply to put people on the record on what is the currently hot-button political issue. In the Senate, it may even be unrelated to the legislation before us. In the House, I guess it has to be germane, but it is not really directed towards sort of shaping the legislation as much as it is trying to get people spotted politically. And that is becoming increasingly hard on the political struggle, regrettably so, in my opinion, in terms of developing legislation.

Chairman BOREN. I think you are absolutely right. It is really material for a 30-second spot. The amendment as drafted makes it almost impossible to explain within 30 seconds why you voted one way or another.

Really there is an enormous amount of time now being wasted through this kind of procedure as opposed to really legislating and getting down to business.

Mr. BRADEMAS. Mr. Chairman, I think it was Mark Twain who once said, "God loves fools and the people of the United States." Given the problems you have been airing here today, let's hope so.

Chairman BOREN. Well, thank you all very, very much. We have appreciated the testimony and the lively interchange.

We are glad that while the three of you are not currently actively in our Federal Government, that there certainly hasn't been any diminution of the stimulating testimony you would give and the intellectual interchange. We thank you all very, very much for being with us.

We stand in recess.

[Whereupon, at 4:55 p.m., the committee was adjourned.]

INTERBRANCH RELATIONS

THURSDAY, JUNE 24, 1993

UNITED STATES CONGRESS,
JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS,
Washington, DC.

The committee met, pursuant to recess, at 11:06 a.m. in room SC-5, The Capitol, Hon. Lee H. Hamilton (co-chairman of the committee) presiding.

OPENING STATEMENT OF HON. LEE H. HAMILTON, A U.S. REPRESENTATIVE FROM THE STATE OF INDIANA

Chairman HAMILTON. The Joint Committee on the Organization of Congress will come to order.

Today the committee is continuing its hearings on Legislative-Executive relations, with special focus on Congressional oversight.

Our distinguished witnesses are particularly knowledgeable about this issue because they are among the most important House and Senate leaders in the oversight area.

Many witnesses who have appeared before the Joint Committee have stated that Congress is doing an inadequate job of oversight. As former Speaker Tip O'Neill used to say, Members like to make laws, but they shy away from oversight. This committee and its members recognized the critical importance of oversight in ensuring that our laws are implemented according to Congress' intent; eliminating waste, especially in this era of fiscal scarcity, where every dollar counts; and making sure that Executive policies reflect the public interest. Given the size and the scope of the national Government, with its $1.5 trillion budget, the Joint Committee must be open to ideas and suggestions about how we might strengthen this vital function. I believe the following points deserve particular consideration.

Many Members suggest that there are too few incentives for doing oversight. They say oversight is dull, difficult work with little payoff in the press or with the voters back home. Is that an accurate assessment? And if it is, what can we do institutionally to encourage more and better oversight?

Are there specific reform proposals or rules changes that we should consider in the oversight area?

Do we need to achieve greater coordination and cooperation among committees and between the House and the Senate in the conduct of oversight?

Is Congress doing too much micromanaging and not focusing enough on the overall performance of agencies?

These are several of the questions about Congress' oversight role that should be addressed.

Our first witness today is Representative John Conyers, Jr., who has been representing the 14th District of Michigan since 1964. Currently he is Chairman of the Committee on Government Operations, a position he has held since 1989. He also sits on the Judiciary Committee and the Small Business Committee.

We would like to welcome you before the Joint Committee, John, and we look forward to hearing your testimony. Your testimony, of course, will be included in the record in full.

Let me first call on the Vice Chairman, Mr. Dreier, for any comments he might have.

Mr. DREIER. Thank you very much, Mr. Chairman. I, too, want to join in welcoming our good friend John Conyers here.

I would like to say that this issue of Congressional oversight is one which has been hotly discussed here in this committee, and it is going to remain a major topic of concern for us. That is why your testimony is going to be very helpful as we proceed with our deliberations here.

I welcome you. We are happy to have you.

Chairman HAMILTON. You may proceed, sir.

STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. CONYERS. Thank you, gentlemen and colleagues. I am delighted to be here.

I begin my comments this morning by offering to you my sincerest congratulations for the scope of the task with which you are charged, and the constancy with which you have taken it. I am maybe the 100th witness that you have listened to. That's a bit of testimony there, even for the Rules Committee or Foreign Affairs or Government Operations. I congratulate you sincerely. I realize that with the concluding of the testimony, that still doesn't end your responsibility. What it all adds up to and how it will be interpreted and what recommendations from this Joint Committee, made up of distinguished Members of the Senate and the House, is something that not just the Members of the Legislative Branch await, but in a sense those of us who have been watching the development of the Federal process. It has been changed. When we came in, Lee, there were major changes wrought that have been felt to this day. There have been other kinds of modifications grafted on.

We now come to this setting on this day, at this time, with a generally frustrated citizenry waiting to see what's going to happen. Are these guys really for change? Is this just another way to placate citizens who feel that the processes have become overloaded with procedure, that they are counterproductive, that they can't get anything done, that there's too much gridlock?

All of these things really add to the responsibility that we have to try to step back, and you have all been carefully selected to examine our own shop, see if we can come up with some sensible changes that will put it in order, make it operate a bit smoother.

It is to that end that I am pleased to join you with a few comments and suggestions of my own.

I think that joining the Government Operations Committee a number of decades ago was probably, without knowing it, the smartest move I ever made in my career. I just want to tell you why. I'm not seeking any new members; we've got 43, and that's more than enough, thank you.

But the whole idea of being in a position to oversight the Executive Branch of Government, to try to remedy the very problems that bring us here today, in a sense—inefficiencies, overlapping, duplication, the kinds of problems that violate process in terms not only of budget but in terms of the way business is done in procurement—is a tremendous opportunity. As Chairman of my committee, I have to interface with more of the other chairmen in the Congress than perhaps any other committee Chair. It brings me in contact with the Executive Branch of Government in a way that no other committee does. We have direct jurisdiction over many of their operations, plus any changes that would be proposed in the Executive Branch. Currently, elevating the Environmental Protection Agency to a department is in our jurisdiction, and any other modifications; budget considerations and enforcement are all part of our jurisdiction.

So it is a jurisdiction of which I am very, very proud, to be leading a very important part of our Congressional responsibility with my members, both Democrats and Republicans. And why? Because most committees, even though they have the oversight authority themselves—it is inherent in every committee to be able to oversight their jurisdiction—the reality that every member of your committee knows perfectly well is that that's probably the least attended-to responsibility. I say this as uncritically as I can, that any committee deals with its own oversight. Don't ask me why; I hope you don't, because it's a bit of an anomaly. Why wouldn't you watch over your own legislative product and see if it's working?

But in our governmental process, we're moving on to a new subject, a new issue. Things are always changing so fast that it's very hard to really go back.

So the Congress, in its wisdom back in the 1940s, saw that there should be one committee that doesn't have too much other jurisdiction except to review these things. For example, with reference to the military and the Pentagon, where the procurements are larger than anywhere else in our Government, I've been interfacing with the Chairman of the Armed Services Committee for years; we have worked on many matters, and it always happens that we pick up a subject—the C-17, just to pull one out—the question is not whether we should build a cargo airlift capability or what kind it should be, but what have been the problems with the one that we have?

And while the committee of authorization is locked in a very difficult question of whether to go forward or to build them or not, we are looking at—just to speak about this one subject—a very dismal track record, laden with inefficiencies, duplications, questionable activities not only on the part of the Defense Department, but the contractors themselves. And unravelling that would have been a job of such magnitude that the Armed Services Committee is trying to get up to the new speed, the new order of the day. Without a Soviet superpower, we have to reconfigure the entire military establishment of the United States. They really don't have a lot of

time to take 10 men and women off to look at what the procurement problems were with the C–17 to cause wings to fall off, tests to be fudged and failed, questionable loans, and the whole nine yards. They said, "Look, you take care of it, Government Operations; that's what you're here for." And we do.

So our job is an enormous one. I can tell you, we don't pretend to have examined every question that could be raised and brought to our committee, but we feel that the larger ones have an order of magnitude and public attention and outcry focused on them that lead us to picking these subjects selectively and moving along.

What has happened is that your Committee on Government Operations has, by definition—and this is the General Accounting Office, not our own committee report—we submitted $310 billion worth of activities, procurements, and questionable conduct that was lost or mismanaged in the course of a very short period of time. We're proud of that. Now what we're trying to do is work out a system where we regularly examine these questions and then go back to them to find out what happened. Last year for the first time in the oversight history of the Congress we compiled in one volume all of the problems that came to our attention and how they were addressed. This year, in addition to continuing that study, we are going back to determine what happened to the "dirt under the rug," so to speak, that we discovered last year and the year before. Is it still there? Was it cleaned up? And, also importantly, how was it cleaned up? So we now have a tremendous focus on how this matter should be dealt with.

The two most important pieces of legislation that we're proud of are the Chief Financial Officer Act where, after many years of encouragement from Chuck Bowsher at GAO, we were able to pass legislation in both Houses, with a tremendous assist from Chairman of John Glenn who chairs my sister committee in the Senate. This was a Chief Financial Officer Act where the accounting and bookkeeping responsibilities were vested in specifically-named and - trained people, not to be patronage appointments or a casual assignment of duty, and a method of accounting that would be Government-wide so that any accountant could read and interpret it, and that it would be regularized, because in the process we actually found that many of the books in some of the departments and agencies—you couldn't even make a preliminary report, they were in such disarray. I say that kindly; I will not mention names. It is all in the process of being repaired now because of that act.

We also have a Capital Budgeting Act which divides the budget between capital accounting and the rest of their monthly budgeting so that we don't have this big, one-single-pot theory of accounting where all of these very different matters are brought into play.

We have been the real champion in fighting Government waste. We are very proud of that record. I want to tell you, we would strongly recommend against adding any jurisdiction to the Government Operations responsibilities. In my report I point out that we have a breakdown of only 1.5 staff members for every major agency in the Federal Government. That should tell you that there's plenty of activity that we can't get to We have been zero-budgeted for the last two budget seasons, zero-budgeted. The people who have brought back a record of $310 billion worth of savings are

zero-budgeted, and we are left with less than two staff persons for this major committee.

The Congress has made some moves already, and you are all aware of them. One of them is that we've taken 6 percent reductions twice, in October of last year and just recently, and I think that that's instructive.

If I could just conclude on a note of recommendation, I would like very much to hope that there is serious consideration given by this Joint Committee to two-year budgeting. Every year is such a roller-coaster. It creates such instability. It precludes us from seriously looking around the corner at things, and I'm hoping that we can deal with it.

The second recommendation I would leave with this committee is that we stop loading the committees up with incredible numbers of membership. To put 55 members on one major committee, to me is to tie its arms behind its back.

I hope we will look at the difficulty, the delay, and the legislative trouble that has been caused by the rules in the other body that allow filibustering. If one Member can stop any piece of legislation, it seems to me that this ought to be a subject matter that can be reviewed and analyzed by this committee.

The question of non-germaneness, by which we are honor-bound but which does not apply to the other body—believe me, I respect them fully; it's a rule they haven't been able to address—but non-germaneness allows for the greatest kind of mischief and leads to incredible delays in conferences, as all of you who have been on conferences know. And then to legislate on appropriations, at least we have a rule preventing it; and for it to happen, there has to be a waiver permitted. But again, there is no such limitation in the other body. None. It seems to me that it's there that there ought to be some symmetry in terms of the rules of procedure.

These, plus my written comments, are the things that compel me to come before you. I again commend you for the work that you have done and that is still in front of you.

Thank you very much.

[The prepared statement of Mr. Conyers is printed in the Appendix.]

Chairman HAMILTON. John, we appreciate your testimony very much. I will have some questions, but let me begin with the Vice Chairman, Mr. Dreier.

Mr. DREIER. Thank you very much, Mr. Chairman.

John, I think it was very helpful testimony. I did get a chance to look at your prepared statement. I would like to raise a couple of items which you haven't discussed here but which are incorporated in your prepared statement.

Specifically, committee structure is a real challenge here. By the way, I think there are 60 members on the Appropriations Committee; you had mentioned 55. That struck me. One of the big things that we're trying to deal with here is, where do we go as we look at the challenge of trying to structure our committees? Do we in fact put into place parallelism between the House and the Senate so that we don't have a few conferees from the Senate and then a whole load of conferees from six committees in the House?

What should we do about the fact that we have 266 or 299—we hear all these different figures—committees and subcommittees in the House and the Senate? Should we bring about a reduction?

So the natural question that follows is, if we're not going to go from the ground up, which I am inclined to want to do in bringing about a major change here, do we take some of the committees that now exist and fold them into other committees?

I noticed in your testimony that you're opposed to the idea of having the Post Office and Civil Service Committee and the District of Columbia Committee folded into yours, and in your prepared statement you say that you believe that the specific challenge of trying to deal with oversight and eliminating waste in Government is such an overwhelming one that you don't feel that you can take on those other two committees, as some have proposed. I wonder if you can share some thoughts on that.

And then, if you don't want to do that, what do we do when we're trying to deal with this overwhelming number of committees and subcommittees?

Mr. CONYERS. Let me thank you very much, Brother Dreier. I appreciate your focusing in on a particular problem that comes within the parameters of our committee about these other committees. It is true that the Senate has combined these functions.

First of all, let me give you the solution, and then I'll go back to that. I say this with great trepidation. I hope that my colleagues don't read this and become infuriated, and I hope it is not misinterpreted in the media. I beg your humble indulgence.

May I ask you if there is still some rationale that has escaped me in 28 years of service that requires that we separate the authorizing and the appropriating processes completely apart?

Mr. DREIER. Haven't you found that in the Constitution yet?

[Laughter.]

Mr. CONYERS. Yes. Yes.

Isn't there some way that we could vest in those who determined the factual matters of the issue with—as we say in Detroit—how much bread is going to be put on the resolution of these subjects, rather than start it all off in another committee which, with all due respect to the feudal lords of the appropriations realm, they haven't heard one word of testimony in the authorizing committees and now, in their great wisdom, are going to attach how much money ought to be put to it.

It seems to me that you could accomplish a major reconfiguring of the Congress if you would eliminate—I haven't computed the number of committees and subcommittees, but it would be an important way to move forward.

Now, to the problem to which I alluded in my written testimony. Frequently because of the way we're configured in the House, Mr. Dreier, the problems of the Federal Civil Service are given far more—far more—scrutiny in the House by being a separate and free-standing committee than they are in the committee of my dear brother from Ohio, in which it is subsumed.

Now, the District of Columbia—with all due respect, in effect we are talking about a State in the Union——

I just mentioned your name, and not in vain. The red light went on.

[Laughter.]

Senator GLENN. Go ahead, John. That's fine. That's for me, not you.

[Laughter.]

Mr. CONYERS. Okay.

The District of Columbia—if we were talking about the Civil Service authority and Government Operations, that would be one discussion. But to take the District of Columbia—in effect a State, a de facto State—and say, "Hey, look, we've got to cut somewhere; we've got to constrict; we're going to make these angry citizens real happy by letting them know that we've taken these two committees and folded them into another committee whose jurisdiction prevents them from discharging their central responsibilities of oversight, waste, inefficiency, abuse, as fully as they would like. We're going to take the whole question of oversighting the District of Columbia"—and some wag will say, "Well, yes, that's oversight, too." So you are oversighting the Pentagon and the Executive Branch and EPA, so throw in D.C.

And I think that begs the question. The District of Columbia, in the current throes that it is in, in a serious attempt to have us and the public reconsider whether they should be considered as a State, as history suggests that they once were, that this is too important a matter to be tossed to one subcommittee in Government Operations and say, "Okay, guys." And there again, the House goes into far greater detail than does our other body in that regard in Federal Civil Service matters. My junior Senator from Michigan serves with great distinction on the Government Affairs Committee, chaired by my friend from Ohio. The Federal Civil Service is just—frequently we end up with the kinds of problems and tensions that we're all too familiar with.

So in this area, Mr. Dreier, I respectfully would recommend against us trying to reach this symmetry which, as a general principle, I would accede to. But in this instance, I don't see where that would be helpful to our legislative purpose.

Chairman HAMILTON. Mr. Allard?

Mr. ALLARD. Mr. Conyers, I would like to welcome you personally to the committee and thank you for taking the time to come here and testify before us.

Under the Rules of the House, the Committee on Government Operations is instructed to inform other standing committees of the House about the findings in its oversight investigations. Could you describe for the Joint Committee how this function is performed?

Mr. CONYERS. Yes. It is performed in several ways, Mr. Allard.

The first is that we have direct communication with the Chairman. Before you came in I alluded to the fact that I have more personal——

Mr. ALLARD. Let me interrupt you. Is this a formal communication? Or is it more or less informal, where you just sit down and talk with him? Or is there actually a communique or a memo or something like that?

Mr. CONYERS. Yes. It's both. We write, but I go far beyond just written information, because I see them. Les Aspin and I have worked together on every single matter of procurement that has affected the Pentagon, no exceptions. And frequently we do the same

thing with subcommittee chairmen. The same thing obtains with Ron Dellums, the present Chair of that committee, and so on down the line. In Foreign Affairs——

Mr. ALLARD. Let me interrupt you here. Have you made an assessment of how effective you are with your recommendations to the other committee? Do you feel like you're really listened to on your recommendations?

Mr. CONYERS. Well, I wish I could give you a general answer to cover that, but honesty being the course of conduct to which we are bound, sometimes I get lousy noncooperation. It doesn't even reach the level of cooperation. Terrible. That's not to dismiss the fact that in many other instances I get excellent cooperation, and we save ourselves a lot of time, and sometimes even hearings, just by sitting down with the chairmen.

Mr. ALLARD. When you don't get cooperation, what is your follow-up? Do you just have to say, "Well, we tried, we did our part," or is there some follow-up where you feel you can force some cooperation or bring about some cooperation?

Mr. CONYERS. There are several things that happen in that situation, Mr. Allard. First of all, negative publicity is not desired by anybody leading any committee in the Congress that I've ever met in the course of my career. We don't resort to it lightly, but this is the public's business that we're dealing with.

The second thing that we do is that with this compilation of all the instances of inefficiency, abuse, mismanagement, failure to follow policy or statute, we now have a documented trail so that we don't reinvent the wheel every Congress and just walk out at the beginning of each Congress and say, "Well, what do we oversight for the next two years?"

We have the record of each agency or department, and from there we pick up where we left off.

In that regard, there were many people who said, "Well, we just had a change in the White House. I guess Government Operations isn't going to be that active anymore. We've got a Democratic chairman"——

Mr. ALLARD. Let me interrupt you a little bit because my time is running out and there's another thing I wanted to bring up.

Mr. CONYERS. Could I just make this point, sir?

Mr. ALLARD. Yes.

Mr. CONYERS. I don't want to leave this unresponded to.

We are busier with a Democratic Administration than we were with a Republican Administration, and that's not to impugn President Clinton's new organizational group, but there are so many things that we are bringing to their attention for correction that we're busier now than we were in previous Administrations. So it wasn't a matter of being an attack dog for the Congress against a Republican Administration; not at all. We are moving with the same persistence.

I might say here that it was our committee that sued the Advisory Panel on Health Care, questioning whether they had a right to operate without full view in public and observing all of the rights of the Freedom of Information Act and Privacy Act that were afforded. We had no reluctance about that.

Mr. ALLARD. My understanding is that with the 1974 reforms, your committee was required to file an oversight plans report at the onset of each Congress. Has that been done or not been done?

Mr. CONYERS. First of all, it has been done. We have one for every single year for which I have been Chairman. The answer is, absolutely.

But unfortunately, and this is kind of important, everybody doesn't rush breathlessly to the Printing Office to read the reports that we file, and that's why the personal and informal communication becomes so important, sir.

Mr. ALLARD. Do you think there's something that could be done about cooperating with the Senate side on some of your responsibilities? I would like to hear some comments you might have about coordinating some of your oversight responsibilities with the other body.

Mr. CONYERS. Well, I am proud to say that Chairman Glenn has been before my committee more times than I can recall on a wide variety of subjects, to advise us on what his committee is doing. Not only that, we have a close informal relationship, not only between him and me but between our staffs, and that is a point that is extremely important. We observe that close communication and cooperation in every instance. Not only that, but members of his committee have testified before our committee, and likewise I have been before theirs.

Mr. ALLARD. Could this function as a joint committee between the House and the Senate?

Mr. CONYERS. As a joint committee?

Mr. ALLARD. Could you work together on your oversight functions on the administrative agencies?

Mr. CONYERS. Well, I had never thought of that before. May I say that that's the first time that idea has ever reached my ears in my whole life? I had never even imagined it.

[Laughter.]

Mr. CONYERS. The reason, among others, is that with the schedule of Senator Glenn and the members of his committee, I don't know how we would be able to meet. If you look at the Congressional calendar at the number of meetings that are being held in Governmental Affairs and Government Operations Committees, if you ever think we could operate jointly, I think that would be highly unlikely.

Mr. ALLARD. If we could reduce the number of committees, there is a possibility that that could come forward. But it's just a thought that I had.

Mr. CONYERS. Well, look. Thoughts are perfectly welcome, even in the Congress——

[Laughter.]

Mr. CONYERS. —and we can't ignore any of them. I'll keep that in mind.

[Laughter.]

Mr. ALLARD. Thank you very much, Mr. Chairman.

Mr. CONYERS. My pleasure talking to you.

Chairman HAMILTON. It doesn't sound to me like you're going to keep it in mind very long.

[Laughter.]

Chairman HAMILTON. Ms. Dunn?

Ms. DUNN. Thank you, Mr. Chairman.

Mr. Conyers, I sat on a meeting a couple of months ago of the Accounts Subcommittee of House Administration, and we were reviewing budgets of committees. I noticed when the Government Operations budget came through that the staffing was really very disproportionate. At that time it was 54 Democrats to 4 Republicans on staff in that committee. It resulted in my putting together some ideas to cut back committee staff or to equalize committee staff at a ratio of 2 Democrats to 1 Republican.

I am wondering, Government Operations is just about the only link that I have seen in my short time in Congress where you're really doing some important review work of the Executive Branch by the Legislative Branch. I'm wondering, in this time when we have a Democratic Congress and a Democratic Administration, if it isn't time for us to look at the possibility of equalizing that committee, staff-wise and member-wise. What are your thoughts on making that a bipartisan committee with equal representation?

Mr. CONYERS. Well, I am used to that question because it comes up frequently. Those numbers aren't quite accurate, but there is a large disproportion between the Republican and Democratic staff, larger than is normal in the committees.

First of all, that is traditional. It is not something that occurred under my watch; as a matter of fact, we haven't changed it much. But the reasons for that are built into the relationship of the chairman and the ranking minority member down through the ages. Former Member Frank Horton of New York was the ranking Republican member, and, of course, for decades Jack Brooks was the Chairman of Government Operations. They worked in such close harmony and such a close relationship that there was never any question about the disproportionality. Frequently, many of the investigations have no partisanship. Fraud, waste, and abuse is not a Democratic issue nor a Republican issue. For that reason, the committees worked exactly in harmony. Although the issue was raised in the Administration Committee when we came before you, and it is raised by persons like yourself who have a responsibility to ask "how come," the simplest answer I can give on my watch, whatever the numbers may be, is that—and I have assured everybody in the Congress, and I make this statement one more time—no Republican on the Government Operations Committee, and particularly the ranking member, Mr. Bill Clinger of Pennsylvania, with whom I have worked for many years, has ever been denied staffing, resources, equipment, travel, or approval of hearing requests from this Member. Not a one.

What happens is that the investigation of these matters frequently starts off with a little letter, then it builds up, and pretty soon you're dealing with a lot of trails, paper and otherwise, so the people who started work on them keep working on them, Ms. Dunn. The fact that they are Democratic staff or Republican staff doesn't matter. Each time the ranking member comes before your committee and says, "Well, you know, I haven't asked the Chairman for any more members, and that may be why he hasn't given us any more," that's the way we work. It's a beautifully coordinated committee and a perfect example of how bipartisanship can

work on a committee that deals with a nonpartisan subject like the ones that are under our jurisdiction.

Ms. DUNN. Then with the bipartisanship you would have no objections to equalizing the number of staff and members between the minority and majority on Government Operations?

Mr. CONYERS. You know, if you were a member of Government Operations and raised that subject, we would be happy to take it up. But guess what? Nobody on the committee sees any need to change the circumstance that exists.

Chairman HAMILTON. John, we've got a lot of questions for you, and we don't want to keep Senator Glenn waiting. I think we should probably move on.

I want to thank you very much for your appearance and your leadership in the Committee on Government Operations. I think you set a good example of oversight for all of us in the other committees. We very much appreciate your testimony this morning.

Mr. CONYERS. Thank you very much. Anything that comes in writing, I would be happy to respond to.

Chairman HAMILTON. I think we very well might be in touch with you as we proceed along with the course of our work here, and we thank you for your cooperation.

Mr. CONYERS. Thank you, Mr. Chairman. Thank you, members of the committee.

Chairman HAMILTON. We would like to welcome as our next witness Senator John Glenn, who was first elected to the United States Senate in 1974. In addition to his position as Chairman of the Committee on Governmental Affairs, he serves on the Armed Services Committee, the Special Committee on Aging, and Select Committee on Intelligence.

John, we are delighted to have you with us this morning. I apologize for making you wait for a few minutes. We look forward to your testimony, and you may proceed.

STATEMENT OF HON. JOHN GLENN, A UNITED STATES SENATOR FROM THE STATE OF OHIO

Senator GLENN. Thank you very much.

Let me just back up what Chairman Conyers was saying a moment ago about cooperation back and forth. We do cover a whole variety of things. We have a little more of a variety in Governmental Affairs over in the Senate than he perhaps does on Government Operations in that some years ago, in an effort to streamline some things over in the Senate, they did away with the Postal Committee and the D.C. Committee and then termed the full committee Governmental Affairs. This happened well before I was on the committee. So we have slightly different responsibilities, but we do work together closely on these things.

I will skip through a lot of this to leave time for discussion, Mr. Chairman, if that's all right with you.

Chairman HAMILTON. Your statement will be entered into the record in full.

Senator GLENN. Good. We do have a longer statement than the one I have here, and I would appreciate it being entered in the record. Thank you very much.

Let me say that I don't envy you the task that you've taken on, but I think this task is long overdue. I think we have many things that need to be corrected around here to get the confidence of the people of this country, and that is absolutely critical. It means that the Nation's interest must come before special interests or our own individual, personal interests.

We have an obligation, one that this committee is admirably fulfilling, to ensure that a more effective and accountable Congress can strengthen—instead of undermine—our representative democracy.

The two themes I would like to address for a couple of minutes are about the committee system and the role that it plays in effective governance.

We need to reform our committee structure in order to revitalize the legislative process. I will talk a little bit about the management oversight for which committees are responsible.

Effectiveness of Government is a thing that affects everybody in this country, every single life in this country and every business. To make more effective our committee system, I think the Joint Committee must ask the hard questions about how we can create and enforce jurisdictional lines that make sense to people out of Government, not only those of us serving here in Washington. What should be the function of the committees? How do they work so that we prevent another HUD scandal, FEMA disaster, and so on? Can we set goals? Can we measure performance of our committees, as we now are seeking to do in the Executive Branch, through the performance review that the Vice President is taking on?

I hope we don't wind up with just another exercise in "boxology" or rearranging deck chairs on the Titanic, as has resulted from some of the past efforts at reorganization.

The number of committees—I think we have to look at that a little bit. I'd like to offer some specifics in this area, with the idea of getting better results.

Committee structure and assignments—I think that besides reducing redundancy and streamlining jurisdictions, trimming the number of committees and subcommittees will also ease the burden on Members who must serve on an excessive number of committees. We are all hit with that. I am overscheduled this morning by about three committees that I haven't even been able to go to, even though I have responsibilities to the people I represent and to the country to be there and participate in those functions. We are all faced with that kind of a thing on a daily basis.

I think there is a way that we can get past some of these things. I would like to see us reorganize, and this would be a very major restructuring, but I think sometime we have to get to restructuring our Government along functional lines. Now, how would we do that? Well, this would be a general upheaval, and I understand that, but I think five or possibly six major committees could take in most of the functions of Government. For instance, what if we had a Department of Human Resources, that took in all of those functions; a Department of Natural Resources; a Department of National Defense; another one of Economic Affairs; of International Relations; and perhaps a sixth on Rules and Administration?

Now, I know it's a big job to reorganize the Executive Branch of the Government along that line, even though I might prefer to see that, but perhaps we could reorganize our committee structure along those lines. This would encompass a number of things. It would also mean sort of a senior level "executive group," if you will, which could almost be formed as a cabinet for leadership here in the House or in the Senate. I think that's the way you would organize a business. If you are starting out to organize a business, it has to be organized along functional lines. And our committee and subcommittee structure here has just sort of grown and expanded through the years.

I am not an expert on the House subcommittee structure, but over in the Senate it's become almost a custom that you try to have a subcommittee for each new Senator coming in. We don't quite meet that, but we don't miss it very far, and almost every member of the Senate has a subcommittee of one kind or another, even new Members sometimes. That shouldn't be necessary.

I think if we organize more along functional lines, as I have suggested here, which I would hope the Executive Branch would also follow, that would be a much better way to do our work.

Chairman HAMILTON. I'm going to interrupt you here.

Senator GLENN. Sure.

Chairman HAMILTON. The reason the members are leaving is not because they don't want to hear you, it's because we have a vote pending in the House. We'll be back momentarily and take it up from there.

Senator GLENN. You go ahead and break and I'll just wait until somebody comes back. That's fine.

Chairman HAMILTON. It will be very brief.

[Recess.]

Chairman HAMILTON. I will call the committee back to order and recognize Senator Glenn so that he can complete his statement. We thank him for his indulgence, but we had to go and cast some votes on the House side.

Senator Glenn?

Senator GLENN. I certainly understand. We've had problems when we're on votes over on the Senate side, also.

The next area I wanted to bring up, Mr. Chairman, is the Ethics Committee. I know we have different arrangements in the House and the Senate, but over on the Senate side, I think after considerable reflection about the approach used by the Senate to discipline its Members, I would recommend the Senate create an ethics panel—and perhaps one for the whole Congress—that is outside, composed of former Senators or House Members, or perhaps retired members of the Federal judiciary, and members of the general public, also. In my view the Ethics Committee, as currently constituted—at least in the Senate—is unable to obtain the confidence of the Senate or the American public that its proceedings are fair or unpoliticized, and I think I speak for many Members when I say that we were not elected, either in the Senate or the House, to sit and serve as judges and juries of each other. I think it would not only be fairer to Members but it would make sure these matters are dealt with properly if we had an independent group from outside.

On committee rotations, as the chairman of one full committee, the Senate Governmental Affairs Committee, and one subcommittee, which is the Subcommittee on Military Readiness and Defense Infrastructure of the Armed Services Committee, I have thought long and hard about the advisability of rotating memberships of committees. I currently serve on the Intelligence Committee where there is a term for members, and you have to move off of that committee after a set number of years. I believe there is merit in adopting terms for certain committees, among these the Intelligence Committee, and perhaps the Budget and Appropriations Committees also. I know you don't have quite the same seniority rules or customs in the House that we have in the Senate, but I think that perhaps seniority rules are carried too far in the Senate. That should not be the only way that committee chairmen, for instance, are selected. I think it's important to assure the institutional memory, and certainly seniority has its place, but I don't think that should be the only criteria where there is other expertise and knowledge that could be brought to bear if those people were considered as chairmen.

On another subject, on budget authorizations and appropriations committees, I think we've gone overboard on our committee structure. I don't know how we get out of this quagmire we're in, but there are many possibilities for committee consolidation and streamlining that I think we could get into. We have an authorizing process, an appropriating process; we now have a budgeting process over all of them, and at least in the Senate I think there are many, many examples of where we have voted on particular issues at subcommittee, then at full committee in the authorizing process; the same thing comes up at subcommittee and full committee in the appropriating process, and people won't give up. We see them out on the floor again during the processes out on the floor, and then we run through the whole thing again in the budgeting process in the spring and in the fall before they are locked in, where we were supposed to be setting general goals, but then too often these things become the—we now have a lot of these same individual things that were suggested in committee that are now suggested out on the floor in the budgeting process, even in the spring budgeting process that we go through. So I think there is a lot of streamlining that could be done there.

I do not know, Mr. Chairman, whether we combine the budgeting and the authorizing functions, and do away with authorizing committees; or do we combine authorizing and appropriations committees? But I know that there is so much overlap now among the budgeting process, the authorizing process, and the appropriations process, that it literally becomes legislative WPA. We're just making work for ourselves, and unnecessarily. I'm not trying to shortcut anybody's ability to bring up a matter and have it fairly heard, but this thing that we go through now, of hearing the same things in authorizing and appropriating committees and in the budgeting process, all overlapping, and voting several times a year on the same issue, just doesn't make much sense to me. I think we should be looking at ways to combine those functions.

Staff told me that a vote has just begun over on our side on the Sasser amendment, so I, too, am going to have to run before too long and get my vote in.

Chairman HAMILTON. Senator, I did get the same note here, and I was going to make sure you didn't miss that vote.

Senator GLENN. Thank you, good. They'll let me know when we're down to about five minutes here, and then I'll run.

I think we all could do a much better job on oversight than we do. I would like to suggest that we go to a biennial budgeting procedure. I think we definitely should do that. We've done that on the Armed Services Committee of which I am a member, but because all other committees are not on that basis, it doesn't necessarily work that well.

I see no reason why we can't do it on a biennial basis and use the off-year when we're not doing specific budget matters for oversight, and do a far better job of oversight in that off-year. Now, whether it should come in the year of election, or the odd year, which this year is, in between elections, I don't know. There are arguments in both directions. But I really do think we should go to biennial budgeting and do a much better job of oversight which, it seems to me, too often gets short shrift. We do a lot of that in our Governmental Affairs Committee, obviously, because one of our functions is to look at the efficiencies of Government and the organizational aspects of Government.

But we have so many things that do not get looked at in the way of larger management considerations that mean the success or failure of programs: issues of waste, fraud, and abuse; financial management improvements. We put through the IG Act and the Chief Financial Officer Act. Too often I think we're one of the few committees that really looks at those things and gets into what's really going on in each department. There are some very promising things going on with those two entities.

We should be looking more at outcomes instead of just the inputs. This performance review that the Vice President has going, I think we should be doing that as a matter of course here. It should be our requirement for every committee to do that kind of a review going into these programs, not always just coming out of them.

Another issue is academic research. We asked the Congressional Research Service a short time ago to total up what funds we had in all the budget for academic research and development, almost without exception earmarked funds, and we all know what that means. It turns out there is $700 million that they came up with. Now, I think that ought to be brought out and put under a separate function in the budget. I think most of those funds should be determined by competitive considerations, anyway, so that these are not just the traditional pork that everybody gets in under some specific little ruling of some kind or some language that they know what it means, and the money is there, but which isn't apparent to everybody else. We just have stuff hidden all over the budget like that. Trying to ferret these things out is like trying to find a four-leaf clover on a football field. It's just very difficult to do, and I think we ought to pull all those things out.

On nominations, I have been long concerned about the qualifications of political appointees. The political appointees in Government, Mr. Chairman—I had a little study done by GAO; they looked into it. Do you know that 31 percent of our political appointees leave their jobs within 18 months? And half of our political appointees are gone within 27 months? Now, how do you expect to run a Government with that kind of a turnover, churning, going on over in the Executive Branch of Government? It's impossible.

So what I ask each one of the people that I have up for confirmation before my committee—and we have quite a number we're responsible for—I get out of them a commitment that, yes, they will serve through this term; at the pleasure of the President, of course, but they will serve through the term and didn't come in just to get their dossier filled out a little bit and get their ticket punched for another job someplace that they're heading for.

Chairman HAMILTON. Does it work?

Senator GLENN. Yes. Without exception, I've had people say that they will agree. Now, that isn't binding on them, obviously, just my getting their verbal agreement, but I think it indicates that there is a problem there. So I think we ought to look at that a little bit.

Rules and procedures—I think we can also do a lot in that area. I think there have been some abuses in that particular area.

Mr. Chairman, I am going to have to run and vote. We all have a problem today. I submit my longer statement.

Let me say on the budgeting, that our colleague was talking about a little while ago, over on the Senate side we have a 2/3–1/3 majority-minority, and they have 2/3–1/3 on the money. The majority has 2/3 on most committees over there; that's what I have on Governmental Affairs, and 1/3 of the money goes to the minority. They can hire 50 people at cheap wage rates or they can hire 2 people at high wage rates. It's up to them how they want to spend that amount of money. We have a break of 8 to 5, Democrat to Republican, on our particular committee.

So, Mr. Chairman, I appreciate this. I'm sorry I have to rush off.

[The prepared statement of Senator Glenn is printed in the Appendix.]

Chairman HAMILTON. Well, we fully understand that, of course. Thank you very much. We will review your written testimony. You have been helpful to us. I wanted to go into this functional line reorganization; maybe I'll have a chance to explore that with you at another time.

Senator GLENN. Well, maybe I could run back down later.

Chairman HAMILTON. I think we have two of your colleagues coming in just momentarily. But we will be in touch with you, John, about these matters.

Senator GLENN. If we could go to a functional organization in the Government, or at least the Congress——

Chairman HAMILTON. Would it pass the Senate?

Senator GLENN. I don't know whether it would pass the Senate or not. I'd sure try to get it passed, because I think we're due for major surgery in this organizational area. I hope you people get into that. I hope you get the big axe, not just the scalpel. I think we need real reorganization.

Thank you.

Chairman HAMILTON. Thank you, John.

We will stand in recess until the other witnesses are available. [Recess.]

Chairman HAMILTON. The committee will resume its sitting.

For the final panel today we have the Chairman and the ranking member of the Subcommittee on Oversight of Government Management, Senators Carl Levin and William Cohen. Senator Levin is not here yet, but we are very pleased to welcome Senator Cohen. He is a member of this Joint Committee. He has testified during our hearings before with respect to committee structure. He first came to Capitol Hill as a Member of the House in 1972, and was elected to the United States Senate in 1978. He is currently the ranking member of the Special Committee on Aging and serves on the Armed Services Committee and the Judiciary Committee.

Bill, we thank you very much for joining us today. As I think you know, we are focusing on the general question of oversight. I know you and Carl spent a lot of time on that, so you may proceed, sir.

STATEMENT OF HON. WILLIAM S. COHEN, A UNITED STATES SENATOR FROM THE STATE OF MAINE

Senator COHEN. Thank you, Mr. Chairman. Hopefully Senator Levin will be able to join us and give a full statement.

I do have a prepared statement that I would submit for the record, and perhaps just touch on the highlights of it.

Chairman HAMILTON. Without objection, that will be made a part of the record.

Senator COHEN. I think all of us who serve on the Joint Committee are aware of the low esteem in which our institutions are held. There was a recent poll that indicated that 98 percent of the American people feel that Federal agencies are spending money without any regard to the efficiency of the various programs. That's a pretty extraordinary figure. We also know historically that Congress has not enjoyed a very high level of esteem in the eyes of the American people, and perhaps no group of people—with the possible exception of lawyers—have enjoyed more honor and more obloquy than politicians. But we all face the same irony, I guess, and that is that people tend to denounce lawyers as a group, but love their particular lawyer. The same happens to be true with their individual political figures, for the most part.

But I think this 98 percent figure is a truly extraordinary one. That represents the level of discontent—and dismay, I suspect—on the part of the American people, who feel that their dollars are simply being wasted. And they see evidence of this almost on a daily basis, unneeded and unwanted Federal buildings. We've had a good deal of publicity on the fact that GSA has not been engaged in real property management techniques for some time now, that we are building an extraordinary number of expensive buildings in cities in which there are commercial vacancy rates from 18 to 22 percent and even higher in the commercial sector. We are purchasing none of those buildings from either FDIC or the Resolution Trust Corporation.

We see examples of Federal warehouses filled with billions of dollars of unneeded goods, and we find we have Federal contractors who are charging $0.60 for making Xerox copies.

All of those stories—in fact, the reality of those stories—indicate that there is a confirmation of the deep level of cynicism that exists in the country today.

Congress historically has had the power to exercise oversight. It goes back to the very founding of the institution, certainly. We have the power, for example, to organize the Executive Branch. We have the power to confirm and to impeach, and we ultimately have the power of the purse. As I think our founding fathers said best, someone has to be entrusted with power, but no one can be trusted with power. For that reason they called upon each Branch to oversee the others, to be doubly sure that we are abiding by the rule of law.

In 1946 you had the first confirmation of that oversight power in the Reorganization Act of that year, but since that time——

Chairman HAMILTON. Carl, we are glad to have you join us.

Senator COHEN. —we have seen the oversight activities and responsibilities substantially weakened due to the growth of the Federal bureaucracy, due to the vested interests in the authorizing committees—and I'll speak about this in a moment—and third, to the pressure on all of us to deliver for our constituents once those committees set up and fund the various programs. I give you one example of the level of bureaucracy that has been spreading.

In 1932, in the Department of Agriculture, there were 22,000 employees. It had a budget of $280 million, and served 6.7 million farmers.

In 1993, we have 113,000 employees. We have a $66 billion budget, and we serve 2.1 million farmers.

Has oversight been simplified or expedited? The answer is no. At one time you could pick up the phone and call the head of that agency and get a response. Today you submit a request to the Congressional Relations Office, and then it goes through a vast labyrinth of the Federal bureaucracy.

Any of you who have had occasion to pass through Logan Airport in Boston will see a Rube Goldberg contraption where you drop a ball down a chute which sets off a series of motions throughout this huge display. It finally ends up down at the end of that particular device, several minutes later. Everyone is fascinated with how everything trips another lever and another particular motion, and every time I pass through the airport it reminds me that that's pretty much how the bureaucracy in this city functions.

We also know that what is taking place and what is cutting down on true oversight is the old stall. I think time is the ally of the bureaucracy, and it's also the enemy of Congress. You and I and Senator Levin and Congressman Allard have all sat on committees, and we know that we are pressured by the conflicts in our schedules. We are overburdened with various committee assignments. We submit letters. We hold hearings, and then time will simply pass. There will be a delay in the response, and all those on the delaying end know that we have a very short attention span. There are so many demands upon our time that it will be rare if

we can get back to it, and when we do it may be the next session, and then we start the process all over again.

There is another aspect to it that all of us who serve on authorizing committees feel that we have to elevate various agencies to cabinet-level status. That signifies the importance of the particular agency that we might have jurisdiction over, but once you elevate it to cabinet status, then that signifies even greater power of your chairmanship or ranking position; you now have jurisdiction over a much more important agency.

The third point that I mentioned earlier was the special interest lobbying. Once a program has been created, it is virtually impossible to cut it back. The pressure is on to expand it to satisfy that particular group. If you take the combination of factors, I think you can see why we have such a vast Federal bureaucracy and why it's so difficult to do much about it.

I have been one to recommend that we combine the authorizing committees with the appropriating committees. I think if we're going to simplify, we ought to really strike at the heart of our problem. We simply have a layered process which contributes to excessive delay and inaction, and I would recommend that we combine both appropriating and authorizing committees, and that we have an outside committee that would oversee the various committees that are set up for fraud and waste.

I will close very quickly because my Chairman of the Subcommittee on Oversight of Government Affairs is here and I want to give him an opportunity to speak to you more directly.

We have served on the Subcommittee on Oversight since 1979. I think we have made some remarkable reforms that have produced substantial savings through that oversight process. The first one that I can recall is the Competition in Contracting Act, which I think has saved billions of dollars for the Federal Government by insisting on competition. That came about as a result of our efforts in oversight. We have held hearings dealing with clinical laboratories, finding that we have a system where we not only save money, but we save lives through the adoption of the so-called CLIA, the Clinical Laboratories Improvement Act.

Another example of fraud and waste came about through the hearings on the Aging Committee on which I serve as ranking member, the so-called durable medical equipment suppliers, where we have some fly-by-night operations who set up their sort of boiler rooms and hire teenagers to then advise every senior citizen in that region of the kind of things that they are entitled to. They end up selling a bill of goods, such as a so-called flotation mattress, which costs about $23, a piece of foam—they paid about $23 for it and got reimbursement through Medicare and Medicaid of $1,100.

So we have been very vigorous in our oversight process. We have saved money and lives through it. I would recommend that we simplify our system by combining authorizing and appropriating committees and keep a very vigorous oversight process outside of that committee's jurisdiction. So that puts everybody on notice that we are not simply going to be feeding those committees' interests by promoting more and more spending, but rather having very vigorous oversight.

I will stop here, Mr. Chairman, and yield to my friend from Michigan.

[The prepared statement of Senator Cohen is printed in the Appendix.]

Chairman HAMILTON. Could you get through the Senate a proposal to combine the authorizing and appropriating committees?

Senator COHEN. Well, we would have to take that up with Senator Byrd. I'm sure that he might have some objections. I'm quite willing to merge the authorizing committees and put them as part of the appropriating committees. I think it should be the other way around, but practical realities would probably dictate an inversion of that proposal. But I think we have to combine them. I think we ought to have a two-step process rather than the three-step process that we have right now.

Chairman HAMILTON. We are very pleased to have Senator Carl Levin joining us. He was first elected to the United States Senate in 1978. He serves on the Armed Services Committee and the Small Business Committee.

Carl, we are pleased to see you. Thank you for coming down to join us this afternoon. You may proceed to your testimony. It was just handed to me; that will be entered into the record in full, of course.

STATEMENT OF HON. CARL LEVIN, A UNITED STATES SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Thank you. Thanks for the invitation. Being here with Senator Cohen is a double pleasure. He and I have been Chairman and ranking member of our little subcommittee of Governmental Affairs since it was created in 1979, when Senator Ribicoff created it.

I came to the Senate determined to spend some significant time on overseeing Federal programs, and this came out of my frustration as a local official, president of the City Council in Detroit, with the way in which Federal programs were managed. I saw program after program, well-intended, with a goal that I shared, being undermined by waste, fraud, abuse, and arrogance in the way in which they were administered. It was very frustrating to me as a local official to see programs that I believed in—indeed, that I had supported and fought for—being wasted so that they did not accomplish the purpose which was so vital to them.

So when I came to Washington, I was determined to participate in the oversight process. I asked Senator Ribicoff at that time whether or not he might create this subcommittee; in fact he did create the subcommittee, and as I've indicated, I've had the pleasure of working with Senator Cohen as Chairman and ranking member since 1979.

Just to flesh out some of the oversight issues that we've been involved in a bit, Senator Cohen mentioned a few, but I think a few others would be familiar to you as well.

The Social Security disability fiasco, when we had hundreds of thousands of people being removed wrongfully from Social Security disability rolls—our subcommittee was the one that got into that issue in the Senate. The IRS abuses—we had hearings on those

abuses, small businesspeople being put out of business needlessly by IRS arrogance. That led to a Bill of Rights for taxpayers. DOD supply system excesses—this has been rampant. I think we are all familiar with some of those, Allen wrench and toilet seat issues. In the Senate, that came through our subcommittee. We were the ones who brought those to light on the Senate side, and a whole host of other issues which we have been able, with a very small staff, a marvelous staff, to unearth and to make progress on and to save billions on. We saved literally billions last year on the DOD supply system, which had excess supplies in warehouses that were bulging.

I have just a few specific suggestions as to how you might be able to give some greater or additional support to the oversight process and to highlight the importance of Congressional oversight and to retain a structure for the conduct of meaningful oversight.

First, I think we ignore a lot of the oversight that we now do. We produce oversight in some quantity; not enough, in my book. I think Congress should pay much more attention to oversight than it does. One of the ways in which it could do that is if we all had more time for that and if the committee system were streamlined. But putting that aside just for a moment, we do oversight, but often ignore our own oversight and what it produces.

Let me just give you one example of that. The Senate Banking Committee in its own analysis of the causes of the HUD scandal involving Section 8 housing—this is its own analysis—said that "Congress did not pay attention to a number of reports which highlighted ongoing problems at HUD, especially the IG semiannual reports." So not only our own oversight, but we have GAO oversight and we have IG oversight already in existence that we do not take advantage of.

This, by the way, is a GAO book with which you may be familiar, called "Status of Open Recommendations." This is the open recommendations of the GAO, the ones that have not been acted upon.

Now, how can we take greater advantage of the oversight which is being done, whether it's our committee oversight or the GAO oversight or the IG oversight? Let me give two specific suggestions.

One is that our committees of jurisdiction be required each year to hold a hearing on the prior year's reports by the relevant IGs and by the GAO within their committee's jurisdiction. It would force us individually and personally as Members to become familiar with the specific recommendations of the IGs and the GAO in the area of our committee jurisdiction. It's an action-forcing mechanism, in essence. There is a lot of material that we do not personally become connected with because it's not the subject of a hearing. Hopefully our staff looks at these reports, but this would force us to give more attention to it, if our committees were mandated to hold a hearing each year on the prior year's recommendations of the IGs and the GAO in their area of jurisdiction.

Secondly, I think we should require as part of the budget process that agencies over which our committees have jurisdiction report to us annually on what actions they have taken or haven't taken in response to the outstanding IG and GAO recommendations.

So as part of each year's budget process we would tell the agency, "When you come in here defending your budget, as part of

that presentation we want to know annually what actions you have taken or what actions you have decided not to take that have been recommended by your own Inspector General and by the General Accounting Office within your area." That's a second way to kind of take fuller advantage of the recommendations for savings in the way in which these programs are operated.

Thirdly, in our oversight process I think we can try to find ways to apply the principles that we are establishing in one program to other, similar programs. Let me just give you one example.

We have asked the GAO to analyze an existing loan guarantee program to see if they can isolate elements which would be essential, useful, in other loan guarantee programs in order to protect the Government's interest. It's a way of kind of taking the lessons learned in one area and trying to see if we can't find ways to make them available in similar areas where other committees might have jurisdiction, but we don't do a lot of that. It's a bit vague, hard to get a handle on, but it would be very useful if we were able to identify and isolate and draw out principles in a specific instance which might be used in the programs of other committees.

I don't know whether I have overshot my time or not. I have a couple other specific suggestions, but I don't want to go over if I've already done so.

Chairman HAMILTON. Go right ahead.

Senator LEVIN. Sunset legislation—I was strong supporter when I came here. We actually got it out of our Governmental Affairs Committee, but the bill died on the Senate floor. Looking back, it probably should have; it was too broad. We can't practically sunset every program because we're going to sink ourselves in paperwork, but we could identify programs which should be sunsetted. We should sunset more programs.

We could have what I would now call "limited sunset," to try to identify those programs which involve the most money or which are the of the most dubious cost-benefit value, and write in sunset provisions in the legislation. We do that in a number of bills over which we have jurisdiction, including the ethics laws and independent counsel—Senator Cohen and I have just gone through that markup at our committee. We reauthorized independent counsel; and by the way, I think we made significant improvements in the independent counsel reauthorization bill. Senator Cohen is a strong defender of independent counsel, but each time we reauthorize it we think we've improved it. And there are some legitimate complaints about independent counsel which can be addressed, about maintaining the principle of independent counsel. Literally, just an hour ago we were in a markup, discussing a whole host of changes that we're proposing in our bill, in the independent counsel law, and the reason that we were addressing it, literally, is that the independent counsel law expired. It was sunsetted. It had a five-year authorization and ran out. If it had a permanent authorization, we wouldn't have taken the time, which Senator Cohen very properly points out is the thing that is in shortest supply, taking the time to address how something is working.

I think I am going to stop there. I have a few other suggestions, but they are in my statement and you've included them in the record. Perhaps this will leave more time for questions.

Chairman HAMILTON. We just had a vote in the House, so we will have to conclude fairly quickly. I apologize for that, but we'll not try to keep you beyond that.

Wayne, do you have some questions?

Mr. ALLARD. Yes, I have one question.

We've heard Representatives here from the House, from the Committee on Government Operations, and now we have Senators here from that body on Government Ops. Isn't that a duplication of effort between the two Houses as far as agency oversight? Do you work to try to avoid any duplication of effort between the two committees?

Senator LEVIN. There is a significant effort to avoid duplication between those two committees. I think having one cross-agency oversight committee in each House is essential; in other words, one committee that looks at all agencies so that we avoid the so-called "iron triangle" problem, which I won't describe, but it can come about when we're too close to those we are trying to regulate and oversee. So if you have one committee in each House that has cross-agency oversight jurisdiction, I believe that is essential. We do that in the Government Ops Committee in the Senate, and I think we avoid—may be corrected on this; there may be examples where there has been duplication—but our staffs particularly, and we as Members, work quite closely to avoid duplicating. We use their reports, and I think they use our reports, as well.

Senator COHEN. Could I ask a question?

Senator LEVIN. Go ahead.

Senator COHEN. Chairman Hamilton asked if I had taken my recommendation up with Senator Byrd, and I would ask whether you have taken up your question with Congressman Dingell.

Mr. ALLARD. The question of appropriations?

[Laughter.]

Senator COHEN. No, but as you know, he has very expansive oversight in his own committee, and there is always some competition between Government Operations and his particular committee, which is quite active.

Mr. ALLARD. Well, there is that concern in the House when you consolidate committees as to whether you are concentrating too much power or not. I think it's something that needs to be considered, but on the other hand we do have an awful lot of committees and we have an awful lot of staff that goes with those committees.

Senator LEVIN. You were talking about duplication between a Senate committee and a House committee?

Mr. ALLARD. Yes.

Senator LEVIN. Not between two inside of each House.

Mr. ALLARD. Yes.

Senator LEVIN. Assuming you could have one Committee on Government Operations—Government Affairs, Government Operations—have one oversight committee, it seems to me you have to take this up with some of the other people in the House as to whether they are yielding what they consider to be their legitimate oversight.

Mr. ALLARD. Their prerogative as a separate body.

Senator LEVIN. Right.

Mr. ALLARD. Yes. Well, it's just some thinking that we've brought out on this committee. I personally brought that out because I think that perhaps in the nonpartisan area there is plenty of opportunity to do that, and we haven't looked at that hard enough. This is a little more political, a little more tough for one to crack. Personally, I would like to see us tackle that on the nonlegislative, nonpartisan area and get that in order before we go ahead and begin to address some of these. But since you're here and testifying for both Houses, I thought it would be an opportunity to bring that issue up.

I appreciate both of your comments. I want to thank the Chairman.

Chairman HAMILTON. Do you both have quite a bit of confidence in the GAO?

Senator COHEN. I do.

Chairman HAMILTON. How do you determine your priorities in oversight? Do you rely heavily on GAO? You've got this vast area to exercise oversight on. How do you determine——

Senator LEVIN. They are one of the sources.

Chairman HAMILTON. One of the major sources?

Senator LEVIN. They are a major source. But we also look at problems as they come up from various sources. It can be literally from constituents, personal experience, on the floor, newspaper articles, TV. It's not a very well organized thing, and maybe we ought to do a better job of organizing our oversight in advance so it's not so scatter-shot. There is some argument that it should be more organized in advance. But they are one of the sources.

Senator COHEN. Let me add one footnote. In recent years there has been some controversy over the use of the GAO by individual committees, that it has become politicized in some instances. There was a reaction in the Senate and an attempt, perhaps, to cut back on the GAO itself.

So we rely on the GAO, and ordinarily they do a very outstanding job. But nonetheless, some Members do call upon it and have a personal-type agenda.

Chairman HAMILTON. Well, I think the two of you have done a remarkable job for the Senate and for the Congress in terms of oversight and emphasizing the importance of it. You deserve great credit for that. We probably need in this Joint Committee to learn a great deal from you in trying to spread the manner in which you operate more widely in the Congress.

I gather both of you think that we, as an institution, don't do all that good a job on oversight? That's your impression?

Senator LEVIN. That is my impression.

Chairman HAMILTON. Yes.

Senator COHEN. I think we spend too much time legislating and not enough time overseeing, and as a result we find—again, you've been a recipient of the so-called "stall" when we know we can only hold one hearing that week, and there will be recesses coming up and there's a time lag and then we're into the next session. That has been the real bedeviling aspect of this.

Chairman HAMILTON. Well, gentlemen, we would like to visit with you more. I know your schedule is tight, and we have a vote

pending, so I think we will just have to conclude with our appreciation to you for your appearance and your recommendations.

Senator LEVIN. And would you please tell our Senate colleagues just how brilliant we were?

[Laughter.]

Chairman HAMILTON. I'll be happy to. They won't pay any attention to what I say, but I'll be happy to.

[Laughter.]

Senator LEVIN. Thanks for your work on this committee.

[The prepared statement of Senator Roth, submitted for the record, is printed in the Appendix.]

[Whereupon, at 12:43 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

INTERBRANCH RELATIONS

TUESDAY, JUNE 29, 1993

UNITED STATES CONGRESS,
JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS,
Washington, DC.

The committee met, pursuant to call, at 1:40 p.m., in Room HC-5, The Capitol, Hon. Eleanor Holmes Norton, presiding.

Mrs. HOLMES NORTON. Could I ask the next witnesses to come forward?

The joint committee will resume its hearing.

Mr. Robert Kastenmeier, currently a Distinguished Fellow of the Governance Institute and its project on Congressional Recommendations and, for 32 years, a Member of Congress and chair of the Subcommittee on Courts of the House Judiciary Committee. A member of the Federal Courts Study Committee, Mr. Kastenmeier is widely considered to be the Hill's foremost expert on the judicial system.

Judge Patricia M. Wald. Is she here? Judge Wald currently serves on the United States District Court for the District of Columbia, having served as chief judge of the circuit.

In a most distinguished career, Judge Wald has been, among other responsibilities, a staff attorney of the Office of Litigation. She has been a litigation director with the Mental Health Law Project, a Member of the Committee on Codes of Conduct of the Judicial Conference, and Second Vice President of the American Law Institute.

Third, we are pleased to welcome Judge Alex Kozinski, currently United States Circuit Judge for the Ninth Circuit; formerly Assistant Counsel to President Reagan; Special Counsel, Merit Systems Protection Board; and chief judge of the U.S. Claims Court from 1982 to 1985.

Professor Robert A. Katzmann, currently President of the Governance Institute, Walsh Professor of Government and Professor of Law at Georgetown University and a Visiting Fellow at the Brookings Institute. The Governing Institute is a nonprofit organization concerned with exploring, explaining and easing problems associated with both the separation and the divisions of power in the American Federal system.

I am pleased to welcome all four of our distinguished panel members and ask you to proceed in any order you desire.

Mr. Kastenmeier?

STATEMENTS OF HON. ROBERT KASTENMEIER, FELLOW, GOVERNANCE INSTITUTE; HON. PATRICIA M. WALD, JUDGE, UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA; HON. ALEX KOZINSKI, JUDGE, UNITED STATES CIRCUIT COURT FOR THE NINTH DISTRICT; AND ROBERT A. KATZMANN, PRESIDENT, GOVERNANCE INSTITUTE, WALSH PROFESSOR OF GOVERNMENT AND PROFESSOR OF LAW, GEORGETOWN UNIVERSITY, AND VISITING FELLOW, BROOKINGS INSTITUTE

STATEMENT OF HON. ROBERT KASTENMEIER

Mr. KASTENMEIER. Thank you, Madam Chair, members of the committee. It is both a pleasure and an honor for me to be here today, particularly with a panel consisting of two of the most thoughtful and prominent members of the Federal judiciary, Federal appellant judges Pat Wald and Alex Kozinski and also Professor Bob Katzmann, a scholar of national prominence with respect to the judiciary and the Congress with whom I work as a colleague in the Governance Institute.

The subject of the relationship of the Congress and the Federal judiciary is an important one. My understanding is that you have chosen to focus on the specific of legislative history and statutory interpretation.

There are a number of current issues that concern the two branches. Parenthetically, I chair an agency called the National Commission on Judicial Discipline and Removal that deals with the important issue of impeachment, discipline and disability and while issues of communication between the branches—issues of funding, jurisdiction and other matters—are relevant, none is more important that the legislative process and judicial review of legislation—certainly for the Congress.

Although I spent 32 years in the House of Representatives, unlike my fellow panelists, I am neither an expert nor a student of the subject. Like most who serve, I was, rather, a generalist. I did, however, chair a judiciary subcommittee on Courts, Civil Liberties, Intellectual Property and Administration of Justice and increasingly became interested in problems affecting the Federal judiciary.

In the 1988–1989 period it was evident that a view was emerging, primarily attributed to Justice Scalia, that congressional legislative history was unreliable and the judiciary would do well to resort to a "plain meaning" or textual rule for interpreting Federal statutes.

This point of view was ventilated at one or more symposia during this period including one dealing more broadly with congressional judicial relations arranged by Professor Katzmann. This view and its implications were also featured in The New York Times, The Washington Post and other papers as well as in congressional journals, Congressional Quarterly in particular. I mention this because while the subject of legislative history has been authoritatively written about in law review articles by Judge Wald and Judge Kozinski, it had by 1990 achieved a popular political prominence, and on April 19, 1990, I held a hearing on the subject. Two of my fellow panelists were witnesses that day.

If I were to be surprised at all, it would be at the lack of concern of fellow Members of Congress about the new plain meaning doctrine and the reasons for it.

It is given that legislation that becomes law is frequently, very frequently, flawed, and the legislative process is imperfect. The subject of legislation may well be a battleground between conflicting ideologies, economic interests involving partisan considerations sometimes pitting the House against the Senate or the Congress against the Executive, errors arise, ambiguities go unresolved, meaning is obscure, definitions may be missing.

Nonetheless, a judicial review policy that says your reports, colloquies, hearings are untrustworthy and unreliable and will not be used to divine legislative intent is an assault on the integrity of the legislative process that cannot in my view be condoned. As the Federal Judiciary is appropriately concerned about judicial independence, so Congress must be about the integrity of the legislative process and challenges to it. It is akin to the court stripping initiatives of the 1970s intended at that time to punish the Federal Judiciary for unpopular constitutional decisions of the prior decade.

It is now 1993 and I do not see a great rush on the part of the Federal Judiciary to embrace the textualist doctrine. Rather, I see the judiciary more interested in opening communications with the Congress than confronting it by disdaining its work.

But tensions, perhaps serious tensions, between the two branches remain, and one could envision a worst-case scenario with a long-term war developing between Congress and the Judiciary in which both sides fare poorly; loss of jurisdiction, loss of funding, and a judiciary siding with the executive branch.

I think it more likely that we ought to light a candle rather than curse the darkness. Professor Katzmann has brought about a project to cause decisions dealing with troublesome statutes to be especially conveyed to the Congress, to its leadership, to legislative counsel and to the relevant committees. This experiment approved as an experiment involving the D.C. Circuit is well along and we hopefully expect the Judicial Conference will in due course encourage all circuits to participate. This is a small first step—others can follow.

Finally, I would make a series of recommendations. Some are self-evident and would be irrespective of the judicial review doctrine employed:

One, this project should involve the review returned decisions; to determine whether there is a pattern.

Two, have special courses for new House and Senate members in legislative history and statutory constructions and the legislative process—have comparable course for new judicial officers.

Three, give legislative counsels' offices more review authority over proposed legislation.

Four, there ought to be a mandatory legislative checklist; i.e., statute of limitations, federal preemptions state law intended, etc. Do not need Judicial Impact Statement. I do not think the Congress needs to pass a Judicial Impact Statement. There is already an Office of the U.S. Courts to do that. I don't think Congress would be disposed to do that.

Five, avoid to the extent possible massive omnibus bills and hastily considered last minute before adjournment sine die legislation—insure some review.

Six, have more frequent oversight hearings or sessions on legislative history. Make sure the Federal Judiciary is well represented.

Seven, check to see how "revision of laws" project is proceeding. We went through this for many, many years. I don't know the present state of it. But this was a project that, title by title, cured many of the defects found in Federal statutes over the years.

Eight, I do not recommend a return to extensive legislative preambles to register legislative intent. Often we have see bills introduced that state noble purposes as preambles, but often Congress strikes those, lest we clutter the statute with nonoperative statements that precede a particular bill. Only as a last resort to clarify legislative intent would I ever recommend a return to legislative preambles.

Nine, others have recommended that committee reports be signed by all committee members to give the document greater authenticity. That may or may not be a good idea in practice. It depends whether you have them sign, that they read the report or agree to the report. That may be somewhat difficult, but it ought to be considered.

Ten, still others recommend expanding the canons of legislative construction in Title 1 of the U.S. Code. I do not have a view about this, but it ought to be explored.

Legislation is our craft, how well Congress does the job of writing statutes is central to the integrity of the institution. In the months and years to come, as you move toward greater congressional effectiveness and strengthening congressional integrity, there is no more compelling issue than the one before you today.

Mrs. HOLMES NORTON. Thank you very much.

[The statement of Mr. Kastenmeier is printed in the Appendix.]

Mrs. HOLMES NORTON. Judge Wald.

STATEMENT OF THE HONORABLE PATRICIA WALD

Judge WALD. Thank you, Madam Chair and committee members.

The use of legislative history by courts and by administrative agencies that are implementing statutes is very important for two reasons: One, to ensure that laws are enforced as they were intended to be by Congress; and two, I believe it also implicates a proper balance between the legislative, executive and judicial branches under our separation of powers system.

As Mr. Kastenmeier has alluded to, the history of the legislative history is a somewhat checkered one. Our British ancestors in fact did not utilize the legislative history of statutes as an aid. But for over a century, American courts have looked to House and Senate reports, Floor debates, and hearings for guidance, unless the meaning of the law was clear on its face from which we get the term "the plain meaning" principle.

But in reality, as I pointed out, in looking at all the Supreme Court cases in 1982, up until that time, the Supreme Court would look anyway in most cases at the legislative history, even if they thought the meaning was clear on its face, to make sure the history did not show something that contradicted the main meaning. Justice Frankfurter said "The notion just because the words of a

statute are plain, its meaning is also plain, is merely pernicious oversimplification."

In the 1980s, a strong textualist movement emerged led by Justice Scalia. Perhaps oversimplifying the textualist movement, except where the result would be "absurd," in the judge's mind, that is, only the ordinary meaning of the statutory text should be consulted and the legislative history should not.

The theory behind the textualist's view is that Congress passed on the text of a statute, not the report, not the debate and not the hearings. The textualist also believes that things in hearings and reports are too easily manipulated by the staff and even by lobbyists and they are not even read by the Members themselves.

Textualists will permit the text of a provision or a statute to be read in conjunction with other provisions in the same statute or perhaps related statute to look at the overall design of a statute and they will also allow judge—made canons, however, to be used in interpreting the words of Congress.

I visited the Supreme Court that term to see what was happening. Incidently, at least every year, 50 percent of all Supreme Court cases involve statutory construction and I believe that number is probably going up. We have a statutory jurisprudence which increases the emphasis given to the topic we are discussing today.

In 1989, when I looked again, I found that there were more cases—I think about a dozen—in which laws were being interpreted without regard to any legislative history at all. On the other hand, it was clearly present in others. For instance, Justice Brennan, in Public Citizen versus the Department of Justice, he used the legislative history to find a meaning for the statute that was not at all to be found in the text of it.

He was attacked for that by Justices Rehnquist, Kennedy, O'Connor and I believe Scalia and in rejecting the so-called absurdity test of the textualists. Justice Brennan said, "It does not strike me as in any way unhealthy or undemocratic to use all available materials in ascertaining the intent of our elected representatives rather than reading their enactments as requiring what may seem a disturbingly unlikely result, providing only that the result was not absurd."

In the 1989 term, they looked at legislative history in 53 cases, confirmed the plain meaning in 18 of the statutes. In 32 cases where there was no plain meaning, it proved enlightening in eight, and in the other 24, while providing no specific answers, it highlighted the Act's purposes so as to inform judicial interpretation. In five, it dictated a different interpretation than they would have found in the words alone.

I have not done a comprehensive survey, but I did a quick and dirty sample of a dozen or so cases that have come down this term so far. In two, it was ignored in favor of the dictionary by Justice White and Rehnquist, but consulted in seven others by Justices O'Connor, Stevens, and White. In three or four, there was no legislative history looked at at all. Usually the judges will go to a dictionary. Some will go to one or another edition, but they will go to the dictionary rather than legislative history in order to implement its remedial purposes.

Justice Blackmun looked at that and he said, fine, but they never spelled out what those remedial purposes were, so we are not sure and I am just going to look at the legislative history. However, Justice Souter and Justice White would have taken that liberal construction section that Congress had put in its own law and made it dispositive as a tie breaker for one interpretation where they thought the text and legislative history were not dispositive.

In the second case by Justice Souter called Rowland versus California Mens Colony, the question was: Could an association of prison inmates be called a person for purposes of being allowed to file a suit in forma pauperis. As you know, the Dictionary Act in 1 United States Code 1 lays out many meanings for recurring terms and statutes, but it also has the phrase, "unless the context indicates otherwise."

In this case, "person" was defined to include association and you might have thought that was the end of the case. But Justice Souter decided that the context meant looking at other provisions in the statute, they were counterindicative, and therefore, it did not include association. However, four justices in a nine-person Supreme Court dissented, saying that they thought that the dictionary Act controlled and that the court had not faithfully construed Congress' own dictionary law.

Now, I will give you, in a nutshell, my position on courts' use of legislative history. I think we have to use legislative history. We have to be allowed to use legislative history because, one, our statutes are becoming so complex and they deal with such arcane subjects, you know better than I, that it is not humanly possible anymore to draft text whose meaning will be plain for all situations.

Under the Supreme Court Chevron rule, if the court cannot find a plain meaning, whether Congress made its meaning clear, then not the courts will decide what it means, but the executive agency that is implementing the statute, its interpretation will be given priority unless it is a totally unreasonable one.

I did a quick review of 22 major rulemaking cases heard in our own District of Columbia Circuit last year. We get the vast majority of rule-making cases dealing with issues of statutory interpretation. The vast majority involve very technical regulatory concepts including EPA regulation of lands, wastes, clean air or water, nuclear licensing, Medicare provider reimbursement, mining regulation, airport security, gray market, customs regulation, ICC, revenue adequacy levels, recycling requirements for Federal procurement vapor recovery systems for light-duty vehicles, cable television attachments.

All questions came to us of statutory interpretation. Now we did not look at legislative history in all of them. In about eight of them, we found the text in the structure of the stature to be enough. But in the other 14, we did consult legislative history, sometimes on our own and sometimes at the behest of one of the parties.

Sometimes it merely reassured us that there wasn't anything determinative there and what the parties had cited were what we called inclusive isolated snippets. But in others, it dominated the statutory analysis. In at least one, the Court, authored by Judge Silberman, said Congress chose to use the legislative history, not

the general statutory language to make its meaning clear. In short, we need it.

The second point is, judges do know how to pick and chose between snippets and really weighty pronouncements in legislative history materials. In several of the cases in our own circuit, we see such perception. Statements like one single ambiguous statement of a lone legislator cannot conflict with the ordinary meaning of the text. Judges spend their whole lives deciding what information is relevant in other contexts and we should be trusted to do so in this one.

Learned Hand said, "It is one of the surest indices of a mature and jurisprudence not to make a fortress out of the dictionary, but to remember that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning."

Three, the textualist alternatives, mechanical interpretation of the words or judge-made canons do not seem preferable to me to consulting legislative history. It is the legislators, not the judges, who draft and pass the laws. Why should our more general assumptions about what you are doing govern over your own words about what you are doing?

In fact, I suspect it is an invitation to putting judicial preferences about what is "sound public policy" and unguided assumptions about Congress must have meant this or Congress must have meant that above the best evidence of what they did mean.

My final and most significant argument in favor of legislative history has been touched upon by Representative Kastenmeier and that is that legislative history is the official authoritative record of what Congress has done. It is not gossip from the back corridors. It is the materials in which Congress institutionally explains to its own Members, to the public and to judges what it thinks it is doing. Even if we judges are skeptical that Members don't read it all, and do they always read the full text either, we are not the ones to make the judgment that it is not relevant or historically accurate.

I find it quite puzzling, quite frankly, that the judges and even agency executives feel they should decide that Congress' work product is not worthy of consideration when it is the product of the way the Congress has chosen to perform its constitutional function. A vote on the product, to me, is implicitly a vote on the process that produced the product.

Finally, do I have any suggestions on how Congress can more effectively organize legislative history for use by judges and agency implementers? I think, perhaps in contradiction with Representative Kastenmeier, that if legislators can agree that they want a particular provision or term construed liberally or narrowly, it is useful for them to stay so.

Now, Justice Blackmun said you can not use words like "remedial purposes" without spelling out what they are. But remember, two justices in that case still thought that the liberal construction clause should have determined the case. Drafters can't anticipate every application of a complex waste disposal law, but I think they can provide general interpretive aids about particular sections.

Secondly, again alluded to by Representative Kastenmeier, the Federal Courts Study Committee on which he so admirably served, gave a nice legislative checklist for all statutes which could head off many technical questions in the courts.

What parts do you want to be retroactive? Do you want judicial review, and if so, in what court, what kinds of judicial review, what standards for judicial review, who do you want to have standing to challenge particular actions pursuant to the statute?

He has also alluded to the Brookings assisted dialogue. Our court has begun with both houses in which we forward to designated offices cases in which a judge has suggested in the opinion that Congress might want to look at the text again because of an interpretive problem or in which the majority in dissent have differed on a particular construction.

I am told that, last year, only nine such instances had been forwarded. So the resultant burden on you should not be overwhelming. It may be, too, that a broader or more informal mechanism can be instituted in which either a group of scholars or even a day of hearings before an oversight committee can bring to the forefront all of the ambiguous terms and how they have been construed, both by agencies and by the courts.

Four, Congress might revisit or have its legislative counsel revisit the Dictionary Act that I referred to in one of the Supreme Court cases to see if more terms need to go in and if some of the actual definitions have proved misleading or ineffectual.

Congress, I think, should also take heed of an increasing number of situations in which courts are demanding a super clear statement before they will interpret a law a certain way, even if ordinary rules of interpretation would tend to put them in that direction.

That category of super clear statements now includes waivers of sovereign immunity, 11th Amendment cases where a State might be sued in Federal court, conditional grants from Federal agencies to States, application of law extra-territorially. This heightened level of Congressional clarity has been judicially imposed, but if Congress wants to have its intent implemented, it has either got to abide by it or challenge the court's right to adopt such requirements for a sister branch.

Finally, in many cases, the skeptics are correct. Legislative history in both Houses is full of contradictions. This was certainly true for parts of the Civil Rights Acts of 1991. One interesting technique adopted there that might provide a precedent for an end-of-the-line check on inconsistent legislative history is the fact that the conference report for that Act specifically said that in the case of one particular section, the explanation in the conference report, not anything that went before in the legislative history, should inform the construction of the courts.

Now, that certainly makes the work of the courts easier and it could make Congress' own work more likely to be faithfully construed. At the end of important bills, it might be able to agree at conference upon the crucial legislative history in some form of authorized index as to which judges and agency heads could give priority.

Thank you, Madam Chair. I hope these comments will help. I for one need legislative history to do my job, maybe not so much of it. But perhaps some culling by the legislators themselves could make it an even more effective tool for courts, myself and my colleagues.

Thank you.

Mrs. HOLMES NORTON. Thank you very much, Judge Wald.

Judge Kozinski.

STATEMENT OF THE HONORABLE ALEX KOZINSKI

Judge KOZINSKI. Madam Chair, Members of the committee, distinguished fellow panelists. Good afternoon.

I want to thank the committee for inviting me to express my views on so critical a subject, one that goes to the balance of power among the three branches of our government. I suspect, however, I may have been invited here because I am rumored to believe that the only legitimate use of legislative history is to prop open heavy doors or to put under the seats of little children not quite tall enough to reach the table. I hope I will not disappoint the committee by taking a slightly more moderate view today.

I do believe there are some theoretical and practical difficulties in deriving wisdom from the legislative record of a complex statute. Some of the problems include figuring out whose views are embodied in a committee report; determining whether Floor statements reflect the view of anyone except the particular speaker; and accounting for the President's role, if any, in making or approving the legislative record.

At the same time, I am ready to admit that legislative history can be an immensely valuable tool for resolving certain types of problems in statutory interpretation. First and foremost, legislative history helps courts understand what problem the legislature was trying to solve. Especially where some time has passed between a statute's enactment and its interpretation, legislative history can provide insights into the statute's historical context. And it can expose assumptions shared by both proponents and opponents of the legislation—especially where the assumptions seemed so obvious that no one bothered to articulate them in the statute. These are just a few examples of ways legislative history can help courts make sense out of statutes that don't make sense by themselves.

The problem is, in recent years, courts have allowed legislative history to do much too much of the work of interpretation and this has had adverse effects on the legislative drafting process. Because my time is limited, I will offer only two examples—each illustrating somewhat of a different aspect of this problem.

The first involves what I can only call a totally boring housekeeping statute—something very few people even in Washington know or care much about. As you have probably guessed, I am talking about 28 U.S.C. Section 1491(a)(3), enacted by the Federal Court Improvements Act of 1982. Because one or two of you here may have forgotten the precise language of this section. I will quote it: To afford complete relief on any contract claim brought before the contract is awarded, [the United States Claims Court, now renamed the Court of Federal Claims] shall have exclusive ju-

risdiction to grant declaratory judgments and equitable and extraordinary relief.

Note that I emphasized the word "exclusive." I think it is a pretty important word. Just reading this language, one would think Congress vested the awesome power of equitable relief in pre-award contract cases with the judge of my court and my court alone.

Enter the legislative history. In discussing this section, the House and Senate Reports explain that exclusive doesn't mean exclusive, but sort of exclusive: This enlarged authority [of the Court of Federal Claims] is exclusive of the Board of Contract Appeals and not to the exclusion of the district courts.

Now, this presents a classic example of what, in my book, is a misuse of legislative history. The Senate and House Judiciary Committees agreed on language that—apparently—did not reflect their intended purpose. Somehow they became aware of the problem but, for unknown reasons, they chose to leave it in the statute and provide a fix by way of legislative history. In such a case, the legislative history does not merely cast light on the statutory language; it recasts the language altogether.

A court faced with this situation is put in a difficult position. Even among judges who rely on legislative history, statutory language usually still comes first. Many are therefore reluctant to look past very clear statutory language only to find equally clear, but utterly contradictory, legislative reports.

Other courts take a more flexible view: They say that unambiguous statutory language cannot be contradicted by legislative history, but they look to the legislative history to see if the statute is ambiguous. The kicker is they then use the same legislative history that created the ambiguity to resolve it. Go figure.

Predictably enough, the courts that have interpreted Section 1491(a)(3) have split along these lines. The Fourth and Ninth Circuits, plus the Second and Federal Circuits by way of dicta—incidentally, in the formal version of my remarks, I have citations for each of these. I know many of you will want to read these cases—interpreted the language as giving exclusive jurisdiction to the Court of Federal Claims—that is, to the exclusion of the district courts. The Third and First Circuits and the Claims Court itself have adhered to the legislative history and said that the Court of Federal Claims has nonexclusive jurisdiction; the Sixth Circuit and again the Federal Circuit in a different case in dicta agreed with these later cases.

The Judiciary Committee's attempt to preempt this confusion by means of committee reports rather than statutory language just hasn't worked and has had several unfortunate consequences.

One, it has created a split among the Federal circuits that will eventually have to be corrected by the Supreme Court or Congress.

Two, it has caused long-term uncertainty in the law, which in turn wastes time, money, lots of paper and other judicial resources. By my count, there have now been at least 20 published opinions in the Federal courts wrestling with this problem.

Three, there has been shift of authority away from Congress and toward the Federal courts. When Congress speaks with a clear, purposeful voice, judges seldom ignore it, not matter how much

they may disagree with the result—barring unconstitutionality, of course. The more wavering the voice of Congress—as when there is a square conflict between text and legislative history—the more likely it is that policy preferences of the individual judges will prevail.

Four, the confusion surrounding 1491(a)(3) may have legitimized, to some extent, a fuzzy reading of other portions of the same statute. "Look," a judge might say, "it is clear from Section 1491(a)(3) that Congress didn't mean everything it said in the Federal Court Improvements Act of 1982, so I can be just a little bit creative in interpreting other parts of the statute."

Finally, and I think this is quite pernicious, it promoted the view that legislative histories—particularly committee reports—deserve the same level of respect as the statutes themselves. After all, here is a case where two respected committees of Congress have gone about amending the statute, not by amending the language, but saying so in the committee report.

Before I turn to my second illustration—involving a statute much different than 28 U.S.C. Section 1491—I want to say just a few more words about committee reports. As everyone here is aware, committee reports have long been treated by the judiciary as the Rolls Royce of legislative history. Even curmudgeonly judges like me will occasionally be caught sneaking a peek at a committee report. More recently, though, the pedigree of committee reports has become somewhat specific. I can do no better than to quote from a speech given a couple of years ago by Professor Martin Ginsburg to the Tax Section of the New York Bar Association. I should note for the record that these are Professor Ginsburg's views alone, and should not be attributed to anyone else with the same name.

"It is no doubt appropriate to consult legislative history to grasp broad outlines of purpose, but everyone in this room knows it is totally unreasonable to pretend that any of the details that appear in a committee report ever came to the attention of, much less were approved by, any elected body.

"The strange notion that the Joint Committee Staff bluebook, published some months after the tax bill is enacted, merits the status of legislative history, can only derive from a cynical recognition that, after all, the committee reports are written by staff and never read or approved by Members of Congress, so how is the bluebook any different?"

I attach a copy of Professor Ginsburg's text to the formal version of my comments.

Now, let me turn to what I see as the second, and more serious, problem: The case where legislators—well aware that statutes will be interpreted by judges in light of their legislative histories—purposely leave the statutory language vague and then take every opportunity to salt the legislative record with hints, clues, nudges and shoves, all intended to influence later judicial interpretations of the statute.

In a concurring opinion in 1987, I wrote the following passage, which I believe expresses the moral hazard involved here: "The propensity of judges to look past the statutory language is well known to legislators. It creates strong incentives for manipulating

legislative history to achieve through the courts results not achievable during the enactment process. The potential for abuse is great."

While this manipulation has generally been subtle, it struck with a vengeance during the enactment of the Civil Rights Act of 1991. Given its wide recognition, I need not detail the crafty lobbying and procedural maneuvering involved not in drafting the language of this historic statute, but in planting legislative history land mines designed to explode with full-fledged rationales and interpretive methods, if stepped on by a black robe.

What I do want to discuss, briefly, are the implications of this development. Here I must give credit to an excellent piece, authored by Harvard student Mark Filip, title "Why Learned Hand Would Never Consult Legislative History Today." The central thesis of Filip's piece—a thesis I wish to endorse—is that whatever one's initial view of legislative history as an aid to interpretation, that value is destroyed once the participants in the legislative process become aware that it will be used by judges as an aid to—sometimes as a substitute for—interpretation. Legislative history, if it is to be of any help at all, must provide the type of background information that is descriptive, that helps the judge step into the shoes of the legislator. It cannot—should not—provide answers to specific questions. Once legislative history becomes simply another field of skirmish for the political process, it ceases to serve any legitimate purpose. The statutory war is then won not by those who garnered the most votes, but by those who outmaneuvered their colleagues in fortifying the legislative record.

This process diminishes the power of Congress in relation to that of the executive and the courts. The executive branch, as its name suggests, has only the power to execute the laws; its range of discretion involved is inversely proportionate to the statute's precision. So, too, the courts, who have much broader leeway in interpreting statutes when they are vague and fuzzy. The more legitimate options Congress leaves to the courts and to the members of the executive branch, the less likely it is that the outcome will reflect the will of Congress.

If this process continues, it will dramatically and detrimentally affect the delicate balance of power among the branches of our government, leaving Congress the weakest of the three. To anyone who believes—as I do—that the public interest is best served by three strong bodies that can provide checks on each other, this is unwelcome news indeed.

Thank you.

[The statement of Judge Kozinski is printed in the Appendix.]

Mrs. HOLMES NORTON. Professor Katzmann.

STATEMENT OF ROBERT KATZMANN

Mr. KATZMANN. I very much appreciate the opportunity afforded us to come before this Joint Committee on the Reorganization of Congress to address the important subject of legislative judicial relations. In a few weeks' time, when the United States Senate exercises its Constitutional responsibility to advise and consent with re-

spect to a nomination to the Supreme Court, the eyes of the country will be riveted on the process.

The inquiry by the Senate of a nominee is momentous, it is intense, but that kind of direct communication between legislators and judges is short lived. So, I think that the work of this committee, in looking at the relationships between the branches with an effort toward improving relations between the branches, is especially important.

I am honored to be here with such a distinguished panel. I don't know Judge Kozinski, but I very much appreciate his coming here on short notice. Judge Wald and Congressman Kastenmeier, in my view, are two of the most distinguished people on this planet. It is just an honor to be here with them.

As we think about the questions that concern this hearing today, they are all, of course, important. Why should Congress be concerned about these issues? What problems do courts face as they seek to understand statutes? How can courts better understand the legislative process and legislative history?

How can Congress better signal its meaning? How can the judiciary make the legislature aware of its decisions interpreting statutes? What kinds of institution processes might develop so that the legislature can be aware of decisions interpreting its statutes?

I am going to talk here more about some of the practical steps that might be taken and that have been taken in a very small way focusing on the work of the Governance Institutes Project.

As to why Congress should be concerned, I think as Congressman Kastenmeier and Judge Wald, I think, have indicated that what in a sense is ultimately at stake is the integrity of the legislative and judicial processes. To the extent that courts have difficulty understanding the legislative process which they interpret, when Congress does not provide courts with the clear sense of its meaning, then both branches have a problem in need of attention.

The question is what do we do about it. I won't go over much of what is in my statement for reasons of time. To some extent, how we look at the problem will depend upon subjective views about the proper allocation of responsibilities between the branches. But whatever views we might have about the relationships between the branches and what the proper allocations of power between the branches might be, I think we all share the view that understanding how Congress functions, the factors affecting legislative outcomes, and the ability of the judiciary to make sense of Congressional intent are subjects which we should all be concerned about.

Based upon an empirical examination of the way Congress works, we should better be able to ascertain how courts can better interpret statutory meaning and determine whether and how Congress can clarify legislative history.

To those engaged in the task of governance, that is the practitioners in the judicial and legislative branches, the matter of devising practical measures to reduce tensions and improve relations is of special import.

The problem has, it seems to me, at least two dimensions, the first is the creation of a process in which representatives of both branches unaccustomed and indeed uncertain about the very pro-

priety of meaning can examine critical questions, and secondly, the identification of discreet issues susceptible of resolution.

What is required is an agenda which links conceptual ideas and pragmatic solutions that is faithful to the Constitutional design. Thinking about those kind of issues is what we have been trying to do through the Governance Institute which began in part because of the interests of Judge Frank Coffin who was then chair of the Committee on the Judicial Branch of the Judicial Conference and a former legislator who was concerned about ways of developing closer links between the branches.

If we think about practical steps, we can think about them in terms of three ways, that is the legislative process or clarifying statutory meaning can have at least three dimensions. The first in some sense is preventative. That is, it focuses on drafting, focuses on anticipating potential difficulties and in dealing with them before the bill becomes a law.

The second element focuses on the materials that constitute legislative history and is geared towards finding ways for the Congress to more clearly signal its meaning.

And the third part entails developing routinized means, so that after the enactment of legislation, courts which have experience with particular statutes can transmit their opinions to Congress identifying problems for possible legislative consideration.

In the way of reinforcing what is already said, I would support a number of the proposals that have been made and not go too deeply into them.

First, with respect to drafting, I think a checklist could be useful. It doesn't have to be a required checklist that people involved in writing legislation have to sign off on in a formal vote, but simply having this legislative checklist which the legislative counsel's office has used already could be very helpful, I think, as legislative's staffs write their legislation.

In addition, I would support Congressman Kastenmeier's notion of providing orientation seminars for judicial staffs, legislative staffs about the ways in which each process works.

With regard to legislative history, I think that the notion of finding ways to agree upon background and purposes of legislation, as Judge Wald has described, is important, including Steve Ross' suggestion that committee members, if at all possible, should be asked to sign committee reports. As legislation nears passage, the floor managers of the legislation should strive to reach agreement as to what constitutes authoritative legislative history.

With regard to statutory revision, I think there are a number of dimensions to the problem. First, as Congress revises statutes, it might draw upon the experience of courts charged with interpreting laws. Although the courts and the Congress affect each other in many ways, uncertainty about the propriety of various kinds of communications inhibit useful input.

For example, when a committee of Congress is considering revising a complex piece of legislation, it might be useful for judges experienced in interpreting the statute to testify as to the technical difficulties in discerning congressional meaning.

On a few occasions, Congressman Kastenmeier in his committee would call judges to testify when legislation was being revised. But

that is a practice that is used very infrequently. I would suggest that its utility is one that is great. But generally, because Congress does not avail itself of this opportunity, largely because of the uncertainty of judges and legislators about such communication, I think it is appropriate to also think about the development and refinement of protocols of communications between judges and legislators as to statutory revision. That is, if there was a presumption that this kind of communication would be favored by both branches, the efficiency of the administration of justice, I think that would be useful as we think about statutory revision.

Secondly, it would be useful to examine more closely as Shirley Abramson has done of the Wisconsin Supreme Court, the States' experiences with law revision commissions which provide for the orderly evaluation of statutes bringing together representatives of all three branches.

Another element of the statutory revision scheme has to do with an experiment that we have begun with the District of Columbia Circuit. The idea of this project really had its beginnings when Chief Judge Wald invited us in the Governance Institute to participate in an effort to explore how opinions of the D.C. Circuit Court were being considered in the Legislative Branch.

Others involved in this project include Judge Ruth Ginsburg who coined the phrase "statutory housekeeping" as a means of improving statutory revision, Judge Buckley and the current Chief Judge, Abner Mikva. What we have done was we took opinions of the circuit courts identified by the judges of the District of Columbia Circuit themselves, opinions which the judges themselves thought that Congress probably would have a interest in and probably would have some knowledge of. We took those opinions and went back to the relevant congressional committees to determine their awareness of those kinds of decisions.

We determined that except in those cases involving a major case which everyone would know about or a case in which a losing party went back to the Congress to seek some sort of legislative relief, that generally speaking congressional committees were not aware of these kinds of decisions that the courts issued.

Given that, the docket of the courts increasingly is devoting more attention to statutory concerns. This absence of understanding, it seems to me, raises all sorts of concerns.

With that knowledge, we then, with Congressman Kastenmeier, began an effort to secure the interests of the Congress in an experiment in which opinions identifying problems in statutes, largely technical problems in statutes, would be routed to the relevant congressional committees for review. And out of that process, we would hope would come a dialogue about statutory drafting, interpretation, and revision.

We are pleased to say that in a memorandum of May 22, 1992, Speaker Foley, Majority Leader Gephardt, and Republican Leader Michel indicated that they believed that the program would be most useful if it were applied to all circuits.

Senators Mitchell, Byrd, and Dole later stated that this Governance Institute Project offers great promise as a thoughtful and productive step in improving communications between the Judiciary and the Congress to the benefit of both branches.

For its part, in its end-of-the-year report in 1992, the Chief Justice pointed to this effort as an attempt to improve relations between the branches by making it easier for judges to alert legislators to the statutory drafting problems identified in the course of adjudication.

The First Circuit, the Third Circuit, Seventh Circuit and Tenth Circuit have since joined in this effort. So, basically, we have virtually half of the circuits and others expected to follow.

Now, with this system in place, Congress will have a better sense of the Judiciary's work. To the extent that Congress can resolve problems identified in the statutes by the courts, not only will the legislature's intent be better served, but also the judicial case load may be somewhat reduced.

Moreover, we will have a better sense of congressional views about judicial interpretation of statutes as we monitor that reaction. Through the holding, we hope, of seminars, we will be able to improve the dialogue between the branches as to the drafting interpretation and revision of statutes.

Now, these core problems of statutory interpretation that we have heard are with us for now and for some time to come. Some issues may be intractable. When you have ambiguous legislation, there will be a political dynamic often that drives the Congress to pass ambiguous legislation. That is the price for securing a majority coalition.

But at the very least, heightened understanding between the branches can improve our understanding of each other's processes and improve the quality of the final product. By identifying and breaking the problem down into smaller parts, I believe, by improving our relations between the branches though this dialogue, I think that we can hope to see some better understanding of statute making and statute interpretation.

[The statement of Mr. Katzmann is printed in the Appendix.]

Mrs. HOLMES NORTON. Thank you very much, Professor Katzmann.

Mr. Kastenmeier, I was interested that you indicated that one action that might be taken by the Congress might be to give more review authority to counsel. It occurred to me as I thought about that, that in essence, the job of writing statutes falls almost entirely to legislative counsel, that the mechanics, as it were, are who compose the words.

As we debate on the Floor, almost never do we debate actual words from the statute. What we usually debate are points of view about the statute with almost no reference to what the words are. Few of my colleagues, I am certain, sit down and read the words of even simple statutes and certainly not the Transportation Act that was passed last year in multiple pages.

I wonder if you would speak more about what role legislative counsel might play.

Mr. KASTENMEIER. Speaking about the technical review of legislation, they indeed might be better able to be sure that is adhered to. Perhaps I should not use the term "authority," but what I had in mind was that that review, an independent review by legislative counsel of the work product would be helpful in ensuring that tech-

nical errors and certain legislative questions that might be later a problem for the courts in review could be responded to.

They currently have—at least in the House, I cannot speak for the Senate—a very large and competent staff to do that. They are generally used, but I don't think there is any particular requirement that they be used.

I think access to them, perhaps even some sort of mandatory access to them, would certainly improve the legislative work product.

Mrs. HOLMES NORTON. I wonder if you think, given the fact that legislators are disinclined—in fact, I don't see how they could be inclined—to read the real words of a statute, whether legislative counsel might point out in advance that there are word problems that they ought to be aware of.

Mr. KASTENMEIER. Yes. They frequently do that. As I say, I think it is sort of hit and miss in terms of resort to legislative counsel for that purpose. It ought to be more routine and regularized, in my view.

Mrs. HOLMES NORTON. Judge Wald, I wonder if you might give us some insight from your own experience, your considerable experience as a Court of Appeals judge. As you have been about the task of interpreting statutes in the way that you mentioned in your testimony, have you ever thought that there were ways in which the Congress could have better indicated its meaning or have you simply said what I am supposed to do now is go to legislative history?

Have you wished the Congress would have done certain kinds of things that we had not done or did you consider it that that would have been perhaps impossible or too much to ask and simply go to look at the next best thing, the legislative history?

Judge WALD. I have certainly wished that where there is conflicting legislative history, particularly where you have some history that seems to predispose toward one interpretation in one of the bodies, the House, say, and then you have a different bill going through the Senate with some different kinds of legislative history suggesting a different interpretation of a key principle of the statute, I have often wished that when the conference committee comes together and decides on a particular provision, if it is not adopted wholesale from one or the other house, that the conference committee might give some thought to indicating what it meant by taking a particular choice.

Did it really mean to adopt not only the provision in the House bill, say, but all of the discussion, not all of the discussion but the key points of the discussion and the report that went with it?

I do think that there are some major pieces of legislation in which you can just predict very easily that a particular provision is going to be very controversial and is going to be litigated in the courts. If perhaps there is some thought given to that by the Conference Committee, they could make our job a lot easier.

I would also like to add, it is not a question of just going wholesale through the legislative history and saying, aha, Representative X said this and Representative Y said that. In the vast majority of cases, I think we avoid what my colleague here worries about, that the legislative history will trump the actual statute because, in

most cases, where we use it, it is because the statute is ambiguous to begin with and we want to get some help to know whether Congress even thought of the problem and gave any indication.

It is not that it will tell us exactly how to interpret the particular words. It will help us. It will give us some indication that we are on the right wavelength.

Mrs. HOLMES NORTON. Thank you very much, Judge Wald. I am going to run up and run back in time for Mr. Allard to hopefully get there in time to vote. I will be right back. Mr. Allard will take over.

Mr. ALLARD (presiding). Thank you, Madam Chairman.

I want to thank the members of this panel for being here with us to discuss your views.

I want to bring up an issue dealing with the separation of powers between the executive as well as the legislative and judicial branch. One of the things that is very popular to our constituents back in our district is this issue of Congressional exemption. Congress, for one reason or another, decided not to apply the laws to itself, so they exempted themselves.

If we look back into the Federalist Papers, there is a lot of concern about the Congress exempting itself, and because it would do that, it sets itself aside as an elite body.

I am one who would like to bring the Congress under the laws that everybody else has to live under. The argument against that, from some of my colleagues, is that there is a true separation of power.

For example, if you are talking about regulatory provisions, with the regulatory agencies coming in and expecting the offices, that that breaks down the separation of power.

One of my thoughts is that that is why we have the courts there. It is that if there is a conflict between the executive and the legislative branch, that one of the functions of the court would be to resolve that and make a decision if they think that the regulatory process would overstep to the point that it was interfering with the functioning of a legislator to perform their duties.

I would like to hear some of your perspectives on the issue as it might apply to the Congress. Does anyone want to talk about that? Judge Kozinski, would you start?

Judge KOZINSKI. Yes, I very much would like to talk about it, but I cannot. You have raised an issue that is not only very difficult, but one that is quite possibly and perhaps likely to arise in the Federal courts. As much as I would enjoy discussing it over chess or with drinks some afternoon, it is one of those things that if the issue does come to the Federal courts, I believe I should not express a public view on it.

Judge Wald may feel differently on this.

Judge WALD. Not on the basic notion of anything that would come before us. The only thing I would point out just historically is that there have been some statutes where Congress has brought itself under the regulatory regime. Take the Ethics in Government Act, and then generally it designates its own enforcer outside, sometimes, of the Executive so that that kind of problem will not arise.

Mr. ALLARD. A reasonable enforcer might be whom or what?

Judge WALD. That would depend. I assume you have your own ethics office. Each branch, including the Judiciary, which has some of this problem, under particular statutes too, that it has problems in being put under another branch.

So, for instance, just using the Ethics Reform Act as an example, the Judicial Conference supervises the ethics laws for us. An office in the executive supervises it for the executive and you have your own office supervising it up here.

Mr. ALLARD. As I understand the Constitution, it is up to each individual house to discipline its own members. Maybe that does not apply as directly. I would just reply to Mr. Katzmann about why we don't have more people from the Judiciary testifying on issues before committees. One of the things that we run into is that they want to comment because they are afraid that they might have some impact on some case that is going to be pending or is pending before the courts at the time.

So, how do we resolve this, Mr. Katzmann, so we can get more input and public discussion on the language and the interpretation of that language that goes into legislative making?

Mr. KATZMANN. I think that perhaps the task is to improve our understanding about what kinds of communications are appropriate and not appropriate, that is to say that we could come up with distinctions about particular kinds of discussions which would be appropriate or not be appropriate.

For example, if the question is we are devising a complex piece of legislation and the question is really about what kinds of technical issues were difficult for the court as it interpreted the legislation, that certainly would be different from a question that asked about the merits of the particular legislation. Talking about the merits of a piece of legislation and the judges' view about the merits of legislation, I think, would be inappropriate. But talking about some of the technical difficulties that arise could be useful.

I think Congressman Kastenmeier could talk to this issue because I believe that in the copyright area, he held a hearing in which I think it was Judge Newman, Judge LaVall, and some others testified, Judge Oakes, I think.

Mr. KASTENMEIER. Yes. That is correct. I think before my subcommittee, I have probably over the years heard from as many as 30 to 40 judges as witnesses, perhaps half of them on court-related matters or perhaps more than half, but some on other subjects.

And I thought they were superb witnesses. They didn't have a self-interest in the legislation. They had a track record of having considered it almost as a scholar would for an extended period of time and they were willing to speak about it and they proved to be superb witnesses.

Mr. ALLARD. I would like to give you a little more time, Mr. Katzmann, for the record. If you would like to finish your statement, that would be fine. We have a vote pending right now. I have about three minutes to make that. We were trying to stagger our time so that Congresswoman Holmes Norton would be here to pick up the gavel when I walked out.

I will have to call for a brief recess on this committee. She should be back here in about two or three minutes, I would guess.

So I will go ahead and recess the committee, and if you would like to finish your statement for the record, you can do that.

Mr. KATZMANN. Thank you.

[Recess.]

Mrs. HOLMES NORTON (presiding). Judge Kozinski, I was interested in your hypothetical, given the ambiguity, and ambiguity is a mild word for it, and the use of exclusive on the one hand and the apparent failure of legislative history to straighten it all out on the other.

What should a judge do in those circumstances?

Judge KOZINSKI. Well, what I was trying to point out was that there are really two legitimate ways to go in dealing with that. I think a judge applying that statute and trying to be faithful to his or her function and to the legislation presented was confronted with a real problem, a situation where the language of a statute said exclusive and then the committee report apparently recognized at some time before the legislation was passed that it was not adequate.

Mr. HOLMES NORTON. So you probably had a situation where the ambiguity or the error was not discovered until after the statute had passed and so they were left, for all practical purposes, with doing something in another document.

Judge KOZINSKI. I was not there. I should tell you none of those indicated that were cited are my cases, so I am not defending my interpretation. The solution, though, which is to take a committee report, and if we say the committee report is not created until afterwards, then we are really going to have a difficult epistemological problem, and that is to say, by taking the meaning of a statute that had gone to the Floor of Congress and has been passed and signed, and you are diminishing it by a committee report.

If it was not contemporaneous, if it was not done before the legislation was passed but afterwards, then the legitimacy of that kind of a fix is open to question. Some judges say it is fine. Others judges say it is not. I have read all of the cases. Again, I cited in my statement, I think they are open to plausible interpretation by judges who faithfully try to apply the law.

If you look at the judges, you will find no pattern in terms of Republicans or Democrats or liberals and conservatives. It is quite a housekeeping statute. There is no politics or philosophy behind it. It is just trying to get the law right. Yet, they have split badly.

The question I have is: If we endorse the notion that you can detract from the meaning of a statute by use of a committee report, what does that do to the shift of power between judiciary and the courts?

It seems to me that the more pieces that you leave on the table that the courts can play with, the more pieces you leave on the table for the executive to play with, the less control Congress will have on how its legislation is implemented. When the Congress approves this kind of device, as happens with the case that Judge Wald cited where Judge Silberman said the meaning of the statute is where Congress put it in the legislative history.

It seems to me that at that point, you have blown open the process and you have allowed judges to reach a far wider range of results than if you just say you have had to stick to, let's say the stat-

ute, plus the approved committee report, plus one or two other things.

For every case that I have seen where the legislative history really has been genuinely helpful and has genuinely given insight, I can take two cases, maybe more, I can come up with a very long list where the language of a statute was clear but the judge did not like it. So what they did was, they found something in the legislative history that kind of supported their result. Maybe it only happens in the Ninth Circuit, but I think I have seen cases out here as well, and use it to diminish what in fact was an Act of Congress.

This is not about, as I think Congressman Kastenmeier suggested, that somehow those of us who believe in statutory language and are suspicious of legislative history, somehow were rejecting the process, somehow we are telling Congress how to legislate.

We are trying—I am trying just as hard as anybody else in my own way to do what Congress, that entity, the body that makes the laws, wants me to do. I am confused. The more things you throw out there that you say are legitimate to look at, the more confused I am.

Mrs. HOLMES NORTON. You have cited a response from Judge Wald, I see.

Judge WALD. You saw the body language, I am sure, Madam Chair.

My experience may be somewhat different in our circuit. I would point out in my experience, in looking both at the Supreme Court and at our own circuit, it is a very small minority of cases where you find something in the legislative history that flaunts, defies, or indicates a completely different meaning than the statute.

I think the statistics I had in the 89th Session of the Supreme Court were 53 cases in which legislative history was used, and five in which it suggested a different meaning than the statute. Generally, it confirms the plain meaning or it gives you some help in an ambiguous situation.

Now, let me just point out, because you did pick up on the example I gave of Judge Silberman's decision where he did say exactly what I said. He said that Congress chose to use the legislative history.

What happened there was you had a fairly complex statute, the Atomic Energy Act. Congress had said in one amendment that, in an application for a license, an antitrust review should be conducted. The question then came up, when some of these old, 40-year licenses were being renewed, did that require an antitrust review? It simply was not on the face of the statute. Yet the court had to decide it. Courts don't have the privilege of saying take that case away. It is too hard. We cannot decide it. We have to come down one way or another.

In that particular case, by looking at the joint committee report, they were able to find out that Congress in fact gave a clear indication it meant just applications and not 40-year renewals.

Now to me putting all the pieces on the table, especially when Congress made up the pieces, we are not pulling the pieces from out of thin air or from the newspaper reports. When Congress made those pieces, I would rather have those pieces and be left with trying to distinguish between the weighty pieces and the ones

that are some solitary legislator who doesn't like the bill at all objecting and saying it really means this, than to be told that I just have to ignore that.

We don't, in any other aspect of judicial construction, ignore evidence. For instance, take a rulemaking. When we decide whether or not the administrative agency has made an proper rule, that rulemaking record may be full of extraneous stuff, but nobody says to us, you cannot look at that; you can only look at certain predisposed parts of these. They trust us as Article III judges to be able to make some kind of discerning difference between what should be looked at and what should not.

I think by and large, in looking at most cases in which legislative history is used, perhaps I was not that familiar with your example, perhaps that is an exception. It seems to me they do make a similar cut.

Mr. HOLMES NORTON. Professor Katzmann, do you want to weigh in on this subject as well?

Mr. KATZMANN. It seems to me that if we ignore legislative history, that essentially what we are doing is increasing the power of judges, not decreasing it, because if the words of a statute are ambiguous and if for the most part we confine ourselves to the words of a statute and not look at surrounding evidence, then we are increasing judicial power rather than honoring congressional intent.

The task really is to find ways to make legislative history more authoritative, to recognize that there may be excesses in legislative history, but to realize that without legislative history, we cannot really understand what it is that Congress meant.

That, I think, is really the task for us, not to downgrade legislative history, but to see how we can improve it to make it a more workable product.

Judge KOZINSKI. Can I speak to that using Judge Wald's example? I have never seen this case. I know nothing about it except what Judge Wald has told me here today. But let's see how this worked. We have the statute, according to Judge Wald, that said for an application for a license, you have to get one of these reviews. Now, a renewal is an application for a license. Let's say you don't look and there is no set legislative history.

What you would get is a situation where somebody says, hey, give me a license. And the court would look at the language of the statute and say, oh, you want a license, you have to get an antitrust review. It seems to me the degree of freedom that you have at that point is fairly narrow.

But let's say you are a judge who really is not happy about antitrust reviews, who thinks they are bothersome, a kind of pain in the neck, unnecessary, and unuseful. You say, well, I see an ambiguity here. When you say a license application, maybe they don't mean all licenses. Maybe renewal licenses are not licenses. But why are renewal licenses not licenses? Renewal licenses are licenses just like any other license.

That gives you an excuse for looking behind and you find something that detracts from the statute. You have two choices. Up can say, well, a license is a license, or you can say a license is not a license because you see renewal over here.

So you now have two options. You want to talk about power of the judges, who has more power, a judge who has only one option, a license is a license, I don't like the result, I hate it, I think it is a bad thing, it is inefficient, but I must do it. Or a judge who says, look, I can look back here and make for myself a second option.

I would suggest that the power is with the judge who can carve out for him or herself a second option this way. Again, I know nothing else. I am sure Judge Wald's case is more complicated than either she or I have discussed, but it points out the real problem.

Mrs. HOLMES NORTON. You illustrate where the power is, but where is what we intended?

Judge WALD. In the report.

Judge KOZINSKI. How do we know that, Madam Chairman. How do we know that? When the statute says a license and everybody votes for that, and some people think, gee, a license means a license. Every time you get one of these applications and you come up for review, we want to be sure you are not committing an antitrust violation. It is perfectly sensible.

Then months later, somebody in some committee office, somebody comes up with something and says, well, we didn't really mean people coming up for renewal. They are kind of exempt.

Judge WALD. It wasn't months later in this case.

Judge KOZINSKI. I was jumping at the example. To tell you the truth, I used to live on the Hill but I never saw when these reports were made. But they may be made contemporaneous. It could be as the chair suggested, it could happen later, but it doesn't happen at the point when people vote for it.

All I am saying is it may be the wrong result reached in a particular case, but if you want to talk about a shift of power between the two branches, if you want to be sure that judges are limited in how they apply the statute this body enacts, let me suggest that the way to control it is to put more things in the language and fewer things in these other things that will allow people who don't like antitrust review who think it is too much to go behind and find a way out.

Mrs. HOLMES NORTON. Professor Katzmann, your work has tried to focus us on being less rigid about what we learned in grade school about the separations of powers. We were told that was the great genius of the American system and our forbearer came from another system which taught them separation of powers was important in a democracy, at least in the democracy they were trying to build.

I wonder if you could say a word that would clarify just how rigid separation of powers was meant to be and how relaxation might be appropriate to solve the problems that we have been discussing this afternoon.

Mr. KATZMANN. It is my view that the constitution did not create separate institutions but rather as Richard Newstat noted long ago, it created separate institutions sharing power, that if we think, for example, of the legislative judicial relationship each time the courts interpret a statute, an Act of Congress in some ways they can be thought to become as much a part of the legislative process as any other part of the process. Judge McVay has written about that.

So, therefore, given the fact that the institutions interact with each other and affect each other, it seems to me appropriate to inquire as to how each branch can relate to each, operate consistent with each branch's constitutional prerogatives without encroaching upon the prerogatives of each branch.

In the area of statutory—the making of statutes and the interpretation of statutes and the revision of statutes where both branches are so intimately involved with each other's processes, I think it certainly makes sense and certainly the Constitution does not preclude in any way that each branch try to have a better understanding of the other's work product with an eye toward improving that relationship.

Mrs. HOLMES NORTON. Even when cases might be involved at a later point in time?

Mr. KATZMANN. If, for example, a court interprets a piece of legislation, the Congress at any point would be free, if it wanted to, to change that piece of legislation, change that interpretation if it wanted to. The question really is providing enough information to the Congress about what the courts are doing.

The courts issue these opinions as a matter of course. It is all on the public record anyway. So really what we are proposing is simply that which is already publicly available identifying problems, opinions, identifying problems in statutes to be transmitted to the relevant congressional bodies.

Out of that process, I think Congress will have a better sense much how the courts interpret what they do and we may see if we can get, under the right circumstances, through workshops and other devices judges and legislators together, we may see improvements in the way that the branches interact with respect to the making of laws. The law making function, in a since, would be shared by all institutions of government.

Mrs. HOLMES NORTON. I think it may sound strange to the American ear, but again, we have apparently or perhaps have forged constitutional barriers that are necessary and that work against the kind of communication among branches that might do away with some of these problems. Mr. Kastenmeier, I am particularly interested in the perspective you have as a former member now working on these issues who had to live with them in your former life.

To us in the Congress today, everything seems to be more complicated than it surely was before. I am not sure that is the case as we lack the perspective of knowing what went before. Are we looking at greater difficulty inherent in signaling to regulators or judges what we mean or is this simply an endemic problem, a problem of language, an institution allege problem.

I am trying to discern if we are dealing with ordinary complexity or greater complexity. If it is greater complexity, then the answers might be different than they would be if this is simply inherent in the way the institutions have always functioned.

Mr. KASTENMEIER. I surmise there is some additional difficulty in 1993 as opposed to 1958 or any earlier period of time. I think the institutions have all grown substantially in workload, numbers of everything. Whether this is the judicial branch or the legislative,

one of the complaints is, we have increasingly become reliant upon staff. That is true. But I think that is a given.

I think that is also true of the judiciary. It increasingly relies more and more on law clerks and the like. It is true of the executive branch. I think life is more complex. We deal with more technical issues. This is one of the problems confronting your committee, your joint committee, how can you simplify congressional tasks? Do you have too many committees, et cetera?

I don't think that is a very easy thing to do. I do think that the Congress has more difficulty. Fewer people are able to focus on any one subject. You cannot learn about 50 or 70 or 100 subjects simultaneously. The Congress is reliant on subcommittees and committees and their work. That is why I think the Legislative History Committee reports and other indicia of legislative activity in addition to the act that becomes law which, in itself, may not be voted on actually.

I have passed many bills. There have been no recorded votes on Monday afternoon on suspension. So the notion that there is somehow the attention of the whole body, 435 Members, is focused on that piece of legislation, it is really a fiction that we all, in a sense, vote on it. We do at least indirectly.

So we are reliant on small groups in the Congress achieving things legislatively. That will increasingly be true. However, you will be organizing the Congress, I suspect. But the world of a century or 50 years ago will not be returned to. I think that is what we are left with in dealing with this question.

Mrs. HOLMES NORTON. Increasingly, I think we have to face the fact that when people go upstairs, as I just did, to vote, that we are voting on concepts and not language. I was not there to hear the debate. I went upstairs, looked at somebody I trusted and asked how are you voting. He told me how he was voting, told me what the subject matter was, told me who was the sponsor, and then I knew how I wanted to vote.

There is no way in heaven and earth you can do it differently, even if we were to draw down the committees to one and spend all our time on that one committee.

I say that to you truthfully because I believe these questions have to be worked out conceptually and we all have to come to this same understanding of what the problem is and not pretend that there is a solution such as 540 Members of Congress coming to grips with the language of thousands of statutes that are necessarily passed in this body every year.

I want to say to Mr. Kastenmeier, Judge Wald, Judge Kozinski and Professor Katzmann how much the joint committee appreciates your testimony on perhaps the most complicated subject that has come before a joint committee that has heard much complexity. I am particularly grateful.

The subject so fascinates me that next year at Georgetown, where I am still a professor, as Mr. Katzmann knows, I am going to teach a course intended to explore the gulf between legislators and enforcers, a research seminar at the law school. So I have more than a casual or even a joint committee interest in this subject.

I come to this interest, in part, because I have been a regulator and now I am a Member of Congress, thus the difficulty I see up close and regard it as important for us to at least try to deal with.

You helped us immensely in that regard. I want to personally thank you for myself and for the Members who were not here and to tell you that, although we might not read every statute, my colleagues do in fact educate themselves about what those who come to testify have said when Members themselves were not able to be here. Again, thank you to all four of you.

We have had approximately 200 witnesses, outside groups, experts, political scientists, citizens, former Members of Congress, former members of the staff of Congress, and of course current Members of Congress representing a broad perspective all across the political spectrum and in a bipartisan way, more than 30 hearings we have had of the joint committee.

We wanted to especially have this day of hearings near the end of our process to allow the colleagues and others including outside groups to have a last opportunity to share thoughts with us in the hope that perhaps some of the testimony from earlier witnesses and some of the data developed in earlier hearings would spark ideas that have come to us, and that is the reason this day of hearings is so important to the committee.

We will begin the deliberations shortly. I might say to my colleagues, we had a very good retreat this past weekend with 22 of the 24 members of this committee present demonstrating the very strong interest members of this committee have in achieving real reform in the congressional structure.

The committee, as all of us know, is bipartisan and has an equal number of Democrats and Republicans. The thing that was very encouraging to my was that, across the board, there was a real strong commitment to try to bring about meaningful change. There were no divisions along party lines, no basic divisions between the House and Senate.

This was a good, I think, consensus beginning to emerge as to what we can do and certainly a consensus that we should achieve as much as we possibly can that the times are right for real reform of this institution and that we perhaps have a better opportunity than has been given any other similar committees that have operated in the past to achieve those reforms. There is a determination to do that.

So we will be after the conclusion of these hearings and after hearing former Vice President Mondale in our concluding hearing, we are going to be working with a series of informal groups led my members of our committee looking at critical areas, everything from the budget process to ethics process, to what we do to make Congress live under the law that we pass, to the committee structure, obviously, which is exceedingly important to our staffing patterns. All of the areas that we have discussed in the course of these hearings we will begin to look at in detail.

We have approximately 500 proposals that have been put before us to examine and we are going to be hard at work for the remainder of July and the August recess to put together those proposals that seem to have a consensus of support and beginning to mark up our recommendations in September when we return.

The committee is working hard. It is well on schedule and on track. I appreciate the fact that Members of the Senate and House have demonstrated the interest to take the time to come and share their thoughts with us.

[Whereupon, at 2:55 p.m., the Joint Committee was adjourned to convene at the call of the Chair.]

APPENDIX

STATEMENT OF JOHN O. MARSH, JR.

TO THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS

I appreciate your invitation to testify before this Committee. Because I was Chairman of a study of Congressional Oversight of National Security in 1992, The Center for Strategic & International Studies, I would like to quote from the Foreword of that study because it provides a backdrop for my statement.

"The U. S. Congress has not engaged itself in a significant reform of its own organization and procedures since 1946. In the intervening decades the country--indeed, the world--has transformed itself dramatically. Changes that have had a particularly pervasive effect on Congress include the following:

- The population of the United States has increased by more than 100 million.
- The nation has waged four wars, including the Cold War.
- The Soviet Union as it was known for more than 70 years has disintegrated.
- Six new cabinet-level departments have been created: Health and Human Services, Energy, Housing and Urban Development, Transportation, Education, and Veterans' Affairs. In addition, several major new independent federal agencies have come into being, including the Central Intelligence Agency, the National Security Agency, the National Aeronautics and Space Administration, and the Environmental Protection Agency.

- A revolution in transportation has occurred: an interstate highway system has been constructed, more people travel by air than by train, and the airline industry has largely been deregulated.
- Americans have moved into the space age, put people on the moon, and have had to address new national problems, including the environment, drugs, and rampant crime.
- The United States has lost much of its competitive edge, and there are serious questions about the effectiveness of its educational system.
- The information age has dawned, creating new opportunities for learning, knowledge, and productivity.
- The U. S. federal deficit has soared to trillion-dollar figures, interest on the national debt has become the second largest annual federal expenditure, and the balance of trade is consistently adverse.
- Western Europe is moving toward a unified economic community by the end of 1992, while U. S. economic recovery lags.
- As an institution, the U. S. Congress is at an all-time low in public esteem. Being a member has become a full-time job, and questions about congressional procedures, the explosion of committees and subcommittees (a total of 292 in the 102d Congress) "perks," and the confirmation process have given rise to term limitations and antiperk legislation.

Fortunately, Congress is not oblivious to these trends because only Congress can reform Congress. There are internal proposals for reform circulating within it, and others have emanated from the White House. Congressional reform is a matter of concern for the recently created ad hoc Joint Committee on the Organization of Congress.

In this report we have addressed ourselves to one particular subset of this problem--congressional oversight of national security. The report is offered as a stimulus to serious consideration of means whereby this process might go forward in an atmosphere not of obstruction but of friendly, courteous civility, of cooperation--that is, an atmosphere of comity."

Extracted from the Report on Congressional Oversight of National Security, a study by the Center for Strategic and International Studies.

October 1992

Yours is a very important task. I wish you well in your efforts because the Congress is the only institution that can reform Congress.

When I survey the work of the Committee and its goal and purposes, I recognize your task is not simply congressional reform but to achieve a more effective federal system based on a Congress that is responsive and effective.

I would point out to the Committee that of all of my federal assignments, my service in the House of Representatives was the cornerstone. It was the most essential and the greatest help in various assignments later in the Executive branch. Not only did it give me an understanding of the legislative process, but I was able to establish continuing relationships with members and staff which were vital. I have no complaints to direct to any in the Legislative branch upon the manner in which I was treated. All of my relationships were most cordial and friendly even in areas in which there was significant disagreement as to policy. Consequently, having served in the Congress was of an enormous benefit to me in addressing the responsibilities associated with executive duties.

Because of my executive service, I believe I could be a more effective member of Congress now than when I previously served. I suspect other former members who have held Federal posts would make the same comment.

An observation I would make, which I'm sure others have made, is that I believe it is vitally necessary to restore comity

between the executive and legislative branches. It is my view that the breakdown of comity has been one of the great governmental casualties of recent times. Comity is not easy to define but in simple terms it is courtesy between the branches. It is a lubricant to ensure that the wheels of government turn smoothly.

In considering congressional reform, I think it's necessary to look at the role of the Congress. This role has been an evolving one since the American Revolution. It is important to remember that our federal system is an executive system as opposed to a parliamentary one. The origins of this are to be found in our revolutionary experience. I would point out that the American Revolution was a war that was prosecuted for the most part without an executive branch of government. The Commander-in-Chief, General Washington, was a member of the Second Continental Congress. He was chosen by his fellow members to be the Commander-in-Chief at the same time the Congress established the first regular army. The Army would be called the Continental Line, bearing the name of the Congress that was its creator.

The fact that there was not an executive branch is important because of certain precedents that relate to congressional functions and authorities which later would be codified in part in the Constitution. The decision to establish an executive form of government was a deliberate one in order to make the national government more effective. If you examine the history of that

period, Congress was not an efficient agency insofar as the conduct of the war was concerned; but notwithstanding the difficulties of the process together with the patience and character of General Washington, the colonists prevailed.

Despite these inadequacies, the revolutionary experience would nevertheless be the beginning of a pattern of significant involvement in a quasi-executive way by the Congress in the conduct of government which prevails to this day.

The American Constitution had a dual purpose, the first and foremost purpose being the establishment of a representative form of government with the protection of individual liberties. Its second purpose was to unite the independent states into a political entity whereby the new nation would have the means to engage in diplomatic affairs and international commerce. This second dimension is a very important one because the infant nation immediately discovered the Articles of the Confederation were totally inadequate when it came to engaging in foreign affairs and international commerce. However, it should be noted that, in the earlier revolutionary experience, while the Congress played a key role in the prosecution of war it also had responsibility for conducting diplomacy. These precedents of Congressional involvement in the conduct of foreign affairs are still with us. I do not urge this be changed, rather better focused.

Because of my association with the Army, I found of particular interest that, of the forty people who signed our

Constitution, twenty-three had served in the military in the American Revolution, either in the regular forces--the Continental Line--or in the militias of the states. Notwithstanding they were a majority in the Philadelphia convention, they nevertheless would vest the life-and-death powers of the nation not in the military or the executive but in the legislature. The powers to raise taxes, to declare war, to raise armies and maintain navies.

Indeed, there is an order of precedence in the Constitution, Article I is the Legislative, Article II is the Executive, Article III is the Judiciary. The preeminence of the legislative branch is at the heart of the American Republic. It is significant to note that in the order of precedence in Article I is the House of Representatives. This was the only body at that time elected by the people. The Senators were elected by the legislatures of the states, a practice that prevailed until the adoption of the 17th amendment in 1913.

In addressing congressional reform and the effectiveness of the total federal system, I would ask the Committee to address the important principle of separation of powers and its preservation. We are in a period of what I would call congressional ascendancy. In the history of the Country there have been cycles of legislative and executive supremacy. The American Civil War would see an enormous assertion of executive authority. In the years immediately following the War, we would see the pendulum swing the other way with greater assertion of

congressional authority. I believe the Appropriations Committee was for a period of time abolished but later re-instated. World War I would see again a rise of executive authority. In post World War I years, by rejecting President Woodrow Wilson's policy of American involvement in the League of Nations, there was congressional assertiveness.

The trauma of the depression led to a new emphasis on the executive branch which carried over into the World War II era and continued the assertion of executive authority down to two very important events that, in my view, reversed the trend.

Philosophically there has always been a debate in our society about the true nature of the federal system and the extent of centralization of power in that system. Those arguments were raised in the New Deal days of President Franklin Roosevelt and often took the form of states' rights.

In the 1960's we saw a confluence of several very important forces: First, philosophical concern about the centralization of power. Second, the Vietnam War, and third, Watergate, leading to the resignation of a President. Vietnam War issues helped bring about Watergate.

Watergate caused a significant erosion of Presidential power. Still a powerful office, it has yet to regain the authority it possessed prior to the Vietnam War and the ensuing debacle which led to the resignation of a President.

I recall my own days in the Congress in the 1960's. There was restlessness and anger by members of Congress about executive authority and what we as members thought was arbitrariness or even abuses of that authority. The favored whipping boy being the Office of Management and Budget (OMB).

Today, there is much discussion about the power, authority and the prestige of the Congress. Since the Watergate/Vietnam experience there has been a rapid ascendancy of congressional authority. I mention a quote to you from the Federalist Papers by Madison, Number 48, where he complained of legislative authority.

> "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."

Your panel is really dealing with questions of power. We have a system that is structured on the diffusion of power, safeguarded by checks and balances, and the inherent authority of one branch to negate or checkmate the actions of another branch.

Power is something that is not easily surrendered. Today, there is much discussion of arbitrary use of power by the Congress. There are charges of fiefdoms by individuals and committees--fiefdoms that occur either by subject-matter jurisdiction or by control of the purse. Such changes are not

new, they are as old as the Republic. As I observed, power is not easily surrendered, and rarely is it willingly surrendered. Its loss is usually associated with major trauma, war, depression or revolution.

Today there is considerable public unrest about the Congress. There is a lack of the confidence in the Congress by the public that is needed to effectively govern. I am of the view that the emphasis on term limitations and the widening appeal of that approach is a form of trauma, a type of public revolution. It is an expression of frustration and even rage that demands some type of significant or drastic change. There are reasons for these expressions of outrage.

I have referred to the growth of executive power and congressional reaction which seized on the events of the Vietnam War and the Watergate experience to make the pendulum swing toward Congressional ascendancy. The Congress in the 50's and 60's lacked the information resources of the executive branch, it did not have the in-depth staffs. Much of this has changed. The

watershed year was 1974 with the election of the Congress following the Watergate fiasco and resignation of the President.

Many of the changes which would be implemented I am sure were very helpful. However, I think there is some question as to whether all of them were as effective or as useful as congressional sponsors had hoped. You are well aware of these broad, sweeping changes: the Budget Impoundment Control Act, creation of the Office of Technology Assessment, changes in the seniority system in the House of Representatives, the earlier adoption of the War Powers Act. There was other legislation that severely restricted certain intelligence activities, particularly covert operations; legislation that related to access to information, legislation that related to opening up the governmental process and accessibility to committee deliberations that theretofore were severely limited. (As an aside I would point out that the Constitution was a product of in-camera sessions in Philadelphia.)

Having served in the legislative branch for eight years and in the executive branch for over twelve years, I am of the view that what members of Congress really want to do is to shape policy. In that regard, I think members do not fully accept that we are an executive form of government as opposed to a parliamentary form of government. I believe that in our system much of what is done in the policy field the executive branch proposes and the Congress disposes; the executive branch acts and the Congress reacts. There may be ways to give Congress a policy making role that would be helpful. I will make several suggestions.

I think one of the most important things the committee could do would be to (1) define the congressional role, and (2) in the definition, perhaps broaden it in a way that Congress could participate more actively in the policymaking processes of government. I am of the view Congress needs to be more involved in the planning and development of policy and less involved in the execution, with the latter being limited to an oversight role

as opposed to detailed management. True, the adoption of broad legislative programs--whether in the field of economics, defense, health, or social welfare--involve enactments of broad policy guidelines. However, in the executive branch in carrying out those broad policy guidelines established by Congress, there is a term that you've heard many times, that Congress is "micromanaging" the process. Micromanagement is a difficult word to define and has varying meanings. There are many instances where it can be shown that the executive branch did not execute programs effectively; consequently, a certain level of guidance and oversight is necessary.

Legislative Gridlock

I am of the view that much of the gridlock that we are experiencing in our government is a gridlock to which Congress is a major contributor. Legislative gridlock occurs because of differences within and between the two Houses; differences on issues between authorization and appropriations; differences over jurisdictional interests as to subject matter in both the House

and the Senate. At times there are differences that arise because partisan considerations further exacerbate the situation, but partisanship is not the sole factor, or invariably the primary one.

There is also Executive gridlock, and I will discuss that further.

Legislative-Executive Relations

The Legislative-Executive relationship, I believe, is becoming more adversarial. The hearing process can become a confrontational experience. I am not advocating an abandonment of the hearing process. It is essential, but I think it would be helpful if this committee would recognize a need to make such formal relationships less adversarial and confrontational. This is why I urge you to focus on ways through the reform process there be devised a new approach to developing national policy. I am of the view that there needs to be a greater interchange between the executive and the legislative branch through consultation and meetings and planning sessions prior to the

introduction of legislation. I would advocate that this consultation or interchange not be limited along partisan lines. It is important to have partisan consensus on programs, but it is also very important to have a broader involvement of members of both Houses from both parties in the planning and development process.

Congress - A Full Time Job

One of the areas that I would raise with you, and I recognize that you may not be able to make these kinds of changes in the system. One of the major developments that has occurred in the Congress is the fact that it has become a full-time job. I believe this is having significant impacts on what the Congress is, how it operates, and what it does or does not do.

Historical examination of what the framers' intent was indicates they did not envision that being a federal legislator would be a full-time job. It was thought that it would be a part-time job, indeed, getting a two-year term for House members

was significant, inasmuch as many of the state legislatures were only elected for a period of one year.

Once being a legislator becomes a full-time job, it introduces other considerations. (1) An individual becomes dependent upon reelection in order to keep the job. If the legislator is not of independent wealth, there is a built-in insecurity. With the expense of modern-day elections, significant amounts of time and effort must be given by the member to raising funds and devoting efforts to reelection.

There is an impact, which each of you knows, on the families of members once this becomes a full-time job. The debate occurs with many members, as it did with me, as to whether you move your family from your congressional district to the Washington environs. If you do move them, this creates problems for the members when they go back home because they must leave their family to visit the congressional district. This raises, in turn, questions about whether the family becomes most closely associated with the Washington environs than with the

congressional district. A member finds himself pulled between family commitments and congressional responsibilities.

I believe that the Committee should look seriously at the recommendation of adjournment dates that are established by law that would cause the Congress to adjourn at least one of its sessions early, for example, not later than the thirty-first of July. Today's sessions have a lot of down time. I do not think there is an efficient use of time by the Congress. There are times of great inactivity and inefficiencies associated with the fact that there is delay in the legislative process.

Congressional Government

I am of the view, and you may not agree, there are severe limitations in our federal system for Congress to govern. The day to day task of running or administering the government an executive function.

My views were shaped on this in 1974 when I was a counsellor to the 38th President, President Ford. The chaos that was associated with Watergate and the Presidential resignation was exacerbated by a severe energy crisis arising out of the Arab oil embargo in 1973. The embargo was a contributor to but not the only reason for, a severe economic downturn. When a grievous recession hit the Country in the fall of '74. There was a landslide election in '74 with swollen majorities in the House and Senate. In fact, in the House there were not enough Republicans in number for President Ford to sustain his vetoes. The ratio was 291 Democrats to 144 Republicans. Theoretically, in the House the margin provided a veto-proof Congress, but it did not work out that way. One of the first major efforts the

Congress had to address was the energy crisis. This issue alone demonstrated the inability of Congress to carry forward the governing process. Notwithstanding the large Congressional majorities, on the energy situation Congress ended up in gridlock because energy questions are regional. They are not necessarily partisan or political, they are economic. In considering energy matters, there are significant jurisdictional conflicts between the two Congressional Houses. All of these factors of regionalism, economics, jurisdiction, and conflict between the Senate and the House really led to an impasse, and the Congress was not able to come up with a consensus to develop an energy program.

President Ford, who had embarked on a program whereby he indicated there would be no new spending and that he would veto any new spending programs with certain exceptions, was able to use the Presidential veto, which is negative in nature, in an affirmative way to further his own program.

At this point I will list a number of issues to which you may want to give further consideration:

Base Closures - A New Legislative-Executive Methodology

One of the most interesting and innovative approaches that has been developed in the Department of Defense in handling a difficult Congressional issue is the methodology associated with base closures. It would evolve in about 1987, when Mr. Carlucci was Secretary of Defense. I do not know who was the principal proponent of the approach, whether it occurred in the Congress or in the Department, but suffice it to say it was mutually agreed upon. When faced with the reality of base reductions, past experience indicated that to approach base closure on an individual case issue basis usually would not be successful. The reason was affected members had been able to frustrate the process by forging Congressional alliances whereby they could assert sufficient pressure to prevent a specific closure.

The current method is an all or nothing approach. It requires the Congress to accept or reject the entire package.

One base cannot be singled out. Consequently, it pits a great majority of the legislative body against any single or small concert of other members who have parochial interests. It is a method that is used to get around what I have referred to as the Fiefdom Dimension.

I raise it for your consideration because of the applicability of the methodology to other issues. For example, ending the production of certain weapons systems. However, it may have an application to other departments where the Congress may feel that either downsizing of the department, or concentration of operations for efficiencies, would be in the best interest of those departments or agencies, but which cannot be accomplished because of strong parochial Congressional interests.

Executive Privacy

I think that Congress needs to be more cognizant of the need for a certain level of executive privacy for the effective development and formulation of policy. In such deliberations, it is essential that difference of views be surfaced in the staffing process. To be effective, a degree of confidentiality of these views is necessary. The Congress must be careful in how they require production of staffing papers for purposes of legislative consideration in order that they do not disrupt and frustrate policy formulation.

I am aware that sometimes when there has been a mistake and mismanagement, the insistence on security of executive documents is advanced for the purpose of not revealing these mistakes. However, I am of the view that certain guidelines should be established by the Congress in order to distinguish between legitimate executive privacy and self-serving nondisclosure.

Legislation by Label

Because of the vast number of legislative proposals and the methodology and capability of media for headline summaries and media-bite and sound-bite presentations, there is a growing trend whereby legislation is moved to adoption more by its title without adequate consideration as to its substance.

I recall as freshman member I was on the subcommittee which had responsibility to draft the Wilderness Bill that became a hallmark law. This legislation had encountered strong resistance from the committee chairman, a highly knowledgeable and experienced legislator in matters that related to the Department of the Interior and public lands. The principal advocate of the legislation was a member of the Senate who had enormous backing from public interest groups and the media for a Wilderness Bill. When our committee chairman, who was on friendly terms with the Senate sponsor, met and outlined to him his reservations and concerns about the Bill, the response by the sponsor was, "Wayne, I really don't give a damn what you do with

the Bill so long as it's got the name Wilderness on it when it comes out of committee."

Because of concern about the proposed legislation by the House Chairman, much effort went into consideration of the bill which became law; however, as a freshman member of Congress, I never forgot some of the cynicism that accompanied its sponsorship.

I'm sure you can cite many other examples of legislation by label; however, the difficulties that arise from this approach oftentimes can produce legislation that is hastily conceived. Its full impact is not appreciated by the total Congress inasmuch as members do become subject matter specialists and are not fully aware and understand the complexities of important issues outside their area of legislative expertise.

What I'm suggesting is that the Congress establish its own cost benefit analysis capability. There are many sound management techniques used in industry, and particularly in procurement programs of the Department of Defense, which use

program analysis and evaluation to measure costs, risk, economic benefits versus economic impacts, and other tradeoffs. The committee might wish to suggest consideration of such an approach to legislation. This capability would operate independently from the jurisdictional committees but would be available to assist them.

As the Congress moves into more technical fields it is important that legislative enactments be based on information drawn from sound scientific research. There is growing concern among a number of scientists this has not always been the case.

The Appointment Process

These comments are not directed to any specific administration, but rather apply to all the administrations for the past 30 years. The observation is that we are requiring far too long to fill key appointed positions in the federal system. I am referring both to posts that require confirmation and senior executive posts filled by the President, but not requiring confirmation.

The personnel selection process in the White House and many departments of government take too long. When confirmation is required, the time is even greater. To have a more effective government, the Congress needs to address executive personnel selection and ways to expedite the confirmation process.

Many of the day-to-day decisions of the Executive branch occur at the Assistant Secretary and Deputy Assistant Secretary levels. Not having these positions filled contributes to inefficiency, non-responsive and ineffective government.

Role Of Congressional Staffs

Congressional staff size has nearly tripled in the last three decades. There has been considerable discussion about the role that they play in the legislative process; the size of staffs; whether members are becoming isolated or insulated; the authority passed to key staff members.

We have been very fortunate to have had on Capitol Hill dedicated men and women who have devoted lifetime careers to congressional staff service. They have made an enormous

contribution to the effectiveness of the federal syetem. In many instances, these individuals have become experts in their own right on complex subjects; however, have not usually received the reccgnition they deserve for their contributions to public life.

The staff function breaks into two major categories with different duties, i.e., congressional office staff and committee staffs. In most offices there is likely to be considerable inter-staff action between these two staff components.

With the growth and complexity of the legislative program, population increase and greater constituent duties, the expansion and power of staffs have been inevitable. Accessibility to members, not only by constituents but by key people in the executive branch is essential.

My own perception is that in recent years, it has become increasingly difficult to meet with members personally; consequently there is greater delegation to staff members to conduct meetings. Out of this arises certain staff procedures and protocol, with the staff members assuming a more important

role in the legislative process. The danger of misunderstanding and mistaken communication increases when intermediaries are too frequently substituted by either executive or legislative leaders.

Because of the specialization that is now associated with congressional service and multiple committee assignments, particularly in the Senate, it is understandable that there be greater delegation to staff. It is also should be noted that each congressional office takes on its own management style and frequently the inaccessibility of members is really manifestation of a management style rather than the assertion of staff authority.

Nevertheless, there needs to be a better definition of staff roles and functions to ensure that the representative aspect of legislative service continues to be a corner stone.

I would recommend to the committee that one of the areas that you consider would be staff roles and functions. I would further suggest that the Congress establish an ad hoc committee

on congressional staffing. This would be composed of carefully selected staff members who have distinguished themselves for their public service and who have carried out their duties in an exemplary fashion. I believe that such a committee working with a congressional committee should establish certain guidelines and policies that relate to the conduct of staff members and their proper role and function. I would also suggest that annually there be a program of Congressional recognition of outstanding staff members who, by their public service and pursuit of excellence, set an example for other staffers to emulate.

Post Congressional Employment

In recent years, there has been growing discussion about employment of members after leaving the Congress and particularly the question of conflicts. Perhaps this is a subject the committee will consider. Although I recognize the problem, my only comment would be to proceed cautiously as to how limitations are applied so as not to discourage those who seek legislative office. I think there is some danger that post congressional

employment restrictions which are not carefully drafted may raise, indirectly, constitutional issues as to qualifications for election which today are limited to citizenship, residency and age.

Two Audits

I would suggest to the Committee that one of your tasks should be accomplishing two audits or inventories. Perhaps this is something you have done or contemplate doing.

The first audit would be inventorying all of current committees of the Congress and all of their subcommittees. As a part of this survey, there should be set forth their jurisdictions, over which departments or agencies of the federal government they exercise oversight or with which they have a legislative relationship. This would set forth the legislation that they consider and what hearings they have conducted with federal agencies and on what issues. Such an inventory would also indicate where there has been overlap with another committee

and duplication of hearings on similar issues where such has occurred.

I believe such a survey will be both revealing and helpful in addressing your task. I suspect you will conclude there are too many committees and subcommittees for an effective legislative process.

The second audit would be by way of follow-up on specific legislation that has been adopted within the last two decades with impact on the Executive Branch and the manner in which it carries out its duties. It would first establish an agreed upon group of statutes; and the Executive Branch then would be tasked to respond to you as to the application of these statutes, their effectiveness and what modifications, if any, the executive departments and agencies would make in the statutes that would contribute to efficiency in government.

I believe the Congress would find most helpful frank expressions from the Executive Branch as to the statutory

impacts; whether the enactments have been effective and what has been the requirements as to additional workload and costs.

Candidate legislation that I would suggest would include Budget Impound Control Act, legislation relating to the acquisition of computers, the War Powers Act, Freedom of Information, the Inspector General's statutes and Competition in Contracting. There may be others that you might wish to add.

I think it is important for Congress, from the standpoint of efficiency in government, to review consequences and impacts of legislation adopted that affects in a significant way the operation of the Executive Branch. Are these measures working as well as intended? If not, what needs to be done to improve them?

The first rule of medicine is "do no harm." My years in the Executive Branch cause me to believe that rule is applicable to the Congress when considering proposed legislation.

Policy Initiatives

I am of the view that Congress has not developed adequately its policy initiative capabilities based on its Article I, Section 8 powers. It has evolved over the years that policy initiatives for the national government emanate more from the Executive Branch. This no doubt stems from the authorities given to the President in Article II of the Constitution whereby the Chief Executive shall make recommendations for consideration by the Congress of certain measures considered by the President to be in the national interest. Out of this authority has evolved the "bully-pulpit" role of the President described by President Teddy Roosevelt. The policy initiatives of the President are usually contained in the broad charter of purposes of the administration in the State of the Union message.

What I am suggesting is not an abandonment of this role by the President, but rather an expansion of the Congressional role in the field of national policy--a grand strategy that would overlay so-to-speak and complement the President's endeavors.

The Chief Executive would advance proposals to implement the Congressional plan. These proposals would not be limited to the national plan but could also contain proposals for changes in that plan.

I believe the Congress should consider a strategic plan for the nation. Such a plan would be near-term, mid-term and long-term. Near-term would be 5-10 years, mid term would be 10-20 years and long-term would be 20-50 years.

The national plan would be composed of four major areas:

1. National Security and Foreign Affairs;
2. Social Services, which would include education, health, social security and welfare;
3. Environment; and
4. Financial, i.e., budget, revenues, fiscal and monetary matters.

Joint committees of the House and Senate would be formed for each subject area, however, they would not be permanent committees. In structuring the Congressional strategic plan, the

committee would draw heavily not only on Congressional resources but, to a substantial degree, also on executive resources. The most senior officers of the Executive Branch would consult with and provide inputs to the joint committees.

The report of each of the joint committees would b submitted to the Congress for their consideration. It is not anticipated that the Plan would have the force of law, rather it would be a broad statement of national goals and policies as to where we want this country to be and go in the next century.

As a statement of strategic policy, it would be guidance to the Executive Branch that reflects through the Congress the will of the American people. After submission of their reports the joint committees would no longer be operative but would be reconstituted every four years if the Congress chose.

In some respects, the strategic plan would not be unlike the platforms of the national parties; in fact, I would expect that the platforms and their planks would be reflected in the joint committee effort.

The year 2000 affords the Congress a unique benchmark to develop a long-range plan for the Nation. It marks not only the end of a century but the beginning of a new millennium.

CSIS Study

Shortly after I left the Department of Defense, I was asked by Dr. David Abshire, president of the Center for Strategic and International Studies, if I would head up a study group for CSIS to consider Congressional Defense Relations. A copy of the report of this study group is attached. I might add that its membership represented a cross-section of people with experience on Capitol Hill including key staff people and political scientists. A valuable member was former Congressman Don Fuqua who had been chairman of the House Committee on Science and Technology. Congressman Fuqua and I were both elected to the 88th Congress in 1962.

Although the focus of the study was the Department of Defense, it was apparent that many of the observations on congressional relations applied across the spectrum of the

Executive Branch and were not singularly related to the Department of Defense. In fact, it would not be possible to institute a number of the reforms suggested and limit them only to Defense. I have drawn on this report and amplified some of the points that are contained in it. I invite your review of the study for other suggestions for reform, particularly bi-annual budgeting.

Office of Technology Assessment

I would particularly commend to the Committee the work of the Office of Technology Assessment. I cite for example a report that the OTA prepared several years ago on Defense management and Congressional relations. This is an excellent report and I think it would be especially useful in your Committee deliberations. I mentioned that we drew on this report heavily in the Defense Management Review Process which was instituted by President Bush and Secretary Cheney in 1989. The OTA Report cites not only the complexity of issues that the Congress must address but points out jurisdictional problems involving committees, as well as

overriding social issues which impact on federal legislation as a matter of public policy. An example of this is the Small Business Program, which when considered solely on the basis of economics would not be justifiable but on the basis of social policy to encourage entrepreneurship is both a desirable and effective program.

Any student of Congressional reform needs to study this report which is entitled Holding the Edge: Maintaining the Defense Technology Base and is available through the Government Printing Office or from the Office of Technology Assessment.

Breakdown of Party Discipline

The Committee is no doubt aware of the observation that one reason the Congress is not as effective as it was in former years can be attributed to the breakdown of party discipline. I recognize the difficulties of addressing this issue in any reform effort. However, I cite it because key public figures have made reference to it. I know from many conversations with President Ford, who served as the Minority Leader of the House, that he

holds this view and frequently refers to it in response to questions as to improving Congress. I believe it is also a view that has been espoused by former Speaker of the House Carl Albert.

I cite this view because the leaders of the respective parties in the House and Senate need to give it further consideration internally in their organizations in order to be more effective.

Line Item Veto

I recommend to the Committee consideration of the Line Item Veto. This authority in the President, I believe, would be a great help in introducing discipline and spending restraints into the Government.

As one who has been a federal administrator, I can cite examples of pet projects which the Department of Defense would like to terminate but cannot because of powerful Congressional sponsorship. This sponsorship is tied into constituent representation, and the result can be the continued procurement

of weapon systems or conducting other programs which the Department does not need but continues to pursue because of Congressional pressure.

There are also examples of when the congressional sponsor leaves the Congress, the programs are immediately terminated.

If the President has Line Item Veto authority, it means there would be greater restraint by the Congress in sponsoring these programs at the outset. The capability to veto, even though it was not exercised, would in my view have a salutary benefit.

Term Lengths and Term Limits

When I was a member of the House, one of the questions that I was most frequently asked was whether I felt that the length of terms of House members should be changed from two to four years. I strongly opposed any such change, the reason being that I believe the mid-term elections during a Presidential term afford a valuable national referendum on the current policies of any administration. The results of mid-term elections can cause an

administration to alter its course and change its programs based on the November results. This important public expression would not occur if House members had terms that were co-terminus with that of the President.

I did suggest to my constituency, however, and still hold the view, that consideration might be given to a term of three years for House members, with the House divided into three classes and one-third standing for election every three years. This would mean that one-third of the House would stand for elections in off, or odd numbered years, which would give an additional opportunity for reflecting constituent views in years in which there was no federal election.

Reluctantly, I have come to the view to support the constitutional limitation on service of members of the House and Senate to a maximum of 12 years. As I have indicated earlier, I believe the public reaction to the performance of our national government, and particularly Congress, has reached such proportions that serious consideration of such an amendment is

warranted. I believe the only way that it can be averted is for the Congress to take significant and severe measures to reform itself and thereby become more effective and more responsive. As I have outlined earlier in this statement, there have been such systemic changes in the nature of the job requiring its full time pursuit that 12 years without a break in service is a sufficient time to serve.

This observation reflects on the seriousness of the task that you have. I predict that if you are not able to come up with a program of significant reform which makes the Congress more responsive to national needs and more effective in addressing those needs, and if such recommendations are not adopted by the Congress, then the term limitation amendment will surely pass.

Executive Gridlock

I made reference to legislative gridlock but gridlock is not exclusive to the Legislative Branch. It exists in the Executive

Branch and I believe this Committee should address it. I invite your consideration to how staffing occurs inter-departmentally in the Executive Branch. It can be a bureaucratic nightmare trying to establish a consensus on legislative proposals sponsored by a department of government. Let me give you an example; in 1986, the Packard Commission, in their recommendations, pointed out the vital need of Congressional reform on matters that were related principally to defense. However, the impact would be broader than the Department of Defense. There were recommendations in the field of acquisition as to both the Federal Acquisition Regulations (FAR) and Defense Acquisition Regulations (DAR). Seven years later there has really been no significant change to the FAR and DAR.

In reference to the Packard Commission recommendations for legislation embodying procurement reform for the Department of Defense, several years later, no such legislation had been referred to the Congress for its consideration. This is not because the Department of Defense ignored the Congressional

mandate, but it was not able to get the necessary consensus from the various agencies of government with whom it had to be staffed.

The Committee is well aware of how proposed bills move through the legislative process. I suggest that you examine how proposed legislation moves through the Executive Branch. It is a cumbersome, difficult process. It is directed by OMB, which is charged with the responsibility of getting sign-offs on proposed legislation before it goes to the Hill. This is an extraordinarily difficult process and frequently other departments and agencies can frustrate and block necessary legislation. At other times, in order to get consensus, the Congress receives legislation that reflects the lowest common denominator and may not be fully responsive to the need.

What happens is a clash of interests based on jurisdiction, turf and embedded programs that stall change. To further complicate the task of achieving reform as you will recognize, the opposition sometimes voiced by certain departments to

proposed legislation is buttressed and reinforced by Congressional Committee interests of a patron committee. I can tell you from experience, that an opposing department will rally or cite Congressional interests in support of their position and consequently, in some instances, stall or defeat the proposed changes.

I cannot emphasize how important I feel it is that you examine the Executive staffing process. I suggest you also look at linkages between staffs of executive agencies and committees when proposed legislation is at issue. To make this point, I invite you to review the numerous reform efforts and studies that have been initiated in the Executive Branch to try and remedy the process in the procurement field alone. Notwithstanding enormous work and effort, they usually have fallen short of the intended goal inasmuch as they could not develop the consensus in the Executive Branch to pursue them on Capitol Hill.

Procurement reform has been for years the Pentagon's Rock of Sisyphus. As we meet there are many dedicated and able people

in the Department of Defense working countless hours in yet another reform effort by that department. They are trying to roll the rock up the hill again.

Where there are merely staff differences between departments, the issue can ultimately be escalated to the President to resolve, a time-consuming and difficult process.

Reform legislation will likely require amendment or repeal of existing laws; consequently only Congress can break this gridlock.

Lobbying and Special Interests

The Congress is currently addressing issues of campaign reform and lobbying. I will limit my comments to the latter only as it relates to the extension of lobby regulations to the Executive Branch.

In reference to this issue, I urge caution and thorough consideration. The questions to be asked are (1) what is the need; (2) how can it best be met; (3) what will be the impacts on the Executive branch; will it contribute to greater effectiveness and better government, or more government and greater ineffectiveness; or (4) will it make things easier for your constituents, or discourage them by more bureaucracy?

The current statute, adopted several years ago, which requires reporting on contacts to executive agencies is ambiguous and uncertain in its application. There are differences of view as to its meaning, and in the OMB divergent opinions interpreting at least one key provision of the legislation.

Authorization vs. Appropriations

This committee has already received a number of comments on the problem which occurs when there is an appropriation by the Appropriations Committee without authorization. I can only confirm the difficulties which this poses for the senior leadership in the Executive Branch. It is a dilemma that Congress must resolve. The Congress must establish the rules. It could prohibit the practice; it might permit the process, or limit it to exceptions set forth by the legislative body. However, to ignore the issue only aggravates a difficult situation and unfairly imposes a Hobson's choice on the Executive Branch.

Separation of Powers

I believe the real issue which underlies the demand for reform is a more systemic one. It is the separation of powers. This is the issue I suggest you give serious consideration.

Of the three branches, the Legislative is the most powerful. It is the one, unless it exercises restraint, that can encroach

on the other branches. Yet, it is also the one that can best redress the balance. In the last two decades, I believe that delicate balance of power, which is the genius of our system, is being tipped to the Legislative Branch in such a way to be counter productive and against the effective operation of the Federal System. It is not being done deliberately or with malice, but I am sure with well-meaning purpose; nevertheless in many instances the ends desired are not being achieved.

I urge the Committee to study the five articles of Madison in the Federalist Papers (47 through 51) wherein he discusses the separation of powers in structuring our government. I particularly commend to you number 48 in which he quotes Jefferson on legislative power, and 51 where he speaks to the nature and purpose of government, and the necessity to safeguard against the abuse of power from whichever branch. He reminds the reader "that if men were angels no government would be necessary."

The national movement to limit terms is a citizen effort to redress the balances.

I ask you to consider the enumeration of powers given to the Congress as set out in Article I §8 of the Constitution. Compare it to the Article II powers of the chief executive. The President is an agent for the execution of governmental functions. Clearly, the Legislative Branch is the heart of governmental power. The Congress is merely an agent of the people in whom the real power of the nation is vested.

It appears more frequently the Congress is trying to manage the Executive Branch by legislation. Management is not the job of Congress. The real challenge you face is not so much curbing power but ensuring the proper use of power.

What happens in this country has far greater meaning than just America. What has occurred here in the last 200 years has impacted on the whole planet. What we do, or fail to do, has meaning well beyond our boundaries and our times.

Congress is not only the pre-eminent branch but its function is exclusive and unique. Our national strength is both our diversity, and the multiplicity of our interests. This strength can only be translated into a national purpose by a Congress that is truly representative of our people. "Here, the people govern" -- this famous quote states the goal of your endeavors.

STATEMENT OF DICK THORNBURGH

BEFORE

THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS

JUNE 22, 1993

When I first came to Washington in 1975, I came as one fresh from service as a prosecutor, having served the previous six years as United States Attorney for the Western District of Pennsylvania. When President Gerald Ford asked me to take on the responsibility of managing the Justice Department's Criminal Division as an Assistant Attorney General, it was in the wake of the Watergate scandals. The Department, as the Committee knows, had been a prime focal point during that calamitous period in our Nation's history, and, under the stewardship of Attorney General Edward Levi, it was just slowly regaining its stature.

The experience of coming to Washington during that tense time helped foster in me a strong belief that nations and communities cannot effectively function but for the reasoned application of the Rule of Law. It was a theme I tried to expand, with varying degrees of success, during my three year tenure as Attorney General. It is also the theme on which I would like to focus the thrust of my remarks today.

Upon my arrival in Washington, I came to appreciate, for the first time, the high level of tension between the Legislative and the Executive Branches, highlighted in Watergate and expanded in earnest during the Presidential election cycle of 1976. These tensions were destined to be refined into an art form, especially whenever either house of Congress is controlled by a political party different from the one which occupies the White House. In time, reasonable constitutional oversight authority was extended by congressional committees to include examination of ongoing criminal investigations and intricate lawyer-client relationships within the Executive Branch which had previously been considered off limits. By the same token, Executive Branch purists whose agenda included the dismantling of congressional oversight powers engendered widespread distrust in the media and on Capitol Hill. Failure on the part of any cabinet official, even in good faith, to cooperate with congressional requests for information, especially when that

information was controversial and preserved in document form, inevitably ran the very real risk of being characterized as a "cover-up". Since both branches of government generally have a well-reasoned basis for their positions, and since at some uncertain point a constitutional standard must intervene, I think this forum is an appropriate one in which to consider some means of impartial resolution of disputes arising from such requests.

The issues are not difficult to understand. They are just difficult to resolve. Our failure to create some effective vehicle for resolution only guarantees that future misunderstandings, to the ultimate detriment of the public good, will be inevitable. How many more interbranch collisions, such as the well-publicized dispute between the Congress and former EPA Administrator Anne Gorsuch in 1982-83, will be necessary before we take steps to fashion a process that leads to reasoned, rational results? How many more times will the previously untarnished reputations of dedicated public servants, such as Theodore B. Olson, former Assistant Attorney General for the Department's Office of Legal Counsel during the Gorsuch controversy, be subjected to years of an independent counsel's criminal investigation, at the personal cost of hundreds of thousands of dollars, to no avail? Now is an appropriate time for those of us with a background in the Executive Branch to join with you in the Legislative Branch to examine ourselves and our practices, Mr. Chairman, as well as the consequences of our actions on the future of our ability to govern effectively and represent the interests of the People instead of solely our own viewpoints.

I would like to take a moment for a slight diversion. Struggles between the Executive and the Legislative Branches are often couched in terms of constitutional issues or institutional prerogatives. From the perspective of professional prosecutors, this emphasis overlooks a very important point. Although prosecutors are often portrayed as aggressive to a fault, every prosecutor worth his or her salt is alert to the fact that, outside

of waging war, we wield one of the Executive Branch's most formidable powers: the power to criminally indict.

Prosecutors often encounter targets of investigations who are innocent of any criminal charge but who, by virtue of circumstance or association, find themselves within the scope of criminal investigations. In the course of those investigations, they deserve and are entitled to privacy and confidentiality. As we are all aware, the mere mention of someone's name in connection with a criminal investigation can leave a mark which may ruin careers and never fully disappear.

It is for these reasons, primarily, that the Justice Department, during my tenure and before, fought so hard against the unauthorized disclosure of information relating to ongoing investigations. To the extent that the Department fails in adhering to its own rules, it should be held accountable. To the extent that we have battled with Congress in this context, it is important for the Committee to understand why.

Mr. Chairman, I commend to your attention a July, 1990, Report of the Administrative Conference of the United States, in which this issue is discussed in some detail. The principal recommendation of that Report, which is worth examining, is the creation of what it called "a new modus vivendi to govern information disputes." Under this agreement, as envisioned by the Administrative Conference (citing 1987 and 1988 American Bar Association studies), the new process would have both a procedural and a substantive component. The substantive component would be the potential for a declaratory judgment in cases in which resolution is otherwise impossible. The procedural element would be a written understanding between the branches in which the specific interests of each branch would be clearly delineated, a mutual commitment expressed to invoke them in specific terms in the event of a dispute, and "a commitment to explore in

negotiation how the interests of each branch would be advanced or compromised in the particular dispute by the use of various compromise strategies attempted in the past."

With your permission, I would like to submit a copy of the proposal as a part of the Record. I should also add that I have taken the liberty of writing to Brian V. Griffin, Chairman of the Conference, to request that he undertake to re-examine this issue with an eye to fashioning a specific statutory means, more substantial than that envisioned by the 1990 study, which will force closure in cases in which there can be no negotiated solution.

As is the case in many such academic exercises, solutions like those recommended in 1990 by the Administrative Conference are guided by logic and reason. The political climate in which such controversies arise, however, is anything but a genteel gathering of thoughtful intellectuals. It is, instead, too often a battlefield of conflicting interests and political agendas, in which the ability of one side to paint the other in as unfavorable a light as possible seems to command priority. On one side is the President and his Attorney General, and on the other various members of the Leadership of the Senate or House, with the prospect of the uncooperative Executive Branch official being held in Contempt of Congress at the ready. Accusations flow from both sides, and the Executive, more so perhaps than the Legislative, is often unable, because of the confidentiality of the information at issue, to adequately respond to charges bandied about in the press and on the floor of either body.

The only viable recourse, in my view, is some sort of statute which places jurisdiction in the Federal District Court for the District of Columbia, or a three-judge panel of either the Court of Appeals for the District of Columbia Circuit or the Federal Circuit, to resolve such disagreements expeditiously. This can be done by vesting in the

court the authority to appoint a Special Master for purposes of mediating a resolution between the warring parties, taking into consideration on the one hand the interests of the Executive Branch for confidentiality, where Constitutionally appropriate, and on the other the need for congressional entities to have access to certain information in pursuit of their legislative responsibilities. During my tenure as Attorney General, we discussed the creation of such a statute to provide for the resolution of future disagreements, but, unfortunately, the political climate never facilitated the submission of any final proposal.

Now, I believe, is the best time to move forward. Without a specific statute, or remedy, I fear the confrontational tactics of the past will continue. Moreover, the absence of a specific statute will enable courts to continue to dodge what they sometimes view as a political debate between the two branches. The availability of a judicial forum in which to obtain an immediate review of the competing interests of each branch of government might well contribute positively to a more deliberate, reasoned resolution of disputes, enabling cooler heads, more often, to prevail and causing a reduction in the historically confrontational tone of the political rhetoric expended in such disputes. Only with the adoption of such a statute will political gamesmanship be removed from what essentially is a tug of war between competing constitutional constituencies.

Mr. Chairman, I urge the Committee to seriously consider this proposal. As much as any other single factor you might review during the course of your deliberations, a recommendation from this body that a statute be adopted could pave the way for the establishment of constitutional parameters governing interbranch disputes over access to information and documents. More important, perhaps, it could go a long way toward reducing the prospect for this very damaging form of "gridlock". In so doing, it would also constitute a small step toward civilizing political debate in this arena and perhaps abating,

just a little bit, the sense afoot in America that those in Washington care more about short term political victories than about the important business of governing.

I will be happy to answer any questions you might have.

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1 C.F.R. §305.90-7

OFFICE OF
THE CHAIRMAN

Recommendation 90-7

Administrative Responses to Congressional Demands for Sensitive Information

Adopted December 18, 1990

The routine sharing of information between congressional committees and administrative agencies constitutes one of the most important interactions between the political branches of our national government. The process of exchanging information affects the ability of the executive and legislative branches to carry out their constitutionally assigned tasks. The quality of Congress's legislative and oversight work often depends on agency information. The control of the disclosure of sensitive information also affects the executive's ability to fulfill its functions.

The Constitution of the United States operates only loosely as a set of restraints on the behavior of the political branches in disputes over information. Because it does not expressly acknowledge a congressional entitlement to information or an executive prerogative to withhold information, the Constitution provides less a set of clearly understood rules than a framework within which each branch articulates its asserted right to demand or withhold information.

The judicial view regarding disputes over sensitive information between the political branches, as distilled from a very few opinions, respects elements of the views of both branches. While several cases imply what the Supreme Court's view might be,[1] there is no Supreme Court adjudication of any executive privilege dispute with Congress. Consequently, there is no opinion that resolves the principled contentions that such disputes involve.

By all accounts, most congressional demands for information are handled without confrontation, and it is clear that agencies generally respond to requests by providing whatever information Congress is seeking. Moreover, the branches do have a strong and continuing interest in the success of their overall relationship, despite an institutional competitiveness that is augmented when the two branches are controlled by different parties. Nevertheless, serious contentious cases do arise, especially in areas of great concern to the public, and improved mechanisms for resolving such disputes would benefit both political branches, as well as the courts, which shy away from involvement in such cases.

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[1] See U.S. v. Nixon, 418 U.S. 683 (1974) which held that the executive has a constitutionally based privilege to withhold information, the release of which would impede the performance of executive branch responsibilities. See also McGrain v. Daugherty, 273 U.S. 135 (1927) which recognized a constitutionally implied power of congressional investigation and said further that Congress need not have before it a specific legislative purpose in order to trigger its investigative authority.

An understanding of the several factors that may affect the outcome of particular demands as well as the process by which a resolution is achieved is required if improvements are to be recommended for resolving information disputes in a way that enables both branches optimally to fulfill their constitutional functions. One major factor affecting the successful navigation of a dispute is the perceived stakes or interests of each branch. What is at stake for Congress is usually the performance of one of its primary functions. These include routine oversight, the contemplation of possible legislation, the review of nominations requiring the advice and consent of the Senate, or the investigation of possible official wrongdoing. The executive's desire to control the dissemination of information is likely to result also from a predictable set of concerns. These include protecting national defense and foreign policy secrets, protecting trade secrets or confidential commercial or financial information, protecting the candor of presidential communications or intrabranch policy deliberations, preventing unwarranted invasions of personal privacy, whether of government officials, employees, or private persons, and protecting the integrity of law enforcement investigations and proceedings. In some cases, the executive may regard such information as sensitive, meaning that its disclosure could compromise the capacity of the executive branch to discharge its constitutional or statutory responsibilities. Disputes over information often have a purely political basis as well. Congress may seek information in an effort to gain particular political advantage; the executive may seek to withhold such information to cover up mistakes.

The prospects for a nonconfrontational resolution are good if the branches perceive that a particular dispute boils down to a contest only between Congress's ability to fulfill one of its primary missions and the executive's ability to protect one of the routine concerns mentioned, rather than a fundamental readjustment in the institutional power of each branch in relation to the other. Accommodation is possible in such a situation because several intermediate arrangements exist between complete disclosure or complete non-disclosure that allow for a balance of the branches' competing interests.

Among the intermediate arrangements available for settlement of a dispute are: (1) the release of information by the executive in timed stages that allow it to conclude a law enforcement investigation or policymaking process without premature scrutiny; (2) the release of information under protective conditions ranging from Congress's promise to maintain confidentiality to congressional inspection of the materials requested while they remain in executive custody; (3) the release of requested information in expurgated or redacted form; or (4) the release of the requested information in the form of prepared summaries.

Important, however, to the resolution of disputes along these lines is the formation of a new operational process or arrangement. Under this arrangement, each branch would retain the formal authority to assert in legal proceedings what it believes to be its constitutional prerogatives concerning the control of information. At the same time, the arrangement would contain agreements aimed at steering negotiations away from categorical questions of prerogative and toward the pragmatic resolution of immediate disputes. Toward that end, an arrangement should specify at least those interests in the control of the information that each branch could invoke in negotiations, a commitment to invoke those interests in highly specific terms should disputes arise, and a commitment to explore in negotiation how the interests of each branch would be advanced or harmed in the particular dispute by the use of various compromise strategies attempted in the past.

The scope of the new arrangement should include both executive and independent agencies. There is nothing in the constitutional relationship--as distinguished from the statutory relationship--between administrative agencies and either Congress or the President that suggests that labeling an agency as executive or independent yields greater or lesser authority for the President to control agency information or greater or lesser authority for

Congress to demand information. In addition, the arguments for and against the sharing of information do not vary depending on the structure of the agency that holds the information.

Congress might also consider placing in one office the responsibility of coordinating the negotiation of disputes with the executive over information. This would be akin to the practice of the executive branch with respect to the Office of Legal Counsel at the Department of Justice which stores information regarding the resolution of disputes and provides counsel to agencies embroiled in disclosure disputes. At a minimum, Congress ought to more regularly familiarize its members with the information and counsel that the Office of Senate Legal Counsel and the General Counsel to the Clerk of the House of Representatives can provide to committees that are engaged in disputes over information. Congress should consider alternative means for resolving particularly controversial cases in addition to the current criminal contempt procedures. Alternatives could range from third-party mediation to referral to other agencies or to less draconian judicial procedures.

RECOMMENDATION

1. Congress and the President should create an on-going process for negotiating the conditions under which sensitive information[2] in the agencies should be disclosed to or withheld from Congress.

2. This operational arrangement should seek to achieve improved cooperation and relations between the executive and Congress. Specifically, the executive should respect Congress's legitimate legislative and oversight interests, including the pressure of time and the need to have information immediately available. In return, Congress should respect the executive's legitimate interests including, for example, protection of confidentiality in matters pertaining to presidential communications, national security, civil and criminal law enforcement, personal privacy and commercial confidentiality, and the free-flow of staff advice that might be inhibited by outside scrutiny of deliberative documents. However, both branches should invoke these interests only in highly specific terms and should commit themselves to explore in negotiation how the interests of the branches could be reconciled. In designing this arrangement, Congress and the executive should consider adding mechanisms for dispute resolution beyond the negotiations and discussions that currently take place.

3. Such an arrangement need not require legislation, but should be memorialized in some fashion. Counsel of both Houses of Congress and the Office of Legal Counsel in the Department of Justice should retain information concerning the informal resolution of disclosure disputes. Appropriate consideration should also be given to roles these Counsel can play as sources of advice regarding disputes over sensitive information.

4. In addition, Congress should consider establishing procedures for resolving impasses over congressional access to sensitive agency information which could be invoked to help resolve exceptional cases as an alternative to contempt proceedings.[3]

5. No general distinction should be made between executive and independent agencies for the treatment of contested information for resolving disputes over sensitive information.

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[2] Sensitive information is defined as information whose public disclosure could compromise the capacity of the executive to discharge its constitutional or statutory responsibilities.

[3] An example worth consideration might be a declaratory judgment procedure that could be invoked by Congress or the agency after the exhaustion of informal means--such as negotiations between the congressional committee leadership and the agency head--for resolving disputes in which some type of adjudication appears unavoidable. [To avoid constitutional problems, any action brought by an agency under this proposal should be filed against the congressional employee who served the subpoena in question.] In addition, particularly controversial cases might be referred for resolution to *in camera* panels consisting of retired federal judges, members of Congress, or executive branch officials. Other dispute might be avoided by designating an issue of controversy for study by the General Accounting Office.

Administrative Conference of the United States

NEGOTIATING FOR KNOWLEDGE: ADMINISTRATIVE RESPONSES TO CONGRESSIONAL DEMANDS FOR INFORMATION

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Among the many interactions of the political branches of our national government, perhaps none is more important than the routine sharing of information between congressional committees and administrative agencies. The quality of Congress's legislative and oversight work often depends on agency information. Yet, the executive is adamant that, in many contexts, its ability to control the information available to it is critical to the fulfillment of the executive's constitutionally vested functions. The process of information exchange -- demand, response, possible negotiation and disclosure -- is therefore central to each branch's agenda.

The success of interbranch information exchange is very difficult to assess. There is no obvious way of determining in any particular case whether the information provided to or withheld from Congress is optimal given the public interests involved. There is no obvious way to gauge the negotiating efficiency of the branches in resolving contested cases. There is uncertainty even whether the branches are honoring their respective legal obligations because little clear law exists to govern interbranch disputes over information, and each elected branch interprets the governing principles very differently from the other.

Much of Part I and of Part II, A-3 and A-4, below -- the doctrinal analysis of executive privilege and the factual accounts of executive privilege disputes involving James Watt and Anne Gorsuch -- appeared in Shane, Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress, 71 MINN. L. REV. 461 (1987).

Despite these obstacles, some helpful generalizations are possible. It is possible, that is, to suggest some broad substantive guidelines that could help foster a degree of disclosure or withholding likely to be consistent with the interests of both branches, and of the public. Likewise, procedural steps are available to enable the branches to reach agreements more efficiently than they now do in some disputed cases. Because law operates in this area under the dominant shadow of politics, it would be foolish to overestimate the utility of rule prescription and legal process in mitigating undue tension between the branches in the information exchange process. Some progress is possible, however, and improvement in this area might yield benefits with respect to other aspects of the interbranch relationship as well.

To understand both the limits and the potential of reform, it is important to focus on the information exchange problem from two distinct angles. Part I below reviews the law in this area -- not only to clarify what rudimentary doctrines exist, but also to explain the unlikelihood that much more authoritative law will be forthcoming. Part II reviews institutional practice, which, although mindful of law, is also distinctly political. An analysis of clearly successful negotiations, as well as negotiations that were less obviously constructive, suggests both the likeliest sources of tension between the branches and some helpful avenues for agreement.

Part III assesses a variety of possibilities for reforming the current processes of negotiating disputes and testing disputed claims of privilege against Congress. Part IV considers the applicability of the reform analysis to demands for information from so-called "independent agencies." The conventional wisdom in our capital city -- that Congress's entitlement to information or the appropriate degree of disclosure varies between "independent" and "executive" agencies -- makes little sense on either constitutional or policy grounds.

This study benefited greatly from the comments of those present and former employees of Congress and of the executive branch who agreed to be interviewed for the paper. A list of those willing to be acknowledged as interviewees appears as an appendix. Of course, the conclusions I present are mine, not necessarily theirs. I am also grateful for the research assistance of Paul Goddard, Iowa '92.

I. THE BACKGROUND OF LEGAL UNCERTAINTY

As in other separation of powers contexts, the Constitution operates only loosely as a set of restraints on the behavior of the political branches in disputes over information. Nothing in the Constitution expressly refers to Congress's entitlement to information or to an executive prerogative to withhold. Nor have judicial opinions gone very far in elaborating the law. As a result, the Constitution provides less a set of clearly understood rules than a rhetorical framework within which each branch articulates its asserted right to demand or to withhold information.[1]

Congress's institutional view of its right to demand executive branch information is easy to summarize.[2] Congress insists it has plenary authority to demand executive branch information in connection with any properly authorized legislative activity. Thus, for example, the Freedom of Information Act, which exempts large categories of executive branch records from mandatory public disclosure expressly disclaims the application of those exemptions to Congressional demands for information[3] -- including the exemption generally recognized as protecting documents that the executive branch deems to be covered by the generalized deliberative privilege that is perhaps the largest subspecies of executive privilege.[4] The opinions of congressional counsel assert additionally that no information generated at a staff level is properly subject to any executive privilege whatever.[5] Moreover, they recognize no limitation as to the subject matter of information that Congress properly may demand -- even information relating to foreign relations, including international negotiations, is within

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[1]A helpful general synthesis of law and practice in this area is J.C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE (1988).

[2]Helpful general presentations of Congress' view include R. EHLKE, CONGRESSIONAL ACCESS TO INFORMATION FROM THE EXECUTIVE: A LEGAL ANALYSIS (Congressional Research Service Rept. No. 86-50A) (Mar. 10, 1986), and Office of Senate Legal Counsel, Draft Memorandum re: Congressional Oversight of the Department of Justice (Feb. 1986) (on file with author).

[3]5 U.S.C. 552(c).

[4]5 U.S.C. 552(b)(5); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) ("That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear . . ."). For a review of the general contours of the doctrine surrounding invocation of deliberative privilege in court, see Weaver and Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279 (1989). The justification for such a privilege is attacked vigorously in Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. ___ (1990) (forthcoming).

[5]Memorandum from Stanley M. Brand, General Counsel to the Clerk, U.S. House of Representatives to Hon. John Dingell, re: Attorney General's Letter Concerning Claim of Executive Privilege for Department of Interior Documents [hereinafter cited as *House General Counsel's Watt Memorandum*], *reprinted in Contempt of Congress: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st and 2d Sess. 109 (1982) [hereinafter cited as *Watt Contempt Hearings*].

Congress's refusal to recognize a privilege for staff documents extends to attorney work product. Memorandum from Morton Rosenberg, American Law Division, Congressional Research Service to Subcomm. on Oversight and Investigations of the House Energy and Commerce Comm. re: Assertion of Claims of the Attorney-Client and Work Product Privileges Before a Congressional Committee (Feb. 28, 1989). It has even been argued that courts should refuse to recognize an attorney-client privilege for government entities. Note, *Attorney-Client Privilege for the Government Entity*, 97 YALE L. J. 1725 (1988).

Congress's purview.[6] The contrasting executive view is likewise straightforward. For the last 20 years at least, an executive branch doctrine of executive privilege has been embodied explicitly in presidential documents. On March 24, 1969, President Nixon issued a general memorandum to the heads of executive departments and agencies concerning congressional demands for information.[7] The Ford and Carter administrations left this policy intact, and a 1982 redraft by President Reagan left untouched the core principle of that memorandum.[8] That principle is that the executive branch "has an obligation to protect the confidentiality of some communications," but will invoke executive privilege against Congress only with "specific Presidential authorization," in the "most compelling circumstances," and "only after careful review demonstrates that assertion of the privilege is necessary."[9] The scope of the President's authority to withhold demanded information extends, under the executive view, to all information, the disclosure of which would impede the responsible discharge of executive branch functions. Such information may include state and military secrets, the contents of investigative files assembled for law enforcement purposes, information that would disclose

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[6]*Watt Contempt Hearings*, *supra* note 5, at 116-117; Memorandum from Stanley M. Brand, General Counsel to the Clerk, U.S. House of Representatives to Hon. Elliot H. Levitas, re: Attorney General's Letter Concerning Subpoena For Documents to Administrator of Environmental Protection Agency [hereinafter cited as *House General Counsel's Gorsuch Memorandum*], *reprinted* in H.R. Rep. No. 968, 97th Cong., 2d Sess. 58, 61-63 (1982). This is not to say that Congress denies the importance of withholding certain executive branch information from the public, only that it denies the executive branch's authority to regard dissemination to Congress as public disclosure. Congress does regard itself as bound to provide for the nondisclosure of information, the dissemination of which would compromise national security. *Id.* That responsibility may obligate a congressional subcommittee, for example, to respect a good faith executive branch demand that it receive sensitive information only in "executive session." *See* Senate Standing Rule XXIX(6), *reprinted in* S. Doc. No. 1, 98th Cong., 1st Sess. 61 (1984); House of Representatives Rule XLVIII(7), *reprinted* in H.R. Doc. No. 271, 97th Cong., 2d Sess. 692-696 (1983). However, the authority to disclose publicly such information as a committee receives in executive session would reside in the committee, never in the executive branch.

This rendition of Congress's doctrine vis-a-vis executive privilege may appear at odds with the various occasions on which subcommittees have acceded to executive insistence on nondisclosure. *See generally*, Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, re: History of Presidential Invocations of Executive Privilege Vis-a-vis Congress (Dec. 14, 1982), *reprinted* in H.R. Rep. No. 968, 97th Cong., 2d Sess. 90 (1982); Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, re: Refusals by Executive Branch Officials to Provide Information or Documents Demanded by Congress (Jan. 27, 1983); SUBCOMM. ON SEPARATION OF POWERS OF THE S. COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., REFUSALS BY THE EXECUTIVE BRANCH TO PROVIDE INFORMATION TO THE CONGRESS, 1964-1973 (Comm. Print 1974). Those occasions, however, do not represent any unambiguous concession to the authority of the executive branch to withhold. Even Congress's insistence that it is empowered in every instance to demand and receive executive branch information would not require Congress to stand on its asserted authority at every opportunity. It can only be said with confidence that there are many instances in which Congress's calculation of its own interests, its confidence in the President, and the asserted interests of the executive branch permit it to accommodate the executive branch, whatever Congress's view of underlying principle. *See, e.g.*, Sofaer, *Executive Privilege: An Historical Note*, 75 COLUM. L. REV. 1318, 1321 (1975).

It is likewise true that the executive branch's willingness to submit to Congress information that might have been protected under a privilege claim does not gainsay the executive branch's asserted authority to claim privilege. *See generally* Stathis, *Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts*, 3 J.L. & POL. 183 (1986). The difficulty that is posed for Congress when it acquiesces in an executive branch insistence on secrecy, or for the executive when it acquiesces in a congressional demand for information, is justifying nonacquiescence in other instances depending on their facts. Thus, one House Judiciary Committee criticism of the executive branch's handling of the EPA dispute discussed below is that the executive branch failed to explain how the information it sought to withhold differed from earlier EPA information that had been voluntarily released. H. R. Rep. No. 435, 99th Cong., 1st Sess. 28-31 (1985).

[7]Memorandum from the President for the Heads of Executive Departments and Agencies Establishing a Procedure to Govern Compliance with Congressional Demands for Information (Mar. 29, 1969), *reprinted in Executive Privilege-- Secrecy in Government: Hearings on S. 2170, et al. Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. 207 (1975).

[8]Memorandum from the President for the Heads of Executive Departments and Agencies, Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), *reprinted at* H.R. Rep. No. 435, 99th Cong., 1st Sess. 1106 (1985).

[9]*Id.*

the identity of a government informer, personal information about executive branch personnel, and other material generated in the process of policy deliberation, the disclosure of which would threaten intrabranch decisional processes.[10] In the executive view, privileged materials may emanate originally from staff levels considerably removed from the President, although a claim of privilege requires presidential familiarity with and review of the materials.[11]

Because the Executive branch regards the protection of confidential information as necessary to protect the integrity of executive power, it cannot discharge that responsibility by divulging information to Congress under a promise that Congress will act responsibly in deciding whether to disseminate the information further. Such a delegation of control over information would be, in the executive view, an unconstitutional abdication of power[12] analogous to an unconstitutional delegation by Congress of legislative authority via a standardless statute.[13] Further, as Attorneys General have recognized, this position obviates having the executive branch purport to decide which congressional committees are trustworthy, and which are not.[14] The executive branch asserts that it is obligated to divulge privileged information to Congress only when the institutional needs of Congress overbalance the interest of the executive branch in nondisclosure. According to the executive, moreover, it is entitled to follow its own best judgment as to where the balance of interests lies.

As part of its balancing view, the executive branch concedes that the President may not invoke executive privilege to withhold information from Congress that is probative of executive wrongdoing.[15] Thus, prior to the Nixon impeachment investigation, Presidents had repeatedly stated the right of the House to demand executive branch evidence in connection with such inquiries; Nixon's refusal to honor Judiciary Committee subpoenas duces tecum was reported by that Committee as an article of impeachment.[16] A formal opinion by Attorney General William French Smith confirmed the Reagan Administration's agreement that information relevant to an investigation of executive corruption may not be shielded from oversight.[17]

The judicial view, as distilled from a very few opinions, respects elements of both the "congressional doctrine" and the "executive doctrine" of executive privilege. There is, however, no Supreme Court adjudication of any executive privilege dispute with Congress. There is thus no one opinion that purports to resolve definitively, from the judicial point of view, the principled contentions that such disputes involve. Several Supreme Court decisions nonetheless imply what the Court's view would be on a number of critical issues.

Of central importance is the 1974 opinion in United States v. Nixon,[18] which held that the President has a constitutionally based, but defeasible privilege to withhold information from a court based on a generalized claim of presidential confidentiality. The Court identified as the constitutional basis for the privilege "the supremacy of each branch within its own assigned

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[10]*Id.*

[11]*Id.*

[12]Letter from Attorney General William French Smith to Hon. John D. Dingell (Nov. 30, 1982), *reprinted in* H.R. Rep. No. 968, 97th Cong., 2d Sess. 37, 39 (1982) ("[T]he President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.").

[13]*See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[14]Letter from Attorney General William French Smith to Hon. John D. Dingell (Nov. 30, 1982), *reprinted in* H.R. Rep. No. 968, 97th Cong., 2d Sess. 37, 39 (1982), citing a 1941 letter from then-Attorney General Robert Jackson to Hon. Carl Vinson: "Unfortunately, . . . a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman."

[15]*Id.* at 41.

[16]H.R. Rep. No. 1305, 93d Cong., 2d Sess. 4 (1974).

[17]6 Op. Off. Legal Counsel 31, 36 (1982).

[18]418 U.S. 683 (1974).

area of constitutional duties,"[19] and "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties."[20] The Court was untroubled that the Constitution makes no express provision for executive privilege. Instead, citing the holding of McCulloch v. Maryland[21] with respect to the implied powers of Congress, the Court held that a presumptive executive branch privilege of nondisclosure could follow by analogous implication from those powers of the President that are express.[22]

Besides finding a constitutional basis for executive privilege against courts, the Nixon opinion is critical for two additional reasons. The first is its holding that the claim of privilege in that case was overcome by the institutional need of the trial court to have the information necessary to secure "the fair administration of criminal justice."[23] Putting aside whether the Court's balancing in Nixon was entirely persuasive,[24] it is a central element of the Supreme Court's doctrine that a claim of executive privilege may be weighed against the powers of the courts in performing their assigned constitutional tasks.

The other critical point is the Court's implication that different claims of privilege may be accorded different weights according to the bases of the claims. Thus, the Court distinguishes at length the generalized interest invoked in Nixon in the protection of confidential presidential communications from narrower claims of privilege based on military and state secrets, as to which "the courts have traditionally shown the utmost deference to Presidential responsibilities."[25]

The Court in Nixon expressly reserved any question concerning "the balance between the President's generalized interest in confidentiality . . . and congressional demands for information."[26] One thus cannot be entirely certain whether the Court would recognize any constitutionally based privilege against Congress, or, if it did, whether its balancing approach would be the same. On the other hand, it is hard to imagine that the constitutionally based privilege recognized in Nixon would have no relevance whatever in a contest with Congress. The Court's modern approach to the separation of powers is generally a balancing approach, except in those cases in which the Court perceives it is interpreting a fairly specific structural or procedural constitutional command.[27] A separation of powers claim is recognized whenever the initiative of one branch substantially interferes with the power of another to accomplish its constitutional tasks; in such a case, the initiative must be justified by some overarching governmental interest.[28] Given this general approach, the Court would surely find those executive branch responsibilities supporting the existence of privilege in Nixon to be no less deserving of constitutional concern when the threat to the fulfillment of those executive duties emanates from an extrajudicial source. The two relevant Court of Appeals

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[19] *Id.* at 705.

[20] *Id.*

[21] 17 U.S. (4 Wheat.) 316 (1819).

[22] 418 U.S. at 705 & n.16.

[23] *Id.* at 713.

[24] The Court's analysis is forcefully questioned in Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 U.C.L.A. L. REV. 116 (1974). In applying the *Nixon* case, U.S. trial judges have balanced the relevant President's claim of confidentiality not against the institutional interests of the Court, but against the need of a criminal defendant for the information in order to support a particular defense. *See United States v. North*, 713 F.Supp. 1448, 1450 (D.D.C. 1989) (denying subpoena for testimony of President Reagan); *United States v. Poindexter*, 732 F.Supp. 142, 147-48 (D.D.C. 1990) (upholding subpoena for videotaped testimony of President Reagan, subject to special protections for President); *United States v. Poindexter*, Crim. No. 88008001 (HHG) (D.D.C. Mar. 21, 1990), available on LEXIS, Genfed Library, Dist File) (upholding claim of executive privilege as to presidential diaries).

[25] 418 U.S. at 710.

[26] *Id.* at 712 n.19.

[27] Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977).

[28] *Id.*

decisions on executive privilege against Congress are consistent with this analysis. Less than two months before United States v. Nixon, the U.S. Court of Appeals for the District of Columbia Circuit, sitting en banc, upheld the D.C. District Court's refusal to enforce a Senate committee subpoena against Richard Nixon for the "original electronic tapes" of five conversations between Nixon and John Dean.[29] The court of appeals recognized a presumptive executive privilege to protect the confidentiality of presidential communications, and, in the peculiar context of this case, found that his privilege outweighed the need of the Senate Select Committee on Presidential Campaign Activities for the subpoenaed tapes. The dispositive facts were that copies of all the subpoenaed tapes had been delivered to the House Committee on the Judiciary in connection with the Nixon impeachment inquiry, four of the five original tapes had been delivered to the D.C. District Court in connection with the Watergate prosecutions, and the President had already released partial transcripts of the tapes at issue. Because of the House Judiciary Committee investigation, the Senate Committee's "oversight need for the subpoenaed tapes [was], from a congressional perspective, merely cumulative."[30] The Committee's need for the tapes in aid of its legislative function was likewise limited because the Committee pointed "to no specific legislative decisions that [could not] responsibly be made without access to materials uniquely contained in the tapes or without resolution of the ambiguities that the [released] transcripts may contain."[31] This reasoning thus presages the Supreme Court's decision in both recognizing a presumptive, constitutionally based privilege in the President, and in holding that the privilege is defeasible.

Three years later, the Court of Appeals followed a similar approach in monitoring an interbranch executive privilege dispute in United States v. American Telephone & Telegraph Co.[32] The adjudicated dispute arose when the Subcommittee on Oversight and Investigations of the House Interstate and Foreign Commerce Committee subpoenaed documents from A.T. & T. pertaining to certain warrantless wiretapping that the United States, with the assistance of A.T. & T., assertedly conducted for national security reasons. The Department of Justice sued A.T. & T. to prevent compliance with the subpoena on the ground that public disclosure of the Attorney General's letters requesting foreign intelligence surveillance of particular targets would harm the national security. The chair of the House subcommittee intervened, on behalf of the House, as the real party defendant.

Rather than resolve the dispute on its merits, the Court of Appeals, when the case first reached it, remanded with a suggestion that the parties negotiate a settlement under guidelines proposed by the Court.[33] The Justice Department then proceeded -- unsuccessfully -- to attempt to negotiate a procedure under which, instead of receiving the demanded letters, the subcommittee would receive expurgated copies of the backup memoranda upon which the Attorney General based his decisions to authorize wiretaps.[34] Information identifying the wiretap targets would be replaced by generic descriptions written by the Department. Negotiations broke down over the procedure for assuring the subcommittee of the accuracy of these descriptions.

When the case returned to the Court of Appeals, the court ordered a procedure very close to the executive branch's final offer. It did so based essentially on three premises. First, the Court divined a constitutional requirement of interbranch compromise: "[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact

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[29]Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 726 (D.C. Cir. 1974).

[30]*Id.* at 732.

[31]*Id.* at 733.

[32]United States v. American Telephone & Telegraph Co., 567 F.2d 121 (D.C. Cir. 1977).

[33]United States v. American Telephone & Telegraph Co., 551 F.2d 384 (1976).

[34]567 F.2d at 124-125.

situation."[35] Second, a court has power to balance the competing interests of President and Congress in a properly presented separation of powers case. Third, in proffering a settlement to Congress, the executive branch is entitled to respect for both its institutional interests and for its presumptive good faith, but Congress is likewise entitled to continuing judicial vigilance to assure that its oversight interests are fully protected.[36]

Supreme Court precedent relevant to interbranch privilege disputes includes cases upholding Congress' general investigative powers. Just as the Court in Nixon, without textual support, recognized a constitutionally implied executive power to resist disclosure of presidential communications, the Court, without textual support, has recognized a constitutionally implied power of congressional investigation. The leading case, McGrain v. Daugherty,[37] arose from a Senate investigation into alleged corruption in the Justice Department under former Attorney General, Harry M. Daugherty. The Court overturned a lower court order that had discharged Daugherty's brother from his obligation to testify before a Senate select committee investigating the alleged abuses.

In upholding the Committee's subpoena, the Court reached two critical holdings. The first was that "the power of inquiry -- with process to enforce it -- is an essential and appropriate auxiliary to the legislative function,"[38] and is, therefore, implicitly vested in Congress by the Constitution. The second is that, although this power exists only in aid of the legislative function, Congress need not have before it a specific legislative proposal in order for its authority to be triggered. Such was not the case in McGrain. It was sufficient that the Court could conclude on the face of the subpoena: "Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit."[39]

The crux of the judicial doctrine of interbranch executive privilege disputes thus appears to be as follows: Congress has a constitutionally based power to demand information pursuant to investigations in aid of its legislative and oversight functions. The President, on the other hand, has a constitutionally based privilege to withhold disclosure of information, the release of which would impede the performance of executive branch responsibilities. A presumptive claim of privilege may be asserted to protect even the President's generalized interest in confidential deliberations. Executive privilege, however, is defeasible, and a claim of privilege based on a generalized interest in confidentiality may well be less weighty than narrower claims based on military and state secrets.

It is readily perceptible that the body of precedent just recounted contains too few episodes analyzed in too little detail to serve as much of a constraint on the arguments that the political branches pose to one another. Nor is a great deal more judicial guidance likely to be forthcoming. Courts may pronounce on separation of powers issues only in properly presented article III cases. Many disputes between the political branches over principle never become "cases" because the branches reach informal settlements. Even fairly protracted disputes may not involve the interests of particular persons in a manner that confers individual standing to sue. Finally, even if executive privilege cases arise that do involve parties with standing, courts may invoke such "avoidance rules" as the ripeness doctrine to obviate any judicial conclusion on the merits.[40]

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[35] *Id.* at 127.

[36] *See id.* at 131 n.34.

[37] 273 U.S. 135 (1927).

[38] *Id.* at 174.

[39] *Id.* at 177.

[40] *See generally* Baker v. Carr, 369 U.S. 186, 217 (1962) (describing the circumstances in which the political question doctrine is properly invoked); Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting, disputing the existence of congressional standing to litigate disputes between Congress and the President), *vacated sub nom.* Burke v. Barnes, 107 S.Ct. 734 (1987).

Recourse to avoidance doctrines is likely because the ordinary judicial predisposition towards restrained decisionmaking has strong institutional reinforcement in a separation of powers case. The courts have nothing to gain institutionally from venturing putatively final resolutions to interbranch impasses that directly involve neither individual rights, nor the powers of the courts. Indeed, it is intriguing to review in this light the results of the three executive privilege cases described above. The Supreme Court unanimously demanded disclosure in one case, Nixon, in which the interest not only of the courts, but of Congress and of the public, seemed to be profoundly on the side of oversight. In Senate Select Committee, the D.C. Circuit upheld a privilege claim, but only in a case in which one committee of Congress already had the information that another committee sought. In the one truly close case of the three, United States v. A. T. & T., the Court resisted any decisive lawmaking -- fashioning instead a mediator's role that balanced the two branches' compromise offers. This body of law strongly echoes the kind of diplomatic lawmaking of which Marbury v. Madison[41] is the classic example: the courts insist they have the power to declare what the law is, but nonetheless manage to legitimate the constitutional powers of both Congress and the President, calling upon both to reach reasoned compromises in any truly hard case.

[41] 5 U.S. (1 Cranch) 137 (1803).

II. NEGOTIATING OVER INFORMATION

If law, in the sense of "rules," does not directly control the outcomes in interbranch disputes over information in any strong way, then, what does? Government officials interviewed for this study typically say, "Politics." This answer, seemingly synonymous with, "The stronger party prevails,"[42] conjures up an image of negotiating as arm-wrestling. Before exploring the details of specific negotiations, however, it is possible to identify at least three respects in which an arm-wrestling model of information disputes could well be misleading.

The first is that either branch may be strengthened politically by the weight of its legal arguments. Although the law does not directly control most information disputes, judicial precedent lends legitimacy to governmental concern for a variety of interests that one branch or another may invoke in a particular controversy. Arguing on the basis of such interests bolsters a political branch's public credibility. Thus, it is a mistake to conceptualize "politics" as if law were irrelevant to political strength.

Second, the branches have a strong and continuing interest in the success of their overall relationship. Despite an institutional competitiveness that is naturally augmented by differences between the political parties that control the two branches, there are also strong pressures for accommodation. These pressures plus the political salience of making principled arguments adds further complexity to any accurate model of interbranch negotiations.

Third, an accurate assessment of strength is necessarily multi-dimensional, and the relative strength of the two branches at any given moment may be difficult, even for the branches themselves, to calculate. It is not the case, despite Congress's appropriations and impeachment powers, and the political unpopularity of defending nondisclosure in all but extreme cases, that Congress always has the upper hand.

A. The Pattern -- and Some Cases

In deciding whether the process of information exchange works well, two sets of questions are important, although each is hard to answer. The first pertains to the substantive quality of the information exchange: Does Congress get enough information, presented with sufficient helpfulness, to do its job well? To the extent there are interests in nondisclosure, either to the public generally or even to Congress, do the political branches assess and accommodate those interests appropriately? The second set of questions is procedural: Does it take too long for Congress to get the information it requires? Are negotiations more confrontational, and more costly in terms of the general interbranch political relationship, than they need be?

Some strong generalizations are possible as starting points in analyzing these issues. By all accounts, most congressional demands for information are handled without confrontation, and it is clear that most agencies respond to most requests by providing whatever information Congress is seeking. It follows that, in most cases, if Congress is not getting the information it needs, the problem is not agency unresponsiveness to Congressional demands, but something else. Indeed, in many contexts, Congress's main problem is as likely to be a

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[42] It has been argued that, even during the founding period, "[t]he relative political strengths of the branches [and the individuals involved] were more often than not the determinative factors in the resolution of [interbranch] access disputes." R. Ehlke, Congressional Access to Information from the Executive: A Legal Analysis, Cong. Research Serv. Rpt. No. 86-50A 2-3 (Mar. 10, 1986).

surfeit of information, or at least of unfocused information, as it is to be an information deficit.[43]

One systematic attempt to measure agency nonresponsiveness to Congress was a 1974 study by the Senate Judiciary Committee to determine the number of executive refusals to provide information to committees or to subcommittees. The study turned up 284 refusals for a ten year period.[44] Although deplored in the report, these instances would amount to fewer than 30 per year out of what are likely to be hundreds of thousands of requests. This pattern is confirmed by impressionistic evidence. For example, representatives of the Department of Defense general counsel's office estimated that, as of the summer of 1989, the Government Accounting Office -- generally regarded as an arm of Congress -- was conducting over 300 studies of their department. None, in their judgment, was proving confrontational, although much of the information being shared with the GAO is sensitive.

A spirit of cooperation will prevail equally when the executive responds affirmatively to Congressional requests for information and when an agency is persuasive that a requested disclosure would be inappropriate. A former assistant attorney general for legislative affairs reports that, during his period of service, offices of individual members sometimes called asking for the release of information concerning criminal investigations targeting their constituents or others. When he explained the Department's view as to the impropriety of sharing such information, the typical response was an expression of prior unawareness regarding the Department's position, and an acceptance of that position.[45]

The general pattern of responsiveness and nonconfrontation, however, does not belie the possible existence of real problems. Confrontational disputes, though rare, may be of special importance politically. They may concentrate in certain areas of public concern, so that public confidence in a well-informed Congress may justifiably be different for different certain subject matters. Moreover, the lack of confrontation or tension in a particular case of disclosure or nondisclosure does not prove the appropriateness of the outcome in that case. A strong spirit of cooperation may signal a Congress too lenient in its oversight or an executive too lax in its management. A number of congressional employees with extensive oversight experience have expressed the view that many members are unaware of the full extent of their oversight prerogatives and, thus, they press less than they might for executive disclosure.[46]

To assess such potential problems against the backdrop of a generally successful pattern of information sharing, it is necessary to fix more concretely on specific disputes.

1. Secretary of Commerce Rogers C. B. Morton, 1975: Disclosure of Confidential Commercial Information

In 1975, the Subcommittee on Oversight and Investigations of the then-House Committee on Interstate and Foreign Commerce investigated the degree to which Arab countries had asked U.S. companies to refuse doing business with Israel.[47] On July 10, the subcommittee

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[43]In this respect, Congress's difficulties in managing information are likely to parallel those of administrative agencies. *See generally* Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 216-30 (1978).

[44]SUBCOMM. ON SEPARATION OF POWERS OF THE SENATE COMM. ON THE JUDICIARY, REFUSALS BY THE EXECUTIVE BRANCH TO PROVIDE INFORMATION TO THE CONGRESS 1964-1973, at 13 (Comm. Print 1974).

[45]Interview with Robert A. McConnell, former assistant attorney general in charge of the Office of Legislative Affairs, U.S. Department of Justice, in Washington, D.C. (Aug. 4, 1989) (notes on file with author).

[46]Interview with Morton Rosenberg, Congressional Research Service, in Washington, D.C. (Aug. 3, 1989) (notes on file with author); Interview with Charles Tiefer, Deputy General Counsel to the Clerk, U.S. House of Representatives, in Washington, D.C. (Aug. 3, 1989) (notes on file with author).

[47]*See generally* Contempt Proceedings Against Secretary of Commerce, Rogers C. B. Morton: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong.,

requested that the director of the Commerce Department's Office of Export Administration disclose to it copies of all boycott requests filed by U.S. companies under the Export Administration Act of 1969.[48] Secretary of Commerce Rogers C. B. Morton refused to produce the documents, citing section 7(c) of that Act:

> No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.[49]

The subcommittee formally subpoenaed the documents on July 28, postponing the effective date of the subpoena until a hearing could be convened in September.[50]

On September 4, Attorney General Levi opined formally that § 7(c) covered disclosures to Congress, and that Morton was empowered to withhold the documents, given the Secretary's conclusion that their release was contrary to the public interest.[51] Morton offered at a September 22 hearing to inform the committee of the number of reports filed, together with statistical information on the questions asked and the companies' responses, but, citing the Attorney General's opinion, Morton would not reveal the companies' names or details of particular transactions.[52]

On October 21 and 22, the subcommittee took testimony from a number of legal scholars concerning the Secretary's withholding of documents. When Secretary Morton persisted in his position, the subcommittee, on November 11, voted him in contempt.[53] On December 9, the full Interstate and Foreign Commerce Committee was scheduled to consider the contempt resolution. The day before, following an agreement with subcommittee chair Moss to receive the documents in executive session and not to make them public, Secretary Morton agreed to comply with the subpoena.[54] It thus took five months to secure compliance with the subcommittee's request, pursuant to an agreement to protect the confidentiality of the demanded documents.

2. Secretary of Energy Charles Duncan, 1980: Deliberative Documents on the Petroleum Import Fee

The final year of the Carter Administration witnessed a relatively brief, but highly confrontational dispute between a Democratic House subcommitee and a Democratic President concerning Congressional access to deliberative documents. On April 8, 1980, the Environment, Energy, and Natural Resources Subcommittee of the House Committee on Government Operations requested that the Department of Energy disclose to it all documents relevant to President Carter's imposition, six days earlier,[55] of a fee on imported crude oil and

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1st Sess. (1975) (hereinafter, cited as *Morton Hearing*); Rosenthal and Gressman, *Congressional Access to Confidential Information Collected by Federal Agencies*, 15 HARV. J. ON LEGIS. 74, 82-83 (1977).

[48]Morton Hearing, at 152.

[49]50 U.S.C. § 2406(c).

[50]Morton Hearing, at 161.

[51]*Id.* at 173.

[52]*Id.* at 11.

[53]*Id.* at 133-34.

[54]Rosenthal and Gressman, *supra* note 47, at 83.

[55]Proclamation No. 4744, 45 Fed. Reg. 22,864 (Apr. 3, 1980).

gasoline.[56] The Subcommittee's express concerns were (1) the impact of the fee on supplies of gasoline and heating oil and (2) the capacity of the Department of Energy to monitor the fee program to assure its fairness.[57] It was indicative of the fee's unpopularity that Democratic House members were publicly organizing a resolution in opposition to the fee within two weeks of the President's order.

The Department's response was to refuse the transmittal of any documents pending their review by the White House. The Department pointedly sought to avoid the invocation of executive privilege, arguing only that the deliberative nature of the documents necessitated their review by the White House before an authoritative decision not to invoke privilege could be made.[58] Unpersuaded, the subcommittee, on April 22, voted to subpoena the documents.[59] The subcommittee then decided to give Secretary of Energy Duncan two days to respond to its request before formal service of the subpoena. On April 23, Secretary Duncan forwarded 28 documents, plus a letter explaining his decision not to provide "a substantial number" of other documents, including "memoranda setting out policy and legal advice to senior advisers of the Department and the Executive Office of the President, meeting notes, and drafts of documents."[60] Although not invoking privilege, Secretary Duncan wrote that full compliance with the subcommittee's subpoena "would affect adversely the free and frank exchange of opinions in future deliberations in the Department and the Executive Branch as a whole. . .."[61]

Subcommittee chair Toby Moffett responded to the letter by engaging in personal negotiations with White House Counsel Lloyd Cutler and Secretary Duncan.[62] When those negotiations failed to produce an immediate resolution, the subcommittee reconvened a hearing at which it sought information from the Department of Energy's deputy general counsel, Thomas Newkirk, concerning the rationale for nondisclosure. Mr. Newkirk testified that there was no national security concern underlying the Department's reluctance to disclose, and defended the position that, if the President so determined, it could be appropriate to withhold under executive privilege even documents that had originally been prepared entirely for internal Department of Energy use.[63] At the conclusion of its April 24 session, the subcommittee moved to subpoena Secretary Duncan to appear personally with the demanded documents on April 29.[64]

On April 28, DOE's General Counsel Lynn Coleman offered to permit the subcommittee chair and its ranking member, Rep. McCloskey, to review the documents under a promise of confidentiality.[65] At the April 29 hearing, Duncan sought, again, to withhold the documents without invoking executive privilege, indicating, however, that privilege would be invoked if no accommodation could be found.[66] When he failed to accept an offer that the documents be presented to the subcommittee in executive session, not to be released further except by majority vote and after an opportunity for DOE to object, the subcommittee voted to hold Secretary Duncan in contempt.[67]

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[56] *The Petroleum Import Fee: Department of Energy Oversight: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 2 (1980) (hereinafter, cited as *Duncan Hearing*).

[57] *Id.* at 1-2.

[58] *Id.* at 3-8.

[59] *Id.* at 35.

[60] *Id.* at 96, 100-01.

[61] *Id.* at 101.

[62] *Id.* at 96.

[63] *Id.* at 102.

[64] *Id.* at 116-17.

[65] *Id.* at 119-20.

[66] *Id.* at 126.

[67] *Id.* at 134-39.

By May 14, 1989, the White House had decided to release all documents to the subcommittee under the terms of the subcommittee's final offer.[68] Although the subcommittee reconvened on May 14 to begin reviewing the merits of the fee program, the program was essentially foredoomed by a district court opinion one day earlier voiding the President's executive order as beyond his statutory authority with respect to import regulation.[69] The Senate Finance Committee immediately voted to approve legislation prohibiting any further fee.[70]

3. Secretary of the Interior James Watt, 1981-82: Executive Privilege and Foreign Trade Policy

The first highly publicized confrontation between Congress and the Reagan Administration over information involved former Secretary of the Interior James Watt. During the summer of 1981, the Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce requested from his department all documents -- including documents at the staff level[71] -- relevant to the status of Canada under the so-called reciprocity provisions of the Mineral Lands Leasing Act.[72] Watt testified on August 6, 1981 that the department was unlikely to divulge all of the relevant documents because some were confidential.[73] Just over seven months later, following full committee approval of a resolution to hold Watt in contempt of the House, the White House permitted subcommittee members to review the last of the documents that Interior had originally identified as responsive to the subcommittee demand.[74]

The general subject of the subcommittee's inquiry was the impact of Canadian energy and investment policies on United States energy resource companies holding assets in Canada. The hearings were prompted by allegations that the Canadian government was trying, through its policies, to devalue the assets of these companies unfairly and to provoke takeover attempts by Canadian interests.[75] Among the possible retaliatory steps available to the United States would have been invocation of the MLLA reciprocity provisions,[76] which permit foreign citizens to hold interests in mineral leases on United States public lands only if their countries provide equivalent opportunities for United States investors. Under the MLLA, Congress vested in the Secretary of the Interior the authority to determine whether foreign countries are providing reciprocal treatment for U.S. mineral investors. By the summer of 1981, Secretary Watt had not yet made a decision as to Canada. Because of the possibility that a decision adverse to Canada might help protect United States investment interests, the Committee's attention had turned to oversight of Watt's decisionmaking process. The subcommittee's informal demand[77] in early August, 1981 elicited a turnover of 143 documents on September 24, 1981, accompanied by a letter from Watt's legislative counsel asserting that executive privilege might be invoked to protect various documents not disclosed. On September 28, the subcommittee voted to subpoena the remaining documents, and the subpoena was served, after further negotiation, on October 2. Watt responded by releasing an additional 32 documents following what he characterized as an "interagency review" of their contents. On October 13, 1981, President Reagan formally asserted executive

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[68] *Id.* at 142.

[69] Independent Gasoline Marketers Council v. Duncan, 492 F.Supp. 614 (D.D.C. 1980).

[70] Duncan Hearing, at 141.

[71] *Watt Contempt Hearings, supra* note 5, at 3.

[72] 30 U.S.C. § 181.

[73] *Watt Contempt Hearings, supra* note 5, at 3.

[74] *Id.* at 385.

[75] H.R. Rep. No. 898, 97th Cong., 2d Sess. at 3-4.

[76] 30 U.S.C. § 181.

[77] H.R. Rep. No. 898, 97th Cong., 2d Sess. at 4-8.

privilege as to the final 31 documents.[78] Secretary Watt reported the President's decision in testimony to the subcommittee on October 14, 1981. At that time, Watt also asserted that the executive branch had tried unsuccessfully to proffer "other means to familiarize the subcommittee with the contents of these papers without the necessity of providing actual copies of the documents themselves."[79]

In refusing Congress' request for all the documents, Secretary Watt relied on a formal opinion rendered to the President by the Attorney General upholding the President's claim of privilege.[80] The reasoning of the Attorney General's brief opinion was straightforward. It began from three premises. First, the executive branch is constitutionally entitled to protect "quintessentially deliberative, predecisional" documents.[81] Second, although Congress has legitimate interests in obtaining executive branch information, its interests in information "for oversight purposes [are] . . . considerably weaker than its interest when specific legislative proposals are in question."[82] Third, "[t]he congressional oversight interest will support a demand for predecisional, deliberative documents in the possession of the Executive Branch only in the most unusual circumstances."[83] From these premises, it followed that the documents withheld could be withheld because they all were "either necessary and fundamental to the deliberative process presently ongoing in the Executive Branch or relate to sensitive foreign policy considerations."[84] The Attorney General concluded, "The process by which the President makes executive decisions and conducts foreign policy would be irreparably impaired by the production of these documents at this time."[85]

In the ensuing months, the subcommittee tried unsuccessfully to elicit the personal appearance of Attorney General William French Smith to defend his opinion. The printed hearings relating to the eventual resolution of contempt include a detailed rebuttal of the Smith opinion by then-General Counsel to the Clerk of the House, Stanley Brand,[86] and an exchange of testy letters between subcommittee chair John Dingell and the Department of Justice concerning the possibility of Smith's testifying.[87]

The Brand letter forcefully questions all of the Attorney General's assertions concerning the limited investigative powers of Congress. Brand argues that, to the extent executive privilege exists, those documents that were generated at the staff level in a cabinet department could never be protected by it.[88] According to Brand, Congress does not interfere with any executive power in demanding such documents, and its authority to seek such information in performing its oversight function is at least as great as Congress's investigative powers in connection with legislative deliberation.[89]

With negotiations over the documents proceeding, the subcommittee held hearings in November, 1981 on the subject of executive privilege generally and on the Attorney General's opinion.[90] Neither the hearings, nor the continuing negotiations resolved the dispute. On February 2, 1982, without having met the subcommittee's disclosure demands, Secretary

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[78] *Watt Contempt Hearings*, *supra* note 5, at 68 (President Reagan's Memorandum for the Secretary of the Interior Re: Congressional Subpoena for Executive Branch Document).

[79] *Id.* at 67.

[80] 5 Op. Off. Legal Counsel 27 (1981), *reprinted at Watt Contempt Hearings*, *supra* note 5, at 104.

[81] *Id.* at 105.

[82] *Id.* at 106.

[83] *Id.* at 107.

[84] *Id.* at 105.

[85] *Id.* at 108.

[86] *Watt Contempt Hearings*, *supra* note 5, at 108.

[87] *Id.* at 260-266.

[88] *Id.* at 109.

[89] *Id.* at 111-115.

[90] *Id.* at 133-258.

Watt announced that he had reached a decision on Canadian reciprocity favorable to Canada.[91] The next day, on February 3, Watt turned over 19 of the 31 contested documents on the ground that his reaching a final decision obviated further nondisclosure.[92] Six days later, the subcommittee's Democratic majority, joined by its ranking Republican member, voted to hold Watt in contempt and to report its resolution to the full Energy and Commerce Committee.[93]

With total compliance still not forthcoming, the full committee, on February 25, 1982, likewise voted to recommend that the House cite Watt for contempt.[94] This final committee action, and the virtual certainty of its approval by the full House, finally elicited settlement on the eve of the House vote. The White House agreed to permit subcommittee members four hours to review personally and to take notes on the remaining 12 documents. The documents would be reviewed on Capitol Hill, but remain within the custody of the executive branch. No staff personnel could review the documents, and no photocopying would be permitted.[95]

The immediate interests of both branches in the Watt imbroglio are superficially clear. The subcommittee wanted full access to information that might shed light on the usefulness of the MLLA reciprocity process to deal with the alleged problem of unfair Canadian policy, and to consider the need to amend the MLLA or to take retaliatory measures. The executive branch insisted that nondisclosure was essential to the integrity of its deliberative processes and foreign policymaking generally. Presumably, once Secretary Watt reached his final decision, the executive branch's interest in reaching that decision without distortions wrought by premature disclosure of internal deliberations was eliminated. The executive branch would retain, however, a generalized interest in protecting its deliberations and in maintaining confidences necessary to the successful conduct of foreign relations.[96]

From a broader perspective, it is manifest that both branches perceived the Watt dispute in a wider legal and political context. Rep. Dingell, the subcommittee chair, was also chair of the full Committee on Energy and Commerce. From his vantage point, Watt's refusal to comply with the request for MLLA documents likely appeared part of a larger pattern of noncooperation between Watt and Congress over confidential information.[97] On the executive branch side, the Attorney General's vigorous defense of executive privilege occurred against the backdrop of a broader effort led by the Department of Justice to buttress executive branch control over the outflow of information generated within the executive branch.[98] Smith's opinion is notable, for example, for the breadth with which it attempts to establish a presumptive right of the executive branch to withhold deliberative documents from congressional committees.

Personality factors may also have aggravated the dispute, although it is hard to tell how much so. Secretary Watt was widely believed a zealot for Administration policy; Rep. Dingell

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[91] *Id.* at 318.

[92] H.R. Rep. No. 898, 97th Cong., 2d Sess. at 7.

[93] *Watt Contempt Hearings*, *supra* note 5, at 295-296.

[94] *Id.* at 368-370.

[95] *Id.* at 385-386.

[96] 5 Op. Off. Legal Counsel 27, 29 (1981).

[97] H.R. Rep. No. 898, 97th Cong., 2d Sess. at 66-67 (statement of Reps. Moffett, Ottinger, Scheuer, Waxman, and Markey).

[98] *See, e.g.*, the Attorney General's revocation of former Attorney General's Griffin Bell's restrictive policy concerning the circumstances under which the Justice Department would defend agencies' nondisclosure of records under the Freedom of Information Act, WASH. POST, May 5, 1981, at A11, col. 1; and the issuance of a national security directive strengthening the nondisclosure obligations of certain persons with access to classified information and subjecting such employees to possible polygraph examinations in connection with investigations of leaks, *National Security Decision Directive 84: Hearing Before the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 85-90 (1983).

is widely perceived to be among Congress's most powerful and aggressive members.[99] The public communications to Dingell and the subcommittee from various Department of Justice officials assumed no pretense of deference.[100] The final committee report hints of personality problems at the staff level, as well.[101] Nonetheless, in colloquies between Dingell and Watt, and between Dingell and Rep. Marc Marks, ranking Republican on the Dingell subcommittee, the parties were at pains to emphasize the nonpersonal nature of the dispute.[102]

It may be that the Administration was destined, because of the size of the Democratic majority in the House, to lose this executive privilege battle, but it is also possible that the executive branch might have achieved its goal of delaying subpoena compliance without losing so much good will in the process. Notwithstanding the strong Democratic majority, Secretary Watt, an unpopular figure, did succeed in forestalling any release of the contested documents until he had made the decision that the subcommittee wanted to oversee. Furthermore, President Reagan's declared interest in nondisclosure was facially more compelling as a constitutional argument than the positions proffered, respectively, by the Ford and Carter Administrations in the Morton and Duncan disputes, discussed above.

A reasonable hypothesis might be that at least four factors over which the Administration had some control helped to galvanize the opposition to Watt. First, Watt had been injudicious in his attempts to control information in other disputes with the Energy and Commerce Committee, and had weakened his credibility generally. Second, the Attorney General's legal opinion was extremely broad in its justification of nondisclosure to Congress, and some arguments were sure to be seen as overreaching. Third, the Attorney General may have exacerbated his own credibility problem by refusing to defend the opinion personally. Fourth, lower level executive branch officials and legislative staff apparently did not enjoy uniformly good relations. It may have been, of course, that the executive branch viewed the subcommittee investigation -- and the House, in general -- with as much distrust as the subcommittee majority focused on Secretary Watt. The ultimate strength of the Democratic majority, however, provided a hedge that the Administration did not have against miscalculations made in the course of negotiations.

In sum, the Watt dispute does not appear to have been an efficient process for achieving an appropriate level of disclosure to Congress in a way that preserved the branches' ongoing relationship. The subcommittee ultimately prevailed in achieving access to all contested information and the Administration succeeded in resisting disclosure during the decisionmaking process regarding Canada, but the Administration suffered significant and unnecessary damage to its credibility.

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[99] *Cf.*, Peterson, *Now It's Greetinggate: EPA Strikes Back with a "Dingellgram" of its Own*, WASH. POST NAT'L WEEKLY EDITION, Feb. 10, 1986, at 14; Nash, *The Power of the Subpoena*, N. Y. TIMES, Mar. 11, 1986, at 24, col. 4 (describing Dingell as "perhaps Capitol Hill's most zealous investigator and issuer of subpoenas").

[100] *E.g.*, Letter from Assistant Attorney General Robert A. McConnell to Hon. John D. Dingell (Dec. 8, 1981), *reprinted in Watt Contempt Hearings*, *supra* note 5, at 263-264.

[101] H.R. Rep. No. 898, 97th Cong., 2d Sess. at 68-69 (Statement of Reps. Moffett, Ottinger, Scheuer, Waxman, and Markey).

[102] *Watt Contempt Hearings*, *supra* note 5, at 89 (colloquy of Rep. Dingell and Secretary Watt), 286-287 (statements of Reps. Dingell and Marks); *but see* H.R. Rep. No. 898, 97th Cong., 2d Sess. at 68-69 (Statement of Reps. Moffett, Ottinger, Scheuer, Waxman, and Markey) (attributing Secretary Watt's response to the Committee, in part, to "ego," "pique," and "personal arrogance.")

4. EPA Administrator Anne Gorsuch, 1982-83: Executive Privilege and Civil Law Enforcement

The second well-publicized executive privilege dispute between Congress and the Reagan adminstration involved Anne Gorsuch,[103] the former President's first Administrator of the Environmental Protection Agency, who became the first head of an executive branch agency to be held in contempt of Congress while in office.[104] The impetus for the contempt citation was Gorsuch's refusal to divulge certain documents to the Investigations and Oversight Subcommittee ("the Levitas subcommittee") of the House Committee on Public Works and Transportation, in connection with that subcommittee's investigation of EPA's administration of the so-called "Superfund" for the cleanup of hazardous waste dumping sites. The White House settled the dispute with the subcommittee on February 18, 1983,[105] slightly more than two weeks after a federal district court refused to review the legality of the House contempt citation prior to its enforcement.[106]

The Comprehensive Environmental Response, Compensation and Liability Act of 1980, commonly known as the Superfund Act,[107] created a $1.6 billion trust fund to be used for financing the cleanup of hazardous waste sites and spills of hazardous chemicals. Among other things, the Act authorizes the Government to act to control a hazardous waste situation when a responsible party either cannot be identified timely, or cannot act. Parties responsible for hazardous waste or chemical spill sites are required to reimburse the Government for cleanup costs and damages to natural resources; noncooperating parties may be fined treble damages. By executive order, President Reagan delegated his functions under the Act to the EPA Administrator, who was also designated the responsible official for enforcement of the Act.[108]

In 1982, several House subcommittees commenced investigations of various aspects of EPA's Superfund enforcement. The Levitas subcommittee, in March, 1982, commenced a general investigation of hazardous and toxic waste control, focusing on the impact of such wastes and their control on American ground and surface water resources.[109] Of special concern were an EPA decision to suspend its prior restrictions on disposing containerized liquid wastes in landfills that might permit the migration of such wastes to ground and surface waters, and allegations that the EPA was not adequately enforcing the Superfund provisions against parties responsible for hazardous waste sites.[110] On September 13 and 14, 1982, subcommittee staff requested access to EPA's files on enforcement of the Superfund Act and related statutes in so-called Region II.[111] Despite an early assurance of access,[112] EPA subsequently informed the subcommittee that it would not make available certain materials

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[103]During the pendency of the dispute recounted here, Anne M. Gorsuch remarried and changed her name to Anne M. Burford. Because the earliest documents discussed herein refer to her only by the name "Gorsuch," that name is used exclusively throughout this article for consistency.

[104]H.R. Rept. No. 435, 99th Cong., 1st Sess. 3 (1985).

[105]WASH. POST, Feb. 19, 1983, at A1, col. 6. The terms of the final settlement were embodied in a March 9, 1983 memorandum signed by Reps. Dingell and Broyhill and Counsel to the President Fred Fielding. *EPA Document Agreement: Memorandum of Understanding*, 41 CONG. Q. 635 (1983). For another account of the Gorsuch confrontation, see Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1334-1338 (1983).

[106]United States v. House of Representatives of the United States, 556 F. Supp. 150 (D.D.C. 1983).

[107]Pub. L. No. 96-510, 94 Stat. 2767 (1980).

[108]Exec. Order No. 12,316, 3 C.F.R. 168 (1982), *reprinted in* 42 U.S.C. 9615 at 1444-45.

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H.R. Rep. No. 968, 97th Cong., 2d Sess. 7 (1982).

[110]*Id.*

[111]*Id.* at 11.

[112]*Id.* at 13-14.

in enforcement files connected with active cases.[113] This dispute eventuated in the contempt citation against Administrator Gorsuch.

At almost the same time as the Levitas subcommittee staff requested access to EPA files on Region II, the Oversight and Investigations Subcommittee ("the Dingell subcommittee") of the House Committee on Energy and Commerce requested documents relating to several hazardous waste sites outside Region II, on which that subcommittee's investigation of enforcement effectiveness was focusing.[114] Although the Dingell subcommittee's investigation did not spawn any contempt citations of its own, the coexistence of different EPA oversight hearings and demands for access to enforcement files seems to have been critically important to the dynamics of the interbranch negotiation over the Levitas subpoena. The broader range of interested parties made negotiation more difficult because of the greater number of persons to satisfy, the greater likelihood that congressional access to EPA files would undermine executive control generally over the outflow of information on Superfund investigations, and the involvement of more strong personalities, including Rep. Dingell, Secretary Watt's successful opponent.[115]

After the Levitas subcommittee staff, in September, 1982, demanded access to EPA enforcement files, two weeks of unsuccessful negotiations ensued at the staff level.[116] EPA offered to permit staff access to its files, subject to prescreening by an EPA official to maintain the confidentiality of sensitive documents. The offer was declined. On September 30, 1982, the subcommittee authorized subpoenas to issue for the requested documents.[117]

Throughout most of October, 1982, service of the subpoenas was postponed under EPA assurances of cooperation.[118] EPA continued to assert confidentiality for a limited class of litigation-related documents, but then reverted to its position of protecting all "enforcement sensitive" documents -- apparently as a reaction to the issuance of a subpoena by the Dingell subcommittee for similar information. On November 22, 1982, the Levitas subcommittee served a broad subpoena on Gorsuch, demanding the documents and her testimony on December 2, 1982.[119]

On November 30, 1982, Attorney General Smith released a letter to Rep. Dingell, justifying the Administration's refusal to comply with a subpoena for "sensitive open law enforcement investigative files."[120] Smith forwarded the letter also to Rep. Levitas, to explain EPA's refusal to comply fully with the latter's subpoena, as well.[121] On the same day, President Reagan issued a memorandum to Gorsuch directing that she not divulge documents from "open investigative files, [which] are internal deliberative materials

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[113] *Id.* at 15.

[114] *Id.*

[115] Whether the separate Dingell investigation would have made settlement more difficult apart from the alleged intransigence of Justice Department attorneys is a point Congress disputes. According to the 1985 House Judiciary Committee report on the EPA dispute, the Dingell subcommittee's minority counsel proposed a settlement that was deemed acceptable by a deputy assistant attorney general in charge of the Lands and Natural Resources Division in mid-October. H.R. Rept. No. 435, 99th Cong., 1st Sess. 96-103 (1985). As the Judiciary Committee dissenters note, however, it is unclear whether this official ever told any other member of the Justice Department of the minority counsel's proposal or of his own reaction to it. *Id.* at 737-38, 777-78.

[116] H.R. Rep. No. 968, 97th Cong., 2d Sess. 11-13 (1982).

[117] *Id.* at 13.

[118] *Id.* at 13-15; *Hazardous Waste Contamination of Water Resources--Access to EPA Superfund Records: Hearing Before the Investigations and Oversight Subcomm. of the House Comm. on Public Works and Transport.*, 97th Cong., 2d Sess. 88 (1982) [hereinafter cited as *EPA Records Hearing*].

[119] H.R. Rep. No. 968, 97th Cong., 2d Sess. 15 (1982).

[120] Letter from Attorney General William French Smith to Hon. John D. Dingell (Nov. 30, 1982), *reprinted id.* at 37-41 [hereinafter cited as *Att'y Gen.'s Gorsuch Letter*].

[121] H.R. Rep. No. 968, 97th Cong., 2d Sess. 36 (1982).

containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions . . .."[122]

The Attorney General articulated a series of justifications for the nondisclosure of open investigative files: forestalling political influence over the conduct of an investigation, preventing the disclosure of investigative sources and methods, protecting the privacy of innocent parties named in investigative files, protecting the safety of confidential informants, and maintaining the appearance of "integrity, impartiality and fairness of the law enforcement system as a whole."[123] He indicated that no assurance of confidentiality from Congress would permit the President to share his responsibility to protect the information in question,[124] but nonetheless articulated one exception to the rule of nondisclosure: "These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review."[125]

Following the subcommittee's December 2 hearing, General Counsel Brand, on December 8, issued a legal response to the Attorney General's letter, again challenging each of his assertions as to the limitations on Congress's oversight authority.[126] On the same day, Levitas met with Administration officials to attempt a settlement. Levitas made the following offer: Subcommittee staff could review and designate for copying and delivery to the subcommittee all EPA documents relative to the waste sites at issue. If EPA or the Justice Department designated any document selected for delivery as sensitive, it would remain at EPA for inspection there. If actual delivery to the subcommittee of any of these documents proved necessary, further subpoenas might issue. All information disclosed would be treated as confidential.[127]

The Attorney General, the next day, declined the settlement offer, reiterating instead EPA's original offer of access subject to EPA prescreening. The only concession was that prescreened documents would be withheld ultimately from the subcommittee only after broad-based and high-level review in the Executive branch.[128] On December 10, the full Public Works and Transportation Committee responded by recommending, in a party-line vote, that the House hold Gorsuch in contempt.[129]

Six days later, the House overwhelmingly approved a resolution to certify Gorsuch's "contumacious conduct" to the U.S. Attorney for the District of Columbia.[130] Prior to the actual certification, the Justice Department filed an extraordinary suit in federal district court to enjoin further action to enforce the subpoena on the ground of its unconstitutionality.[131]

The District Court on February 3, 1983 dismissed the Justice Department's suit on the ground that any constitutional issue raised by the subpoena could be resolved in a judicial proceeding brought to enforce the subpoena.[132] With the U.S. attorney's office still insisting that it was not bound to enforce the subpoena,[133] Levitas and Reagan reached agreement on

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[122]*Id.* at 42-43.

[123]*Att'y Gen.'s Gorsuch Letter, supra* note 123, at 38.

[124]*Id.* at 39.

[125]*Id.* at 41.

[126]*House General Counsel's Memorandum, supra* note 6, at 58-64.

[127]H.R. Rep. No. 968, 97th Cong., 2d Sess. 20-21 (1982).

[128]*Id.* at 21-22.

[129]*Id.* at 23. *See also id.* at 72-76 (dissenting statement of Republican committee members).

[130]Davis, *Gorsuch Contempt Charge Puts Focus on Enforcement of Hazardous Waste Laws*, 40 CONG. Q. 3162 (1982).

[131]Davis, *Legal Showdown Escalating in Gorsuch Contempt Case*, 41 CONG. Q. 11 (1983).

[132]United States v. House of Representatives of the United States, 556 F. Supp. 150 (D.D.C. 1983).

[133]It appears that the decision not to proceed with the contempt citation was made independently by the U.S. attorney for the District of Columbia. H.R. Rept. No. 435, 99th Cong., 1st Sess. 19 (1985). That decision, however, reflected long-standing Justice Department policy. Memorandum from Theodore B. Olson, Assistant Attorney

February 18, 1983 that the subcommittee would receive edited copies of all relevant documents and a briefing on their contents, and then would be permitted to review any requested unedited documents in closed session.[134]

Although the February 18 settlement resolved the Levitas dispute, it did not end the overall imbroglio. Still pending were subpoenas from the Dingell subcommittee, which now asserted that its investigation was focusing on specific allegations of misconduct by EPA officials.[135] Rita Lavelle, the Superfund administrator and the most prominent of these officials, was dismissed on February 7, 1983 by the President amid allegations of her perjury to Congress and improper administration of the trust fund.[136]

Following the agreement with Levitas on February 18, further disclosures of possibly criminal conduct at EPA made prolonged resistance to the Dingell subpoenas politically impossible.[137] On March 9, 1983, Anne Gorsuch resigned as EPA administrator,[138] and the White House agreed to deliver all subpoenaed documents to the Dingell subcommittee, subject to certain limited protections for the confidentiality of enforcement-sensitive materials.[139]

The Gorsuch episode is striking because, in defending nondisclosure, the executive branch was protecting more specific and more obviously legitimate concerns than had been articulated in connection with the Watt matter. These were further identified in a December 14, 1982 memorandum to the Attorney General from Theodore B. Olson, Assistant Attorney General in charge of the Office of Legal Counsel, who hinted at concern that members of Congress obtaining access to law enforcement files "might have relationships with potential defendants" in EPA enforcement actions.[140] What weakened the case for nondisclosure was not the implausibility of the executive's articulated position, but the strains on the executive branch's credibility wrought by the Watt affair[141] plus the credibility of the growing allegations that EPA officials were guilty at least of mismanaging the Superfund program.

In retrospect, a strong possibility appears that the protracted, even bitter quality of this dispute over information was fueled by a failure of communication between the Dingell

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General in charge of the Office of Legal Counsel, for the Attorney General, Re: Whether the United States Attorney Must Prosecute or Refer to a Grand Jury a Citation for Contempt of Congress Concerning an Executive Branch Official Who Has Asserted a Claim of Executive Privilege on Behalf of the President of the United States 29-31 (May 30, 1984), *reprinted id.* at 2544, 2584-86.

[134]See *supra* note 105.

[135]*EPA: Investigation of Superfund and Agency Abuses (Part One): Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 1-7 (1983) [hereinafter cited as *Dingell EPA Hearings*].

[136]*Reagan Orders Investigation of EPA Charges*, Wash. Post, Feb. 17, 1983, at A1, col. 1.

[137]The House Judiciary Committee concluded from its investigation that the disputed documents contained sufficient "signposts" of wrongdoing that the executive branch *should* have recognized earlier than February, 1983 the untenability of the privilege claim, even under the executive branch's view of privilege. H.R. Rept. No. 435, 99th Cong., 1st Sess. 9-10 (1985). The report does not allege, however, that the executive branch withheld the documents after the relevant officials had actual knowledge of likely EPA wrongdoing, only that the officials should have investigated the alleged "signposts" more thoroughly. *Id.* at 140.

[138]*Burford Quits As EPA Administrator*, Wash. Post, Mar. 10, 1983, at A1.

[139]*Dingell EPA Hearings*, *supra* note 136, at 371.

[140]H.R. Rep. No. 968, 97th Cong., 2d Sess. 82, 89 (1982). In fact, OLC investigated whether any of EPA's investigative targets in two areas being scrutinized by the Dingell subcommittee were political contributors to Reps. Dingell or Mike Synar of Oklahoma. H.R. Rep. No. 435, 99th Cong., 1st Sess. 124-132 (1985). A deputy assistant attorney general in charge of OLC "concluded there were some potential connections," but "all possible matchups were not pursued," and no use was made of the information. *Id.* at 131.

[141]"[T]wo matters--an executive privilege controversy between Secretary of the Interior Watt and prior informational policies with respect to Congress--. . . appear to be highly relevant to the [Judiciary] Committee inquiry [into the EPA dispute] because they shaped expectations--and perhaps motivations--in the EPA controversy itself." H.R. Rept. No. 435, 99th Cong., 1st Sess. 26 (1985).

Subcommittee and the Justice Department Office of Legal Counsel -- a failure of communication exacerbated, in turn, by a failure of communication within the executive branch.

When the Dingell subcommittee requested information from EPA in September, 1982 concerning enforcement actions at particular sites, the subcommittee had already focused internally on the possibility that political considerations were affecting enforcement decisions.[142] Its suspicions were bolstered in October when Lands Division deputy assistant attorney general Alfred Regnery, in hopes of settling the dispute, permitted the subcommittee's counsel, Richard Frandsen, to review the documents being withheld from disclosure to the subcommittee. Frandsen not only spotted a key inculpatory document, but recognized its significance.[143] Furthermore, it appears that EPA staff shared the subcommittee's concerns. In dealing with EPA employees, the subcommittee staff was dealing with people who apparently understood quite clearly what the subcommittee was after.[144] Thus, it is likely that subcommittee members and staff had tentatively concluded by early fall that EPA wrongdoing was at issue and that, at the time the Justice Department was advising the President to invoke executive privilege, the negotiators for the executive branch knew of the subcommittee's concerns and of their seriousness. With these assumptions, it would be unsurprising for congressional negotiators to interpret the nondisclosure of EPA documents as a strong indicator of Justice Department concealment and bad faith.

The subcommittee, however, did not publicly signal allegedly improper political influence as the focus for its investigation until December, 1982,[145] and OLC was not privy to the suspicions of EPA staff. The subcommittee's unwillingness to share its suspicions with OLC thus left the assistant attorney general in charge of that office unaware throughout the fall of 1982 either that improper political influence might have occurred at EPA or that dcuments sought by the subcommittee might help prove it. The House Judiciary Committee, later investigating the episode, "found no evidence" that, prior to February, 1983, Assistant Attorney General Olson "understood the [incriminating] significance of the notes" that the Dingell subcommittee had acquired.[146] On the contrary, "[t]he information that the Judiciary Committee received strongly indicated that" at the time OLC recommended that President Reagan invoke executive privilege "Olson and OLC had no idea that the . . . documents reflected misconduct."[147] From Mr. Olson's point of view, then, the aggressiveness of the subcommittee in pursuing 35 documents withheld after the release of 40,000 others was bound to appear grossly unreasonable.

5. FTC Commissioner Terry Calvani, 1988: Disclosing Deliberations with Personal Advisers

During early October, 1987, the House of Representatives was set to vote on a proposed amendment to a new Federal Trade Commission authorization bill that would have authorized FTC investigations of possible unfair and deceptive acts and practices in the U.S.

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[142]H.R. Rep. No.435, 99th Cong., 1st Sess. 31 (1985) ("Although . . . the Dingell . . . Subcommittee[] had been involved in the oversight of EPA activities well before September 1982, [it] had made no public findings or allegations of impropriety concerning the general administration of the Superfund program. During the course of the controversy, however, there were a number of disclosures that raised questions about possible wrongdoing by EPA officials, including suggestions that decisions on certain Superfund sites had been made for political reasons.")

[143]*Id.* at 97-99.

[144]*Id.* at 32-35, 59.

[145]*Id.* at 233.

[146]*Id.* at 12.

[147]*Id.* at 140.

airline industry.[148] The Washington Post, on October 3, 1987, quoted an FTC press release reporting on a supposed letter from the FTC to the National Association of Attorneys General, concerning the NAAG's promulgation of proposed State guidelines for regulating the airlines. The release represented the FTC as having said: "We are unaware of any evidence indicating that airline fare advertising, frequent flyer programs, or overbooking compensation policies are generally unfair or deceptive."[149] Some House members relied on this statement in debate, successfully opposing an authorization provision that would have strengthened FTC oversight of the airlines.[150]

In fact, the FTC had not made the statement. Its letter to the NAAG said: "Unless the task force has evidence indicating that airline fare advertising, frequent flyer programs, or overbooking compensation policies are generally unfair or deceptive, the legal and factual basis for the draft guidelines are not clear."[151] Concerned about the discrepancy between the FTC's actual and reported statements, the Dingell subcommittee formally requested that the Federal Trade Commission supply to it all documents relating to the FTC's letter to the NAAG and to the press release issued concerning that letter.

The FTC supplied all the demanded documents, except for the documents of three commissioners that reflected communications between those commissioners and their personal advisers. Two of the three commissioners permitted committee staff to inspect those documents in the commissioners' offices, although they indicated that the papers in question did not have any information connecting the FTC comments for the NAAG with Congress's pending consideration of legislation about airline regulatory authority.[152] The third, Commissioner Calvani, initially refused to comply on grounds of privilege, asserting also that the relevant documents in his possession indicated nothing pertinent to the committee's concerns.[153] Following four months of correspondence and meetings between the commissioner and committee staff, the subcommittee formally served a subpoena for his documents.[154] Under protest, he complied at a subcommittee hearing three weeks later.[155] To the Commissioner's personal knowledge, none of the documents he produced prompted any follow-up by the subcommittee.[156]

6. 1989 Oversight of the Internal Revenue Service

During July, 1989, the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations held hearings regarding alleged corruption in the Internal Revenue Service.[157] Among other things, the hearings targeted an alleged incident in which an IRS official agreed to audit the economic competitor of an individual who had bribed the official.[158] In preparation for the hearing, the subcommittee asked the IRS for all tax information it had relating to the putative victim of the scheme.

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[148]*Subpoenaed Documents from Federal Trade Commissioner Terry Calvani: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 5 (1988).

[149]*Id.* at 1-2.

[150]*Id.* at 2, 10.

[151]*Id.* at 2.

[152]*Id.* at 3.

[153]*Id.*

[154]*Id.*

[155]*Id.* at 46.

[156]Telephone interview with Federal Trade Commissioner Terry Calvani, in Washington, D.C. (Jan. 8, 1990).

[157]*IRS Senior Employee Misconduct Problems: Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations*, 101st Cong., 1st Sess. (1989).

[158]The facts reported in this subsection are all derived from an interview with Peter S. Barash, staff director of the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations, in Washington D.C. on Aug. 3, 1990.

This episode is noteworthy because the branches reached a fairly expeditious and nonconfrontational settlement despite two ordinarily strong obstacles to disclosure. The first is the general statutory bar to the disclosure of tax returns and tax return information. The statute at issue authorizes disclosure to most congressional committees pursuant only to a resolution of the house of Congress of which the committee is a part.[159] The subcommittee eliminated this barrier, however, by obtaining the taxpayer's waiver of the nondisclosure provisions with respect to the subcommittee. The IRS Commissioner did not find that the resulting disclosure would "seriously impair Federal tax administration,"[160] thus clearing the way for subcommittee access under the statute.

The second obstacle was Rule 6(e) of the Federal Rules of Criminal Procedure, prohibiting the disclosure of information that is part of a grand jury investigation. Although, in the course of negotiations, the Justice Department cited 6(e) as a ground for nondisclosure, the Department did not formally invoke the rule when the subcommitee made clear its intention to subpoena the information, if necessary.

Despite these obstacles and the sensitivity of the subject matter, the subcommittee agreed with the Internal Revenue Service that (1) staff would have access at IRS to all the information requested, (2) staff could takes notes on the documents, (3) the documents would remain within IRS custody, and (4) the subcommittee would not publicly rely on any data garnered from the documents unless it was confirmed from another source.

7. Intelligence Committees: A Modus Operandi

The three subcommittees involved in the four previous episodes are devoted exclusively to oversight. They are thus relatively distinctive in the depth of their experience with the nuances of information exchange, and in the degree to which their watchdog role is undiluted by their political identification with particular programs they helped to design and enact. Even subcommittees devoted exclusively to oversight, however, generally proceed with their investigations without the benefit of detailed rules governing the exchange of information with the executive branch.

The two oversight committees that are exceptional in this last respect are the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. The requirement that these committees be "fully and currently informed" of all intelligence activities appears in statute,[161] as does a requirement that:

> the House of Representatives and the Senate, in connection with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of the Congress under [the statute].[162]

Pursuant to this provision, the Houses of Congress have adopted similar rules that amount to a unique modus operandi for the sharing of information between the branches. In their key provisions, the rules of each House provide that:

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[159] 28 U.S.C. § 6103 (f).

[160] 26 U.S.C. § 6103(e)(7).

[161] 50 U.S.C. § 413(a)(1).

[162] 50 U.S.C. § 413(d).

1. Committee employees must agree in writing to abide by committee rules and must receive an appropriate security clearance before receiving access to classified information;[163]

2. Members of the committees are forbidden to disclose information individually if the rules provide that such information may be released only pursuant to committee vote;[164]

3. The President may object to a committee vote to disclose properly classified information submitted to it by the executive branch, in which case the information may be disclosed only pursuant to a vote of the entire House;[165] and

4. The committees may regulate and must record the sharing of information made available to them with other committees or with any Member of Congress not on the committees.[166]

In an interview, Britt Snider, general counsel to the Senate Select Committee on Intelligence, expressed the view that his committee has enjoyed a generally smooth relationship under these rules with those departments and agencies involved in intelligence. Mr. Snider attributes the success of the relationship to at least seven factors:

1. The existence of an orderly process through which the executive can object to the release of information;

2. A tacit understanding that the committees will not ordinarily seek to discover the identifies of particular agents;

3. Agency understanding of the role that the committee plays in bolstering the intelligence community's credibility in Congress and its ability to win support;

4. A generally bipartisan sense of shared objectives;

5. The relative stability of the membership on the congressional staffs;

6. Systematic contact between the committees and the leadership of each House, which is represented on each committee ex officio; and

7. The regularity with which it is possible to seek higher level review within the bureaucracy for staff refusals to disclose information to the committee.[167]

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[163]Standing Order of the Senate on the Select Committee on Intelligence [hereinafter, *Senate Intelligence Committee Order*], § 6, *reprinted in* S. COMM. ON RULES AND ADMINISTRATION, SENATE MANUAL, S. DOC. No. 1, 100th Cong., 1st Sess. 141 (1988) [hereinafter, *Senate Manual*]; House of Representatives Rule XLVIII [hereinafter, *House Intelligence Committee Rule*], § 5, *reprinted in* W.H. BROWN, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. 248, 100th Cong., 2d Sess. 756 (1988) [hereinafter, *Jefferson's Manual*].

[164]Senate Intelligence Committee Order, § 8(a), *reprinted in* Senate Manual, at 142; House Intelligence Committee Rule, § 7(a), *reprinted in* Jefferson's Manual, at 757.

[165]Senate Intelligence Committee Order, § 8(b), *reprinted in* Senate Manual, at 142-43; House Intelligence Committee Rule, § 7(b), *reprinted in* Jefferson's Manual, at 757-59.

[166]Senate Intelligence Committee Order, § 8(c), *reprinted in* Senate Manual, at 144; House Intelligence Committee Rule, § 7(c), *reprinted in* Jefferson's Manual, at 760.

[167]Interview with Britt Snyder, staff director and general counsel to the Senate Select Committee on Intelligence, in Washington, D.C. (Aug. 1, 1990).

Several members of the executive branch who have been involved in national security matters independently express agreement with Mr. Snider's view.

Taking the collective experience of the intelligence committees as a single case study, however, illustrates the knottiest conundrum in analyzing the success of the branches' information sharing processes from a wholly procedural perspective. Mr. Snider's observations support the view that, when the intelligence committees demand information, there is reason to believe that the transaction costs for obtaining the information will not be unduly high. This is not to say, however, that the committees will get all the information that sound policy making requires. The committees may not be able to identify the information they should have, and the executive may seek to circumvent its statutory obligations to take the initiative in informing Congress of intelligence-related matters.

These dangers were dramatically illustrated, of course, by the so-called Iran-Contra affair, in which the executive branch structured its covert programs for selling arms to Iran and diverting profits for the aid of the Nicaraguan resistance in order to prevent congressional oversight.[168] The congressional committees investigating the affair found: "The statutory option for prior notice to eight key congressional leaders was disregarded throughout [the Iran-Contra episode], along with the legal requirement to notify the Intelligence Committees in a 'timely fashion.'"[169] The committees were unanimous "that officials of the National Security Council misled the Congress and other members of the Administration about their activities in support of the Nicaraguan Resistance."[170]

Moreover, some observers believe that, putting aside executive malfeasance, the modus operandi of the intelligence committees helps to insure an underinformed Congress. The stability of relationships between these committees and the agencies that they oversee may foster leniency in oversight. Intelligence agencies may use the information access they provide to the intelligence committees to resist access to other committees that properly have intelligence-related matters under their jurisdictions.[171] Such resistance occurs despite the existence of congressional rules stating that intelligence committee access is not to be used to deny access to other committees in appropriate cases. These circumstances promote suspicion that the intelligence committees identify more strongly with the "cause" of the agencies than with the goal of democratic oversight of national security policy.

The degree to which committee co-optation and the insulation of intelligence agencies from other committees' review have occurred is difficult to assess. Whether such phenomena have resulted in a Congress less informed than it would be without the intelligence committee system is probably unknowable. Mr. Snider's view is that the difference in the quality of oversight before and after the creation of the current intelligence committees "is like night and day. . . .[N]ot another agency in the federal government . . . receives the degree of congressional oversight given the CIA." Although he acknowledges the possibility that the intelligence agencies may be less than fully forthcoming, he sees essential safeguards in (a) the political cost to the agencies of being discovered withholding information, and (b) the experience and knowledge of the committees and their staffs, which support independent judgments about the positions taken by the intelligence agencies. The incentives are sufficient, according to Mr. Snider, to promote routine agency initiatives to brief the committees on new developments.[172]

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[168] *See generally* Note, *Undermining Congressional Oversight of Covert Intelligence Operations: The Reagan Administration Secretly Arms Iran*, 16 N.Y.U. REV. L. & SOC. CHANGE 229 (1987-88).

[169] H.R. Rep. No. 433 and S. Rep. No. 216, 100th Cong., 1st Sess. 379 (1987).

[170] *Id.* at 447 (minority report of Rep. Cheney, *et al.*).

[171] Interview with Charles Tiefer, deputy general counsel to the clerk of the House of Representatives, in Washington, D.C. (Aug. 3, 1990).

[172] Letter from L. Britt Snider, General Counsel, Senate Select Committee on Intelligence, to Professor Peter M. Shane, University of Iowa (July. 10, 1990).

B. Factors Shaping Negotiation

Reflection on these case studies helps to suggest a fairly detailed understanding of the dynamics of information sharing between Congress and the executive. The outcome of a particular demand, as well as the process by which the resolution is achieved, may be affected by a variety of factors that can be grouped under three broad headings: the stakes for either branch in receiving or withholding particular information, the existence of avenues for compromising competing interests, and the political atmosphere in which the negotiation will occur.

1. The Competing Stakes and the Avenues for Compromise

The stakes in a dispute over information may be assessed along several dimensions. Most generally, what is at stake for Congress is the performance of one of its primary functions: routine oversight; the contemplation of possible legislation; the review of a nomination requiring Senate advice and consent; or the investigation of possible official wrongdoing. The range of potential subjects within Congress's purview is as broad as the range of subjects within its article I and article IV regulatory powers. That is, the range is limitless.

The executive's desire to control the dissemination of information is likely to result also from a predictable set of concerns. These are:

1. Protecting national defense and foreign policy secrets;

2. Protecting trade secrets of confidential commercial or financial information;

3. Protecting the candor of intrabranch policy deliberations;

4. Preventing unwarranted invasions of personal privacy, whether of government officers, employees, or private persons; and

5. Protecting the integrity of law enforcement investigations and proceedings.[173]

If all of what the branches perceive to be critically at stake in a particular dispute boils down to a contest between Congress's ability to fulfill one of its primary missions and the executive's ability to protect one of the routine concerns just catalogued, the prospects for a nonconfrontational resolution are good.[174] That is because, between complete acquiescence in Congress's demand and complete acquiescence in executive nondisclosure, there are four intermediate options, each of which permits a balancing of the branches' competing concerns:

1. The executive may provide the information requested, but in timed stages. A delay in providing information might permit the executive to conclude a law enforcement investigation or a policymaking process that it does not wish to subject to premature scrutiny.[175]

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[173]This catalogue of interests mirrors the various grounds specified in the Freedom of Information Act, 5 U.S.C. § 552(b), for exemptions from the ordinary rule of mandatory disclosure of executive branch records.

[174]The following analysis is based, in part, on Shane, *supra* note *, at 520-29.

[175]Such was the de facto consequence of the Watt executive privilege dispute, in which full disclosure did not occur until Secretary Watt had concluded the deliberative process with respect to Canada's status under the Mineral Lands Leasing Act.

2. The executive may release the information requested, but under protective conditions ranging from Congress's promise to maintain confidentiality for the information it obtains to congressional inspection of the material while it remains in executive custody. Such protective conditions are most helpful when the executive concern is less with the initial revelation to Congress and more with the possibility of subsequent re-dissemination of the material to other audiences.

3. The executive may release expurgated or redacted versions of the information demanded. Redaction is obviously helpful in preserving the confidentiality of informants, shielding personal privacy, and protecting the details of investigative methods.

4. The executive may release prepared summaries of the information demanded. Where the expurgation of existing documents would be insufficient to protect interests in confidentiality, the executive may be able to satisfy Congress's information needs by summarizing the information of direct relevance to Congress. As the A. T. & T. litigation suggests, it is possible to give Congress added assurance of the accuracy of the summaries by permitting selective sampling to compare original documents to the summary presentations.

Of course, at the same time that the branches are promoting their routine institutional concerns, other political factors may come into play. Congressional vigor in investigating an unpopular or ill-managed program may boost the political strength of Congress or, in what amounts to the same thing, may weaken the political stature of the executive. Similarly, executive nondisclosure may defer or limit the exposure of material that would associate the executive with a politically unpopular position. It may distract public attention from an underlying policy dispute, and raise the transaction costs generally for members of Congress intent on vigorous oversight.

Such political considerations may come into play no matter which party controls either end of Pennsylvania Avenue; the Democratic Congress's dispute with President Carter's Energy Secretary illustrates the point. It is reasonable to hypothesize, however, that the long-term difference in the partisan control of the two branches has significantly increased the branches' willingness to conduct their institutional competition openly. Demographics and the pattern of recent electoral results suggest that Republican control of the executive and Democratic control of Congress are likely to continue.

Even partisan political considerations, however, need not undermine the possibilities for compromise. Despite the potential political gains for Congress in the IRS investigation discussed earlier, no confrontation occurred. In part, this may be because the Bush Administration did not regard the potential results of the investigation as likely to be damaging to the incumbent President. The same factor might help explain Secretary Jack Kemp's cooperation in a congressional investigation of alleged abuses during the Reagan Years in the administration of the Department of Housing and Urban Development.

These examples of cooperation, however, also reflect explicit executive endorsement of the principle that Congress -- as in the IRS matter -- is entitled to broad accommodation in its investigations of alleged official wrongdoing. Putting aside the potential embarrassment, this general stance recognizes that a President's willingness to be forthcoming in a corruption investigation may prove a political plus for any Administration that does stand to be tarnished by a particular investigation. White House cooperation in the Iran-Contra

investigation is also illustrative on this score.[176] Thus, it may be most accurate to say that, in the IRS investigation, Congress and the executive reached a relatively quick agreement because (1) the immediate institutional needs of the branches could be accommodated through a compromise on the form of disclosure, and (2) the potential political gains to Congress either did not threaten to undermine the President's position, or the executive lacked any option more politically advantageous than cooperation. This may well be a common pattern.

In analyzing the stakes in a particular information dispute, the greatest problems seem likeliest to arise not because of the branches' different functions or even because of their short-term political interests. A problem is most likely to occur when one or the other branch behaves as if the stakes in a particular dispute included an overall adjustment in the relationship of the two branches.

This phenomenon -- a preoccupation with the implications of one disagreement for the entire interbranch relationship -- seems to have become a conspicuous factor in the prolongation of the Dingell-Gorsuch dispute. When the Justice Department first became involved, the relevant officials may have focused their attention on the discrete question of protecting open investigative files in this particular matter. Similarly, the initial, discrete concern of Representatives Dingell and Levitas may have been rooting out improper partisan influence in EPA prosecutorial decisionmaking. Fueled by misunderstandings, however, about the other branch's knowledge and intentions, the negotiators seem quickly to have shifted their rhetoric to general statements about presidential obligation and congressional prerogative. Once negotiators begin to act as though that level of principle is implicated in their disagreement, accommodation becomes vastly more difficult. In the words of former White House Counsel Fred Fielding: "If both parties are acting in good faith, you can negotiate a resolution to any issue unless or until it becomes an institutional clash. Once that occurs, resolution is very difficult because the issue has changed."[177]

2. The Ingredients of the Negotiating "Atmosphere"

Whether the negotiators "get institutional" is influenced, in turn, by other elements of the negotiating "atmosphere." That atmosphere will vary, first, with the degree to which shared goals do or do not animate Congress and the executive in the subject matter area that Congress is pursuing. The successes of the intelligence committees and the success of recent IRS oversight reflect, in part, a set of shared norms between the elected branches. Both take the defense of national security seriously. Neither wants to compromise national security through inappropriate disclosures of confidential information. Each branch is committed to the value of official integrity, and is aware of the particular sensitivity of tax enforcement in this respect.

In contrast, the areas of trade and environmental policy implicated in the Morton, Duncan, Watt and Gorsuch disputes were highly contentious. There are serious partisan differences over regulatory policy, undoubtedly exacerbating the disputes between OMB and

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[176]In May, 1989, the Senate Select Committee on Intelligence investigated whether certain White House documents relevant to the Iran-Contra matter released during the criminal trial of Oliver North had been provided to the Iran-Contra Committee and, if not, why the failure occurred. The Committee determined that the six documents had not been provided to the committee, but that there was no evidence to suggest that any of the documents had been deliberately withheld. Instead, it appeared that the FBI agents in charge of the original search may not have recognized the relevance of the documents. The committee could not determine with certainty whether a seventh trial document that the Committee had not seen had, in fact, been transmitted. White House records indicated transmittal had occurred. SENATE SELECT COMM. ON INTELLIGENCE, WERE RELEVANT DOCUMENTS WITHHELD FROM THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, 101st Cong., 1st Sess. (Comm. Print 1989).

[177]Letter from Fred J. Fielding to Peter M. Shane (Jan. 8, 1990) (on file with author).

Congress over access to regulatory material. Iran-Contra -- the greatest failure of the intelligence committees system -- was an executive response to the political certainty that Congress would not support the President's foreign policy goals. In those areas where policy contests are hottest, one can expect the most strident claims of congressional prerogative and the most vigorous executive complaints about congressional "micro-management."

A second critical factor is trust. As noted earlier, a developing distrust between the Office of Legal Counsel and Congressional staff may have been a significant exacerbating factor in the 1982 dispute over EPA's enforcement files. Secretary Watt's weakened credibility with the Dingell Subcommittee likewise aggravated the tone of their information dispute. By contrast, counsel to the Senate Select Committee on Intelligence and to the oversight committee investigating the IRS both cite mutual trust as an important aspect of their committees' successful relationship with the agencies they oversee.[178] In a similar vein, John A. Mintz, formerly general counsel to the Federal Bureau of Investigation, believes that a new mutual trust helped the FBI greatly in developing a satisfactory oversight relationship with Congress in the wake of the 1976 Church Committee investigation into intelligence abuses. Both the personal credibility of Judge William Webster as the agency's new director and the relative stability of staff membership both for the FBI and the Judiciary Committees were critically important factors, in Mintz's view.[179]

A third factor affecting negotiations is, of course, each branch's perception of the political risks involved in pressing hard for its position. With respect to foreign policy, for example, the President ordinarily operates against a backdrop of deference to executive branch initiative. Many members of Congress, regardless of party, are reluctant to place themselves in the position of appearing publicly to usurp the President's foreign policy prerogatives. At least one experienced staff member in the area of foreign policy oversight reports that this reality of congressional politics enables the executive to persevere in not sharing information on grounds of sensitivity, despite his subcommittee's unblemished record of keeping such information confidential. To subpoena such information would typically be impractical given the immediacy of the subcommittee's needs, and the President knows that the chances are miniscule of either House of Congress enforcing a subpoena for foreign policy information. In contrast, Secretary Duncan's dispute with Congress over the oil import fee was short-lived in part because the Carter Administration, having pledged "open government" in the wake of Watergate, was ill-equipped to invoke executive privilege to defend a hugely unpopular program.

The skill of the particular negotiators involved is also a factor that necessarily affects the process. Negotiators may vary in their understanding of the scope of their authority, their ability to minimize personality conflict, their creativity and flexibility in arriving at solutions, and in their skill at enabling other negotiators to reach compromise solutions without losing face.

A related factor is the orientation of each negotiator to his or her task. Negotiators who are willing to take each problem on its own terms and work pragmatically toward a solution may reach quicker agreements than those who psychologically regard each negotiation as an opportunity to advance broad principles. Negotiators who see a client's success as a "statement" of their own prestige or value may also be less flexible than negotiators whose sense of self-worth is less entwined with a client's success.

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[178]Interview with Britt Snyder, staff director and general counsel to the Senate Select Committee on Intelligence, in Washington, D.C. (Aug. 1, 1990); Interview with Peter S. Barash, staff director of the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations, in Washington, D.C. (Aug. 3, 1990).

[179]Interview with John A. Mintz, former general counsel to the Federal Bureau of Investigation, in Washington, D.C. (Aug. 4, 1989).

C. The Persistent Sources of Tension

The catalogue of factors that potentially shape the quality of a particular negotiation explains why any formally elegant model of that process is likely to depart significantly from reality. Although it is easy to imagine a polar "easy" case[180] and a polar "confrontational" case,[181] the spectrum of possibilities between those poles includes an enormous number of plausible scenarios.

What a review of the law and analysis of the case histories do yield is an understanding of the different kinds of potential tensions that make dispute resolution difficult. Some may be uncontrollable; others, not. Some may be eased through formal procedural mechanisms; others require attitudinal changes, which, of course, are more difficult to implement.

The two baseline factors that are least likely to change are political competition between Congress and the President and the existence of background legal uncertainty. Institutional competition, whether or not colored by partisanship, is an intended aspect of the constitutional design. Differences in party control of the two branches only exacerbate an inherent tension between the executive and legislative arms of government. The likelihood, discussed earlier, that courts will not provide any significant number of new decisions regarding executive privilege helps to perpetuate a state of legal uncertainty in which the competition of different institutional points of view can flourish.

A related attitudinal factor that is also unlikely to change is the difference between the branches' initial premises as to the legitimacy of Congressional interest in the details of executive branch policy making.[182] Administrators frequently complain of congressional "micro-management" -- a Congressional unwillingness to confine that body's attention to what, from the executive standpoint, is Congress's proper role of legislation and general policy oversight. The executive chafes at what it believes is Congress's unwillingness simply to live sensibly with the breadth of discretion Congress confers on administrative agencies.

Congressional representatives, however, tend to dismiss "micro-management" complaints as undervaluing the constitutionally intended legislative primacy in domestic affairs. Congress, from this point of view, has become more interested in "micro" issues because Presidents have (1) attempted to assert more direct presidential control at the "micro" decisionmaking level, and (2) implausibly defended the scope of their unilateral policy making authority under article II of the Constitution. From this standpoint, "micro-management" is a necessary counterweight to the Imperial Presidency. Despite this difference in perspective, certain shifts of attitude -- even against a background of uncertainty and competition -- could ease negotiations significantly. There are areas in which each branch perceives that its institutional interests are so chronically underweighed by the other branch that an agreement to focus conciliatory attention on just these four areas would, if practicable, have a significant impact.

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[180]The easiest case would be a dispute in which (1) the branches are pursuing compatible functions, (2) compromise mechanisms are easy to identify, (3) the information at issue involves a policy area in which the branches' shared values predominate, (4) the negotiators trust one another, (5) it appears risky to be obstreperous, (6) the negotiators are skillful, and (7) the negotiators are pragmatic.

[181]The "worst case" would be a dispute in which (1) each branch is protecting a sensitive function, (2) it is difficult to identify a mechanism for compromise, (3) the information at issue involves a hotly contested policy area, (4) the negotiators are unfamiliar with one another or mutually distrustful, (5) neither branch sees great political risk in pushing hard for its position, (6) the negotiators are not exceptionally skillful, and (7) the negotiators tend to worry more about principle than problem-solving.

[182]For a helpful discussion of the scope of congressional oversight and the variety of perspectives as to its quality and intensity, see NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES: THE NEED TO STRIKE A BALANCE AND FOCUS ON PERFORMANCE (Undated).

Congress's chronic procedural complaint is that the executive ignores (or excessively manipulates) the importance to Congress of promptness in providing information. Because most significant legislation requires a hearing process in both Houses, committee mark-up in both Houses, floor debate in both Houses, a conference committee reconciliation, and further floor debate before final passage, the two-year lifespan of Congress substantially limits the time frame in which members can hope to be effective in pushing new legislative initiatives. Additionally, because it is difficult to sustain attention to any particular problem -- whether public attention, media attention, or the attention of a member's colleagues -- a subcommittee engaged either in oversight or legislative deliberations may feel pressed to act within a short time frame when the issue is "hot." Because of this reality, the appearance of executive temporizing is always likely to provoke congressional resentment.

Congress's chronic substantive complaint is the executive's unwillingness to be more forthcoming in the sharing of foreign policy and national security information. Despite occasional episodes of congressional initiative (or over-initiative), Congress generally is deferential to presidential foreign policy making. Yet, the repeated reluctance to share information -- often explained by the executive in terms of both presidential prerogative and a fear of leaks -- is a frequent source of frustration to the branch that is expressly charged with powers to appropriate funds, to raise an army and navy, to regulate foreign trade, to implement international law, and to control immigration.[183] Congress regards its "leak" record as better than the executive's and is, of course, unpersuaded by arguments that the president is unilaterally charged to formulate all elements of our foreign and military policy.

Administrators also articulate a procedural frustration -- the inability to secure an adjudication of an issue of privilege without submitting to a congressional resolution of contempt. Whether the executive is seriously concerned in this respect is not obvious, however; there is, after all, at least some reason to suppose that greater ease in invoking judicial resolutions to information disputes would ultimately result in less executive control over information.

The executive's substantive concerns, however, are undoubtedly serious. The first is that Congress, from the executive standpoint, is insufficiently sensitive to the delicacy of information-sharing in the context of civil law enforcement. In seeking information regarding criminal law enforcement, Congress appears generally to understand the importance of privacy, of protecting sources and methods of gathering information, of shielding the government's strategic discussions, of not compromising ongoing investigations, and of preserving public confidence in the evenhandedness and depoliticization of law enforcement. The executive perceives, however, that Congress is not respectful of the same values -- even when they are equally salient -- in the context of law enforcement by a civil regulatory agency.[184]

Executive employees also believe that Congress underweighs the negative impact of oversight on executive branch deliberations when Congress demands the disclosure of deliberative documents representing advice to an administrator from that administrator's personal advisers and immediate subordinates. This concern looms largest in policy making areas, such as social and economic regulation, where political competition predominates over shared values and objectives, and least in such areas as criminal law enforcement, where

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[183]U.S. CONST., art. 1, § 8, cls. 3, 4, 10, 12, and § 9.

[184]Interview with Robert A. McConnell, former assistant attorney general in charge of the Office of Legislative Affairs, U.S. Department of Justice, in Washington, D.C. (Aug. 4, 1989). The best publicized recent example of alleged inappropriate interference by members of Congress in civil law enforcement involves the intervention by five Senators with the Federal Home Loan Bank on behalf of Lincoln Savings & Loan, a "failing thrift." Merry, *A Senatorial Effort to Save a Thrift*, CONG. Q. June 24, 1989, at 1594. On former Speaker Wright's possible exercise of undue influence in dealing with the Federal Home Loan Bank Board, see HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, REPORT OF THE SPECIAL OUTSIDE COUNSEL IN THE MATTER OF SPEAKER JAMES C. WRIGHT, JR., 101st Cong., 1st Sess. 192-279 (1989).

shared values and objectives predominate. A number of administrators insist that the susceptibility of deliberative memoranda to congressional scrutiny has (1) reduced the willingness of administrators and their support staff to commit their candid positions to paper, (2) increased the incentive for writing advisory documents in a manner that renders those documents virtually inscrutable as a public record, and (3) reduces the quality of decisionmaking by pushing more hard decisions into the context of oral deliberation and away from written analysis.[185]

It is arguable, of course, that administrators should be indifferent to the political consequences of exposing their staff's advice to Congressional scrutiny. If that advice differs from the administrator's ultimate decision or exposes other problems worthy of congressional investigation, the result will be only that Congress may press the administrator to defend his or her performance, an event entirely appropriate under our system of administrative accountability.

What this position may underweigh, however, is the problem of "agenda overload" for many administrators. Time is among the scarcest resources in Washington. An administrator may wish to avoid the production and subsequent disclosure of candid documents not solely out of apprehension for the political fallout, but also to reduce the time burden that explaining those documents may entail. Even an administrator confident of prevailing in the substance of a policy dispute with Congress has incentives to reduce the burden of oversight in terms of time and effort. Congress perceives arguments of this kind from the executive as manifesting an unwillingness to "take the heat"; it may be, however, that "taking the time" is also a genuine concern.

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In sum, if the object of procedural reform is to reduce the time and stress involved in reaching a mutually acceptable resolution of potentially confrontational information disputes between Congress and the executive, that strategy should optimally incorporate each of the following elements:

1. Enhancing the branches' recognition of various forms in which information may be shared that may accommodate the branches' respective interests in the disclosure or protection of information;

2. Deterring the tendency towards behaving as if the potential stakes in a particular information dispute included an overall adjustment in the relationship of the two branches;

3. Trading greater executive willingness to accommodate Congress's time pressure and its legitimate interests in foreign and national security affairs for an enhanced congressional willingness to respect the executive's concerns for civil law enforcement and the unnecessary scrutiny of deliberative documents representing advice to an administrator from that administrator's personal advisers or from his or her immediate subordinates.

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[185]Interview with Robert P. Bedell, former Administrator, Office of Federal Procurement Policy, Office of Management and Budget, in Washington, D.C. (Aug. 2, 1989); Interview with John Cooney, former assistant general counsel, Office of Management and Budget, in Washington, D.C. (Aug. 2, 1989).

III. SUGGESTIONS FOR REFORM

Over the last twenty years -- but most notably during the Watergate period and following the Reagan Administration's EPA imbroglio -- numerous legislators and commentators have offered suggestions for procedural reform in the exchange of information between Congress and the executive.[186] Nearly all the proposals that have been discussed involve (1) prescriptions for the procedure through which executive privilege is asserted, (2) resuscitating Congress's use of its inherent contempt authority, (3) creating some avenue for the civil enforcement of Congress's subpoenas to the executive branch, or (4) strengthening the current criminal law enforcement prospects, most importantly through the authorization for a special prosecutor in executive privilege cases. In contrast to these recommendations for formal changes in the exercise of the branches' respective authorities, this author, in 1987, proffered a fairly elaborate scheme for routinizing certain aspects of the informal interbranch negotiations that currently take place.[187]

Statutory proposals to prescribe the procedure through which executive privilege is asserted have aimed chiefly at insuring that responsibility for the invocation of executive privilege is lodged with the President, and that the privilege is not invoked by subordinate officials. President Nixon's 1969 adoption by memorandum of this very procedure, however, and its subsequent observance by every President since Nixon, has mooted this strategy as an avenue for further improvement.

Congress could increase the pressure for the quick resolution of information disputes by invoking its inherent contempt power.[188] Although the Constitution does not mention Congress's investigation or subpoena powers expressly, the Supreme Court has inferred both that Congress has such powers and that, in aid of its powers, Congress may adjudge for itself that a targeted witness or holder of documents is in contempt of Congress. Upon such an adjudication, Congress may provide for the incarceration of the contemnor within the Capitol itself, permitting the defendant to raise any privilege issues in court through a petition for habeas corpus.

Use of the inherent contempt power, however, has obvious disadvantages.[189] Although it does not require the cooperation of other branches, the deliberative process it entails is still time-consuming. The spectacle of summary incarceration is politically unseemly, especially if the defendant is a government official. Congress had enough doubts as to the effectiveness of the procedure by 1857 to provide by statute for the executive prosecution of "contumacious" witnesses. Congress has not used the power at all since 1934.[190] Proposals to permit a civil declaratory judgment action or an injunctive suit to enforce a congressional subpoena offer a "cleaner" way of adjudicating an issue of privilege than does the current statutory

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[186]The various legislative proposals are discussed, in some cases with suggestions for improvement, in Brand and Connelly, *Constitutional Confrontations Preserving a Prompt and Orderly Means By Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71 (1986); Comment, *Executive Privilege and the Congress: Perspectives and Recommendations*, 23 DE PAUL L. REV. 692 (1974); Committee on Civil Rights, *Executive Privilege: Analysis and Recommendations for Congressional Legislation*, 29 REC. A.B. N.Y. 177 (1974); Hamilton and Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated By Congressional Subpoenas*, 21 HARV. J. ON LEGIS. 145 (1984), Note, *Executive Privilege and the Congressional Right of Inquiry*, 10 HARV. J. ON LEGIS. 621 (1973); and Rosenthal and Grossman, *Congressional Access to Confidential Information Collected by Federal Agencies*, 15 HARV. J. ON LEGIS. 74 (1977).

[187]See Shane, *supra* note *.

[188]For extensive histories and analyses of Congress's contempt power, see J.T. MELSHEIMER, CONGRESS' CONTEMPT POWER (Congressional Research Service Rep. No. 76-152 A) (Aug. 12, 1976); and J.R. SHAMPANSKY, CONGRESS' CONTEMPT POWER (Congressional Research Service Rep. No. 86-83A) (Feb. 28, 1976).

[189]Brand and Connelly, *supra* note 185, at 74-77; Hamilton and Grabow, *supra* note 185, at 151-52.

[190]J.C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE 88 (1988).

scheme.[191] Under existing law, an executive officer can secure an adjudication of a privilege claim only by incurring contempt and raising the privilege issue defensively in a criminal prosecution. It would undoubtedly be easier for Congress to pursue a civil remedy than it is for Congress to invoke effectively the criminal process as that process is presently structured.

It should be recognized, however, that the possibility of civil suit would not likely do much to change the current atmosphere of interbranch negotiation. Furthermore, it specifically would not advance the two concerns Congress feels most pressingly, that is, executive failure to respond promptly to all information requests and the executive withholding of foreign policy information.

The reason for supposing that the possibility of a congressional suit to enforce its subpoena would not much alter the existing pattern of negotiation is that such suits, as both branches know, are both time-consuming and uncertain.[192] Congress is not likely to authorize a procedure under which suits could be initiated based on a subcommittee vote alone. A full committee vote to authorize suit would require time for the full committee to deliberate, and to persuade the majority of committee members of the appropriateness of the suit and, perhaps, of its likely outcome. Additionally, even if suit is filed under an expedited procedure, the suit -- and its possible appeal -- could take months. Such a mechanism would not be practicable as a routine device for exacting executive cooperation in information sharing.

Moreover, the areas in which Congress feels most routinely underinformed -- on questions of foreign and national security policy -- are the areas in which courts are most likely to be deferential to executive claims of privilege. Despite the lack of support for the executive's oft-repeated claim of exclusive authority over all matters touching diplomacy, courts have been reluctant to second-guess particular executive claims that the disclosure of certain information would compromise intelligence sources or methods, or the confidence of other nations' intelligence services in our own.

Despite these problems, Congress might think it worthwhile to enact a declaratory judgment procedure to accommodate the rare case in which adjudication appears unavoidable in order to solve an impasse with the executive branch. In principle, pursuit of such an action should be open either to Congress or the executive once a subpoena issues. The procedure, even if little used, would be preferable to the currently existing criminal process.

The fourth set of proposals -- proposals to facilitate recourse to the criminal process -- is also unlikely to alter much the existing pattern of negotiating behavior. Proposals to permit the appointment of a special prosecutor to pursue criminal contempt charges respond to one important problem with the application of the current contempt statute to the executive. When a case against an administrator is referred by Congress to a United States Attorney, that official necessarily faces a conflict between the duty to enforce the law and his or her institutional duties to the Department of Justice. Congress cannot confidently expect the pursuit of such a prosecution so long as a Department of Justice appointee must conduct the grand jury and any subsequent trial. Thus, were Congress authorized to apply to a court for the appointment of an independent counsel, it could eliminate a troublesome feature of the current system.

Yet, criminal prosecutions are even less promising vehicles for resolving disputes quickly than would be civil suits. Once an indictment is filed, the defendant can no longer purge him- or herself of contempt by complying with the subpoena.[193] This renders much more problematic Congress's ability to engage in an efficient bargaining process with the defendant.

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[191] *E.g.*, Linde, *"A Republic . . . If You Can Keep It"*, 16 HASTINGS CONST. L.Q. 295, 326 (1989).

[192] Brand and Connelly, *supra* note 185, at 83.

[193] *Id.* at 77.

Further, the courts are not traditionally friendly to criminal contempt actions. To achieve a conviction, the prosecutor must, of course, prove each element of the statutory offense beyond a reasonable doubt. Should the defendant be acquitted, Congress has no avenue for appeal.

There are also strong policy objections to the creation of a special prosecutor mechanism to resolve executive privilege disputes. Although constitutional objections to judicially appointed prosecutors proved unpersuasive in Morrison v. Olson,[194] Justice Scalia forcefully explained the potential that the special prosecutor mechanism has for destabilizing the co-equal relationship of the branches. The Constitution allocates specific tools to Congress for the purpose of checking the executive -- most notably, the appropriations, confirmation, and impeachment powers. Permitting Congress at will to prompt the appointment of a special prosecutor goes substantially further in enabling Congress, at little cost to itself, to distract the executive branch from its primary functions and to undermine popular support for the President.[195] When serious indications exist of criminal wrongdoing by executive officials, the potential for destabilization is properly overbalanced by the contribution of the independent counsel mechanism to preserving the rule of law. It is not obvious that there is a comparable public benefit to be gained in information disputes that would justify the destabilizing potential of a special prosecutor in this context.

The various objections to those formal procedural reforms that others have suggested do not mean that nothing should be done. However unlikely the litigation of these disputes may be, a declaratory judgment proceeding would be "neater" than any criminal contempt process. Congress could also sensibly enact the sorts of protective procedures envisioned in the Congressional Right to Information Act proposed in 1973.[196] That bill obligated committees to protect confidential information that agencies received from entities or persons outside the federal government, and provided that any breach of confidentiality by a member of Congress would trigger an ethics investigation. Furthermore, Congress could provide for the physical security of confidential information, and permit entities or persons outside the federal government who supply such information to explain their interest in continued confidentiality before any congressional decision to disclose.[197]

If, however, the elected branches are truly to create conditions for more constructive and less burdensome negotiations, they must focus on procedures that are not dependent on the courts or on the exercise of contempt power. Based, in part, on this author's earlier study of interbranch information disputes, the American Bar Association in 1987 endorsed three such measures for adoption by the elected branches and two areas for congressional study, in order to facilitate the resolution of disputes over executive privilege in a manner that would "take account more effectively of the constitutional responsibilities of each branch and without undue cost to the necessary working relationship of Congress and the Executive."[198] The ABA endorsed another such measure in 1988, pertaining specifically to congressional demands for documents revealing communications between administrators and their personal advisers.[199] These measures, implemented in a manner consistent with the findings of the present study, promise to do more to redirect the energies of the elected branches in information disputes than do the categories of procedural reform discussed earlier.

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[194]108 S.Ct. 2597 (1988).

[195]*Cf., id.* at 2623-25, 2630-31 (Scalia, J., dissenting).

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

[197]Rosenthal and Grossman, *supra* note 47, at 111-116.

[198]E. Grenier, Report and Recommendation to the ABA House of Delegates from the Section of Administrative Law (Aug. 1987).

[199]A. Bonfield, Report and Recommendation to the ABA House of Delegates from the Section of Administrative Law (Aug. 1988).

The centerpiece of a reform effort that is not dependent on the courts would be the negotiation between the branches of a new modus vivendi to govern information disputes. This modus vivendi would have both a procedural and a substantive component. Under the modus vivendi, each branch would retain the formal authority to assert in legal proceedings what it believes to be its constitutional prerogatives concerning the control of information. At the same time, the modus vivendi would contain agreements aimed at steering negotiations away from categorical questions of prerogative -- who is legally entitled to what? -- and toward the pragmatic resolution of immediate disputes.

Toward that end, the agreement should specify at least (a) those interests in the control of information that each branch could invoke in negotiations, (b) a commitment to invoke those interests in highly specific terms should disputes arise, and (c) a commitment to explore in negotiation how the interests of each branch would be advanced or compromised in the particular dispute by the use of various compromise strategies attempted in the past. Another important procedural component would be the creation of some mechanism for systematic recordkeeping concerning the informal resolution of executive privilege disputes. This set of agreements has the potential to enhance the branches' recognition of the various forms in which information may be shared that may accommodate the branches' respective interests in the disclosure or protection of information, and to deter treating the stakes in particular information disputes as if they included an overall adjustment in the relationship of the two branches.

It would not be necessary to implement such an agreement through statute. Once an agreement was negotiated, the President could bind the executive branch to its observance through executive order. Congress could adopt the agreement as part of the rules of each House. Such mechanisms would enable each branch to escape the agreement should it prove unworkable.

Yet greater strides could be made to interbranch comity if the agreement, as suggested earlier, traded greater executive willingness to accommodate Congress's time pressure and its legitimate interests in foreign and national security affairs for an enhanced congressional willingness to respect the executive's concerns for civil law enforcement and the unnecessary scrutiny of deliberative documents representing advice to an administrator from that administrator's personal advisers or from his or her immediate subordinates. Such a trade could be accomplished in a variety of ways.

Congress, for example, could agree -- as recommended by the ABA -- not to subpoena:

> from administrative agencies any documents embodying [communications between administrators and their personal advisers], except on the basis of a demonstrated, specific need for such documents. In determining whether such a need exists, the following factors should be among the criteria considered: the nature of Congress's interest in its investigation, the importance to Congress's investigation of the particular material requested, the nature of the agency's interest in not disclosing the material, and the availability to Congress of adequate alternative sources of information.[200]

Additionally, it could negotiate understandings regarding the exchange of civil law enforcement information that show sensitivities similar to those displayed in the context of criminal law enforcement.

The executive could offer some promise for assuring a quick, good faith response to every request, plus quick engagement in negotiations -- perhaps under presumptive deadlines -- in the event of disagreements. The branches could explore increased congressional access to

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[200]American Bar Association Report No. __ (Aug., 1988).

foreign policy information as a goal, facilitated perhaps by measures akin to those now used for the sharing of classified intelligence.

Determining the particulars of these agreements would likely not be easy, but it is fair to say that adversaries throughout the world, under imperatives to cooperate less compelling than those facing Congress and the President, have reached agreements over even knottier issues. That payoff could be considerable, especially if such a modus vivendi laid the groundwork additionally for a more bipartisan foreign policy and greater congressional confidence in executive administration of the laws.

One of the other two areas that the ABA in 1987 recommended for congressional study was the possible provision for a central body in Congress with continuing responsibility for negotiation in executive privilege negotiations, akin to the responsibility held in the executive by the Justice Department's Office of Legal Counsel. A final area for study was possible recourse to non-abiding third-party mediation in the most serious disputes. The ABA report, like the article from which it was drawn, mentioned federal judges as possible mediators.[201] Retired members of Congress and former Presidents are also possibilities.

The first of these ideas could be implemented by strengthening and perhaps more fully publicizing to the members of Congress the current roles of the Office of Senate Legal Counsel and the General Counsel to the Clerk of the House. Both offices now operate as repositories of information about past disputes, and sources of legal counsel to individual committees. Any further centralization of negotiating authority, however, is likely to be regarded as too significant a departure from norms of congressional procedure to commend itself to Congress unless and until there is a political disaster under the current structure.

The second idea may well have merit, but would constitute a dramatic innovation, likely requiring statutory implementation. Congress and the executive could quite reasonably decide that consideration of such a mediation mechanism should be postponed until the branches had experimented with the structurally less innovative modus vivendi described above. The set of political agreements here outlined is more responsive to the factors producing success or failure in the case studies described in Section II and to the points of agreement and disagreement articulated in the interviews conducted for this study than are proposals for resurrecting Congress's contempt power, creating a civil process other than contempt for enforcing congressional subpoenas, or authorizing the use of independent counsel in information disputes.

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[201] Shane, *supra* note *, at 529-31.

IV. ARE INDEPENDENT AGENCIES DIFFERENT?

If the elected branches decided to negotiate the sorts of agreements described in the previous section, a difficult issue to resolve would be the scope of those agencies whose records would be covered by the new modus vivendi. The branches could, as a matter of policy, agree to cover any set of agencies they choose. An interbranch "treaty" on information sharing might cover just the Executive Office of the President and its components, or just the core cabinet-level agencies, or just agencies with jurisdiction over environmental policy or any other constellation of agencies. The various jurisdictional possibilities, however, are not necessarily of equal appeal in terms of either their policy or principle sense.

One easily imagined jurisdictional line that does not make a good deal of policy or principled sense is the line between those agencies conventionally labeled "executive" and those conventionally labeled "independent." That line, although deeply embedded in separation of powers folklore, is unappealing for two reasons. First, recent Supreme Court opinions cast substantial doubt on the proposition that there are constitutionally distinct categories of agencies called "executive" or "independent." Second, whether there do or do not exist good reasons for withholding or disclosing agency information will rarely have anything to do with an agency's particular structure.

A. The Unitary Nature of the Administrative Agency

The agencies conventionally called "independent" are structured in a variety of ways that are designed to mitigate the influence of partisanship on agency policy.[202] Among the common accoutrements of "independence" are collegial decisionmaking, staggered terms for agency administrators, terms of administrative office longer than a single Presidential term, and quotas on the number of agency members who may belong to either of the major parties. The Constitution is silent on each of these features. Congress has the power to adopt such features, depending entirely on its judgment as to what is "necessary and proper" for the effective functioning of the agency.

The Constitution does speak at least elliptically, however, to a number of issues that are relevant to agency structure, taking as an element of that structure the appropriate relationship between agency administrators and the President or other elected officials. Most obviously, the Constitution provides that the President shall appoint all non-inferior administrative officers "by and with the Advice and Consent of the Senate."[203] The Supreme Court has held this provision fully applicable to the Federal Election Commission, an "independent agency," because the FEC is an administrative agency that implements the authority of the United States.[204] Thus, Congress may not, by labeling an agency "independent," deprive the President of his appointments role.

Second, the Constitution -- as read by the Supreme Court since Myers v. United States[205] -- limits the permissible scope of Congress's power to participate in the removal of any officer of the United States. Congress may remove an officer of the United States only through impeachment. So long as Congress permits an administrator to implement the authority of

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[202]Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 608 (1989). The difficulty in finding principled distinctions between so-called "independent" agencies and others is well developed in Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581-86 (1984).

[203]U.S. CONST., art. II, § 2, par. 2.

[204]Buckley v. Valeo, 424 U.S. 1 (1976).

[205]272 U.S. 52 (1926).

the United States, Congress may reserve for itself no other removal role, even if the administrator is one, such as the Comptroller General, who is widely regarded as an "arm of the legislative branch."[206] Third, because the President is charged to "take Care that the Laws be faithfully executed,"[207] Congress must permit the President to remove, directly or through a subordinate he fully controls, any administrator who is not faithfully executing the laws.[208] Although the full scope of this power has not been elaborated, it presumably includes the power to discharge an official who has broken the law, who refuses to implement the law, or who is performing so poorly as to undermine Congress's purposes in delegating power in the first place.

Fourth, however, even if an administrator is performing power of a sort historically performed almost entirely by officers universally regarded as executive, Congress need not render the administrator susceptible to "at will" discharge by the President.[209] It may be that the President must have plenary removal power to supervise fully the exercise of administrative functions by any official -- such as the Secretary of State -- who assists the President in discharging an inherent article II function. If an administrator, however, is implementing delegated authority that is not within the scope of the President's inherent article II functions, then any discretion the President has to discharge the administrator depends upon congressional permission -- except for the constitutionally guaranteed authority to discharge an officer for failing faithfully to execute the laws.[210]

The foregoing propositions, all squarely affirmed by recent Supreme Court decisions, assure the President a constitutionally prescribed minimum level of authority with respect to every agency. That an agency has multiple administrators, with lengthy, staggered terms, or that Congress has limited the number of agency administrators who may be members of a particular party, would have no impact on the President's appointment power or on his authority to take care that the laws be faithfully executed. Nor would Congress have more authority to supervise the administrators within such an agency. If displeased with an administrator, it would have no power other than impeachment to remove the official. In these respects, all agencies are "executive."

On the other hand, the relationship that the Constitution promises to the President falls far short of plenary policy control. Only if an administrator is involved in discharging functions constitutionally vested in the President is such control a probable constitutional mandate. Otherwise, the scope of such supervisory power and the scope of authority the President has to remove an executive official are judgments within the discretion of Congress. It follows from this analysis that there is nothing in the constitutionally mandated relationship between administrative agencies and either Congress or the President that suggests that labeling an agency "executive" or "independent" yields (a) greater or lesser authority for the President to control agency information, or (b) greater or lesser authority for Congress to demand information.

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[206]Bowsher v. Synar, 478 U.S. 714, 746 (1986).

[207]U.S. CONST., art. II, § 3.

[208]*Cf.*, Morrison v. Olson, 108 S.Ct. 2597, 2619 (1988) ("This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws.")

[209]*Id.* at 2619-21 (limits on presidential supervision of independent counsels do not impermissibly impede President in discharge of his constitutionally vested powers).

[210]*See generally* Shane, *supra* note 201.

B. Agency Structure and the Policy Implications of Information Sharing

The line between independent and executive agencies also seems unhelpful in distinguishing between situations when policy arguments for information disclosure will or will not be persuasive.[211] In part, this is because the agencies are not neatly distinguished by subject matter. Although most foreign policy matters are handled by executive agencies, some "independents," such as the Nuclear Regulatory Commission, have a potential impact on foreign policy and access to classified information that is of no less concern to the President than the agenda of the State Department. Sensitive financial information exists both in the "independent" Securities and Exchange Commission and in the "executive" Department of the Treasury. Health and safety, antitrust, energy, and transportation are additional critical policymaking areas in which both executive and independent agencies are involved.

Just as important, the arguments for and against the sharing of information do not vary depending on the structure of the agency that holds the information. Congressional demands for information, as noted above, coincide with legislative deliberations, ordinary oversight, confirmation investigations, and probes into alleged wrongdoing. The fact that the context in which a particular one of these activities is occurring involves an "independent" agency or an "executive" agency is irrelevant to whether Congress will find particular information either relevant or helpful to its tasks.

Similarly, the interests in nondisclosure catalogued above -- protecting defense and foreign policy secrets, confidential financial information, the integrity of administrative policy deliberations, personal privacy, and law enforcement -- do not vary depending on whether those interests arise in an "independent" or "executive" agency context. State secrets are sensitive, wherever held. Financial information is no more or less sensitive because held by the Internal Revenue Service or the Federal Reserve Board. The integrity of Federal Trade Commission investigations and deliberations is of no less concern than investigations and deliberations by the Environmental Protection Agency or the Justice Department. The personal privacy interests of ICC employees are presumably no different from those of Defense Department staff.

In sum, to draw a line in information handling between agencies conventionally labeled "executive" and others conventionally labeled "independent" may have political appeal. There would be no constitutional barrier to the branches negotiating an informal agreement that does treat these categories differently. It would be a mistake, however, simply to assume either that constitutional doctrine or policy analysis dictates different treatment. They do not.

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[211] Strauss, *supra* note 201, at 654-660.

V. CONCLUSION

The foregoing study supports the following conclusions with respect to improving the resolution of disputes between Congress and the executive over congressional access to information:

1. Congress should consider enacting a declaratory judgment procedure to accommodate the rare case in which adjudication appears unavoidable in order to solve an impasse with the executive branch over access to information. 2. Congress and the President should consider negotiating an agreement, implemented through congressional rules and an executive order, regarding negotiations over the sharing of sensitive information.

   A. Such an agreement should specify at least (a) those interests in the control of information that each branch could invoke in negotiations, (b) a commitment to invoke those interests in highly specific terms should disputes arise, and (c) a commitment to explore in negotiation how the interests of each branch would be advanced or compromised in the particular dispute by the use of various compromise strategies attempted in the past.

   B. Such an agreement should involve the creation of some mechanism for systematic recordkeeping concerning the informal resolution of executive privilege disputes to enhance the branches' recognition of the various forms in which information may be shared that may accommodate the branches' respective interests in the disclosure or protection of information, and to deter treating the stakes in particular information disputes as if they included an overall adjustment in the relationship of the two branches.

   C. Negotiations regarding an informal agreement should focus on the possibility of trading greater executive willingness to accommodate Congress's time pressure and its legitimate interests in foreign and national security affairs for an enhanced congressional willingness to respect the executive's concerns for civil law enforcement and the unnecessary scrutiny of deliberative documents representing advice to an administrator from that administrator's personal advisers or from his or her immediate subordinates.

3. Congress should fully orient its members to the roles of the Office of Senate Legal Counsel and the General Counsel to the Clerk of the House as repositories of information and sources of counsel to individual committees in negotiating disputes over information.

4. In resolving disputes over information, all three branches of the federal government should avoid presuming different treatment for contested information depending on whether the information is held by agencies conventionally labeled "executive" or "independent."

APPENDIX

Government Officials Interviewed for Study

This report benefitted greatly from the willingness of a number of past and present employees of Congress or the executive branch to share their views and experiences with the author. Because the following people did not insist on confidentiality, I am able to thank them publicly for their generosity.

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Testimony of John Brademas
President Emeritus, New York University
Member of Congress (D-Ind.), 1959-81
Before the
Joint Committee on the Organization of Congress
Washington, D.C.
Tuesday, June 22, 1993

Chairmen Hamilton and Boren and members of the Joint Committee on the Organization of Congress, I am honored to have been invited to contribute to your deliberations on the operation of Congress and to today's discussion of Legislative-Executive branch relations.[1]

I speak to you from the perspective of one who was educated as a political scientist; served in the United States House of Representatives for twenty-two years, the last four as Majority Whip; served eleven years as a university president; and has served, and continues to serve, on a number of boards and commissions that deal with various aspects of Federal policy.

In this last connection, I served on the National Commission on the Public Service, chaired by my distinguished colleague on this panel, Paul Volcker; serve now on the National Advisory Council on the Public Service;

[1] I discuss at greater length some of the issues in this statement in my books Washington, D.C. to Washington Square (Weidenfeld & Nicolson; New York, 1986); and (with Lynne P. Brown) The Politics of Education (University of Oklahoma Press; Norman, 1987).

served on the Carnegie Endowment National Commission on America and the New World; serve on the Consultant Panel to the Comptroller General of the United States; chair the Committee on Congress of the Carnegie Commission on Science, Technology and Government; and have recently become Chairman of the National Endowment for Democracy.

While in Congress, I served on the Committee on Education and Labor, House Administration Committee and the Joint Committee on the Library [of Congress] and the House Democratic Steering and Policy Committee.

Of particular relevance to this Committee perhaps is that during my last four years in the House, from 1977 to 1981, I was Majority Whip, third-ranking member of the Leadership. In this position I was responsible for rounding up votes for the legislative positions of Speaker O'Neill and the Democratic Leadership and for advising the Speaker and Majority Leader. As Whip, I attended, with other House and Senate Democratic leaders, the twice-monthly breakfasts at the White House with President Carter and Vice President Mondale.

As the theme of this panel is Legislative-Executive relations, I note that my service in Congress spanned the tenure of six presidents: three Republicans--Eisenhower, Nixon and Ford--and three Democrats--Kennedy, Johnson and Carter.

Basic to an appreciation of Legislative-Executive relations, indeed, of the American form of government, are certain fundamental factors. First, we have a separation-of-powers Constitution. Second, our political parties are decentralized. Third, over the last twenty years, there have been significant changes in the operation of Congress that, in an already fragmented system, have further dispersed power.

Now people hear the phrase, "separation of powers," but too few understand its meaning. Some think Congress exists to do whatever a President wants. This is not what the Founding Fathers had in mind.

It is imperative here to remember that Presidents, Senators and Representatives are elected by different constituencies, for differing terms and with different Constitutional responsibilities.

In our system, as distinguished from a parliamentary one, the chief executive is not chosen from the legislative majority and often does not even belong to the majority party in Congress. Witness the years of Presidents Reagan and Bush.

It may be instructive in this respect if I tell you that in my own fourteen races for Congress, I ran five times in Presidential election years but that only once did the people of my Northern Indiana district vote for the

nominee of my party for President.

The American way of governing was not designed for peaceful coexistence between the Executive and Legislative branches even when both are controlled by the same party.

Beyond the constitutional arrangement of what Richard Neustadt has called "separated institutions sharing powers" is another factor that greatly affects the relationship between the two ends of Pennsylvania Avenue. We do not have highly disciplined political parties.

Our two traditional major parties in the United States have made possible durable coalitions of disparate but broadly compatible interests. The umbrella of national party affiliation has helped build consensus within as well as across party lines, a crucial role in making government work in a big country like ours with many differences of region, race, ethnic origin and economic interest.

But for various reasons, the ties of party have been weakened over the last generation. The decline of political patronage, with the rise of the civil service, is one explanation. Another is that television has now become the chief instrument of political communication. Television in turn is largely responsible for the escalating cost of running for office and for the enormous importance in American politics today of money to finance campaigns.

When I first ran for Congress in 1954, I spent, as I recall, between $12,000 and $15,000; the last time, in 1980, my memory tells me, around $675,000.

The imperative of raising campaign funds, married to the increasingly significant impact of decisions by the Federal government on society and the economy, has opened the door to very great influence on the political process of so-called special interest groups and campaign contributions from political action committees, developments that clearly have made far more difficult the task, essential to the process of policy-making in a democracy, of accommodation and compromise.

To these decentralizing, fragmenting forces must be added changes over the last two decades in the operations of Congress itself, especially in the House of Representatives. I was part of those changes, aimed chiefly at curbing the power of autocratic full committee chairmen, at opening up the system to effective participation by more members and at making the House more democratic and accountable.

These reforms, however, have not necessarily made the House of Representatives easier to lead or majorities easier to forge. So dealing with the House--I do not even speak of the Senate!--is often just as difficult for a Speaker as it is for a President.

Here let me note that Congress has been affected not only by the kinds of reforms I have cited but also by steps Congress has taken to strengthen its capacity to carry out its functions as policy-maker and overseer of the Executive in carrying out the laws.

Most significant in this regard is the establishment of a Congressional process for producing a Federal budget. Next year marks the 20th anniversary of the passage of legislation that created Budget Committees in the House and Senate and a Congressional Budget Office.

The Office of Technology Assessment is another example of the continuing effort by Congress to enhance its access to intelligence and advice. Indeed, the raison d'etre of the Carnegie Commission on Science, Technology and Government is to study ways in which all branches of the Federal government, as well as the states, can more effectively make decisions on issues with scientific or technological implications.

The Carnegie Commissions's Committee on Science, Technology and Congress has produced two reports, one on S&T advice from the Congressional support agencies--CBO, OTA, the General Accounting Office, and the Congressional Research Service of the Library of Congress--and a second

on sources of such expert advice outside Congress.[2]

My committee is now working on the third report, in my view, most difficult, on the organization and procedures of Congress for dealing with S&T issues.

At this point, I want simply to list certain reforms that I believe would significantly improve the capacity of Congress to play its deliberative as well as representative role in our political system.

First, a four-year term for Members of the House of Representatives would enable them, without such unrelenting pressure to campaign and raise money, to focus more on long-range policy. To preserve the advantage of a biennial referendum, stagger the terms, with half the seats up every two years.

Next, reform the campaign finance laws. As a co-author of the 1974 statute that provides for financing of presidential campaigns, I have long favored public financing of House and Senate races, and not solely as a

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[2] Science, Technology, and Congress: Expert Advice and the Decision-Making Process, 1991.

Science, Technology, and Congress: Analysis and Advice from the Congressional Support Agencies, 1991.

See also Working with Congress: A Practical Guide for Scientists and Engineers, by William G. Wells, Jr. (Carnegie Commission on Science, Technology and Government with the American Association for the Advancement of Science; Washington, D.C., 1992).

way to impose spending limits but, still more important, to reduce the excessive influence of PAC and other special interest money on public policymaking.

I also favor encouraging contributions to political parties as a way of strengthening their place in developing policy proposals, fashioning consensus for them and encouraging greater citizen participation in politics.

These are a few examples of changes I would make that would not only help Congress do a better job but would also increase the prospects of cooperation between Congress and the Executive, a question to which I now turn.

The subject of this panel is so broad that I can offer but a few generalizations and some concrete illustrations. The safest generalization, in response to questions about institutional forces and individuals in the American political system, is, "It all depends."

For the state of Legislative-Executive relations varies with the time period, the policy area and above all, with the configuration of political forces. Is the President a Democrat or a Republican? Which party controls the Senate and House and by how many votes?

I remind you that when Presidents Johnson and Carter took office, there were more than 290 Democrats in the House and 60 in the Senate; today there are only 258 in the House and 56 in the Senate.

Nonetheless, as Congressional Quarterly (May 29, 1993) has noted, "...[A]n analysis of this year's votes shows party unity is at an all-time high for both Democrats and Republicans, continuing a 20-year trend....[T]hrough May 28, the average Member supported his or her party on roughly 90 percent of the partisan votes (...) when a majority of Democrats voted against a majority of Republicans."

That Democrats today have a majority in the Senate does not, obviously, mean automatic approval of a Democratic President's budget any more than a Republican President in 1981 found swift passage of his budget by a Republican-controlled Senate.

Another point: The Lyndon Johnson of 1965 was not the Lyndon Johnson of 1968. The Richard Nixon of 1969 was not the Richard Nixon of 1974. The George Bush of 1991 was not the George Bush of 1992. In politics, although the same people may be in office, times change. Indeed, if I may say so, the Bill Clinton of two weeks ago was not the Bill Clinton of last week, much I'm sure, to his satisfaction!

Now I sat on the House Committee on Education and Labor during the Great Society days of Lyndon Johnson, and whether or not you agreed with the legislation that he and our committee produced, no one can say that the Executive and Legislative branches did not work together effectively.

Yet it was Democrats in Congress who ultimately turned against Johnson on the Vietnam War and ultimately drove him from office.

During the Nixon years, I will flatly assert, the Executive branch had little to do with the making of Federal policy in the field of education. We in Congress, Republicans often joining Democrats, initiated and shaped the major education bills. I make this point because we have become so accustomed to thinking of Presidential lawmaking as the norm.

As I was a member of the Congressional Leadership during Jimmy Carter's presidency, perhaps I should offer a few observations on that relationship.

President Carter was new to Washington and had won election by, in effect, running against it. He did not seem to have the zest for and relish in political combat that some of us, like Tip O'Neill, Hubert Humphrey, and John Brademas, had. President Carter wore his office like a burden.

That we had all been elected by larger margins than he was not lost on us.

President Carter appeared to feel that once he had made judgments on the substance of policy, shaped his legislative proposals and shipped them to Capitol Hill, his job was done. He worked prodigiously to develop his

proposals but not as hard in selling them. He disdained the horse-trading and bargaining that characterized much of the legislative process.

He also tended to overload the legislative pipeline.

He found it difficult to understand the way a Member of Congress, especially of the House of Representatives, up for reelection every two years, must see the world.

These at least were some of the ingredients of Jimmy Carter's style in his first year. But Mr. Carter's relations with Congress improved considerably, and during his presidency, he built an impressive legislative record. The Department of Energy, the Panama Canal Treaties, the Department of Education, Ethics in Government Act, Superfund and his own efforts on behalf of human rights worldwide and in reaching the Camp David Accords--all that is not a bad record for a President and Congress who supposedly couldn't get along!

Here let me draw attention to a problem of which every President complains. The argument is that Congress, through legislation, committee reports and in other ways, ties, in inappropriate fashion, the hands of the Executive in implementing laws. To this general charge, I must again respond, "It all depends." Sometimes it's fair, sometimes not.

During the years of Richard Nixon, many Democrats like

me, a proud member of the White House "Enemies List," did not trust the Executive faithfully to carry out the laws, and, of course, we were right.

Here I shall tell you of one encounter with the Executive with which, as some of my former colleagues on this committee are well aware, I was directly involved.

Nineteen years ago this summer, following an abortive coup against then-President Makarios of Cyprus, a coup attempted by a Greek military dictatorship which I, the first native-born American of Greek origin elected to Congress, strongly opposed, and which subsequently fell, Turkish troops, equipped with weapons supplied by the United States, invaded and occupied this small island republic.

Because American law--the Foreign Assistance Act and the Foreign Military Assistance Act--mandated immediate termination of further U.S. arms to any country using them for other than defensive purposes, several of us in Congress called on then-Secretary of State Kissinger to insist that he enforce the law and halt weapons shipments to Turkey.

My colleagues and I reminded the Secretary that the reason Mr. Nixon was that very week on his way to San Clemente was that he failed to respect the laws and the Constitution of the United States.

As you will recall, in light of the willful refusal of the Executive branch to enforce the laws of the land, Congress acted to do so, through imposing an arms embargo on Turkey.

Nearly two decades later, Cyprus is still divided, Turkish troops still occupy the country and, in my view, American Presidents, of both parties, have failed utterly to provide leadership to resolve the issue.

But to debate the pros and cons of the Cyprus issue is not my intention. I am making a larger point, and I do so as bluntly as I can and with particular reference to the question of Executive-Legislative relations in the field of foreign policy, a matter on which several members of the Joint Committee on the Organization of Congress have been deeply involved.

I cite but two examples of what I'm talking about. In view of the secret actions of the Reagan Administration in trading arms to Iran for American hostages and using the proceeds, in violation of law, to buy arms for the Nicaraguan resistance, and in view of the actions of President Bush, contrary to his representations, of building up, before the Persian Gulf War, the war machine of Saddam Hussein, I believe the question of relations between Congress and the Executive in the field of foreign affairs to be a far more profound challenge to the American

Constitutional system than the American people are even now aware.

For foreign policy is the life and death arena for a President and Congress, and without a sense of trust between the two branches, we imperil the vital interests, indeed, the security, of our nation.

The co-chairman of this Committee, my friend and distinguished former colleague from Indiana, now chairman of the House Committee on Foreign Affairs, once put my point this way:

> The object is to make the Constitution of the United States work....I do not see how that can be done unless those of us who are charged with that responsibility speak to one another the truth....
>
> The Congress cannot play its Constitutional role if it cannot trust the testimony of representatives of the President as truthful and fully informed.

The point Chairman Hamilton makes is crucial for the Constitution assigns specific and major powers to Congress in foreign policy, including the power to appropriate money and to declare war. So it is imperative that between the President and Congress there be an attitude of, if not always harmony, one of respect and above all, to reiterate, of trust.

A President who wants to be successful in the conduct of foreign affairs must be able to work honorably and

straightforwardly with Congress. If he deceives or lies, ultimately, he and the nation will fail.

Based on my experience of over twenty years in Congress, and having served with--not under!--six Presidents and having closely observed those in office since I left Washington, D.C., I must tell you that I have become increasingly disturbed over the last decade by what I believe is a widening gap between the principles at the core of the American republic and the activities of American presidents in foreign affairs. I must also be critical of the failure of Congress, which for most of the years since I was first elected in 1958 has been controlled in both bodies by my party, to carry out the responsibilities in foreign policy prescribed for it by the Constitution.

I hope, with the election of Bill Clinton and Al Gore, Democratic leaders who can work with a Democratic Congress, there will be a renewal of trust between the two branches and, accordingly, a more effective American foreign policy. I add that the opportunity a united government presents to overcome the institutional distrust that has characterized the foreign policy process of recent years must not be lost.

As I conclude, I return to the general question of how to improve cooperation between the two branches and

overcome friction. It must be obvious from what I have said that I do not favor eliminating friction and disagreement, not only an impossible goal but an unwise one.

For sometimes obstruction by Congress of Executive branch actions is in the national interest. It's always a matter of judgment. For example, I wish that in 1981 Congress had been far more obstructionist and had effectively opposed Ronald Reagan's huge tax cut and huge increase in military spending. Had Congress then blocked those actions, America would not now be suffering a $4 trillion plus national debt and enormous annual deficits in the Federal budget.

Certainly there are institutional, structural changes that can increase the likelihood that both the President and Congress can more effectively deal with the nation's problems. But in the final analysis, the answer to that question will depend on the quality of the leaders the American people choose and so on the judgment, good or bad, of the American people.

STATEMENT OF THE HONORABLE JOHN CONYERS, JR.

Joint Committee on the Organization of Congress
June 24, 1993

Chairmen Boren, Chairman Hamilton, Congressman Dreier, and Senator Domenici, and members of the Joint Committee. I appreciate the invitation to address the committee on the role of oversight by Congress. I would also like to commend the committee for its hard work on the difficult task of examining the way Congress does business and recommending appropriate changes.

You asked me to address several issues related to the oversight role of the Congress. I cannot stress enough how critical a mission this is for Congress. Polls routinely indicate that the public believes waste, fraud, and abuse is one of the most important problems in government. They are not without foundation. A report by the Committee's Majority staff last December identified significant and costly management problems in virtually every major agency and department. What we found were billion-dollar computer systems that don't work, financial management systems that were inaccurate and unreliable, and general mismanagement on a massive scale. The single most costly problem we found, common to almost every agency, was bad information systems-- the most basic tool of sound management.

Before I address the specific issues raised in your invitation letter, I think it is important to discuss the role of the Committee on Government Operations. The Committee is unique on Capitol Hill in that its primary and virtually exclusive mission is its oversight responsibilities and its ability to enact government-wide corrective legislation. Almost without limitation, it is authorized to conduct oversight and investigations into any aspect of the Federal government to ensure that programs are managed efficiently and effectively, in accordance with the dictates of Congress, and in full compliance with the law.

The Committee is divided into six subcommittees, with each roughly responsible for three departments and a number of smaller agencies. For example, the subcommittee which I chair is responsible for the Pentagon, NASA, the State Department, and the intelligence community. The subcommittee chaired by Mr. Synar has the Departments of Energy, the Interior, EPA, and the Forest Service. This way, we can ensure that every program receives at least some level of scrutiny by the Committee.

Obviously, in some cases, that scrutiny is far more in depth than in others. This is because with the staff limitations imposed on the Committee, we are able to assign an average of

less than one-and-a-half staff members for each major department and agency. And every time there is another successful attempt to cut committee funding, that number goes down. So contrary to the rhetoric that you often hear, the budget freeze we have been under for several years is counterproductive and short-sighted to the goal of reducing government waste.

Most other Committees do have oversight responsibilities for programs within their legislative jurisdiction. This results in the possibility of conflicting loyalties. Because the Government Operations Committee oversees programs that it does not authorize, we are therefore seen as being more objective than other committees, and more able to see the bigger picture. After all, it is unrealistic to expect a subcommittee chairman to conduct aggressive, adversarial oversight of an agency head with whom he is also regularly negotiating.

Many members have the mistaken impression that the Government Operations Committee has no legislative responsibilities. In fact, the Committee has an aggressive legislative function that compliments its oversight role. Central to that is what we call our "good government" jurisdiction to address waste, fraud, and abuse-- legislation that dictates efficiency and sound management across the government. It includes government-wide procurement and information resources management, and extends to budget process, which I will discuss shortly.

Let me give you just a few examples of our "good government" legislation. This Session, the House has already passed H.R. 826, the Committee's bill to require performance measurement and performance-based budgeting from agencies. We have also set in place in the budget reconciliation measure, provisions for greater controls in skyrocketing entitlement outlays. In recent years, the Committee has passed the Inspectors General Act, the Chief Financial Officers Act, and the Competition in Contracting Act. These laws demonstrate that after identifying waste, fraud, and abuse across the agencies through aggressive oversight, we then try to fix these problems through legislation. My point is that oversight and this type of legislation must go hand-in-hand.

There are two other areas of legislative jurisdiction that are closely related to the Committee's oversight mission. Because of the Committee's broad view of government agencies and its more objective position, it also has jurisdiction for government reorganizations. For example, we are currently drafting legislation to elevate the EPA to Cabinet status, and in the process attempting to mandate better management practices at EPA. Besides the elevation, the legislation is aimed at cleaning up the enormous mismanagement at the agency with the tools gleaned from our oversight work throughout the government.

In addition, the Committee has legislative jurisdiction for budget process. We have carved out intensive functions in this area, including managing House passage of the "enhanced-rescission" legislation and budget enforcement provisions of budget reconciliation. We also passed legislation on Performance Budgeting requiring agencies to justify their budgets with measurable outcomes which they can be judged against. We are looking at other long term budget process issues such as capital budgeting, entitlement controls, and the treatment of certain budget components under the Budget Enforcement Act. These are important functions, which are well handled outside the annual partisan budget resolution and reconciliation battles.

I am also a supporter of biennial budgeting, coupling legislative branch changes to similar cycles in the executive branch. This is best done through the Government Operations Committee.

Some people have advocated collapsing other Committees into the Government Operations Committee. While some may consider it uncharacteristic for a Committee Chairman to turn down additional jurisdictional responsibilities, I am concerned that such additional responsibilities, may dilute the focus of our primary mission to identify and fix the enormous problem of government waste. The exclusive nature of the Committee ensures better, and more pure, oversight. The functions of other committees would distract our members from the mission at a time when the mission requires more focus, not less. I fear sound oversight will be lost if it is mingled with those other responsibilities.

Let me now quickly address some of the issues raised in your invitation letter.

1. What are the objectives of oversight?

While I have discussed this briefly, I want to reiterate that not only must oversight identify the waste, fraud, abuse, and mismanagement, more importantly it must restore faith of the American public in its government institutions. I also believe that oversight can not simply identify problems -- it must also help to implement solutions.

2. What changes can Congress make that can lead to better oversight?

The single biggest lapse in Congress' oversight role is the disconnect between the oversight Committee's and the authorizing and appropriating committees. Our recommendations on management problems and fixes are often overlooked. While the House Rules include a requirement that findings from the Government Operations Committee be considered in legislative reports, this

is infrequently the case. I do not have an answer to this problem, but it is one that the Joint Committee should consider.

3. What are the oversight responsibilities of Executive Branch executives?

Agency officials have a responsibility to make a good faith effort to correct problems identified by Congressional oversight before they become front-page scandals. Unfortunately, for a variety of reasons, this is rarely the case. I am not sure how the Joint Committee can resolve this issue.

4. Would alternatives to the traditional approach to oversight lead to a dramatic difference in the quality of governance?

I believe that this is certainly the case. The major change must be in translating the findings of oversight into corrective actions that will prevent problems from reoccurring in the federal government. The Executive Branch must have a "management revolution" in order to overcome its many management problems: again, it's using 1970s technology and management techniques to solve 1990s problems. Many of those changes can only come with better leadership from the Executive Branch.

I thank the Committee for its interest in oversight matters, and would be pleased to answer any questions its members might have.

Senator John Glenn
Joint Committee on the Organization of Congress
June 24, 1993

Good morning. I want to thank the co-chairmen of the Joint Committee on the Organization of Congress, Senator Boren and Representative Hamilton, as well as the other members of this committee, for the opportunity to testify here this morning.

The work of the Joint Committee on the Organization of Congress is absolutely vital to restoring the credibility of the Congress. Americans signaled loud and clear in the last election that they are tired of the gridlock that has stalled effective legislation, and that the time for politics and business as usual has ended. This means that the nation's interest must come before the special interests. We have an obligation, one that this committee is admirably fulfilling, to ensure that a more effective and accountable Congress can strengthen instead of undermine our representative democracy.

As we all know, the internal workings of the legislature, while arcane, go to the heart of policy making and also set the tone for how Americans perceive their elected officials. Thus, when the public sees that Congress fails to pass appropriations bills before the fiscal year begins, or when committees ignore spending targets in order to push yet another camel's nose under the tent, when gridlock stymies all change, voters

rightfully conclude that Congress no longer has the country's interest in mind.

Mr. Chairman, I will stress two themes in my testimony about the committee system and the role it plays in effective governance. I will first discuss the critical need to reform our committee structure in order to revitalize the legislative process and end gridlock. Furthermore, I will talk about the importance of strengthening the management and oversight role for which committees are responsible. And I would also offer a note of caution: This committee can spend its time studying and recommending changes that alter things which are only important to Members of Congress and other Washington insiders, or it can spend its time ensuring that its recommendations will lead to results that truly serve the American public. Yet the public will be judging the changes we make here on the only scorecard that matters: how it affects the effectiveness of their government, their quality of life and that of the nation as a whole.

As part of the effort to make more effective our Committee system, the joint committee must ask the hard questions: How can we create and enforce jurisdictional lines that make sense out of government? What should be the function of committees, and what can be done to make them more effective? How can we improve the oversight role of committees and diminish the chances that another HUD scandal, another banking scandal or

student loan scandal or FEMA disaster, occurs? Can we set goals and measure the performance of our committees, as we now are seeking to do in the executive branch? I submit, Mr. Chairman, that until we answer these questions and others like them, efforts to restructure the committee system will be an exercise in boxology, in simply re-arranging deck chairs on the Titanic.

We all know that this is not the first time a distinguished committee has been formed in the hopes of returning Congress to its real work. There have been many recommendations, terrific recommendations, which have come out of the work of past joint or special congressional reform committees. The problem has not been the recommendations, but, rather, the unwillingness of members to give up their power -- even in the public's interest. The key to fixing Congress has never been a question of finding the way but, rather, the will.

Rarely in our history have calls for governmental reform come together in such a positive way -- we now have what may be just the right mix of political consensus and public pressure to successfully overhaul the government. And I am not just talking about the Congress. As my colleagues know, the President has intitiated a six-month National Performance Review under the direction of Vice President Gore. I commend the President for making a bold move toward reforming

government, an endeavor which complements the efforts of the Senate Governmental Affairs Committee, which I chair -- such as the creation and support of Inspectors General and Chief Financial Officers, to fight waste and improve accountability for financial and general management.

Yet, the public demands that we do more. While Congress and the public support the efforts of the President in his six-month governmentwide performance review, many of our problems are more complicated and substantial. They can only be solved through a comprehensive approach using the talents and experience of both the executive and legislative branches. That is why I, and others, have introduced legislation to establish a Commission that will help us to permanently reform and restructure the Federal government. We would hope that the recommendations of the National Performance Review will be incorporated into the work of the Commission.

All of us are well aware that our nation and our world are changing rapidly. And we are equally aware--or should be aware--that a government still largely organized for the Great Depression cannot possibly help America meet the challenges of today, or of the future. Farming has been completely transformed in the past half-century, yet the Agriculture Department still retains an office, sometimes several offices, in nearly every county in the nation. Job training and development is of paramount importance to America's retaining a

competitive edge in the global economy, but our citizens must wade through a bewildering array of 125 different job programs to get help. Equally problematic is that Congress's structure reflects that same crazy quilt of overlap that leads to ineffective and uncoordinated program oversight.

In the end, reform will be of little consequence, for example, if Congress adopts the recommendations of an independent commission on restructuring executive branch agencies, yet Congress fails to rationalize its own committee jurisdictions. Of course, this goes not just for improving how executive agencies and legislative committees relate to each other, but for recommendations that might affect the budget process, civil service reform, performance measurement and other important issues. Thus, I would urge this committee to pay close attention to the work of the National Performance Review and, if time permits, to the role of any independent commission that Congress creates for reorganizing and improving the performance of the executive branch. At the same time, I do not think that the Congress must wait for a reorganization of the Executive Branch in order to make meaningful changes of its own.

I am surely not the first Senator or Representative to suggest that our age-old Committee structure needs a substantial overhaul, but I am increasingly concerned about

this problem. Historians will tell you that our Committee system, like the executive branch itself, remained relatively modest until the centralization resulting from the Civil War and the ensuing industrialization of the nation put pressure on the government to expand. As we all know, it seems to have never stopped expanding. Now, with our government and its concerns immeasureably more complex, we have created a committee system so unwieldy that it threatens to sink of its own weight. The number of committees and subcommittees, of joint committees, select committees, special committees and leadership committees is excessive.

In my opinion, it is not the number of committees that is important but the focus. In the same way that the reform of the executive branch should focus on the functions and performance we expect our agencies to achieve, so too must our reform of the Committee structure reflect ours' and the public's views on how to best consider and pass legislation. The number, the titles, the specific lines we draw, are less important than the results we achieve. The sheer complexity of our structure, the jurisdictional gridlock that thwarts compromise and encourages fiefdoms, the overlap that bewilders even insiders and wastes resources, must all be eliminated. I recognize that this is easier said than done, but our credibility now rests on our willingness to change.

I would like to offer a few specifics in this area:

o **Committee Structure and Assignments.** Besides reducing redundancy and streamlining jurisdictions, trimming the number of committees and subcommittees also will ease the burden on members who must serve on an excessive number of committees. Many of my colleagues share the frustration I often feel of being pulled in too many directions. Few of us can be truly informed and fully effective in all of these areas, and for all of the committees, to which we currently are committed. Another way to deal with overlapping committees is for us to get away from the notion that all new Senators should expect to get a subcommittee chairmanship -- especially if we are to concentrate our efforts on the issues that matter most. Thus, I would recommend that we reformulate and reduce our Congressional committees, and that we mainly do this by restructuring along functional lines of the government's role in society. It is high time that we simplify for improved efficiency and effectiveness, and we can do this by curtailing the number of committees and subcommittees, which in turn will reduce overlap and enhance our focus. I think it makes sense to have five major committees, with a limited number of subcommittees, that can more adequately focus on the functions of government and society. Having five committees structured by function will also allow the Senate leadership more control in formulating and moving legislation, and would permit the

Majority Leader a sort of legislative cabinet to help oversee a functional approach to government. I would propose that we create committees to focus on human resources, natural resources, national defense, economic affairs and international relations, with perhaps a sixth committee on rules and administration to handle such matters as the federal civil service which don't conform to the other categories. And although the Executive Branch may not immediately align itself in a parallel manner, I do think that over time, the agencies of government will recognize that a more streamlined organization will improve services to the public and reduce wasteful spending.

Finally, in this area, I want to mention the ethics committee. After considerable reflection about the approach used by the Senate to discipline its members, I would recommend that the Senate create an ethics panel composed of former Senators, perhaps members or retired members of the federal judiciary, and members of the general public. In my view, the Ethics Committee as it is currently constituted is unable to obtain the confidence of the Senate or the American public that its proceedings are fair or unpoliticized. I think I speak for many members when I say that we were not elected to the Senate to serve as the judges and juries of other senators.

- **Committee Term and Chair Limits.** As the chairman of one full committee, the Senate Governmental Affairs Committee, and one subcommittee, the Subcommitee on Readiness, Sustainability and Support of the Senate Armed Services Committee, I have thought long and hard about the advisability of rotating memberships of committees. I currently serve on the Intelligence Committee, where there is a term for members, and I believe there is merit to adopting terms for certain committees, among them Intelligence, and perhaps the Budget and Appropriations Committees. I think that seniority, for members and for chairmen, is important to assure the institutional memory for our committee responsibilities, but expertise and knowledge should also be factors in the selection of committee members and chairmen.

- **Budget and Appropriations Committee Consolidations.** As I mentioned, earlier, there are many possibilities for committee consolidation and streamlining that the joint committee might consider recommending, but there is one other that I would like to stress. I think that the Congress truly does itself and the country a dis-service through its complex, multi-layered approach to spending. The overlay of budget committees, authorizing committees and appropriations committees, combined with sequestration and the budget summits, has broken down. It distorts the

process, dilutes fiscal accountability, disconnects oversight from outlays, and renders unintelligible Congress' most basic responsibility: the wise spending of taxdollars. Our attempts to fix this problem in the past have only added to their complexity. It is time we work in the other direction, and that we somehow integrate the budget and appropriations function into the authorizing role. We need to merge the appropriations and authorizing roles, and create some combination that stops overlap, so that once and for all we can eliminate what I think is just a "legislative WPA." Make no mistake -- this will alter the power structure here on Capitol Hill, but retaining the status quo, the myriad of fiefdoms and duplication, serves no one but ourselves.

While I am at it, let me mention the importance of biennial budgeting to governmental reform. I don't need to remind my colleagues how complicated the budgeting process has become, and how much more time we spend on it than we did in the past -- time that could be better spend on oversight and policy deliberation. Biennial budgeting would help free up the Congress to spend more time in the off-years actually overseeing programs and helping to ensure the effective management of agencies. The Executive Branch also would clearly benefit from a more stable budget environment in which program managers could more effectively plan and utilize their resources.

I should also mention that judging ourselves by intended results instead of some static view of today's structure or interests suggests other organizational changes, as well. For example, my oversight of executive branch information resources management tells me that in this dawning electronic information age, Congress, too, should be reassessing how we handle our own information and, even more importantly, how we communicate with the public.

My bill to reauthorize the Paperwork Reduction Act, for instance, deals not only with reducing redtape burdens on the public, but also with promoting the effective use of information technology for managing information. Congress must focus on improving its own information infrastructure. At the same time, it needs to more effectively access executive branch information sources to assist in its authorization, appropriations and oversight functions. This requires review of congressional information activities, and cooperation among all entities of the legislative branch.

While I am on the subject, I want to note that much of the Federal government's information dissemination activities are still rooted in the 19th century printing laws that created the Government Printing Office. There

is no doubt about it -- the wave of the future involves more the electronic dissemination of information than it does paper. In addition to the legal question of the propriety of having a legislative office manage information activities for the executive branch, there is the question of whether it makes sense to have a centralized "printing" facility for the entire government. We need to rethink the role of GPO and how to integrate its function into our technological future.

Now, I would like to say a few words about the Senate's oversight role. The complexity of jurisdictional issues impacts oversight, as does our inadequacy in focusing on government management problems and our obligations for the confirmation process.

- **Management.** Mr. Chairman, while I am talking about the duties of committees, I want to urge my colleagues to view agency management issues as a more central part of their responsibilities. In a recent hearing of the Governmental Affairs Committee, Comptroller General Charles Bowsher was asked to name a government agency which he believed to be well managed. He hesitated for a few moments, said he could not think of any, and then said that the Army had at least made some management improvements. This is a terrible state of affairs; we can no longer afford to

ignore how agencies are managed. Too often, our committees spend their efforts exclusively on specific program activities within their jurisdictions while rarely considering the larger management considerations that can mean the success and failure of programs. Issues of waste, fraud and abuse, financial management improvements, providing reliable and timely program information through better information systems, insisting on effective and complete resolution of audit findings, ensuring adequate capacity, oversight and resources for agencies to accomplish their missions, strengthening contract management, focusing on agency outcomes instead of outputs -- all of these issues are critical to program effectiveness and to the accountability of government in spending taxdollars. Thus, I urge my colleagues to consider these issues in their oversight of agencies and to work more closely with Chief Financial Officers and Inspectors General to improve the management of the Federal government.

- **Academic Research.** One other thing that needs reform, Mr. Chairman, is the way that committees and the Congress as a whole earmark money for academic research and development. According to the Congressional Research Service, Congressionally earmarked funds for academic research and development exceeded $700 million in fiscal year 1992 and are growing rapidly. Many in the scientific and technical

community are concerned that this trend signifies a growing movement in the Federal government away from traditional competitive-based peer review towards decisions based largely on political consideration. While I support Congress' right to determine agency spending priorities, I believe the process by which the Appropriations Committee earmarks these funds should be opened up to greater transparency and sunshine. Anyone who has looked through an Appropriations bill and report to locate one of these earmarks knows that it is like trying to find a four leaf clover in a football field. I suggest that a separate section be set aside in the Appropriations Committee reports that lists all the earmarked projects, the recipient institution and its geographic location, and whether the projects went through a competitive, peer review process. In my opinion, only in rare cases should such funds be earmarked; these funds must be provided on a merit-based, competitive basis. This approach would bring greater public sunshine to the process and would allow us to determine the extent to which Congress is involving itself in agency funding decisions on academic research.

Nominations. Mr. Chairman, I have long been concerned with the qualifications of many of the political appointees who are nominated for important positions in the government. In my opinion, many of these people come

into office just to get their ticket punched, to enhance their resume, and then move on. I requested the General Accounting Office to look into this matter, and they recently reported back to me that 31 percent of political appointees have left their jobs in 18 months and some 50 percent are gone within 27 months. It is beyond me how we can expect to effectively and efficiently operate Federal departments and agencies -- many of them much larger than our major corporations -- when turnover is so high and when the qualifications of some individuals to begin with are dubious. I have no wish to impinge on the President's constitutional authority to nominate executive branch officials, but the Congress also has a constitutional obligation to advise and consent on nominations and to oversee the agencies. I submit that it is our responsibility, through our current committee system or any other we may devise, to ensure that the individuals nominated by the President for appointive office have the qualifications for the position, and that we obtain a commitment that their goal is not to punch their ticket but to serve the President and the public.

I would also note that there are simply too many political positions that the Senate must confirm. At a time when it is quite clear that many agencies are adrift because the President's nominees have not been confirmed, we must consider a different approach to let new

Administrations get down to business. Otherwise, we will continue spending one year out of every four with a government that, for all intents and purposes, remains in a holding pattern. Perhaps one approach, Mr. Chairman, is to have fewer Presidential nominees who must go through formal Senate confirmation, and allow the President to simply appoint qualified individuals to other than the most senior agency positions.

o **Rules and Procedures.** Mr. Chairman, in ending my comments on specific changes that Congress should make, I want to suggest that we consider some alterations in our rules and procedures. I think, for instance, that when it comes to nominations and other business, at least in the Senate, we should rethink the purpose of holds, which in my opinion have been greatly abused in recent years. I believe that the legislative hold has a legitimate purpose in protecting the rights of the minority -- one of the great strengths envisioned by the Founding Fathers for the Senate. Yet, when it is invoked to block specific nominations to barter for pork, for instance, or to retaliate for some White House slight, then the legislative hold symbolizes not Madision's hopes for this chamber, but only the arrogance of power. I think we need to limit the time we allow for holds to stop the business of the Senate to two legislative days -- which is enough

time to consider the position of the minority -- unless members vote to extend the hold. Let me add, Mr. Chairman, that I find particularly obnoxious the practice of anonymous holds, which are used not to create dialogue and compromise, but to prevent action altogether. I still get angry recalling an anonymous Republican rolling hold two years ago that prevented a compromise already agreed to by both houses and by the administration to reauthorize OMB's Office of Information and Regulatory Affairs and the Paperwork Reduction Act. Everyone had signed off on it, OMB had agreed to it, but we still couldn't get it through because of the anonymous rolling holds. We must change the rules on this. At a minimum, I suggest that we do away with the practice of anonymous holds. In the same way that GAO no longer permits anonymous requests, we should no longer permit anonymous holds; as a basic matter of fairness, Senators have a right to know which members are holding their legislation hostage.

I think that it might also be useful for the Senate to reconsider its rules as they regard the germaneness of amendments offered on the floor. My experience in managing S.171, the Department of the Environment bill, showed clearly how legislative deliberations can be dragged on unnecessarily. Adopting some disciplined rules similar to what the House requires on germaneness would certainly help to speed legislation through the Congress.

Additionally, we might consider asking the Democratic and Republican Policy Committees to screen and offer an opinion about legislation introduced on the floor which has not been voted out of committee. Such a measure would not prevent members from bringing their legislation to the floor, but it might introduce some discipline into the process that today does nothing to discourage all manner of bills that perhaps we should not be voting on. This way, with some sort of opinion provided by the policy committees, we would at least have a better way to judge legislation introduced on the floor.

I would also like to see the Senate pay more attention than it does today to Rule 26, section 11(b), which mandates that committees assess the regulatory impact of the bills we consider. I would urge that we strengthen the application of this rule as a way to show the American people and the business community that we are serious about reducing the burdens of undue government regulations and paperwork requirements. In my opinion, neither the Congress nor the executive branch are sensitive enough to the concerns of ordinary Americans who must deal with the impact of the laws and regulations we impose.

And in the same way that we take more seriously the impact on the American public of the legislation we pass, so, too, do I think that Congress must improve its record of making the laws it passes for the nation apply to itself. I think that nothing irks the public more than a Congress that refuses to abide by its own rules -- all it does it perpetuate a feeling that what applies to everyone else does not apply to us. And while I recognize that in some areas constitutional issues may have to be faced, there is no question in my mind that EEOC and OSHA and other rules should apply to Congress and its employees. I understand that we may not wish to be held accountable to specific Executive Branch regulatory agencies, but we might consider creating some legislative entity to adapt relevant laws to Congress so that we are no longer seen as being above the law.

Mr. Chairman, I will conclude my remarks this morning with this final thought. There was a time when the United States Senate stood at the apex of the American policy debate. The public galleries would be packed as the statesmen and the orators now celebrated in the history books debated the fundamental issues of their generation. It is from the inspiring words and honest exchange of those illustrious Senators that makes me wish that we might again have a Senate where members would gather to speak out on the issues of <u>our</u>

generation, where the chamber might again be full with statesman passionate about the impact of policies on the people they represent. I think the Senate has a great role to play in the difficult decisions that our nation must face for a successful future, and it is a role that all of us, in the model of Henry Clay and Daniel Webster, must play.

The joint committee has an historic opportunity to help the Congress recapture its respect with the American people. I urge you not to make reform for reform's sake, but to recommend the kind of changes that will re-establish the connection between people and their government, to suggest ways that reinforce the conviction of our founding fathers that the Congress would truly be the representatives of the people. Thank you.

TESTIMONY

OF

SENATOR WILLIAM S. COHEN

Before the Joint Committee on the Organization of Congress

June 23, 1993

Mr. Chairman, I am pleased to join my friend and Chairman on the Subcommittee on Oversight, Senator Carl Levin, in testifying on legislative oversight of the executive branch.

At a time when public confidence in government has plummeted to an all time low and the national debt is growing at a record pace, Congress must take action to ensure effective operation of government agencies and rein in the excessive growth of federal spending. One essential means for Congress to identify and eliminate wasteful spending, and generally improve the operation of government, is through its oversight function. Oversight must include both the identification of and proposed solutions to problems.

In a poll conducted earlier this month by CBS News and the New York Times, it was reported that 98 percent of the public feels, rightly or wrongly, that federal agencies waste money with little regard to what is funded or the programs' success. This perception is reinforced by recent reports of unneeded and unwanted construction of federal office buildings, federal warehouses filled with billions of dollars of unneeded goods, and federal contractors charging the government 60 cents for Xerox copies. It is no wonder that the public's distrust of government shows little sign of abating.

Based on polling data and the popularity enjoyed by Ross Perot, it is apparent that the public does not yet believe that Congress is serious about changing the way we do business. The Joint Committee has a rare opportunity to restructure Congress in a way that will emphasize the need for effective independent oversight and demonstrate to the public that Congress is serious about change.

To understand the critical nature of, and need for Congressional oversight, I think it is necessary to provide some historical background.

Congressional oversight of executive branch activities is a fundamental and essential feature of American democracy. The authority of Congress to conduct oversight is derived from a number of constitutional provisions including the power to organize the executive branch, the power of confirmation and impeachment, the power to investigate and the power of the purse. It was clearly the intent of the founding fathers, as James Madison suggested, that the branches of the federal government be, "doubly watched by the other."

Congressional oversight has been accepted and practiced from the earliest days of the Republic and was largely accomplished by using the power of the purse and periodic investigations. In the early days, it was also somewhat easier to accomplish given the relatively small size of the federal bureaucracy and the budget. In 1946, Congress saw the need to formalize its oversight role and passed the Legislative

Reorganization Act which specifically required congressional committees to oversee federal agencies and programs within their jurisdiction.

In recent years, the ability of the authorizing and appropriating committees to conduct effective oversight has been weakened by a number of factors, including the growth of the bureaucracy, the vested interest authorizing committees develop in the perpetuation of the programs they have approved, and pressure to deliver "programs" to their constituents regardless of effectiveness.

The growth of the bureaucracy has made effective oversight tantamount to controlling the forces of nature. For example, the Agriculture Committee is responsible for overseeing a Department with a $66 billion budget with over 113,000 employees to serve some 2.1 million farmers. In 1932, the Department had 22,000 employees, a budget of $280 million and served three times as many farmers (6.7 million). Yet oversight was significantly easier because agencies did not have huge staffs controlling information that came out of the

departments. If Congress wanted to get an answer, it asked the agency head and received a prompt reply. In today's information age, the request goes to the agency's Congressional Relations office and is routed through the bureaucracy to the person who can (theoretically) answer the question. Frequently, agency responses are not timely and important decisions get made without sufficient information.

An additional factor which diminishes the ability of Congress to conduct oversight is that committees often have a vested interest in the success and perpetuation of the bureaucracy they create and oversee. This is evidenced by the number of authorizing committees that seek Cabinet level status for their agencies. This is typically done to signal the importance of the agency's programs on the political spectrum, but it is also done because having jurisdiction over a department rather than an agency is seen as more significant.

As agencies and special interests lobby key committee members extensively and aggressively for additional funding and expanded programs, individual members have a difficult time

saying no -- especially when constituents will benefit. As we know, once a program makes it through committee, eventual passage is generally likely. It then, as the program is implemented, becomes increasingly difficult for a member to critically review what he or she helped create. Consequently, only programs that are the "easiest" to kill get targeted for review and elimination.

The situation I just described underscores the need for some form of independent oversight which is outside the jurisdiction of authorizing committees. If the authorizing and appropriating Committees are combined, as I would like to see, perhaps it would be appropriate to create specific oversight committees to investigate waste, fraud and abuse; identify mismanagement; review programs for efficiency, effectiveness and performance; and determine if agencies are adhering to congressional intent.

This type of system would accomplish three things. First, it would ensure that programs receive periodic independent review. Second, it would encourage much needed critical

review of politically sensitive programs. Finally, the increased odds of being the subject of congressional inquiry might increase the economy and efficiency of agency operations if they know they will be called upon to explain their actions.

Based on my experiences on the Governmental Affairs Committee and the Senate Special Committee on Aging, I believe this type of independent oversight is critically important, provides valuable legislative contributions and saves billions of dollars every year. For example, on the Governmental Affairs Committee, where I serve as Ranking Republican on the Subcommittee on Oversight of Government Management, I have pursued issues, ranging from procurement reform to passage of the Clinical Laboratory Improvement Act (CLIA), that might not have otherwise been explored. In a number of cases, subcommittee reviews have saved not only billions of dollars but, as in the case of CLIA, saved lives as well.

Over the years, the Subcommittee has also held a number of successful hearings examining issues ranging from inspection of food to excessive inventory at the Department of Defense,

subjects that the subcommittee did not feel were receiving adequate attention from the committees of jurisdiction.

In addition, significant legislation has been developed from subcommittee reviews in a wide variety of critical areas. These include, for example, the Competition in Contracting Act, which required the government to purchase goods and services competitively and resulted in billions of dollar savings annually; the aforementioned Clinical Laboratory Improvement Act, which was introduced in response to many concerns regarding the accuracy of medical testing; the independent counsel law, which addresses conflicts of interest that arise when the executive branch investigates allegations of criminal wrongdoing by high-ranking government officials; and landmark Social Security Disability legislation which protected thousands of disabled individuals who were being wrongly denied benefits were all initiated by the Oversight Subcommittee.

Also performing a critical oversight role is the Senate Special Committee on Aging where I also serve as Ranking Republican. The Committee has examined a number of issues

ranging from unscrupulous durable medical equipment suppliers overcharging medicare for heating pads, foam mattresses, and wheelchairs, to price gouging of the public by the pharmaceutical companies. In many instances the Aging Committee has followed up its oversight investigations with legislation correcting abuses. Clearly, the government and elderly would continue getting ripped off if it were not for aggressive oversight by the Aging Committee. The committee's work to expose these types of issues may save the government and senior citizens billions of dollars.

The oversight function of Congress is not without its critics. But, to suggest, as some staunch defenders of both Republican and Democratic administrations are prone to do, that oversight is excessively burdensome or intrusive to the operation of the executive branch is simply wrong. One need only to remember the Watergate hearings, Iran/Contra and $600 toilet seats to understand the need for congressional scrutiny over executive branch operations. Vigorous oversight is not only necessary, but essential to ensure the continued health, vitality and integrity of the American political system.

Senator Carl Levin

STATEMENT BEFORE THE JOINT COMMITTEE
ON THE ORGANIZATION OF CONGRESS

Legislative-Executive Relations

June 24, 1993

I appreciate your invitation to testify before the Joint Committee today and am particularly pleased with your interest in looking at the role and conduct of congressional oversight.

I have been involved in congressional oversight for over 14 years -- from the start of my first term -- and I have found it to be probably the most rewarding work I do as a Senator. But it isn't easy, and real progress comes only with hard, detailed work and follow-up.

My own interest in oversight was born out of the deep frustration and anger I felt as the President of the Detroit City Council in fighting with federal agencies over the implementation of their programs at the local level. We would go and lobby Congress for a particular program to service a desperate need in our community, and although we would succeed in getting the legislation we needed, the goal of that legislation would often be thwarted by wasteful, inflexible or arrogant implementation. I saw very clearly how important it was for Congress to follow up on how agencies implement federal programs in order to get the intended job done.

When I was elected Senator in 1978, I asked then-Chairman of the Governmental Affairs Committee, Abraham Ribicoff, for a subcommittee from which I could conduct oversight of federal programs. I was lucky that Senator Ribicoff shared the same concerns and assigned me the chairmanship of a new subcommittee -- the Subcommittee on Oversight of Government Management. Senator Cohen joined me as Ranking Republican, and we have served on that subcommittee -- trading off stints as chairman and ranking member -- for almost 15 years. We've looked at waste and mismanagement in a broad array of federal programs -- everything from improper terminations and denials of benefits in the Social Security Disability program to IRS abuses to the tremendous excesses in the DOD supply system to the huge backlog in collecting countervailing and anti-dumping duties to the waste of hurry-up, year-end spending to inadequate debarment and suspension procedures for preventing government contracts with contractors who cheated or provided shoddy goods to the government in the past, and a large number of

programs in between. We've seen how the oversight process works and what it takes to make it work.

Over the years my support for congressional oversight has only increased. I think we need to do more oversight and we need to follow through more fully on the oversight we now do. There's no doubt about it -- it's far easier to hold a hearing on a piece of proposed legislation and hear from the affected parties than it is to dig into the details of an existing program and root out the cause of a management problem or identify real waste. One thing your committee can do is highlight the importance of congressional oversight and retain a structure for the conduct of meaningful oversight in whatever you propose.

Let me first comment on the oversight that we now do. Too often we ignore the oversight work that is already being done. The Senate Committee on Banking, for example, in analyzing the causes of the HUD scandal involving the Section 8 Moderate Rehabilitation Program in the 1980s, found that, in part, "Congress did not pay attention to a number of reports which highlighted on-going problems at HUD, especially the IG semiannual reports." Out of concern that many of these reports and warnings go unheeded, or if noticed, go unaddressed, I recommend that the committees of jurisdiction be required each year to hold a hearing on the prior year's reports by the GAO and the relevant inspectors general on the programs for which the committees are responsible. This would at least be one way of assuring that the Members and the public are made aware of and consider the most important management concerns and recommendations for corrective action by key agency officials and the GAO. Too often these recommendations lie on the shelf and are unheeded because they are not brought personally to the attention of members in a position to act on them.

Moreover, congressional committees should require -- as part of the budget process -- that the agencies over which they have jurisdiction annually report on the actions they have or have not taken in response to the outstanding IG and GAO recommendations.

I also think we should make a greater effort to draw on lessons learned in the oversight process for purposes of other agencies and programs. We should use what we learn from our oversight investigations to set standards and principles for other federal programs. I think the Office of Management and Budget, working with the Congress, should take the lead in identifying key elements which the oversight process shows are necessary for good program management and possibly develop models which could be used when creating a new or restructuring an old federal program.

GAO, at my request, is currently analyzing existing HUD loan guarantee programs to determine what elements are necessary in other loan guarantee programs to protect the government's interests. Once that is done, it could be used as a model -- made available to all congressional committees working in this area -- to reform existing and create new loan guarantee programs. Similar work could be done on other types of programs.

As for increasing the amount of oversight, we spend too much time creating and trying to pay for new programs without doing the detailed work of overseeing the operations of the programs we already have. The work of this committee can be very helpful in this regard by streamlining the number and types of congressional committees and thereby giving Members more time to delve more deeply into the programs that they oversee. So I add my voice of encouragement to you in this effort.

One unfortunate feature of our current congressional oversight process is that it comes about in an ad hoc fashion. What programs are reviewed is somewhat unpredictable. A member or staff person may have read an unnerving newspaper article; a whistleblower may have called and identified a problem that management continues to ignore; a constituent may raise a question or call an agency practice into question; a finding of an Inspector General may catch the eye of a member or staff person. What we look at doesn't necessarily depend upon a set of priorities, but depends upon any number of possible circumstances and events. I think we should strive for a better, more organized approach to oversight.

Over 10 years ago our Senate Governmental Affairs Committee, in its enthusiasm for congressional oversight, reported to the full Senate a bill that we called "sunset" legislation. It was a whopper. It would have required the reauthorization of every single federal program -- regardless of size or significance -- every 10 years. If the program wasn't deemed fit for reauthorization, it would die. Simple as that. Our enthusiasm, however, exceeded our capabilities, I think, and we didn't adequately understand the size of the task we were asking Congress to undertake. When we got the computer printout which showed how many programs would have to be reauthorized every year, the number was mindboggling -- so mindboggling that the bill would have sunk Congress under the weight. The bill was never taken up by the full Senate and died a somewhat quiet death on the Senate calendar.

While that bill attempted too much, I remain supportive of "sunset" legislation -- at least for certain or a limited number of federal programs. I know in my subcommittee we have had limited authorizations for several programs and offices over which we have jurisdiction and every time we

have to reauthorize those entities, we identify specific improvements we can make to produce better, less costly and more effective results. So I think this Committee could encourage each committee to select those programs or agencies for which sunset review should be conducted and construct a reauthorization schedule on that basis. Priorities should be determined depending upon criteria, including the amount of money at stake, clarity of the cost benefit value of the program, and the likelihood of waste or fraud in the program. Each committee would follow its sunset agenda as the authorizations for various programs and agencies expire. The committees would not place every agency or program on a sunset review cycle, but should be encouraged to sunset as many programs as appropriate.

Having served on the Senate Governmental Affairs Committee for my entire service in the Senate, I also believe that it is important that there be a committee in each house of Congress that has government-wide jurisdiction on cross-agency issues, like management and procurement and ethics. The iron triangle referred to in political science classes can be real. Committees with direct jurisdiction over an agency, despite their best intentions, can sometimes get caught in a non-objective relationship with the regulating agency and the regulated community. A committee like Governmental Affairs, however, does not have the day-to-day relationship with the program constituencies and can often step into a program review in a more bold manner. Moreover, a committee like Governmental Affairs can draw on lessons learned from oversight of other agencies in solving and analyzing similar problems in an agency under review.

Finally, I want to talk about two organizations that assist Congress in conducting oversight -- the General Accounting Office, or GAO, and the Inspectors General. The GAO is a vitally important entity for the conduct of oversight. Despite some criticism to the contrary, I think GAO has proven itself to perform an independent investigative and audit role far beyond the capability of committee staff. The Governmental Affairs Committee is in the process of conducting a major audit and review of the operations of GAO, since that hasn't been done before that I know of, and I think that is a timely and wise decision. But in responding to the isolated pockets of criticism about this very important organization, we should consider how to improve and make more efficient its assistance to Congress as opposed to taking any move to cut back its responsibility. So to with the Inspectors General -- I believe their work has been enormously important to the cause of good oversight.

To sum up, then, I make the following recommendations:

1 -- Overall, there should be an increased emphasis by congressional committees on oversight and more time for

Members to conduct oversight. I think your work in streamlining the number of committees in Congress can be very helpful in that direction.

2 -- In order to make better use of the oversight work that is already being done by the GAO and the Inspectors General, committees should be required to hold a hearing each year on the prior year's findings of the GAO and inspectors general with respect to agencies and programs in their jurisdiction.

3 -- Committee should also be encouraged to sunset as many programs and agencies as appropriate to encourage the conduct of oversight review on a regular basis.

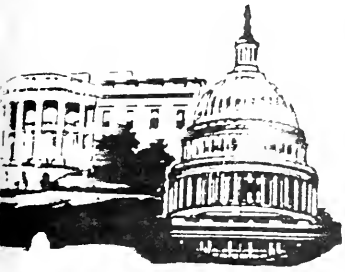
4 -- The Senate and House should retain the committees of cross-agency jurisdiction to enhance the conduct of oversight.

5 -- The work of the GAO and the Inspectors General should be strengthened and reinforced, and GAO and Inspector General reports and recommendations should be an integral part of any program reauthorization or review process.

Those are a few suggestions. The bottom line is that the congressional oversight process is vitally important to the conduct of good government. It needs improvement and expansion, and I hope your committee takes us on the path to achieving it. Thank you.

BEYOND DISTRUST

Building Bridges Between Congress and the Executive



A Report by a Panel of
The National Academy
of Public Administration

BEYOND DISTRUST

Building Bridges Between Congress and the Executive

Panel on Congress and the Executive

James R. Jones, *Panel Chair*
Thomas H. Boggs, Jr.
Alan S. Boyd
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John N. Erlenborn
Joseph L. Fisher
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Harry S. Havens
Matthew Holden
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NATIONAL ACADEMY OF PUBLIC ADMINISTRATION
Washington, D.C. January 1992

4

The High Cost of Interbranch Confrontation

This chapter contains the panel's value judgments of the aggregate evidence. The chapter also introduces the framework for the panel's recommendations.

The panel's inquiry produced a rich and detailed portrait of congressional-executive performance during this era of divided government. The results are complex and paradoxical, reflecting the difficulty and sheer magnitude of contemporary problems. The panel's charge is to use its experience to judge this evidence and to recommend ways to improve policy implementation through a better congressional-executive relationship.

STUDY CONCLUSIONS

The case study evidence, in the context of the forces of change, surprised the panel: Contrary to widely held views, difficult situations were often improved as a result of congressional intervention; yet, in the panel's judgment, neither Congress nor the Executive Branch was strengthened institutionally, nor was the overall decision-making system improved by these temporary adaptations.[1] The panel addresses this paradox by drawing seven conclusions.

1. *Both Congress and the Executive Branch have all too often disregarded their responsibilities for broad policy making and effective management of federal programs. Both branches urgently need to adapt their behavior and their institutions if the nation is to achieve accountable and effective governance to meet the challenges directly ahead.*

The nation faces enormous and fast-changing problems in domestic policy, defense, and international affairs. Yet there is a tendency in both branches, in these cases, to take a limited, narrow view of policies and programs. Broad, cross-cutting policy is more difficult to develop and implement with such a detailed focus.

Neither branch stands up for performance-oriented program management or for the development and maintenance of an infrastructure that will ensure it. Both branches suffer from lack of reliable and relevant intelligence to facilitate effective executive implementation and congressional oversight. The result is a lack of attention to the largest, most urgent problems, which can lead eventually to crisis.

Effective governance under modern circumstances requires far greater emphasis on shared powers, negotiation, shared accurate information, and cooperative management than on the classical doctrine of the separation of powers. The nation is in an era in which familiar labels are no longer descriptive and conventional wisdom provides limited guidance. The Constitution permits a range of possibilities for arranging the power to self-govern. The current political profile—wherein the division between Congress and the Presidency is also a division between Democrats and Republicans—pushes the limits of institutional procedures and relationships fashioned for an earlier time.

The net effect is a sense of urgency for deliberate actions to avert a crisis. The outright confrontation and increasingly competitive relationship between the two branches—conducted in agency-committee venues as well as presidential-congressional relationships—has a high cost: a political system more and more unresponsive to the nation's problems and unaccountable to the American people for addressing those problems.

2. *Inadequate interbranch communication and collaboration result in misunderstanding and counterproductive performance by both branches. Structure and process are important in creating the conditions for shaping effective policy. But structure and process cannot be a proxy for substantive communication, information sharing, and constructive problem solving between the branches.*[2]

The researchers found in each case poor or inadequate interbranch communication, shared information, and collaboration, often resulting in misunderstanding and counterproductive performances by both branches. These communication problems were compounded by the contrast in organizational cultures, perceptions, constituencies, and senses of mission that exist between congressional units and corresponding executive agencies.

The absence of routine, accurate information flows between the branches

on program implementation precipitated congressional intervention (usually preceded by growing suspicion of executive performance) and occasionally impelled Congress to create quasi-independent commissions and boards to fulfill the need for trusted policy and program information.

3. *Congress does, at times, interfere with the Executive Branch's management of programs for parochial or political reasons; however, the criticism of congressional micromanagement can be easily overstated. In the cases the panel examined, Congress was more constructive in policy and program implementation than its critics or the panel initially supposed.*

Some of the criticism of congressional micromanagement of program administration—to the detriment of program performance—is overstated when compared with the specific policy issues we examined. In some cases, without congressional intervention, legislative objectives would probably have been thwarted. If one discounts some of the negative institutional implications, Congress was more constructive in policy and program implementation than its critics or this panel initially supposed. The pejorative term *congressional micromanagement* thus does not always represent or accurately describe congressional intervention in administrative details.

In some cases, Congress did involve itself to promote narrow, parochial, or institutional concerns in ways that diverted attention away from achieving basic program goals. For example, funds and projects were earmarked for political and historic—rather than current programmatic—reasons. The result often was unproductive battles between the branches at the expense of attention to severe policy problems (e.g., transportation infrastructure; health care costs; safe, permanent storage for nuclear waste). Anecdotal evidence, of the sort catalogued by the Heritage Foundation and the American Enterprise Institute, is still abundant that antiquated and unnecessary congressional meddling frequently occurs.[3] Hundreds of congressionally mandated executive reporting requirements, for example, still drain scarce executive resources in exchange for what many regard as very limited benefits.

4. *Congress now does part of the job of the Executive Branch; it sometimes perceives it has little choice but to do so because Executive Branch difficulties—delays, cost inefficiency, program breakdown, executive refusal to adhere to congressional directives,[4] even outright management failures and deceit—all but impel it to intervene at the administrative level. Congress does not have and cannot create the resources to intervene effectively as an administrative manager across the enormous range of governmental programs. Yet increased con-*

gressional interventions are unavoidable unless the Executive Branch (1) fulfills its responsibilities with renewed determination, vigor, and management skill consistent with congressional mandates and (2) reorganizes and upgrades its managerial systems accordingly.

Although Congress does, at times, interfere with the Executive Branch's management of programs for parochial or political reasons, the case study evidence suggests that Congress often intervenes in order to fill a management vacuum created when the Executive Branch is not meeting its responsibilities in accordance with congressional expectations. In most situations, the administrative issues should have been addressed in the Executive Branch, with or without prompting from Congress. Examples of the critical shortfalls in executive performance include:

- Providing poor information. The errors were generally more those of omission than commission. But in at least one case, AMRAAM, there is evidence of intentional deceit.
- Refusing to follow specific congressional directions as stated in legislation.[5]
- Neglecting to propose solutions to recognized problems that were clearly understood to be the responsibility of the executive agency involved.
- The Office of Management and Budget's lack of focus on managerial and organizational effectiveness and program results.
- Protracted and intense conflict among OMB, Executive Branch agencies, and Congress over budgetary and regulatory issues, which in some cases invited congressional intervention.

The Executive Branch effectively hands over its managerial role when it fails in its job of administration. The reasons are often complicated. Administrative skirmishes between the branches can flow from broader, long-standing conflicts between Congress and the President over federal policies and programs—conflicts sometimes made more pointed by divided party control of the two branches. Under circumstances of policy disputes, executive agencies can be caught in the cross fire making it difficult for them to propose solutions or comply with congressional guidelines (e.g., the Medicare Prospective Payment System case). Outcomes are typically the products of extremely complex and prolonged interactions among and within the branches, often all three of them, along with various associated client groups. But whether caught in a policy dispute, a program breakdown, or network of conflicting interests, when the Executive Branch cannot meet its

responsibilities in accordance with congressional expectations, the vacuum will somehow be filled. In the cases we studied, it was filled by Congress.

Joint congressional-executive involvement in policy implementation is a natural and inevitable product of American government. Some blurring of responsibility is actually built in to prevent tyranny, protect liberty, and promote good government and service to the public. Congress has always been interested in the details of policy and program implementation, and this is not likely to change. But congressional involvement has increased and intensified in recent years, and this is likely to continue. Changes in both branches are needed, but increased congressional interventions are unavoidable unless the Executive Branch fulfills its responsibilities and reorganizes and upgrades its managerial systems accordingly.

5. *When Congress intervenes extensively in administration, it risks its capacity for appropriate, systematic, and uncompromised oversight.*[6]

Congressional interest in policy implementation and program management is legitimate because it leads to oversight of policy. Notwithstanding the need for intervention, Congress risks the effectiveness of its roles when it intervenes excessively in implementation:

- As Congress spends more time intervening in executive details, better program implementation may result. But in doing so, Congress necessarily gives less attention and fewer resources to broad-gauge legislative policy making and performance-oriented oversight.
- Congressional committees can become so involved in the supervision of (and functional responsibility for) program administration that it becomes difficult if not impossible to maintain the arm's-length relationship essential to effective oversight.

6. *When Congress substitutes its expertise for Executive Branch responsibility to implement policy and manage programs—even though it may be intervening because of Executive Branch difficulties—accountability for policy implementation and program management often breaks down.*

Accountability is central to the democratic process. It often breaks down when, as a result of congressional intervention in administration, Congress substitutes its expertise for Executive Branch accountability to implement policy and manage programs—even though Congress may be intervening because of Executive Branch evasions. It also breaks down when the network of quasi-independent commissions, offices, boards, agents, and staffs takes on traditional executive roles, conducts congressional oversight func-

tions, and becomes a permanent rather than an ad hoc feature of government.[7]

In both cases, the boundaries between the constitutional branches as they are traditionally understood are blurred so that neither branch is accountable—or at the very least that accountability for government's performance is likely to be obscured. Players in both branches can circumvent accountability. Congress can avoid making explicit policy goal statements and immerse itself in a sea of specific procedural detail. The Executive Branch can blame Congress for directing it to conduct ineffective implementation initiatives—that are not "best" in the policy sense.[8]

The relationship between Congress and the Executive Branch has become not a cooperative enterprise so much as a marketplace for competing demands and alternative political responses. If either branch fails to exercise its responsibilities, the other branch will step in to substitute its agenda and expertise. This situation so alters and obscures the core responsibilities of the branches that no one takes responsibility for the big problems that develop. Ultimately, the nation suffers because performance is uneven, unreliable, and unaccountable.

7. *Unable to rely on the Executive Branch for trusted, accurate, and timely information and reliable program management, Congress has constructed a managerial capacity more responsive to its own needs in the form of a permanent set of commissions, boards, offices, and agents within and between both branches. The accountability and effectiveness of such devices is open to serious question.*

Congress has developed and sustained many relationships with actual providers, vendors, and local managers—officials, agents, and institutions that were formerly part of or in close association only with the Executive Branch as part of its role in providing services. The result, all too frequently, is that the Executive Branch is bypassed as an ill-equipped Congress attempts to implement programs on its own.

All too rarely do either Congress or the Executive Branch focus on broad-scale managerial capacity-building in the Executive. This has led to creating managerial capacity in Congress (e.g., with the creation of commissions, boards, offices, and agents). Meanwhile the need to build managerial capacity in the responsible executive departments and agencies has been neglected. In the long term, this risks the erosion of Executive Branch capacity for accountable and effective program development and implementation. The result almost certainly will be a less effective—and more expensive—government.

TOWARD ACCOUNTABLE AND EFFECTIVE GOVERNANCE

Even when congressional intervention in administration is a constructive response to Executive Branch weaknesses, accountability is likely to be diffused and major problems left unattended. This paradox of modern governance is troubling, because the ability of the nation to handle its public responsibilities is eroding. Yet the attention of two most powerful forces that could reverse the situation—Congress and the Executive Branch—seems to be elsewhere.

The solution is not a simple "Congress should intervene less and oversee more." Such a conclusion would be a one-sided demand that Congress retreat and the Executive Branch return to its old ways. New models of organization and management practices are needed within and between Congress and the Executive Branch. The reorientation of presidential-congressional relationships and agency-committee relationships is imperative. Policy makers and staff should try to design and implement services so that accountability is clearer, professional standards are valued and protected, performance is emphasized, and information flows provide a sound foundation for policy debate.

The panel's recommendations point to some *initial* ways to begin to address the paradoxical problems. In the next four chapters, these recommendations are presented within four broad challenges—the need for Congress, the President, and the Executive Branch, separately and jointly, to:

- Build new bridges for productive relations between the branches;
- Provide leadership for broad policy and planning;
- Improve executive information and congressional oversight; and
- Strengthen the structure of executive functions.

The central theme of the panel's recommendations is the need for new bridges, new activities, and new relationships to reduce the difficulties between Congress and the Executive Branch and improve program performance. To create more effective relationships, each branch must have appropriate internal capacity to engage the other. Each branch must also support organizational devices that respond to contemporary problems and bridge their institutional boundaries, at the same time preserving fundamental prerogatives of constitutionally separated institutions.

NOTES

[1]Matthew Holden, Jr., takes the position that the panel has not engaged in an analysis that would allow it to reach a judgment on this point. The report says that

difficult situations were improved as a result of congressional intervention. Is it plausible that that is all that was intended? If so, why is that not a success? If something more fundamental was supposed to have happened, what was it and how do we judge it? One finds it hard to believe that the panel was not, like most educated Americans, so filled with the Brownlow doctrine that everything depends on presidential leadership that it was hard put to live with the results of its case studies. Martha Derthick concurs.

[2] Matthew Holden, Jr., agrees with this, but thinks the point is more far-reaching. If the interests in society are fundamentally in conflict, then no amount of substantive communication will lead to problem solving unless (1) the interests are reconciled (the work of political negotiation) or (2) one set of interests is powerful enough to override another. Martha Derthick concurs.

[3] Gordon Crovitz and Jeremy A. Rabkin, *The Fettered Presidency: Legal Constraints on the Executive Branch.* Washington, D.C.: American Enterprise Institute, 1989; Gordon S. Jones and John A. Marini, *The Imperial Congress.* New York: Pharos Books, 1988.

[4] Martha Derthick comments: As I said above, I have been unable to detect in the case studies a pattern of refusing to follow specific congressional directions.

[5] Martha Derthick comments: As I said above, I have been unable to detect in the case studies a pattern of refusing to follow specific congressional directions.

[6] Matthew Holden, Jr., believes it is plausible that Congress may be overcommitted in detail, but the panel might have considered further that is the reason Congress is incomparably the strongest legislative body in the world of major democracies. Compared to it, the British parliament and most of the European nations' parliaments are mere ratifying bodies for the executive of the day. The reason precisely is that it is access to detail that constitutes power. Martha Derthick concurs.

[7] Harold J. Krent, "Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government," 85 *Northwestern University Law Review* 1 (1990), p. 62-112.

[8] Martha Derthick comments: This discussion presumes that the U.S. Constitution allocates responsibility between the Executive and Legislative branches in a way so neat and clear that the public should be able to tell by watching whether each is performing properly. I believe that the Constitution, for better or worse, does just the opposite. It invites precisely the perplexing struggle that we witness. Accountability is sacrificed in this struggle, but abuses of power are contained.

SENATOR WILLIAM V. ROTH, JR.
TESTIMONY ON IMPROVING CONGRESSIONAL OVERSIGHT
JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS
JUNE 24, 1993

Thank you for this opportunity to suggest to the Joint Committee how congressional oversight might be improved. I do have a specific recommendation for either a statutory requirement, or a change to House and Senate rules, which I strongly believe would result in more effective oversight by committees of Congress.

A common shortcoming of the existing oversight process, by which Congress reviews the efficiency and effectiveness of federal programs and agencies, is the lack of objective standards of performance. In order to fairly evaluate a program, there needs to be some pre-established "benchmarks" against which to measure that program's success. Otherwise, an oversight hearing becomes largely a recitation of anecdotal items, cast without adequate context within which to draw accurate generalizations.

S. 20, the Government Performance and Results Act, will partially address this problem. It will require agencies to develop annual performance plans with measurable program goals, and to file annual performance reports. However, I do not believe that having agencies alone set program goals is sufficient. Congress itself should play a direct role in the establishing of at least some of those goals. Congress creates and funds the programs, so it ought to give some indication as to what it expects them to accomplish.

This is not micro-management; in fact, it is just the opposite. Determining what results a program should achieve is the essence of policymaking. It is what really guides a program's direction. But Congress rarely does that, so it falls upon the program managers to determine the objectives. Then Congress will often try to steer a program's direction by interceding in its day-to-day operations -- which is micro-management. What we end up with is the managers trying to set policy, and the policymakers trying to manage -- not a prescription for good government.

If, on the other hand, Congress specified a few specific goals in its authorization and appropriation legislation, agencies could then develop a more detailed hierarchy of goals -- all aimed at eventually achieving the Congressional objectives.

At a May 9, 1991, hearing on how to improve Congressional oversight held by the House Ways and Means Committee, former Carter Administration OMB Director James T. McIntyre recommended that,

> To facilitate the oversight process, standards to measure each program should be included in its authorization or reauthorization. The Congressional Budget Act should be amended to require this. The standards should be in quantitative terms. Even qualitative goals should be specified quantitatively. The standards should be part of the legislation itself, not conference report language. The conference report on all reauthorizations should explain how the program's performance compares to the goals set.

The need for Congress itself to set program goals is clearly one of the major lessons of the recent HUD scandals. After looking at those problems, the Congressional Oversight Panel of the National Academy of Public Administration strongly recommended that,

> Congress should set performance goals . . . that provide a better match between those goals and the resources likely to be available for implementation. . . . Congress should . . . provid[e] in authorizing statutes criteria by which to measure program effectiveness.

In May 1990, the Senate Banking Committee's HUD/Mod Rehab Investigation Subcommittee held hearings on the abuses at HUD. That subcommittee received testimony from several expert witness who emphasized the need for congressional program performance goals in order to prevent future scandals:

> Within the agencies, people will want to know what is it that Congress defines as the indicators for how well a program is doing.
> Bert Rockman, Brookings Institution

> Quite frankly, sometimes the Congress does not want to really clarify what the indicators are, either. It is easier to keep it somewhat confused. That creates additional problems for the agency.
> Richard L. Fogel, Assistant Comptroller General, General Accounting Office

> . . . we must look at the legislative history of the statute itself, and articulate the objectives. Quite often we find that sometimes those are not very clear and are quite difficult to comprehend.

> Paul A. Adams, Inspector General, Department of Housing and Urban Affairs
>
> Preventing more HUDs ultimately is a continuous process of improving program goals in law and testing agency performance against them. . .
> Richard A. Wegman, National Academy of Public Administration

And most recently, at the Senate Governmental Affairs Committee hearing of March 11, 1993, David Osborne, the author of the book "Reinventing Government", testified that,

> Some of the lessons from abroad and from State and local governments tell us that unless a legislature puts performance targets in its appropriations, they will never be taken terribly seriously. You have to force legislators who are appropriating money to define the outcomes that they want. . . Unless it is done, the performance reports will sit on the shelf.

As these comments suggest, good management starts with clear policy direction, and that is the responsibility of Congress. The failure of Congress to establish program performance goals is an open invitation to program abuse and mismanagement -- and it makes objective oversight much more difficult.

I do not believe that requiring Congress to specify a few program performance goals is unreasonable or infeasible. Congress has an obligation to tell the American taxpayers what results we intend for the money we spend. This should be a requirement either of law, or of House and Senate rules.

STATEMENT OF ROBERT W. KASTENMEIER

BEFORE

THE JOINT COMMITTEE ON THE ORGANIZATION OF THE CONGRESS

June 29, 1993

It is both a pleasure and an honor for me to be here today, particularly with a panel consisting of two of the most thoughtful and prominent members of the federal judiciary, federal appellate Judges Pat Wald and Kosinski -- and also Professor Bob Katzmann, a scholar of national prominence with respect to the Judiciary and the Congress. The subject of the relationship of the Congress and the Federal Judiciary is an important one. My understanding is that you have chosen to focus on the specific subject of legislative history and statutory interpretation.

There are a number of current issues that concern the two branches. Parenthetically, I chair an agency called the National Commission on Judicial Discipline and Removal that deals with the important issue of impeachment, discipline and disability and while issues of communication between the branches -- issues of funding, jurisdiction and other matters -- are relevant, none is more important that the legislative process and judicial review of legislation -- certainly for the Congress.

Although I spent 32 years in the House of Representatives, unlike my fellow panelists I am neither an expert nor a student of the subject. Like most who serve, I was, rather, a generalist. I did, however, chair a judiciary subcommittee on Courts, Civil Liberties, Intellectual Property and Administration of Justice and increasingly became interested in problems affecting the federal judiciary. In the 1988-1989 period it was evident that a view was emerging, primarily attributed to Justice Scalia, that congressional legislative history was unreliable and the judiciary would do well to resort to a "plain meaning" or textual rule for interpreting federal statutes. This point of view was ventilated at one or more symposia during this period including one dealing more broadly with congressional judicial relations arranged by Professor Katzmann. This view and its implications were also featured in The New York Times, The Washington Post and other papers as well as in congressional journals, Congressional Quarterly in particular. I mention this because while the subject of legislative history has been authoritatively written about in law review articles by Judge Wald and Judge Kosinski, it had by 1990 achieved a popular political prominence, and on April 19, 1990, I held a hearing on the subject. Two of my fellow panelists were witnesses that day.

If I were to be surprised at all it would be at the lack of concern of fellow members of Congress about the new plain meaning doctrine and the reasons for it.

It is a given that legislation that becomes law is frequently, very frequently, flawed, and the legislative process is imperfect. The subject of legislation may well be a battleground between conflicting ideologies, economic interests involving partisan considerations sometimes pitting the House v. the Senate or the Congress v. the Executive, errors arise, ambiguities go unresolved, meaning is obscure, definitions may be missing.

Nonetheless a judicial review policy that says your reports, colloquies, hearings are untrustworthy and unreliable and will not be used to divine legislative intent is an assault on the integrity of the legislative process that cannot in my view be condoned. As the Federal Judiciary is appropriately concerned about judicial independence, so Congress must be about the integrity of the legislative process and challenges to it. It is akin to the court stripping initiatives of the 1970s intended to punish the federal judiciary for unpopular constitutional decisions of the prior decade.

It is now 1993 and I do not see a great rush on the part of the federal judiciary to embrace the textualist doctrine. Rather I see the judiciary more interested in opening communications with the Congress than confronting it by disdaining its work.

But tensions, perhaps serious tensions, between the two branches remain, and one could envision a worst-case-scenario with a long term war developing between Congress and the Judiciary in which both sides fare poorly; loss of jurisdiction, loss of funding, and a judiciary siding with the executive branch.

I think it more likely that we ought to light a candle rather than curse the darkness. Professor Katzmann has brought about a project to cause decisions dealing with troublesome statutes to be especially conveyed to the Congress, to its leadership, to legislative counsel and to the relevant committees. This experiment approved as an experiment involving the D.C. Circuit is well along and we hopefully expect the Judicial Conference will in due course encourage all circuits to participate. This is a small first step -- others can follow.

Finally I would make a series of recommendations. Some are self-evident and would be irrespective of the judicial review doctrine employed:

(1) review returned decisions;

(2) have special courses for new House and Senate members in legislative history and statutory constructions and the legislative process -- have comparable course for new judicial officers;

(3) give legislative counsels' offices more review authority over proposed legislation;

(4) make mandatory legislative check list, i.e., statute of limitations, federal preemptions state law intended, etc. Do not needJudicial Impact Statement;

(5) avoid to the extent possible massive omnibus bills and hastily considered last minute before adjournement sine die legislation (insure some review);

(6) have more frequent oversight hearings or sessions on legislative history. Make sure judiciary is well represented;

(7) check to see how "revision of laws" project is proceeding;

(8) I do not recommend a return to extensive legislative preambles to regional legislative intent;

(9) Others recommend that committee reports be signed by all committee members to give the document greater authenticity. That may or may not be a good idea in practice; and finally

(10) Still others recommend expanding the canons of legislative construction in Title 1 of the U.S. Code. I do not have a view about this, but it ought to be explored.

Legislation is our craft, how well Congress does the job of writing statutes is central to the integrity of the institution. In the months and years to come, as you move toward greater congressional effectiveness and strengthing congressional integrity, there is no more compelling issue than the one before you today.

STATEMENT OF THE HONORABLE ALEX KOZINSKI OF THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT BEFORE THE JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS

Mr. Chairman, Members of the Committee, Distinguished Fellow Panelists:

I thank the Committee for inviting me to express my views on a subject so critical to the balance of powers in our government. I suspect, however, I may have been invited because I'm rumored to believe that the only legitimate use of legislative history is to prop open heavy doors or to put under the seats of little children not quite tall enough to reach the table. I hope I will not disappoint you by taking a slightly more moderate position today.

I do believe there are some theoretical and practical difficulties in deriving wisdom from the legislative record of a complex statute. Some of the problems include figuring out whose views are embodied in a committee report; determining whether floor statements reflect the views of anyone except the particular speaker; and accounting for the President's role, if any, in making or approving the legislative record.

At the same time, I'm ready to admit that legislative history can be an immensely valuable tool for resolving certain types of problems in statutory interpretation. First and foremost, legislative history helps courts understand what problem the legislature way trying to solve. Especially where some time has passed between a statute's enactment and its interpretation, legislative history can provide insights into the statute's historical context. And it can expose assumptions shared by both proponents and opponents of the legislation -- especially where the assumptions

seemed so obvious that no one bothered to articulate them in the statute. These are just a few examples of ways legislative history can help courts make sense out of statutes that don't make sense by themselves.

The problem is, in recent years, courts have allowed legislative history to do much too much of the work of interpretation and this has had adverse effects on the legislative drafting process. Because my time is limited, I will offer only two examples -- each illustrating somewhat different aspects of this problem. The first involves a totally boring housekeeping statute -- something few people even in Washington know or care much about. As you've probably guessed, I'm talking about 28 U.S.C. § 1491(a)(3), enacted by the Federal Court Improvements Act of 1982. Because one or two of you here may have forgotten the precise language of this section I will quote it:

> To afford complete relief on any contract claim brought before the contract is awarded, [the United States Claims Court, now the Court of Federal Claims] shall have exclusive jurisdiction to grant declaratory judgments and . . . equitable and extraordinary relief . . . .[1/]

Note that I emphasized the word exclusive. I think it's a pretty important word. Just reading this language, one would think Congress vested the awesome power of equitable relief in pre-award contract cases with the judges of the Court of Federal Claims and nowhere else.

Enter the legislative history. In discussing this section, the House and Senate Reports explain that exclusive doesn't mean exclusive, but sort of exclusive:

1/ 28 U.S.C. § 1491(a)(3) (1982).

> This enlarged authority [of the Court of Federal Claims] is exclusive of the Board of Contract Appeals and not to the exclusion of the district courts.[2/]

Now, this presents a classic example of what, in my book, is a misuse of legislative history. The Senate and House Judiciary Committees agreed on language that -- apparently -- did not reflect their intended purpose. Somehow they became aware of the problem but, for unknown reasons, they chose to leave it in the statute and issue a fix by way of legislative history. In such a case, the legislative history does not merely cast light on the statutory language; it recasts the language altogether.

A court faced with this situation is put in a difficult position. Even among judges who rely on legislative history, statutory language usually still comes first. Many are therefore reluctant to look past very clear statutory language to what may be equally clear, but utterly contradictory, legislative reports. Other courts take a more flexible view: They say that unambiguous statutory language cannot be contradicted by legislative history, but they look to the legislative history to see if the statute is ambiguous. The kicker is they then use the same legislative history that created the ambiguity to resolve it. Go figure.

Predictably enough, the courts that have interpreted section 1491(a)(3) have split along these lines. The Fourth[3/] and Ninth

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2/ H.R. Rep. No. 312, 97th Cong., 1st Sess. 43 (1981). See also S. Rep. No. 275, 97th Cong., 2d Sess. 23, reprinted in 1982 U.S. Code Cong. & Admin. News 11, 33.

3/ Rex Systems, Inc. v. Holiday, 814 F.2d 994, 998 (4th Cir. 1987).

Circuits,[4/] plus the Second[5/] and Federal Circuits[6/] by way of dicta, have interpreted the language as giving exclusive jurisdiction to the Court of Federal Claims -- that is, to the exclusion of the district courts. The Third[7/] and First Circuits[8/] and the Claims Court itself[9/] have adhered to the legislative history and given the CFC nonexclusive jurisdiction; the Sixth Circuit[10/] and again the Federal Circuit[11/] have agreed in dicta.

The Judiciary Committees' attempt to preempt this confusion by means of committee reports rather than statutory language just hasn't worked and has had several unfortunate consequences:

1. It has created a split among the federal circuits that will eventually have to be corrected by the Supreme Court or Congress.

4/ J.P. Francis & Assoc. v. United States, 902 F.2d 740, 741-42 (9th Cir. 1990).

5/ B.K. Instrument, Inc. v. United States, 715 F.2d 713, 721-22 (2d Cir. 1983).

6/ F. Alderete Gen. Contractors, Inc. v. United States, 715 F.2d 1476, 1478 (Fed. Cir. 1983).

7/ Coco Bros. v. Pierce, 741 F.2d 675, 678-79 (3d Cir. 1984).

8/ Ulstein Maritime, Ltd., v. United States, 833 F.2d 1052, 1058 (1st Cir. 1987); In re Smith & Wesson, 757 F.2d 431, 435 (1st Cir. 1985).

9/ National Steel & Shipbuilding Co. v. United States, 8 Cl. Ct. 274, 275 (1985).

10/ Diebold v. United States, 947 F.2d 787, 805-06 (6th Cir. 1991).

11/ United States v. John C. Grimberg Co., Inc., 702 F.2d 1362, 1374-76 (Fed. Cir. 1983).

2. It has caused long-term uncertainty in the law, which in turn wastes time, money, lots of paper and other judicial resources. By my count there have now been at least twenty published opinions in the federal courts wrestling with this problem.[12/]

3. There has been shift of authority away from Congress and toward the federal courts. When Congress speaks with a clear, purposeful voice, judges seldom ignore it, no matter how much they may disagree with the result (barring unconstitutionality, of course). The more wavering the voice of Congress -- as when there is a square conflict between text and legislative history -- the more likely it is that policy preferences of the individual judges will prevail.

4. The confusion surrounding 1491(a)(3) may have legitimized, to some extent, a fuzzy reading of other portions of the same statute. "Look," a judge might say, "it's clear from section

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12/ Diebold, 947 F.2d at 805-06; Cubic Corp. v. Cheney, 914 F.2d 1501, 1503 (D.C. Cir. 1990); J.P. Francis & Assoc., 902 F.2d at 741-42; Price v. United States Gen. Serv. Admin., 894 F.2d 323, 324 (9th Cir. 1990); Ulstein Maritime Ltd., 833 F.2d at 1058; Rex Systems, Inc., 814 F.2d at 998; In re Smith & Wesson, 757 F.2d at 435; Coco Bros., 741 F.2d at 678-79; B.K. Instrument, Inc., 715 F.2d at 721-22; F. Alderete Gen. Contractors, Inc., 715 F.2d at 1478; John C. Grimberg Co., 702 F.2d at 1374-76; Alaska Airlines v. Austin, 801 F. Supp. 760, 763 (D.D.C. 1992); North Shore Strapping Co. v. United States, 788 F. Supp. 344, 345-47 (N.D. Ohio 1992); Neeb-Kearney & Co. v. United States Dep't of Labor, 779 F. Supp. 841, 844 (E.D. La. 1991); Commercial Energies, Inc. v. Cheney, 737 F. Supp. 78, 79-80 (D. Colo. 1990); Arrow Air, Inc. v. United States, 649 F. Supp. 993, 997-98 (D.D.C. 1986); Caddell Constr. Co. v. Lehman, 599 F. Supp. 1542, 1546 (S.D. Ga. 1985); Rubber Millers, Inc. v. United States, 596 F. Supp. 210, 211 (D.D.C. 1984); ACME of Precision Surgical Co. v. Weinberger, 580 F. Supp. 490, 499-501 (E.D. Pa. 1984); Aero Corp. v. Dep't of the Navy, 558 F. Supp. 404, 409-10 (D.D.C. 1983); National Steel & Shipbuilding Co., 8 Cl. Ct. at 275.

1491(a)(3) that Congress didn't mean everything it said in the Federal Court Improvements Act of 1982, so I can be just a little bit creative in interpreting other parts of the statute."

5. It promoted the view that legislative histories -- particularly committee reports -- deserve the same level of respect as the statutes themselves. After all, here is a case where two respected committees of Congress have gone about amending the statute by saying so in the committee report.

Before I turn to my second illustration -- involving a statute much different than 28 U.S.C. § 1491 -- I want to say just a few more words about committee reports. As everyone here is aware, committee reports have long been treated by the judiciary as the Rolls Royces of legislative history. Even curmudgeonly judges like me will occasionally be caught sneaking a peek at a committee report. More recently, though, the pedigree of committee reports has become suspect. I can do no better than to quote from a speech given a couple of years ago by Professor Martin Ginsburg to the Tax Section of the New York Bar Association. I should note, for the record, that these are Professor Ginsburg's views alone, and should not be attributed to anyone else with the same name:

> It is no doubt appropriate to consult legislative history to grasp broad outlines of purpose, but everyone in this room knows it is totally unreasonable to pretend that any of the details that appear in a committee report ever came to the attention of, much less were approved by, any elected body.
>
> The strange notion that the Joint Committee Staff bluebook, published some months after the tax bill is enacted, merits the status of legislative history, can only

derive from a cynical recognition that, after all, the committee reports are written by staff and never read or approved by members of Congress, so how's the bluebook any different?[13]

Now let me turn to what I see as the second, and more serious, problem: The case where legislators -- well aware that statutes will be interpreted by judges in light of their legislative histories -- purposely leave the statutory language vague and then take every opportunity to salt the legislative record with hints, clues, nudges and shoves, all intended to influence later judicial interpretations of the statute. In a concurring opinion in 1987, I wrote the following passage, which I believe expresses the moral hazard involved here: "The propensity of judges to look past the statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process. The potential for abuse is great."[14]

While this manipulation has generally been subtle, it struck with a vengeance during the enactment of the Civil Rights Act of 1991. Given its wide recognition, I need not detail the crafty lobbying and procedural maneuvering involved not in drafting the language of this historic statute, but in planting legislative

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13/ Martin D. Ginsburg, Luncheon Speech at Annual Meeting of New York Bar Association Tax Section (Jan. 24, 1991), at 8 (attached).

14/ Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986).

history land mines designed to explode with full-fledged rationales and interpretive methods, if stepped on by a black robe.[15/]

What I do want to discuss, briefly, are the implications of this development. Here I must give credit to an excellent piece, authored by Harvard student Mark Filip, titled Why Learned Hand Would Never Consult Legislative History Today.[16/] The central thesis of Filip's piece -- a thesis I wish to endorse -- is that whatever one's initial view of legislative history as an aid to interpretation, that value is destroyed once the participants in the legislative process become aware that it will be used by judges as an aid to -- sometimes as a substitute for -- interpretation. Legislative history, if it is to be of any help at all, must provide the type of background information that is descriptive, that helps the judge step into the shoes of the legislator. It cannot -- should not -- provide answers to specific questions. Once legislative history becomes simply another field of skirmish for the political process, it ceases to serve any legitimate purpose. The statutory war is then won not by those who garnered the most votes, but by those who outmaneuvered their colleagues in fortifying the legislative record.

This process diminishes the power of Congress in relation to that of the Executive and the courts. The Executive branch, as its name suggests, has only the power to execute the laws; its range of discretion involved is inversely proportionate to the

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15/ See, e.g., Robert Pear, With Rights Act Comes Fight to Clarify Congress's Intent, N.Y. Times, Nov. 18, 1991, at A1.

16/ 105 Harv. L. Rev. 1005 (1992).

statute's precision. So, too, the courts, who have much broader leeway in interpreting statutes when they are vague and fuzzy. The more legitimate options Congress leaves to the courts and to the executive, the less likely it is that the outcome will reflect the will of Congress.

If this process continues, it will dramatically and detrimentally affect the delicate balance of power among the branches of our government, leaving Congress the weakest of the three. To anyone who believes -- as I do -- that the public interest is best served by three strong bodies that can provide checks on each other, this is unwelcome news indeed.

Thank you.

NYSBA TAX SECTION
Annual Meeting Luncheon
Thursday, January 24, 1991

LUNCHEON SPEECH

Martin D. Ginsburg

I live in fear that someone in Arthur's spot, some day, is going to announce that I need no introduction, sit down, and give me no introduction. Whereupon no one will have a clue who I am.

I was led to this thought earlier today when I ran into one of the now more senior partners in the Weil, Gotshal firm, along with one of the firm's newer lawyers. I had practiced with the firm for some twenty years before becoming a school teacher. The young lawyer was amazed to learn this. When I joined the firm back in the 1950s it had fewer than 20 lawyers. When I left there were about 275 lawyers. My former partner proudly announced that the firm now has some 575 lawyers, and cheerfully added that this enormous growth, post-Ginsburg, showed how much I had held the firm back while I was with it.

I was hurt and amazed to hear this view of my tenure. It is quite wrong. I have not previously mentioned it in public, but the explanation of the firm's enormous growth over the past twelve years is evident to me, and I am sure it is evident to all of you. The Weil firm grew from 275 lawyers to 575 lawyers, after I left, because it took 300 lawyers to replace me.

Over the 20 years I was at it, I thoroughly enjoyed practicing in New York City as a tax lawyer. I owe a great debt of gratitude to the Internal Revenue Code just a single provision of which, section 341 as it happens, put both of my children through college and one of them through two graduate schools. Indeed, taken as a whole the 1954 Code allowed me to take up a luxurious early retirement, improve my cooking, tell students how it used to be before General Utilities was killed in the Battle of Bull Run, and write nasty letters to the Government for reproduction in Tax Notes.

It is not clear to me which of these activities led to my selection as today's luncheon speaker. Nor, as a matter of fact, have I been able to find anyone on the Executive Committee of the Tax Section who admits to having voted me this honor. But a great honor I do account it. I am, to the best of my knowledge, the first Tax Section Chairman ever promoted to luncheon speaker. Carr Ferguson, when he took office as Assistant Attorney General in the Tax Division of the Department of Justice, noted with great pride that he was the first in that job who earlier had served as a line attorney in the Tax Division. It is hardly the same, but I do understand his good feeling.

School teachers, certainly those who teach in the tax field, have ample opportunity to teach in places other than the home law school. A couple of years ago a sizable accounting firm -- not one of the big eight, now the shrinking six, but one of the next dozen with offices in 70 or so smaller cities -- invited me to teach a corporate tax seminar at the annual summer retreat of the firm's tax partners and senior tax managers. Three days in the company of 99 tax accountants -- 99 is what I recall it turned out to be -- may not seem to you an exciting way to spend time, but it emerged so.

The firm's clients, in the main, are small to moderate size business entities, corporations and partnerships. The tax accountants, in the main, were serious, hard-working, professional, reasonably experienced, and intelligent. They were clearly quite good dealing with day to day operating tax problems of the small business entity. Most of them were not quite so good dealing with the corporate reorganization provisions, the principal focus of our seminar, but most of the reorganization rules have been in place a long time and the participants had accrued experience sufficient to avoid total failure.

In developing one of the hypothetical cases in the seminar I strayed to section 338, ever so briefly, and that is when things got interesting. I had not given an advance assignment under section 338 and so the students brought with them only their background practice experience. In the discussion I commented that, in light of General Utilities repeal, unless a section 338 election is in fact intended, the practitioner ought not rely upon the so-called affirmative action carryover basis election, but should instead make an explicit "protective carryover election."

The response seemed to me somewhat doubting. Attempting to be clearer, I restated the position this way. If there has been a qualified stock purchase of one corporation by another, and if a section 338 election would be tax disadvantageous, and if you fail to instruct your client to file a protective carryover election, the only interesting question is whether you have committed malpractice.

Never in my life have I said anything to attract so warm a response. Consternation everywhere.

You see, the prior response of these 99 decently able tax accountants had not been "doubt," as I had thought. It turned out, in that summer of 1989, that only two of the 99 practitioners in the room had ever heard of the "protective carryover election" that is provided in the endless temporary regulations under section 338.

For whose use and whose consumption are the tax rules written these days?

Would I have done better with a more sophisticated class of tax practitioners, accountants or lawyers, from New York City? Sure. Or

Chicago or Atlanta or Boston or maybe even Washington, D.C.? Sure. But their clients are not inevitably the small, usually family owned, corporations whose tax advisors were in the room with me that summer.

Suppose instead of 99 accountants from 70 small cities, participating in my seminar were 99 lawyers conducting a business oriented practice in those cities? I suspect the number of the knowledgeable would have dropped from 2 to 0. Outside the large metropolitan areas, in most of this country, tax is the accountants' domain and lawyers are not expected to enjoy an informed relationship with protective tax elections of any sort.

At the administrative level, and at the legislative level surely, the tax process has thoroughly lost touch with sense and with reality.

Would I have done better, in my summer sojourn, to deliver a subchapter K seminar, perhaps "living and dying under the section 704(b) substantial economic effect regulations" or perhaps "six different ways to exit the partnership: the tax treatment of those who leave and those who remain"?

In fact, Gordon Henderson of this Tax Section and Jack Levin of Chicago and I delivered exactly that "exiting the partnership" seminar to a rapt audience of lawyers and accountants, some 300 strong, in a warm climate location this past October 31. October 31 is of course Halloween and that turned out to be strikingly appropriate. In the seminar we pursued 7 very simple example cases -- in each there were never more than three partners and never more than half-a-dozen assets in the partnership -- and by varying one term of the deal at a time -- exit by substitution of a new partner, exit by retirement, exit by departing this world -- we produced a nightmare of amazingly different tax consequences to everyone in sight.

In preparing the Halloween seminar Gordon and Jack and I had anticipated a high level of audience hostility. It is after all an ancient and honorable tradition that when bad news is delivered, you shoot the messenger. But in truth there was no hostility at all, just some nods, occasional smiles, notetaking once in a while.

It all became clear when we asked some questions and took a poll. Don Lubick, testifying before the Ways & Means Committee a dozen years ago, was absolutely right when he announced, "there are no collapsible corporations in Buffalo!" He simply did not take that brilliant perception far enough. In at least one warm climate, we learned, quite a number of Code provisions and more than a few regulations have been declared inoperative by default. Nullification, it seems, remains a viable political concept in America, if only in the tax field.

How about the substantial economic effect regulations under section 704(b)? In particular, what about the regulations' firm contemplation that the partnership agreement at all times will require proper maintenance of capital accounts, liquidating distributions made in accordance with positive capital account balances, and either deficit makeup or some other designated mystery?

We received from our warm climate friends a variety of responses. None was entirely satisfactory. All were interesting. I group them for you.

The class A response -- "What regulations are those?" Happily, there were only a few class A responses.

The class B response -- Magic litany. "We always put those three sentences in our partnership agreements, right at the beginning." There were a lot of class B responses. On further inquiry they broke down into two very distinct subclasses.

The first subclass, B-1 if you like, marches to the tune of Regulations Triumphant. These practitioners have convinced their clients that arrangements among partners must conform to tax regulations. If the partners, for business reasons however good, prefer a different arrangement, tough luck. Perhaps because there are not that many supine clients, there were not that many practitioners in subclass B-1.

Subclass B-2 had many members. Informed of the Treasury's magic rules by the practitioner, the clients replied, "That's fine Sam, you put into the partnership agreement any damn fool thing you want, we know what our deal really is." Whether they will still know later on, after the death of a partner for example, is another matter. Right now, in what is no doubt conceived to be a rational response to irrational tax rules, these folk are writing one agreement for the revenue agent, a different agreement for themselves. It's like keeping two sets of books. We used to give that sort of thing a nasty label.

Finally, there was a class C response. If the parties' negotiated deal does not fit the Treasury's magic rules, the partnership agreement should reflect the deal and not the magic rules. This seemed to us remarkably sensible. Are you surprised to hear that there were very few class C responses?

Last year's grand event in subchapter K, however, was neither the partnership allocation regulations nor the supporting temporary regulations under section 752 on partnership liabilities. But we are getting close. The great event in 1990 was Gordon Henderson's brilliant simplification of those section 752 regulations. It was, I thought then and still do, the most promising document produced by the Tax Section during the year, probably the decade. A convincing demonstration that the prolixity and complexity of the "modern" tax regulation can be substantially reduced at an affordable cost in coverage and detail.

Was Henderson's effort greeted with the universal enthusiasm it deserved? Of course not. After all, if you are institutionally in the business of writing endless impenetrable regulations, how likely are you to applaud english?

You will think that not fair comment, and likely you are right. But I remind you that a principal objection to Henderson's slimmed-down basic principles was this. After reading Henderson's regulation, goes the objection, you would not understand the partnership liability rules nearly as well as you do had you not first studied and mastered the Treasury's awesome, intricate, technical, endlessly dull temporary regulation.

What amazes me about this argument -- and the argument really is advanced, I have not made it up -- is the astonishing assumption that underlies it.

The unstated assumption is that when Treasury produces one of its dense endless masterpieces, practitioners the country over race to read and reread, and after a while all those practitioners understand these full blown regulations and can and do properly apply them in practice.

But that of course is nonsense. The section 338 temporary regulations, to take a fair example not exactly at random, surely qualify as a triumph of endless exposition, but I know of a certainty that, in the summer of 1989, in one firm 97 out of 99 tax accountants did not understand those regulations.

In truth, the pattern of comprehension seems to me no better than a sensible pessimist would anticipate. The average practitioner in the tax field has a good grasp of some regulations, usually material of a certain antiquity and obvious relevance to her practice; an uncertain grasp of a fair number of other regulations; and anything from a nodding acquaintance to no acquaintance at all with the rest. I am suggesting that the average tax practitioner, hard-working but drowning in detail and watching the flood rise, has never read many of the Treasury's regulations and never will, and has not adequately understood a goodly part of the regulations that have been read.

The issue is not whether a practitioner would be better off mastering the Treasury's detailed section 752 temporary regulations or would be better off mastering Henderson's abridgement. That is not the choice. In the real world, I suggest, when the Treasury publishes one of its "modern" regulations, for many and probably most, it is Henderson or nothing.

To be fair, the Service and Treasury did publish during the past couple of years some regulations that everyone could understand. Most recently, the proposed one-class-of-stock subchapter S regulations.

The carefully implemented purpose of these proposed regulations, as I had occasion to suggest earlier this month in an intemperate submission to the Service, "is to make it as difficult as possible for ordinary taxpayers to make use of subchapter S and to disqualify retroactively as many S corporations as possible."

Let me tell you why I wrote that angry letter fully two months after the proposed regulations were published. I wrote an angry letter because you didn't. By "you" I do not refer only to this Tax Section. I mean that over a period of more than eight weeks, while dozens of submissions were filed and everyone was negative, submissions on behalf of clients narrowly focused on the client's specific concern, and submissions by professional groups were the usual technician's triumph, picking issues and propounding lapidary solutions not merely tree by tree but leaf by leaf.

Forget the trees and leaves. There was a forest out there, and a bunch of mad people in your Government, in furtherance of no conceivable policy, was proposing to burn it down.

The sensible response to arson is not to file a report with the arsonist addressing the technical merits of alternative fuels. When there is good reason to be angry, then be angry and be vocal about it. A careful technical report is no help. If anything it misleads those people in Washington into believing that a little cutting and stitching will effect a cure, when in fact the need is for a heart transplant.

One of the valued members of this Section's Executive Committee for many years was Cliff Porter, a wonderful tax lawyer and a wonderful person. At Executive Committee meetings Cliff would identify the case, fortunately rare, in which a member seemed to be promoting a narrow client interest rather than a broad public interest. Cliff would rise, shame those who deserved it, and remind the rest of us why we were there. Invariably our reports were much the better for this.

I suggest the Executive Committee of the 1990s ought to include at least one member whose job it is to rise up and get angry when anger, and not lawyer-like reticence, is called for. Our reports will be much the better for this.

If one is going to be perverse and critical, one ought not disregard very long the legislative product and process.

This afternoon I propose to begin, not with the statute but with committee reports. This seems proper since it has been said, probably not in jest, that in the tax field today one consults the statute only if the committee report is unclear. And that is the very problem I wish to focus.

Half-a-dozen years ago Justice Scalia, then Judge Scalia in the D.C. Circuit, wrote a concurring opinion to disassociate himself from the majority's reliance on legislative history. Scalia was concerned that "routine deference to the detail of committee reports, and the predictable expansion of that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription."

The case in which Scalia wrote was not a tax case, but he buttressed his concurrence with the lengthy footnote from which I am about to quote:

> Several years ago, the following illuminating exchange occurred between members of the Senate, in the course of floor debate on a tax bill:
>
> MR. ARMSTRONG (the Senator from Colorado). My question, which may take the chairman of the Finance Committee by surprise, is this: Is it the intention of the chairman that the Internal Revenue Service and the Tax Court and other courts take guidance as to the intention of Congress from the Committee Report which accompanies this bill?
>
> MR. DOLE (the then chairman of the Finance Committee). I would certainly hope so.
>
> MR. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?
>
> MR. DOLE. Did I write the committee report?
>
> MR. ARMSTRONG. Yes.
>
> MR. DOLE. No; the Senator from Kansas did not write the committee report.
>
> MR. ARMSTRONG. Did any Senator write the committee report?
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> MR. DOLE. I have to check.
>
> MR. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?
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> MR. DOLE. I might be able to identify one, but I would have to search.
>
> MR. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report?
>
> MR. DOLE. I am working on it. It is not a bestseller, but I am working on it.
>
> MR. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?
>
> MR. DOLE. No.

MR. ARMSTRONG. Mr. President, the reason I raise the issue is not perhaps apparent on the surface, and let me just state it. The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate.

If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.

For any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.

128 Cong. Rec. S8659 (Daily Ed. July 19, 1982). Hirschey v. FERC, D.C. Cir. Nov. 15, 1985.

Good for Armstrong, who can have my vote any time, and good for Scalia who never needed it.

It is no doubt appropriate to consult legislative history to grasp broad outlines of purpose, but everyone in this room knows it is totally unreasonable to pretend that any of the details that appear in a committee report ever came to the attention of, much less were approved by, any elected body.

The strange notion that the Joint Committee Staff bluebook, published some months after the tax bill is enacted, merits the status of legislative history, can only derive from a cynical recognition that, after all, the committee reports are written by staff and never read or approved by members of congress, so how's the bluebook any different?

Suppose the millennium arrives. Armstrong and Scalia carry the day. Stripped of detail, committee reports now confirm only the congressional purpose underlying the enactment. Would the tax system be better for it?

I do think so.

I suspect you may think so too after you look again at some recent committee reports, replete with announcements that "the committee intends" that the regulations, likely to emerge ten years hence, will reflect this or that exquisite technicality -- when you know perfectly well that the Committee had no such thought in its head. It is yet another member of the

staff, one who knows right from wrong, leaving his (or her) mark on the world. For some reason I recall the man who, desperate to have his name remembered in history but blessed with no special merit or talent, went out and burned the Parthenon.

If you are still with me you may be slightly puzzled. I began this afternoon by bashing recent tax regulations and those who wrote them. Now I complain of the congressional staffers who only want to guide those who must write the regulations. Is it simply that I hate everyone?

At times, perhaps, but not here. The guidance Treasury needs from the Hill is not in the detail. It is in a proper appreciation of the objective informing the legislation. Concentration on a host of secondary matters, on notes but not music if you will, risks disregarding the statute's essential purpose. The Service and Treasury are quite capable of committing that sin without help -- witness the recent one-class-of-stock subchapter S proposed regulations.

I suppose the reason why I prefer to go with the Treasury, informed as to policy and legislative purpose but not directed in a hundred details, relates to accountability.

Everywhere you look, in Government and out, you will find good people and arrogant people.

It is not that the arrogant people are "bad," as in "evil beings." It is that they care too much about turf, position, sometimes authority, and somehow have come to believe that, in this precise area of the tax law or that one, they have cornered wisdom.

I have come to the conclusion, which I suspect is controversial, that arrogant staffers writing regulations and other administrative ukase are a serious concern, but arrogant staffers engaged in the formulation of tax legislation and the writing of committee reports are a far more serious concern. It has something to do with the frequency and success of repair.

When you scream at the Service or the Treasury for having self-generated a gross misfortune, they may hate you but there is a reasonable chance someone with sense in higher authority sooner or later may listen. Not always, unfortunately, but reasonably often.

When you scream about a lunatic proposed or recent amendment to the Code or an awful committee report directive, the chance that someone in high authority -- they are called "Senators" and "Representatives" on the tax-writing committees -- will listen is rather remote. And if complaints are heeded and action ultimately is taken, the legislative correction is likely to prove incomplete at best.

Without taking time to detail a familiar story, I remind you of the 1984 revision of the tax treatment of divorce, sensible in the House and

sabbotaged in the Senate Finance Committee, and the 1986 legislative changes that undid part but by no means all of the damage.

Twenty years ago, in this Tax Section's Complexity Report, we concluded that Congress should write purposive rather than intensely precise tax statutes, and the Service and Treasury, responsive to the congressional purpose, should manage the detail. Our reasons of twenty years ago were a little different. They did not squarely reflect the perhaps controversial concern I have expressed -- one bunch is a problem but the other bunch is more of a problem -- or reflect at all the "legislation by revenue estimate" concern Arthur mentioned earlier.

Whatever the reasons advanced in support of it, the proposal has not changed. If, as Justice Frankfurter almost said in Portland Oil, "wisdom should not be denigrated merely because it comes late, since it comes so seldom," then surely wisdom that is consistently advanced deserves, sooner or later, a slightly more positive response.

It was great of you to have me for lunch. Thank you.

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PREPARED STATEMENT OF
ROBERT A. KATZMANN
PRESIDENT, THE GOVERNANCE INSTITUTE,
WALSH PROFESSOR OF AMERICAN GOVERNMENT &
PROFESSOR OF LAW, GEORGETOWN UNIVERSITY, AND
VISITING FELLOW, THE BROOKINGS INSTITUTION
BEFORE THE JOINT COMMITTEE ON THE
ORGANIZATION OF CONGRESS,
June 29, 1993

I very much appreciate the opportunity given to the Governance Institute to assist the Joint Committee on the Organization of Congress as it addresses the important subject of legislative-judicial branches. It has been an honor to work with you to help organize this hearing, and we look forward to other such occasions. The mission of the Joint Committee holds historic promise -- to study fully the organization and operations of Congress, and to recommend improvements "with a view toward strengthening the effectiveness of the Congress, simplifying its operations, improving its relationships with and oversight of other branches of the United States Government, and improving the orderly consideration of legislation." This concern with relations with other branches importantly recognizes that the institutions of government affect each other, and that the link between the courts and Congress, although not as well understood as it might be, has an important impact on the legislative and judicial branches.

The subject of today's hearing, statutory interpretation and the uses of legislative history, raises several questions: Why should Congress be concerned? What problems do courts face as they seek to understand statutes? How can courts better understand the legislative process and legislative history? How can Congress better signal its meaning? How can the judiciary make the legislature aware of its decisions interpreting statutes? What kinds of institutional processes and mechanisms can be devised in the pursuit of these objectives? In the time allotted, I want to touch upon each of these questions, focusing on some practical efforts which might be taken so that the First and Third Branches can better understand each other's problems and processes. In so doing, I draw upon the Governance Institute's project -- a project which began at the invitation of Judge Frank M. Coffin, then chair of the U.S. Judicial Conference Committee on the Judicial Branch. I am privileged to be joined here by Judge Wald, Judge Kozinski, and our Governance Institute Distinguished Fellow Robert Kastenmeier, who have been such an important part of our work.

The Concerns of Congress

In recent years, Congress has come under scrutiny with regard to way it writes its law, just as the courts have come under criticism with respect to the way they interpret those laws. Some, such as Justice Scalia, have urged upon the courts a more restrictive interpretation of legislative history. A number of institutions within the Congress and the judiciary, and organizations concerned with the legal system, have been delving into the issue: for example, leadership of both chambers of Congress; the Subcommittee on Courts, Intellectual Property and

the Administration of Justice of the House Judiciary Committee; the Federal Courts Study Committee; the U.S. Judicial Conference Committee on the Judicial Branch; the D.C. Circuit Judicial Conference; the Governance Institute; and the Brookings-AEI Report on the organization of Congress (to which the Governance Institute contributed the sections on judicial-legislative relations). The Congress-Court connection has received attention in such popular journals as The Washington Post, The New York Times, Congressional Quarterly, and the National Journal.

As Congressman Kastenemeier has noted, what is at stake ultimately is the integrity of the legislative and judicial processes. To the extent that courts have difficulty understanding the legislative process which the they interpret, or Congress does not provide the courts with a clear sense of its meaning, then both branches have a problem in need of further attention.

The Problems Courts Face

In this age of statutes, judicial interpretation of statutes has become for courts an increasingly significant and time-consuming responsibility. As Judge Abner Mikva has observed, it has become as important to the legislative process--for what the courts decide has obvious ramifications for Congress--as any single part of that process.

The Joint Committee has just heard from panel of judges and an honored former legislator about the often complicated nature of the inquiry for a court which seeks to discern legislative meaning. Congress enacts a law; the statute becomes the object of litigation. The court must interpret the meaning of the words of the statute. Yet, the language is often unclear. As the judiciary looks for guidance, it delves into the legislative history--the foundation on which judges seek to interpret statutory meaning. In so doing, the court must determine in the first instance what constitutes legislative history and how to weigh its various parts--such as committee reports, conference committee reports, floor debates and votes. It may have to penetrate layer upon layer of rules and procedures. At times, the legislative history is virtually non-existent. In other situations, the legislative history is ambiguous. To be sure, in particular cases Congress may deliberately not deal with difficult issues; but in other circumstances, the legislature might very well have chosen to do so if it had been made aware of the problem. Sometimes, the problem results not from legislative ambiguity but from silence: Congress has not addressed the issue. The court is then asked to fill in the gaps, not only with respect to the meaning of statutory language, but also with regard to a whole host of commonly overlooked issues--for example, those bearing on preemption, attorney's fees, civil statutes of limitations, constitutional severability provisions, private right of action, exhaustion of administrative remedies, the nature of the administrative proceedings. The difficulty of discerning the legislative will has increased as Congress has changed over the last several years: in some ways fragmentation has increased, staffs have grown substantially, subcommittees have proliferated, and the opportunities for legislative entrepreneurship, in ways unobserved by the whole house, have expanded as well.

What this all means is that when Congress, as a deliberative body, does not give explicit

direction about its legislative meaning, it not only creates added burdens for the courts: it also increases the risk that the judiciary, in the good-faith effort to make sense of the problems before it, will interpret the statutes in ways that the legislature did not intend. That the myriad patterns of relationships between the judiciary and Congress have important impacts on governmental processes and policy suggest the peril of the present circumstance -- that in the absence of mutual understanding, the quality of governance will inevitably suffer. It is, of course, too much to expect that institutions will act with perfect knowledge. Given the political and policy complexities surrounding particular issues, it is unrealistic to believe that those institutions can definitively address all the problems they face. But at the very least, each can strive to overcome tensions which prevent one from accurately assessing the processes and outcomes of the other.

To be sure, what the role of the judiciary in reviewing legislation should be is in no small measure dependent upon subjective perspectives about the proper allocation of responsibilities among courts, Congress, and various parts of the administrative branch--about what tasks we think each institutional process should assume. I have written elsewhere about these various conceptions (Judges and Legislators: Toward Institutional Comity, pp. 15-20), some of which our other panelists have presented. For present purposes, it is important to note that for all of their differences, most of these various approaches share a concern with the process by which Congress operates, indeed, with the ways in which the branches of government interact. Their perspectives are based upon assumptions about how Congress functions, the factors affecting legislative outcomes, and the ability of the judiciary to make sense of congressional intent. Thus the proponents of these conceptions should to one degree or another share an objective of this hearing today (and I might add of the Governance Institute project on judicial-congressional relations) -- that is, based upon an empirical examination of the way Congress works, to ascertain how courts can better interpret statutory meaning, and to determine whether and how Congress can clarify legislative history. Theories about how courts should interpret legislative history can be advanced with greater confidence to the extent that they are informed by an appreciation of the complex reality of the legislative process.

If the foregoing analysis is correct, then at bottom, we need to strive to find ways for courts to better understand the legislative process and legislative history and for Congress to more clearly signal its intent. We need to see if the system can be fine-tuned to promote informed interaction between the branches. As Congressman Kastenmeier observed in the Report of the Federal Courts Study Committee, "A radical restructuring of the relationship between the branches is not necessary, but each branch should give priority to institutional reforms (page 92)."

For those engaged in governance--the practitioners in the judicial and legislative branches--the matter of devising practical measures to reduce tensions and improve relations, is of special importance. The problem has at least two dimensions: (1) the creation of a process in which representatives of both branches, unaccustomed, indeed uncertain about the very propriety of meeting, can examine critical questions; and (2) the identification of discrete issues, susceptible of resolution. What is required is an agenda which links conceptual ideas with

pragmatic solutions. The agenda should be faithful to constitutional norms and societal values, and respectful of the institutional prerogatives and norms that underlie relationships among the branches. Moreover, whatever proposals for improvements are advanced should be evaluated as to their feasibility -- indeed, not only where they can be achieved, but also at what costs, if any. Required, in essence, is a weighing of advantages and disadvantages, judged in terms of normative views about the way our system should work.

The Need for a Practical Approach

That brings me to the work of the Governance Institute, a not-for-profit organization, incorporated in 1986, concerned with exploring, explaining, and easing problems associated with both the separation and division of powers in a democratic polity. Our focus is on institutional process, a nexus linking law, institutions and policy. Our objective is concrete and pragmatic: how to refine the functioning and interaction of institutions to enable them to better address specific problems. We strive not only for scholarly publications that will be read, but also for ideas that will be to use. That is why we try to work with those decisionmakers with responsibilities for the institution or institutions involved, those who will have something to say about what changes will be made.

In its first years, the Governance Institute has concentrated on the interaction between the federal judiciary and the Congress. This work is rooted in the premise that these two branches of government need to better appreciate each other's processes and problems if they are to overcome unnecessary friction -- friction which impedes the most effective functioning of both and policymaking more generally. The project began, as I noted earlier, at the invitation of the U.S. Judicial Conference Committee on the Judicial Branch, chaired by Judge Frank M. Coffin of the U.S. Court of Appeals for the First Circuit. Upon his appointment as chair of the Committee on the Judicial Branch, Judge Coffin proposed that its focus should include, in addition to its traditional concerns, a long-range program devoted to increased understanding of an respect for the judiciary. At the core of such an agenda would be an examination of past, present, and future relations between Congress and the judiciary. The judiciary could not hope to strengthen its well-being without congressional support -- and that depended upon a mutual appreciation of each branch's responsibilities, processes and problems. With the backing of then Chief Justice Warren Burger, and the approval of his committee, Judge Coffin moved to launch an inquiry.

The project has sounded the basic themes and methods of the Governance Institute: responding to the needs of institutions -- in this case, the U.S. Judicial Conference Committee on the Judicial Branch and selected legislators; creating with a planning committee a process for considering relevant questions, commissioning papers from an interdisciplinary group of historians, political scientists, lawyers, judges, legislators, and legislative staffers; holding an all-day colloquium at the Brookings Institution to sharpen our agenda; publishing the proceedings in Judges and Legislators: Toward Institutional Comity; and, having identified several smaller parts of the problem, establishing working groups and experimental pilot projects, to assess

practical proposals.

The workshop and pilot project phase now underway consists of three components: (1) the delineation of the kinds of ground rules, protocols, and factors to be considered for different kinds of communications between the branches; (2) examination of how courts can better understand the legislative process and legislative history, how Congress can better signal its meaning (for instance, in the drafting of legislation, and consideration of committee reports) and how the judiciary can make the legislature aware of its decisions interpreting statutes; and (3) exploration of the institutional processes and mechanisms that can be devised to improve relations between the branches.

Ways to Improve Understanding of the Legislative Process and Legislative History

The second component of our work -- the current phase of the Governance Institute project -- is the subject of today's hearing.

As we think about the issues confronting us, we could spend some time pondering what can be done about the legislative fragmentation, the conflicts among committees, the difficulties in making trade-offs, and the problems of deliberation in Congress--all of which contribute to the courts' difficulties in understanding the legislative process. But there may be more immediate steps that could be taken to clarify statutory meaning and legislative history involving the related matters of statutory drafting, interpretation and revision. Clarifying statutory meaning, according to the approach which we have taken, has at least three parts. The first is in some sense preventive; that is, it seeks to anticipate potential difficulties, and to deal with them before a bill becomes a law. As such, it goes to the heart of the drafting process. The second element focuses on the materials that constitute legislative history and is geared towards finding ways for Congress to signal more clearly its meaning. And the third part entails developing routinized means so that, after the enactment of legislation, courts which have experience with particular statutes, can transmit their opinions to Congress, identifying problems for possible legislative consideration.

(1) Drafting. With respect to drafting, it would be useful to determine if some way could be found to subject such activity to some central scrutiny applying accepted standards as there is in some states. The House of Representatives and the Senate have offices of legislative counsel, trained in the nuances of drafting. As we noted in Judges and Legislators (pages 183-84), might a checklist of common problems be prepared for the benefit of those in Congress who do not use the professional drafting services, which could reduce judicial burdens and at the same time give clearer direction as to legislative intent. Such a checklist would focus the legislators' attention on such matters as constitutional severability, civil statute of limitations, attorney's fees, private right of action, preemption, exhaustion of administrative remedies. These issues, when they are not explicitly addressed in the legislation itself, are often left ultimately to the courts for resolution. To improve drafting, periodic seminars involving legislative counsel and judges could be useful. The Governance Institute is engaging in efforts to improve such exercises.

I note that both the Federal Courts Study Committee and the Committee on Second Circuit Courts of the Federal Bar Council have endorsed the idea of a checklist. I quite agree with Congressman Kastenemeier's observation in the Federal Courts Study Committee report that such a checklist cannot by itself do justice to the complexity of the legislative process. But I believe that it can stimulate much needed thinking.

(2) Legislative History. With regard to legislative history, attention should be paid to the ways in which legislative signals of intent could be made clearer. Deserving scrutiny is the question of whether the most important and agreed-upon background and purposes of the legislation can be more sharply identified.

Consider the significance to be attached to committee reports. Assuming they are to be given weight as courts seek to understand statutory meaning--attention should be paid to devices that make it more likely that committee reports receive positive congressional assent. Are there ways to distinguish between those parts of committee reports that receive such affirmative approval and those that do not? As Professor Stephen Ross as noted, it would be desirable if committee members signed committee reports. At present, only the chairman and those presenting additional views sign the reports, leading to the charge that they may lack majority support.

As legislation nears passage, the floor managers of legislation should strive to reach some agreement as to what constitutes authoritative legislative history. Thus, they would reach some shared understanding as to which floor statements and colloquies should be given weight and indicate that such material by express arrangement is meant to be part of the authoritative legislative history.

Relatedly, with regard to the Congressional Record, means should be devised so that judges can have a better sense of how to weigh statements, speeches and colloquies. As to colloquies, I point to Joan Biskupic's account in a Congressional Quarterly piece of floor statements regarding the effort to repeal the McCarran-Walter Act of 1952, as to its sections denying visas to people to enter the United States on grounds of ideology. Representatives Kastenmeier and Berman took to the House floor to say that the proposed provision would supersede the relevant portions of the '52 act. Later, Senators Helms and Simpson said on the floor that they did not believe the provision superseded the '52 Act. The next day, Senator Moynihan responded that "As the author of the provision, I rise to state the contrary." The bill passed, 98-0. President Bush released a statement asserting that he did not believe the provision changed current law. At some point, it is not unlikely that a court will be asked to make sense of all this.

Are there ways, as former judge and Solicitor General Kenneth Starr queried, for Congress to instruct the courts with respect to the degree of deference it should give to its delegate, the administrative agency?

Congressional concern with making legislative history more authoritative will also aid courts as they weigh amicus briefs of legislators seeking to influence the judiciary's view about legislative intent. At times, legislative, who have failed to secure their objectives in the congressional arena, try to secure their ends through the judiciary. To the extent that legislative materials become more authoritative, courts will be better able to evaluate amicus briefs and ascertain congressional meaning.

(3) Statutory Revision. As Congress revises statutes, it might draw upon the experience of courts charged with interpreting its laws.

Although the courts and Congress affect each other in many ways, uncertainty about the propriety of various kinds of communications inhibit useful input. For example, when a committee of Congress is considering revising a complex piece of legislation, it might be useful for judges experienced in interpreting the statutes to testify as to the technical difficulties in discerning congressional meaning. As chair of the Subcommittee on Courts, Congressman Kastenmeier would from time to time draw upon such expertise. But generally, Congress does not avail itself of this opportunity, largely because of the uncertainty of judges and legislators about such communication. Accordingly, the development and refinement of protocols of communications between judges and legislators as to statutory revision would be helpful.

Moreover, it would be useful to examine the states' experiences with law revision commissions that provide for the orderly evaluation of statutes, bringing together representatives of all three branches (Justice Shirley Abrahamson of the Wisconsin Supreme Court and retired Justice Hans Linde of the Oregon Supreme Court have done work in this area). Meriting continuing examination as well is Judge Coffin's suggestion made some years ago that judicial criticisms be collected from opinions and rulings and presented for congressional examination. Along the same lines, I would point to the writings of Judge Ruth Bader Ginsburg in volume 100 of the Harvard Law Review, and the remarks of Justice John Paul Stevens before the American Law Institute.. It would also be worthwhile to identify conflicts among the circuits with respect to legislative meaning, which Congress could resolve, as Justice Stevens and Judge Wilfred Feinberg have recommended.

A practical component of this effort to make the process of statutory revision more rational is a pilot project, which the Governance Institute began at the invitation of the judges of the U.S. Court of Appeals for the D.C. Circuit -- due, I think, to the special interest of then Chief Judge Wald, Judge James L. Buckley, Judge Ruth Bader Ginsburg, and current Chief Judge Abner J. Mikva. In that work, we are helping design a system of collecting, sorting, and circulating statutory opinions of the that court to relevant congressional committees for legislative consideration. In the effort to help close the gap between those who produce legislative history and those who digest it, we conducted a study in which we attempted to determine how judicial decisions identifying problems in legislation are examined by Congress (see "Bridging the Statutory Gulf Between Courts and Congress, 80 Georgetown Law Journal 653 (1992), and 124 Federal Rules Decisions 312-35 (1989)). We selected 15 cases, suggested by the judges of the D.C. Circuit. Some problems involved questions of grammar, such as misplaced commas and

ambiguous adjectives. Other laws had technical gaps, such as failing to state which courts had jurisdiction over cases that could be brought under the statutes. In still other cases, the courts explicitly invited congressional action to clear up ambiguities.

We found that Congress was nevertheless unlikely to clarify these cases because it was unaware that the problems existed. In 12 of these cases, the responsible congressional committees did not know these court decisions. Staffs, I found, tend generally to be aware of major cases, or those in which a losing part seeks some sort of legislative relief. We also found anecdotal evidence suggesting that the judiciary may not know of activities on the congressional side which have bearing on the court's work.

In the course of interviews, it became clear that both branches believed that some means -- a transmission belt -- should be developed to transmit relevant judicial opinions to Congress.

The task, it seemed to us, was to create a low-visibility mechanism, preferably without the need for a new committee or structure within Congress, which would directly transmit opinions or suggestions to Congress. Working with the D.C. Circuit, the Governance Institute is attempting to design such a mechanism. We hope to create a mechanism which: (1) is respectful of the institutional prerogatives of each branch, that is, a mechanism which does not raise concerns in either branch about its propriety; (2) does not burden either branch; (3) is sound technically; and (4) contributes to informed decisionmaking by the judiciary and Congress. To secure a sense about manageability, the Governance Institute has for the few years been monitoring relevant statutory decisions of the D.C. Circuit. Each month we have received opinions from the staff attorneys office of the D.C. Circuit. Having determined that the numbers of opinions would not burden the institutions within Congress which would have to digest them, Robert Kastenmeier, Judge Coffin and I, in consultation with Chief Judge Mikva, then proceeded to our next step -- to work out an arrangement with the House of Representatives and the Senate whereby some office would receive the opinions and transmit them to the relevant committees. We did so after many discussions on the Hill, with the special support of the Legislative Counsel of the House and the Senate and the Legal Counsel of the Senate. I am pleased to report that the bipartisan leadership of each branch -- Speaker Foley, House Majority Leader Gephardt, House Minority Leader Michel, Senate Majority Leader Mitchell, Senate Pro Tem Robert Byrd and Senate Minority Leader Dole -- launched the experiment in 1992 (see enclosed memoranda).

In their memorandum of May 22, 1992, Speaker Thomas S. Foley, Majority Leader Robert Michel and Republican Leader Robert Michel indicate that they "believe that the program would be most useful if it were applied to all circuits." Senators Mitchell, Byrd, and Dole state that "this project offers great promise as a thoughtful and productive step in improving communications between the judiciary and the Congress to the benefit of both branches." They note that the "hope is that the identification and transmittal of such opinions to the appropriate congressional committees will furnish information helpful to Congress's efforts to improve its communication of legislative intent in statutory drafting." For his part, Chief Justice William H. Rehnquist, in the "1992 Year-End Report of the Federal Judiciary" pointed to the Governance

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Institute project as an effort to improve relations between the branches by making "it easier for judges to alert legislators to statutory drafting problems identified in the course of adjudication." Other circuits -- the First, Third, Seventh, and Tenth -- have joined this initiative, with others expected to become a part as well. The U.S. Judicial Conference Committee on the Judicial Branch, chaired by Judge Deanell Tacha, is monitoring our efforts.

With the system in place, Congress will have a better sense of judiciary's work. To the extent that Congress can resolve problems in statutes identified by the courts, not only will the legislature's intent be better served, but also the judicial caseload may be somewhat reduced. Moreover, we will have a better sense of congressional views about judicial interpretation of statutes since we will try to monitor such reaction. The Governance Institute will analyze the data from both the judiciary and Congress, and hold seminars involving all those who work with statutes. The objective would be to upgrade the drafting, interpretation and revision of statutes.

Conclusion

The problems we examine today are longstanding, and no one should have any illusions about the ease with which they can be addressed. Some issues may be intractable. The legislative process will always be complicated; there will always be political dynamics which drive the process so that many statutes will be deliberately ambiguous -- that is the price for securing a majority coalition.

But at the very least, heightened understanding should benefit each branch, and policymaking too. I share Congressman Kastenmeier's view that "communications are a two-way street with messages flowing both ways. Each end of the process needs improvement" (Federal Courts Study Committee Report, page 92). If we are to chip away at the various problems of judicial-congressional relations, then we have foster processes by which both branches can communicate with each other. That at least is the hope of the Governance Institute. Having identified and broken the problem into several smaller parts, we hope to continue to develop concrete proposals, assemble a small but representative group of judges, legislators, and other interested persons, to reflect upon the proposals, make recommendations of the actions deemed most useful, and undertake more experimental programs. All this is to say that we would be pleased to assist this Joint Committee in the months ahead and the Congress in the years ahead in ways deemed appropriate as you address the issues discussed today.

Congress of the United States
Washington, D.C. 20515

May 21, 1992

Dear Mr. Meade:

We write to inform you of the inception of a pilot program to transmit to Congress opinions involving matters of technical statutory construction by U.S. Courts of Appeals.

The U.S. Court of Appeals for the District of Columbia Circuit and the Governance Institute, a non-profit public policy organization, have jointly developed an experiment to select, and provide to the House of Representatives without comment, published opinions of that Circuit which have to do with technical issues such as grammatical errors, textual ambiguities or drafting mistakes. Opinions would be selected by the Chief Staff Counsel of the Court pursuant to the attached guidelines. They would be sent to the bipartisan leadership, chairmen and ranking minority members of key committees, the Parliamentarian, the Legislative Counsel and the General Counsel to the House, all of whom would be free to transmit them to other Members and staff.

At first, this process would involve just the Court of Appeals for the District of Columbia Circuit and the House of Representatives. Efforts will be made shortly to involve the Senate as well. The Judicial Conference of the United States has also agreed to study and review the pilot project with an eye towards its possible extension to all the U.S. Circuit Courts.

We welcome this Court's experimental initiative, which is to begin this week. We believe that the program would be most useful if it were applied to all circuits and both houses of Congress. In either case, we anticipate that the numbers of opinions transmitted to Congress will be modest.

Your comments on the application of this concept would be helpful in evaluating its usefulness. Please provide them to Chairman Brooks and the Ranking Republican, Mr. Fish, of the Committee on the Judiciary, whom we have asked to conduct appropriate oversight on the part of the House.

With every good wish, we are

Sincerely,

Thomas S. Foley
The Speaker

Richard A. Gephardt
Majority Leader

Robert H. Michel
Republican Leader

Mr. David Meade
Legislative Counsel
136 Cannon House Office Building
Washington, D.C. 20515

United States Senate

WASHINGTON, DC 20510

September 28, 1992

Francis L. Burk, Jr., Esq.
Legislative Counsel
The United States Senate
Washington, D.C. 20510-7275

Dear Mr. Burk:

We are writing to express our support for the pilot project that the Governance Institute has developed, in cooperation with the United States Court of Appeals for the District of Columbia Circuit, to improve communications between the courts and Congress about questions of statutory construction and congressional intent.

We understand that this pilot project has already begun in the House of Representatives and that the D.C. Circuit is prepared to extend the project to the Senate. As Judge Coffin and Representative Kastenmeier have described this program to us, staff counsel at the D.C. Circuit will identify recent opinions of that court which address noncontroversial issues of statutory interpretation based on apparent errors or omissions in legislative drafting. The hope is that the identification and transmittal of such opinions to the appropriate congressional committees will furnish information helpful to Congress's efforts to improve its communication of legislative intent in statutory drafting.

This project offers great promise as a thoughtful and productive step in improving communications between the judiciary and the Congress to the benefit of both branches. Its extension to both Houses of Congress should enhance the project's usefulness and permit a more accurate appraisal of its potential benefits as consideration is given to expanding the effort to other Circuits.

We are pleased that you have agreed to join your counterpart in the House, David Meade, in serving as the point of communication for this program by receiving opinions from the D.C. Circuit on behalf of the Senate and forwarding them to the appropriate committees of jurisdiction for their consideration. We encourage all Members and committees of the Senate to take advantage of the information that will become available through this mechanism.

Please let us know if there is anything we can do to assure the success of this project as it is implemented in the Senate.

Sincerely,

Robert C. Byrd
President pro tempore

Robert Dole
Republican Leader

George J. Mitchell
Majority Leader

Congressional Record

nited States
f America

PROCEEDINGS AND DEBATES OF THE 102d CONGRESS, SECOND SESSION

l. 138 WASHINGTON, THURSDAY, OCTOBER 8, 1992 No. 144

Senate

(Legislative day of Wednesday, September 30, 1992)

he Senate met at 8:40 a.m., on the iration of the recess, and was called rder by the Honorable HOWELL HEF-, a Senator from the State of Ala-na.

PRAYER

he Chaplain, the Reverend Richard Halverson, D.D., offered the follow-prayer:

et us pray:

ternal God, loving Father in heav-as the 102d Congress adjourns, may who labor here disperse in the con-nce that You will never leave them forsake them; that Your love and iance can be theirs as often as they it it; and that Your presence will be stant and relentless.

he *Lord bless you, and keep you: The d make his face to shine upon you, be gracious unto you: The Lord lift his countenance upon you, and give peace.*—Numbers 7:24–26.

men.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

he PRESIDING OFFICER. The rk will please read a communication the Senate from the President pro npore [Mr. BYRD].

he assistant legislative clerk read following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, October 8, 1992.

he Senate:

nder the provisions of rule I, section 3, of Standing Rules of the Senate, I hereby oint the Honorable HOWELL HEFLIN, a ator from the State of Alabama, to per-m the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mr. HEFLIN thereupon assumed the air as Acting President pro tempore.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

PILOT PROJECT TO STRENGTHEN COMMUNICATIONS BETWEEN THE COURTS AND CONGRESS

Mr. MITCHELL. Mr. President, for the information of the Senate, I would like to describe briefly a pilot project to improve communications between the judicial and legislative branches.

The project, which the distinguished Republican leader and I have been advised is already underway in the House, is to establish and test a system for communicating to the Congress Federal appellate opinions which identify drafting problems in acts of Congress. While the Congress is naturally aware of major issues concerning the construction of its legislation, there is concern that other issues regarding the interpretation of statutes, which do not evoke public controversy, may escape the attention of the Congress. Courts, Government agencies, citizens, and businesses may be required to expend considerable public and private resources to resolve even relatively minor questions of statutory interpretation through litigation.

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Under the project, which will begin with the U.S. Court of Appeals for the District of Columbia Circuit, staff counsel at the court will identify, and transmit to the Senate's legislative counsel, Frank Burk, recent opinions which address noncontroversial issues of statutory interpretation that are based on apparent errors or omissions in legislative drafting. On the Senate side, the legislative counsel, who has joined in recommending the project to us, will bring to the attention of the appropriate committees of jurisdiction the opinions he receives from the court. Our hope is that committee staff and legislative assistants to members will then join the legislative counsel in an effort to identify the issues in those opinions that suggest the possibility of corrective legislation for particular matters or, importantly, bear generally on the drafting of future legislation that effectuates the intent of Congress and provides clear guidance to the courts and affected parties.

I ask unanimous consent that there be placed in the RECORD a July 28, 1992, letter from U.S. Senior Circuit Judge Frank M. Coffin and former Representative Robert W. Kastenmeier, to the distinguished Republican leader and me, bringing the project to our attention, and a letter of September 28, 1992, to the Senate legislative counsel, in which the distinguished President pro tempore of the Senate joined the Republican leader and me in expressing our support of the project.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

JULY 28, 1992.

Hon. GEORGE MITCHELL,
Majority Leader,
U.S. Senate.
Hon. ROBERT DOLE,
Minority Leader,
U.S. Senate.

DEAR SENATOR MITCHELL AND SENATOR DOLE: From our perspectives as legislator and judge, we hope that we might interest you in a pilot project which seeks to build a bridge between the judiciary and the Congress. Our effort tries to strengthen communications between the branches by developing an institutional process whereby opinions of the federal courts of appeal, identifying discrete noncontroversial issues in statutes, will be forwarded without comment to the legislative branch. Those technical matters have to do with apparent grammatical errors, drafting glitches, litigation-brewing ambiguities, or gap-filling. Research indicates that Congress tends to be largely unaware of the judicial opinions interpreting legislation (but for major cases, or those in which an interest group seeks some legislative relief). Although there are many things that may be done to make communication between the branches more effective, this project would seem to be among the most promising. It does not impinge upon the autonomy of either branch. Congressional committees need act only on those statutory omissions, ambiguities, or internal inconsistencies that they deem worthy of correction. But to the extent that "statutory housekeeping" takes place, the Congress better fulfills its purpose and courts will benefit by having needless litigation forestalled.

The first focus of this project is the opinions of the U.S. Court of Appeals for the D.C. Circuit, but other circuits are expected to become involved. Indeed, at its recent meeting in June, the U.S. Judicial Conference Committee on the Judicial Branch (chaired by Judge Deanell R. Tacha) took steps to elicit the interest of other circuits.

This pilot project is already underway in the House of Representatives. We enclose the bipartisan letter of Speaker Foley, Majority Leader Gephardt and Republican Leader Michel, launching this good government, non-partisan effort. We quite agree with the House leadership's view that "the program would be most useful if it were applied to all circuits and both houses of Congress." As we seek to implement this pilot project in the Senate, we have been grateful for the support of Legislative Counsel Francis L. Burk, and Legal Counsel Michael Davidson. At their suggestion, we turn now to you for your guidance and, we hope, approval.

This project on judicial-legislative relations began some years ago, at the initiative of the U.S. Judicial Conference Committee on the Judicial Branch (then chaired by Judge Coffin). It was the feeling of the judges, several of whom were former legislators, that efforts should be made to improve communications between the branches, to overcome unnecessary tensions that impeded the effective functioning of each. The Governance Institute, a non-profit organization in Washington, D.C., was created to help explore the full range of relations between the branches, working with decisionmakers with an eye towards practical results. We have been very much involved in its activities (Judge Coffin as a founding director and Boo Kastenmeier as Distinguished Fellow).

With the opinion transmittal process in place, Congress will have a better sense of the judiciary's interpretation of its work. Moreover, the judiciary may have a better sense of congressional views about judicial interpretation of statutes. Over time, improvements might be seen in the drafting, interpretation and revision of statutes.

We hope we might have your support to extend this pilot effort to the Senate, and that some appropriate communication (perhaps similar to the one initiated by House leadership), might be sent to relevant persons in the Senate. Should you or your staffs need further information about the project, we would be happy to provide it. Please feel free to contact us or Robert Katzmann, the president of the Governance Institute (and the Walsh Professor of Government and Professor of Law at Georgetown University). By way of context, apart from the letter of the bipartisan House leadership, we enclose: information about the process to be followed in the House of Representatives; a background memorandum; a law review article on the subject; some information about the Governance Institute; and a copy of "Judges and Legislators: Toward Institutional Comity."

Knowing how busy you and your staffs are, we are especially thankful for your attention.

Sincerely,

FRANK M. COFFIN,
U.S. Senior Circuit Judge Board Director, the Governance Institute.

ROBERT W. KASTENMEIER,
Chair, National Commission on Judicial Discipline and Removal, Distinguished Fellow, the Governance Institute.

U.S. SENATE,
Washington, DC, September 28, 1992.

FRANCIS L. BURK, Jr., Esq.
Legislative Counsel,
U.S. Senate, Washington, DC.

DEAR MR. BURK: We are writing to express our support for the pilot project that the Governance Institute has developed, in cooperation with the United States Court of Appeals for the District of Columbia Circuit, to improve communications between the courts and Congress about questions of statutory construction and congressional intent.

We understand that this pilot project has already begun in the House of Representatives and that the D.C. Circuit is prepared to extend the project to the Senate. As Judge Coffin and Representative Kastenmeier have described this program to us, staff counsel at the D.C. Circuit will identify recent opinions of that court which address noncontroversial issues of statutory interpretation based on apparent errors or omissions in legislative drafting. The hope is that the identification and transmittal of such opinions to the appropriate congressional committees will furnish information helpful to Congress's efforts to improve its communication of legislative intent in statutory drafting.

This project offers great promise as a thoughtful and productive step in improving communications between the judiciary and the Congress to the benefit of both branches. Its extension to both Houses of Congress should enhance the project's usefulness and permit a more accurate appraisal of its potential benefits as consideration is given to expanding the effort to other Circuits.

We are pleased that you have agreed to join our counterpart in the House, David Meade, in serving as the point of communication for this program by receiving opinions from the D.C. Circuit on behalf of the Senate and forwarding them to the appropriate committees of jurisdiction for their consideration. We encourage all Members and committees of the Senate to take advantage of the information that will become available through this mechanism.

Please let us know if there is anything we can do to assure the success of this project as it is implemented in the Senate.

Sincerely,

ROBERT C. BYRD,
President pro tempore.
ROBERT DOLE,
Republican Leader.
GEORGE J. MITCHELL,
Majority Leader.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. There will now be a period for the transaction of morning business for not to extend beyond the hour of 9 a.m., with Senators permitted to speak therein for not to exceed 5 minutes each.

The Senator from Florida [Mr. GRAHAM] will be recognized to speak for up to 20 minutes.

There will then be 2 hours of debate prior to the vote on the motion to invoke cloture on the conference report accompanying H.R. 776.

Under the previous order, the Senate will proceed at the proper time to the consideration of the conference report accompanying H.R. 429.

Who seeks recognition?

Mr. GRAHAM addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from Florida is recognized.

CONCERNS REGARDING ENERGY BILL

Mr. GRAHAM. Mr. President, the purpose of my remarks this morning is

Statement of
L. Ralph Mecham, Director
Administrative Office
of the United States Courts

BEFORE THE
JOINT COMMITTEE ON THE ORGANIZATION
OF CONGRESS

June 29, 1993

Distinguished Chairmen:

My name is L. Ralph Mecham, and I am the Director of the Administrative Office of the United States Courts. I also serve as the Secretary to the Judicial Conference of the United States. I appreciate the opportunity to submit this statement on behalf of the Federal Judiciary to provide information on the relationship between the Judicial and Legislative Branches. The importance of communication and cooperation among all three branches of government cannot be overstated. The foundation of our system of government is three equal branches, and we must recognize and respect the roles and responsibilities each branch is assigned. The Judiciary welcomes the opportunity to share its thoughts with this Committee and to encourage a continuing dialogue and interaction between our branches. Although there are some committees in Congress with which the Judiciary deals on a daily basis, such as the Judiciary, Appropriations, and Public Works Committees, there are many committees where the contact is more limited. I thought it might be helpful to provide a brief overview of how the Federal Judiciary is structured before providing specific examples of interaction between the two branches.

I Structure of the Federal Judiciary

A. The Judicial Conference of the United States

The federal court system governs itself on the national level through the Judicial Conference of the United States. In 1922, the Conference of Senior Circuit Judges was created by Congress to "serve as the principal policy making body concerned with the administration of the United States Courts." In 1948, Congress enacted §331 of title 28 U.S.C., changing the name to the Judicial Conference of the United States. The Judicial Conference is a body of 27 federal judges composed of the Chief Justice of the United States, who serves as the presiding officer; the chief judges of the 13 courts of appeals; the chief judge of the Court of International Trade; and 12 district judges elected from the regional circuits.

Section 331 of title 28 specifically provides that the Conference shall:

- Make a comprehensive survey of the conditions of business in the courts of the United States;

- Prepare plans for the assignment of judges to or from courts of appeals or district courts, where necessary;

- o Submit suggestions to the various courts in the interest of promoting uniformity of management procedures and the expeditious conduct of court business;

- o Exercise authority provided in §372(c) of title 28 for the review of circuit council conduct and disability orders filed under that section;

- o Carry on a continuous study of the operation and effect of the general rules of practice and procedure in use within the federal courts, as prescribed by the Supreme Court pursuant to law; and

- o Submit to Congress, through the Chief Justice, an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

The Conference operates through a network of committees created to address and advise on a wide variety of subjects, such as automation, personnel, probation and sentencing, space, security, and matters affecting the jurisdiction of the federal courts. A list of the Judicial Conference Committees is attached. Of particular interest is the Executive Committee of the Judicial Conference, composed of seven conference members and the Director of the Administrative Office of the U.S. Courts, which has been assigned the responsibilities to coordinate legislative liaison on behalf of the Judicial Conference and to maintain and improve judicial-legislative relationships.

B. The Administrative Office of the United States Courts, the Federal Judicial Center, and the United States Sentencing Commission

Many of the support functions for the federal court system are performed by the Administrative Office of the United States Courts (AO). The AO was created in 1939 by Congress as an administrative body for the courts that functions independently of the Executive Branch. The AO is directed and supervised by the Judicial Conference. In that capacity, the AO prepares and submits the budget and legislative agenda for the courts to the Judicial Conference for transmittal to Congress. The AO monitors legislation that affects federal court operations and personnel, and prepares judicial impact statements on major bills, which if enacted, would significantly affect the workload of the courts. It provides administrative assistance to appellate, district, bankruptcy, and magistrate judges, clerks of court, probation and pretrial services officers, court reporters, public defenders, and other court personnel. The AO also performs audits (financial examinations of court accounts); manages funds for the operation of the courts; compiles and publishes statistics on the volume and distribution of the business of the courts; and recommends plans and strategies to efficiently manage court business. Another

major function of the AO is the provision of professional staff support to the committees of the Judicial Conference.

Daily contacts with Congress are handled by the AO either by the Director or through senior staff personnel who report to the Director. The Legislative and Public Affairs Office has four professionals who maintain full-time liaison activities with Congress on behalf of the Judicial Conference. Other specialized legislative activities and budget-related issues are handled directly by personnel at the AO with expertise in these areas. These communications through staff offices are routine and number in the thousands per year.

Additionally, the Federal Judicial Center is an independent agency in the Judicial Branch. Its primary responsibilities are conducting research on the operation of the courts, and the education of judges and federal court personnel. Its Director periodically transmits to Congress the results of research and testifies on various issues at the request of Congress.

Finally, the United States Sentencing Commission is an independent body within the Judicial Branch that maintains its own contacts with Congress.

II Judicial-Legislative Interaction

The Judicial Branch has grown significantly over the past few years, and it faces significant challenges as the year 2000 approaches. Currently there are 842 Article III judgeships, more than 400 senior judges, 326 bankruptcy judges, 381 full-time and 97 part-time magistrate judges, and over 27,000 Judicial Branch employees. As we confront these challenges, the Judiciary realizes the critical role that Congress will play in shaping the Judiciary in the years ahead—not only in terms of the number of judges, but in terms of jurisdiction, funding, and structure. At the same time, Congress should also recognize that judges and court personnel have experience and expertise in the workings of the court system and more broadly, the justice system, which should be very helpful to Congress as it considers legislation affecting the Judiciary.

Although many Members of Congress know the judges and court personnel in their respective districts, Members may never have had the need or occasion to deal directly with the Judicial Conference or the AO. And Members—or judges—may not be aware of the numerous daily communications between the Judicial and Legislative Branches.

There are numerous examples of the informal and formal mechanisms in place to facilitate and encourage communication between the branches. The result is

a collegial existence that respects the necessary separation of powers, yet recognizes the value to both branches and the nation of a working interbranch relationship. There are constant exchanges of communications between the Judicial Conference leadership, as well as among the administrative, operational, and research institutions of the Judiciary and Congress. These communications include not only formal letters, documents, and testimony but also numerous informal contacts with Members of Congress and their staff to explain matters of concern to the Judiciary and to respond to questions and concerns of Members of Congress.

The following are some examples of joint Legislative-Judicial Branch initiatives and communications:

• **Members of Congress traditionally address the Judicial Conference of the United States at its biannual meeting.** Senator Howell T. Heflin, Senator Orrin G. Hatch, Representative William J. Hughes and Representative Jack Brooks have spoken at recent meetings of the Judicial Conference.

• **Members of Congress and congressional staff are invited to attend and address the Judicial Conferences of the 13 federal circuits.** For example, Senator Joseph R. Biden and Representative Hughes recently delivered major addresses to the Third Circuit Judicial Conference in April.

• **Periodically, the Chief Justice hosts informal luncheons at the Supreme Court.** These meetings provide a forum for the discussion of critical areas of judicial administration with key members of Congress and leaders of the Judicial Branch.

• **The Judicial Conference has, from time to time, established special committees to communicate its views on important legislation.** For instance, the Ad Hoc Committee on Gender-Based Violence has spent nearly two years studying and engaging in a dialogue with Congress on the Violence Against Women Act.

• **The Judicial Conference has invited congressional participation in special aspects of its work.** For example, the Committee on Long-Range Planning, which has the broad and important charter of formulating a long-range plan for the Judicial Branch, has benefitted from congressional input. Several Members from the Appropriations and Judiciary Committees attended a conference sponsored by that Committee and the Federal Judicial Center in 1992 at the Supreme Court.

• **The Judicial Branch Committee of the Judicial Conference has coordinated an effort for judges to invite members of Congress to observe the courts in their districts and discuss issues of mutual interest.** This enables Members to gain valuable firsthand knowledge about the operations of the courts and to educate the judges about the realities of Congress.

• **Legislation has resulted in the creation of various entities that have brought leaders of the branches together to study issues of common concern.** Perhaps the most noteworthy was the Federal Courts Study Committee, which included federal judges, Members of Congress, and other legal scholars. The Committee conducted one of the most comprehensive reviews ever of the federal court system. Many of the recommendations contained in its April 1990 final report have since been enacted into law as improvements currently in use in the federal courts. The National Commission on Judicial Discipline and Removal, which will issue its final report on August 1, 1993, and the Citizens' Commission on Public Service and Compensation are other examples of interbranch participation.

• **The Brookings Institution Seminar on the Administration of Justice annually brings together the leaders of the three branches.** Participants have engaged in an off-the-record dialogue on the major issues of the day. The seminar has a long-standing tradition of providing the framework for establishing institutional solutions to problems.

• **The Rules Enabling Act is an ideal example of how the Judiciary and Congress work together for the more efficient operation of the federal courts.** The Judicial Conference and its committees conduct a lengthy review of all proposed changes to the Federal Rules of Practice and Procedure, allowing for public comment in writing and at open hearings. Often, congressional staff attend Rules Committee meetings or hearings. Congress has an opportunity to act on any proposed change before it takes effect. There have been some bills in recent years that have circumvented the Rules Enabling Act. The position of the Judicial Conference is that such proposals to change important court rules outside the Rules Enabling Act process, and without input from the courts, bar, and public are counterproductive. The Conference urges Members of Congress to have confidence in and to rely on the statutory rules process.

•**The D.C., First, Third, and Tenth Circuits are involved in a project in which staff attorneys review opinions as they are handed down to determine whether they might be of interest to Congress.** Appropriate opinions that demonstrate ambiguities arising from the interpretation of statutes are forwarded to the leadership and the legislative counsels' offices. This idea originated with the Governance Institute and is another avenue of communication.

The above examples are illustrations of how Congress and the Judiciary have maintained effective mechanisms for communicating and working together. But, ample communication does not always result in agreement or action. For example, the Judiciary Committees originated and the 102d Congress enacted legislation to authorize 35 new bankruptcy judgeships. However, because of significant budgetary

constraints, the appropriating committees have been unable to provide the necessary funding. Another example is the proliferation of legislation to federalize crimes that traditionally are handled by the state courts. This expansion of jurisdiction has triggered a significant rise in workload. However, often this legislation is enacted without providing the Judiciary with the necessary resources to meet the increased workload.

I believe that the Federal Judiciary and Congress have developed a strong working relationship. Congress has recognized the expertise of judges in many areas and has drawn upon their experiences on many occasions. Judges frequently testify before congressional committees, often over a hundred times in a given Congress. We appreciate the reception they are given and the acceptance of many of our proposals or observations. Occasionally there is disagreement, but this may be a healthy example of the legislative process.

We recognize that the relationship between our branches can be improved. We also recognize that the Legislative, Executive, and Judicial Branches do not operate in a vacuum.

In his 1992 Year-End Address, the Chief Justice, in commenting on the various roles of legislators, executive officials, and judges, stated:

> The central challenge is to blend these sometimes conflicting perspectives into a responsible policy that will best serve the national interest. We have often met this challenge in the past and can do so again. We will fail in this endeavor, however, unless we work cooperatively, all the while retaining respect for the good faith of all participants and the legitimacy of their different perspectives.
>
> Justice Robert Jackson once said, in a different context to be sure, "[t]he Constitution. . .contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence. . . ."

It is our separateness that defines our responsibilities. It is our interdependence that provides our strength.

Thank you for this opportunity to share some thoughts with this Committee. As Congress begins its evaluation of its own role in our system of government, the Judiciary is pleased to participate in the process.

ATTACHMENT

CHAIRMEN OF THE COMMITTEES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES AND THE EXECUTIVE SECRETARIAT

March 1993

NOTE: An abbreviated statement of each committee's jurisdiction is provided below. The full statement of jurisdiction can be found in the JUDGES' MANUAL, Chapter I, Exhibit B, and is also available upon request to the Administrative Office. Staff support for the committees is provided by the Secretary of the Conference, who is also the Director of the Administrative Office of the United States Courts. An Executive Secretariat has been established within the agency for this purpose, consisting of senior members of the Administrative Office's professional staff who dedicate all, or a substantial portion, of their time to the work of the Judicial Conference and its committees. The Executive Secretariat function is coordinated by the Judicial Conference Secretariat.

EXECUTIVE COMMITTEE: The senior executive arm of the Conference.

Honorable John F. Gerry
U. S. District Court, New Jersey

Karen K. Siegel
Chief, Judicial Conference Secretariat (202-273-1140)

COMMITTEE ON THE ADMINISTRATIVE OFFICE: To perform general oversight of Administrative Office operations.

Honorable Thomas P. Jackson
U. S. District Court, Washington, D. C.

(Vacant)
Deputy Director (202-273-3007)

Cathy A. McCarthy
Chief, Management Coordination (202-273-1150)

COMMITTEE ON AUTOMATION AND TECHNOLOGY: To coordinate the automation program in the courts and to improve automated resources available to the federal judiciary.

Honorable Rya W. Zobel
U. S. District Court, District of Massachusetts

Roy L. Carter
Assistant Director, Automation and Technology (202-273-2300)

COMMITTEE ON ADMINISTRATION OF THE BANKRUPTCY SYSTEM: To perform general oversight of the federal bankruptcy system.

Honorable Lloyd D. George
U. S. District Court, District of Nevada

Francis F. Szczebak
Chief, Bankruptcy Division (202-273-1900)

COMMITTEE ON THE BUDGET: To assemble and present to Congress the budget for the judicial branch.

Honorable Richard S. Arnold
U. S. Court of Appeals, Eighth Circuit

Raymond A. Karam
Assistant Director, Finance, Budget and
Program Analysis (202-273-2000)

Dewey R. Heising
Chief, Budget Division (202-273-2100)

COMMITTEE ON THE CODES OF CONDUCT: To provide advice on the application of the *Code of Conduct for United States Judges* and other judicial branch codes of conduct and Titles III (relating to gifts to federal employees) and VI (relating to limitations on outside earned income, honoraria, and outside employment) of the Ethics Reform Act of 1989, as amended.

Honorable R. Lanier Anderson
U. S. Court of Appeals, Eleventh Circuit

R. Townsend Robinson
EEO and Special Projects (202-273-1260)

Marilyn J. Holmes
Assistant General Counsel (202-273-1100)

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: To study and make recommendations on matters affecting case management, jury administration, and other subjects as assigned by the Executive Committee.

Honorable Robert M. Parker
U. S. District Court, Eastern District of Texas

Duane R. Lee
Chief, Court Administration Division (202-273-1530)

COMMITTEE ON COURT AND JUDICIAL SECURITY: To oversee all court and judicial security matters.

Honorable C. Arlen Beam
U. S. Court of Appeals, Eighth Circuit

William A. Cohan, Jr.
Chief, Court Security Office (202-273-1517)

COMMITTEE ON CRIMINAL LAW: To oversee the federal probation system and to review legislation and other issues relating to the administration of the criminal law.

Honorable Vincent L. Broderick
U. S. District Court, Southern District of New York

Donald L. Chamlee
Chief, Probation Division (202-273-1600)

COMMITTEE ON DEFENDER SERVICES: To oversee the provision of legal representation to defendants in criminal cases who cannot afford an adequate defense.

Honorable Gustave Diamond
U. S. District Court, Western District of Pennsylvania

Theodore J. Lidz
Chief, Defender Services Division (202-273-1670)

COMMITTEE ON FEDERAL-STATE JURISDICTION: To analyze proposed changes in federal jurisdiction and to serve as liaison with state courts.

Honorable Stanley Marcus
U. S. District Court, Southern District of Florida

Karen M. Kremer
Office of Legislative and Public Affairs (202-273-1120)

COMMITTEE ON FINANCIAL DISCLOSURE: To supervise the filing of financial disclosure reports by judicial officers and employees.

Honorable Julian A. Cook, Jr.
U. S. District Court, Eastern District of Michigan

Raymond A. Karam
Assistant Director, Finance, Budget,
and Program Analysis (202-273-2000)

COMMITTEE ON INTERCIRCUIT ASSIGNMENTS: To assist the Chief Justice in assigning and designating judges for service outside their circuits.

Honorable Thomas F. Hogan
U. S. District Court, District of Columbia

John E. Howell
Chief, Article III Judges Division (202-273-1860)

Marion A. Ott
Office of the Judicial Conference
Secretariat (202-273-1140)

COMMITTEE ON THE JUDICIAL BRANCH: To address problems affecting the judiciary as an institution and affecting the status of federal judicial officers.

Honorable Deanell R. Tacha
U. S. Court of Appeals, Tenth Circuit

John E. Howell
Chief, Article III Judges Division (202-273-1860)

COMMITTEE ON JUDICIAL RESOURCES: To consider all issues of personnel administration, including the need for additional Article III judges and support staff, and to supervise the operation of statistical systems and the development of work measurement formulas.

Honorable Carolyn R. Dimmick
U. S. District Court, Western District of Washington

William J. Lehman (Acting)
Assistant Director, Administration
and Human Resources (202-273-1200)

David L. Cook
Chief, Statistics Division (202-273-2240)

Charlotte G. Peddicord
Chief, Human Resources Division (202-273-1270)

COMMITTEE ON LONG RANGE PLANNING: To coordinate the planning activities of the judiciary.

Honorable Otto R. Skopil, Jr.
U. S. Court of Appeals, Ninth Circuit

Peter G. McCabe
Assistant Director, Judges Programs (202-273-1800)

Charles W. Nihan
Chief, Long Range Planning Office (202-273-1813)

COMMITTEE ON ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM: To provide oversight of the federal magistrate judges system.

Honorable Wayne E. Alley
U. S. District Court, Western District of Oklahoma

Thomas C. Hnatowski
Chief, Magistrates Division (202-273-1830)

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS: To consider petitions for review of final actions by circuit judicial councils on complaints of misconduct or disability of federal judges, and to review legislative proposals on judicial discipline and removal.

Honorable Levin H. Campbell
U. S. Court of Appeals, First Circuit

William R. Burchill, Jr.
General Counsel (202-273-1100)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE: To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Honorable Robert E. Keeton
U. S. District Court, District of Massachusetts

Peter G. McCabe
Assistant Director, Judges Programs (202-273-1800)

ADVISORY COMMITTEE ON APPELLATE RULES

Honorable Kenneth F. Ripple
U. S. Court of Appeals, Seventh Circuit

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Honorable Edward Leavy
U. S. Court of Appeals, Ninth Circuit

ADVISORY COMMITTEE ON CIVIL RULES

Honorable Sam C. Pointer, Jr.
U. S. District Court, Northern District of Alabama

ADVISORY COMMITTEE ON CRIMINAL RULES

Honorable Wm. Terrell Hodges
U. S. District Court, Middle District of Florida

ADVISORY COMMITTEE ON EVIDENCE RULES

Honorable Ralph K. Winter
U. S. Court of Appeals, Second Circuit

COMMITTEE ON SPACE AND FACILITIES: To oversee all space and facilities issues affecting the federal judiciary.

Honorable Robert Broomfield
U. S. District Court, District of Arizona

William J. Lehman (Acting)
Assistant Director, Administration
and Human Resources (202-273-1200)

Gerald P. Thacker
Chief, Space and Facilities Division (202-273-1230)

COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT: To study and report on the administration and operation of the Criminal Justice Act of 1964, and to make recommendations for legislation and for procedural or operational changes in the administration of the CJA program.

Honorable Edward C. Prado
U. S. District Court, Western District of Texas

Theodore J. Lidz
Chief, Defender Services Division (202-273-1670)

AD HOC COMMITTEE ON GENDER BASED VIOLENCE: To monitor Congressional consideration of the proposed Violence Against Women Act of 1991 and, in coordination with the Executive Committee, communicate the Conference position to members of Congress.

Honorable Stanley Marcus
U. S. District Court, Southern District of Florida

Karen M. Kremer
Office of Legislative and Public Affairs (202-273-1120)

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