

Congressional Investigations:

SIGNIFICANCE FOR THE ADMINISTRATIVE PROCESS

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ALTHOUGH the subject of this paper can hardly be called trivial, it is interesting that no full-scale treatment of it is available. Perhaps the reason lies in the fact that the impact of the investigative power of Congress on the executive branch tends to get lost in the general commotion caused by the separation of powers. When there are many devices and opportunities for recording friction and imposing censure, no one of them is very likely to stand out by itself. Even though it may be no overstatement to say that the congressional power of inquiry "has been a fountainhead of dissension between the executive and legislative branches,"¹ most studies of legislative-executive relations deal with the investigative function as one among a considerable number of pertinent factors.²

A detailed analysis of congressional investigations of administrative activities would be a welcome contribution. There is a great shortage of accounts of particular phases of the legislative process, bringing together in a systematic way the rich but scattered supply of case materials. A comprehensive study of the investigative method in its application to the executive branch may be expected to cast additional light on the intermeshing of the legislative and the administrative processes; on the degree to which this intermeshing is governed in its characteristics by the changing circumstances of our national life and by the balance of personalities; and on the corresponding changes in the use to which the investigative power is put in any given period.³

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¹ These are the words of an able member of the United States Senate. Ives, *In Place of Congressional "Circuses,"* *N.Y. Times Magazine* 20 (Aug. 20, 1950).

² Consult, e.g., Key, *Legislative Control*, in *Elements of Public Administration* 339 (Morstein Marx ed., 1946).

³ These conclusions are suggested in an appraisal of the investigative power based largely on the evidence of the thirties. McGeary, *The Developments of Congressional Investigative Power* (1940).

Needless to say this kind of study would require the space of a monograph, and possibly of several. Nothing like that could be attempted here. Instead it is proposed to present in a rather general way three aspects of the topic: (1) the need for facts in governmental action and the role of the investigative function in meeting this need; (2) the operation of the investigative power in relation to administrative responsibility; and (3) the operation of the investigative power in relation to legislative responsibility.

Administrative Means of Getting at the Facts

One of the common features of contemporary government throughout the world is the continuing expansion of public functions. To some, this tendency bespeaks the inevitable demise of free society. To others, the widening scope of governmental responsibility is the only means by which free society can be made both reasonably secure and tangibly meaningful to the great body of citizens. Whatever the point of view, when government comes to affect individual and group enterprise in so many ways, it cannot afford to act blindly. It must inform itself in sufficient detail not only of social, economic, scientific and technological developments but also of the effects of its own actions upon these developments. Thus, by sheer necessity, as governmental responsibilities increase, a broadly corresponding growth occurs in what may be called the government's intelligence function⁴—the organized collection and evaluation of countless facts and figures, including such widely different matters as the relationship between taxation and private investment, the weaning habits of mothers, the spread of forest pests and the behavior of cirrus clouds.

Two facts alone would demonstrate the growth of the government's intelligence function during the past half-century. The first is the striking increase within the civil service of men and women trained for the professions. The second is the no less noticeable sprouting of staff units, in individual agencies as well as on the level of the Chief Executive, which are occupied with the sifting and weighing of data for use in policy decisions. A large part of these data accrue as a by-product of the administrative process. Another part flows to individual agencies from the public in response to official inquiries.⁵ The large mass of governmental publications

⁴ I have used this term previously (as have others). Morstein Marx, *The Social Function of Public Administration*, in *Elements of Public Administration* 98, 114-15 (Morstein Marx ed., 1946).

⁵ In the federal government the Federal Reports Act of 1942, 56 Stat. 1078 (1942), 5 U.S.C.A. § 139(a) (Supp., 1949), requires the approval of such inquiries by the Bureau of the Budget, which acts as the President's staff agency for matters of general management in order to obtain co-ordination and to keep to a minimum the burden on the public.

by which needed specialized knowledge is furnished to various parts of the public and the advance of government research to a billion-dollar enterprise are also indicative of the growth of the government's intelligence function.

In other words, the "service state"⁶ of today is not only "big government" but also better-informed government. Of course, just as military intelligence is capable of fateful blunders, so better-informed government does not mean wise government. But there is little doubt that the volume of factual information at the command of present-day government is vastly larger than it was at the turn of the century. And because much of this information accumulates automatically in the work of administrative agencies, the executive branch has become a prime source of special knowledge on every subject of interest to government.

Legislative Means of Getting at the Facts

In some respects, legislators build up a store of essential information in very much the same way as do administrative agencies. Committee service, especially when it continues for some time, makes many a member into something of an expert. But lawmakers usually lack effective means of organizing for themselves the kind of machinery for reference that in administrative agencies is provided by planning units on the one hand and by library and record staffs on the other. In addition, there is the relentless pressure of time. Administrative officials suffer from it too, but they generally know how to make the most of constant briefing by subordinates, who are able to summarize the steady flow of departmental intelligence. Members of Congress do not have at their disposal a comparable briefing service, and they are often disinclined to become dependent on such staff assistance as is available to them.⁷ They absorb much of their knowledge by ear.

However, organized staff work on the legislative level has recently made great progress, in particular as a consequence of the Legislative Re-

⁶ The trend "toward the service state," in the words of a recognized authority, became conspicuous in the administrative evolution in the United States during the first three decades of the present century. White, *Trends in Public Administration* 341 (1933).

⁷ In this matter, legislators, quite naturally, reflect their own earlier occupational backgrounds. Much of the country's recruitment for political functions is from among men and women who are accustomed to do nearly all of their work by themselves. Hence, members of Congress often find it difficult to use a professionally trained staff, quite aside from establishing relationships of confidence in a business in which confidence is highly valued. Not a few legislators are given to speaking skeptically of the "waste of overstaffing." The staff group built up in his office on his own initiative by Senator Herbert H. Lehman of New York is a very exceptional thing.

organization Act of 1946.⁸ The Legislative Reference Service in the Library of Congress has succeeded in assembling an able body of specialists in different fields, whose work has further strengthened the government's intelligence function. Committee staffs and personal staff assistance to individual legislators have contributed to placing legislation on a sounder basis.⁹ As a result, Congress is now better equipped than it was before to appraise independently the information proffered by interest groups and lobbies or presented to it in reports and testimony under auspices of the executive branch.

Staff development in Congress obviously is not intended to duplicate staff work done in the administrative agencies. Rather, congressional staffs are to enable legislators to test and use for their own purposes the information that is at their beck and call in the executive branch. The role of the presidency as a source of proposed programs of government action, submitted for consideration by Congress, is not being minimized. This role, alluded to in the Constitution, was first defined in specific terms by the Budget and Accounting Act of 1921,¹⁰ which charged the President with the preparation for use by Congress of the budget—an annual comprehensive work plan for the federal government as a whole. At the same time that the Legislative Reorganization Act gave added impetus to congressional staffing, the Employment Act of 1946 broadened the President's function of program recommendation by making it his duty to lay before Congress an annual economic report.¹¹

One incidental but important benefit of better congressional staffing is the marked increase in informal contacts between the legislative and the executive branches. A member of Congress, especially if he does not belong to the party of the President, may often find it inopportune to prevail upon an administrative agency for information he needs. A staff specialist in his office, talking to a professional colleague in the agency, is less inconvenienced by political distance. He may see his counterpart on the

⁸ 60 Stat. 812, 834 (1946), 2 U.S.C.A. § 72a (Supp., 1950).

⁹ It should not be assumed that the relationships between old-line committee clerks and the members of the legislator's intimate entourage on the one hand and the professionally trained newcomers on the other are always close or cordial. Nor should it be assumed that problems in this area are unknown in the administrative agencies. The increased supply of professional staff assistance in government has not generally been accompanied by corresponding experience in the best use of available staff resources.

¹⁰ 42 Stat. 20 (1921), 31 U.S.C.A. § 1 (1927).

¹¹ 60 Stat. 24 (1946), 15 U.S.C.A. § 1022 (1948). All three of the principal annual messages of the President follow each other closely at the opening of the regular session of Congress: the State of the Union message, the economic report and the budget message accompanied by the budget document.

administrative side in the activities of professional associations to which both are likely to belong. Free exchange on the staff level yields mutual returns in useful knowledge. Moreover, the professional bond in many instances may prove stronger than the pull of institutional location. On either side of the constitutional fence, professional staff members will appreciate the delicacies of informal exchange of information, but in a large number of cases no such delicacies are involved. It is then simply a matter of being helpful in sharing data that happen to be available at one or another place. Nor is there any collusion about this process, because it could not go on without a measure of encouragement a step above.¹²

As contemporary government is better-informed government, so Congress today has substantially more information at its service than it had a few decades ago. A special pleader intent upon misleading a legislative committee in matters of fact would be on a difficult and risky errand. An administrative official embarking upon such a venture would know that few in his own agency could be trusted to grant him extenuating circumstances. There is so much competition for the ear of Congress and so much enlargement of its auditory mechanism that nobody can hope to turn the legislative mind this way or that way simply by some adroit mauling of facts. Congress has greatly reinforced itself against falling prey to misinformation.

Agencies as Targets

Administrative agencies, in particular, know that even an occasional fib may carry with it drastic penalty. Appropriations committees make short work of an agency they find unworthy of their confidence. Legislative proposals in which the agency is vitally interested may not get anywhere if the committee dealing with the subject thinks little of the agency's veracity.¹³ The weight of emphasis in the conduct of all administrative business is definitely on the side of being on the best of terms with Congress, especially the committees closest to the agency's concerns, including particular members of great influence and even committee clerks. Hence when the President, looking at the affairs of the nation in the large, feels it necessary or desirable to fling a challenge at the legislative body, administrative agencies, preoccupied with their long-range programs, are

¹² Staff collaboration between the legislative and the executive branches may also be on a more formal basis, especially at the instance of a congressional committee working on important legislative proposals, including those not expressly sponsored by the executive branch.

¹³ Legislative measures originating within the executive branch as well as all proposed executive orders must be cleared for the President by the Bureau of the Budget.

more likely than not to cringe at the thought of battle. Getting along with Congress is a motto so plainly inscribed above administrative portals that being "good" in the eyes of the most immediately influential lawmakers becomes almost second nature. It is not being argued here that being "good" in this sense coincides always with the pursuit of the public interest.

Formal investigative action by Congress, in short, is but one arrow in the well-stocked quiver of legislative surveillance over administrative conduct. The curious, no doubt, might like to know just what prompts the archer to pick one arrow in preference to others. Of course, there is no single answer. But one thing can be said generally. Formal investigative action, in the nature of the process, always buys a larger public audience than even the most merciless grilling and spanking of administrative officials before a subcommittee of the House or Senate Appropriations Committee.¹⁴ A larger public audience may be deemed beneficial when it is hoped to mobilize public opinion for administrative reforms. But newspaper headlines are also bread and butter for members of Congress eager to advance their personal standing. Although depending ultimately on the state of public thinking if not on his own sense of responsibility, it may be very profitable for a legislator, in a time of deeply felt international tension, to call for an investigation of treasonable influences in as many agencies as he might find listed in the *United States Government Manual*. Perhaps more properly, in a time of national emergency, lawmakers will see reasons for investigating such aspects of the governmental defense effort as may seem to be in need of scrutiny before the grandstand of the nation.*

Not surprisingly, the arrow of investigation may be placed into the bow or pushed back into the quiver by hands other than those of the archer. When there is a high degree of accord between Congress and the President, he or some of the departments will not encounter insurmountable obstacles in co-ordinating the investigative power with the goals of the political program.¹⁵ The findings of a legislative inquiry can help to

* Consult Cook, Senate Preparedness Subcommittee, page 634 *infra*.

¹⁴ The publicity aspect of congressional investigations and the undesirable consequences inseparable from it are stressed in Glassie and Cooley, *Congressional Investigations—Salvation in Self Regulation*, 38 *Geo. L.J.* 343 (1950).

¹⁵ For some comment on this point and the evidence of the thirties, consult McGeary, *op. cit. supra* note 3, at 34 et seq. The general condition referred to in the text is far from common. On the other hand, obviously no department is coldly neutral when a congressional investigation either sits on its neck or conversely appears to bolster the department's position by sympathetic moves. In the first case the department will try to corral its friends

build up public sentiment for governmental action favored by the President. Or, when there is a high degree of accord between a congressional committee on the one side and a particular agency or an intransigent faction within an agency on the other, it is within the realm of possibility that the investigative power comes to the fore as the protector of friends and the scourge of foes. Of course, it is an old story that regulation and promotion live close together. Agencies adept at being "good" may earn more than ordinary rewards from the controlling committee by their skill and devotion.

The Theory of Administrative Responsibility

In a democratic society, it is a matter of principle that administrative agencies must answer for their plans and actions. Accountability keeps the public services from turning into a self-willed bureaucracy. The prime means of achieving accountability is a unified executive branch whose head comes into office by the electorate's decision. As Chief Executive, he secures administrative accountability through his power of direction, thus assuming responsibility before the legislative body as well as the voters.

That, in a nutshell, is the constitutional theory of public administration. The practice looks different in many ways. The legislative body too often seems to vanish behind the actions of its committees. The Chief Executive too often seems to lack effective discipline over his subordinates. Time and again the legislative and the executive branches seem to give way to power combinations formed by particular interest groups with an individual committee on the one side and its departmental counterpart on the other. Thus it becomes practically impossible for the Chief Executive to carry out his responsibility to the legislature and the electorate.¹⁶

The result is not an inevitable consequence of the separation of powers. Even though the legislative and the executive powers are divided, responsible government requires a considerable degree of co-operation between them. The necessary link can only be provided by a properly organized party system. We do not possess such a party system now.

Short of such a party system, legislative-executive relations tear apart into a thousand separate cross-connections. The department head may spend more time keeping his congressional fences in good repair than fol-

in and out of Congress. In the second case the department will help wherever it can. See also McGeary, *Historical Development*, page 425 *supra*.

¹⁶ For fuller discussion, consult Price, *Democratic Administration*, in *Elements of Public Administration* 72, especially at 78 (Morstein Marx ed., 1946); Leiserson, *Political Limitations on Executive Reorganization*, 41 *Am. Pol. Sci. Rev.* 68 (1947).

lowing the wishes of the President. The bureau chief, with backing from a legislative committee, may let things go with barest allegiance to departmental policy. Congressional committees, in turn, may go their own ways. The relationships between Congress as a whole and the President become part of a badly tangled web.

Difficulty of Internal Control in Congress

Senator Irving M. Ives of New York has recently called the investigative function "one of Congress' most valuable legislative aids."¹⁷ This appraisal is not likely to arouse dissent, for a legislature without power to probe and inquire is like a reed which any breeze can bend. It is an entirely different question, however, whether Congress is so constituted as to give institutional direction to the exercise of the investigative function.

Unfortunately, Congress has no reliable machinery for asserting its own institutional position in its internal operations. There is no committee on the legislative program. The nearest approximation is the Joint Committee on the Economic Report, created by the Employment Act of 1946 to consider the President's economic reports and to make recommendations on economic policy for the benefit of the working committees in each house.¹⁸ But the relationships between the Joint Committee and other committees have continued to be rather tenuous; as things stand, it would be a miracle if it were otherwise. Another approximation of a committee on the legislative program might perhaps be seen in the appropriations committees acting on the government's annual work plan submitted in the form of the President's budget. But it is precisely as sources of general legislative policy that the appropriations committees have made their least conspicuous contribution.¹⁹ The reasons, again, are obvious.

Realists—those who know only yesterday—will probably laugh off the very idea of a committee on the legislative program. In the context of current congressional practice the idea seems preposterous indeed. But the idea supplies a good vantage point to spot the faulty deployment of legislative strength. With almost nothing at hand to bring Congress as a whole to bear upon its internal operations, the institutional position of the legislature is manipulated by freely congregating majorities without durable bonds, defined working agreements, or a broader purpose. This spectacle

¹⁷ Ives, *op. cit.* supra note 1. Consult Fulbright, *Significance for the Legislative Process* page 440 supra.

¹⁸ 60 Stat. 25 (1946), 15 U.S.C.A. § 1024 (1948).

¹⁹ For an informative recent case study with respect to the country's military policies, consult Huzar, *The Purse and the Sword* (1950).

one might call the technique of informal or unbound coalition, cutting straight through party lines. Such coalitions, mindless of party labels, are far too fluid to serve as organizers of Congress, but they are likely to become possessed with their own sense of political convenience.

As organizers of Congress the parties fall quite short of satisfactory performance. Without a democratically developed and hence generally accepted party program to govern each party's plan of operations in the legislature, party-policy committees face formidable roadblocks in giving guidance for concerted action. Caucus decisions become pious pronouncements when they cannot pretend to be in the nature of tactical implementation of common party strategy. Left very much on their own resources, members of Congress find it difficult to set general policy against the special interests that press upon them through their local constituencies. The representative's vaunted independence of conscience, so greatly fostered by looseness of congressional party organization, thus constantly invites dependence on organized external forces which seek to lead him by the hand. These forces, by and large, view all general policy with misgivings, for the simple reason that special objectives have freer play when the restraining influence of general ends is not felt.

The Utility of Investigation of Administrative Behavior

Under these circumstances it would be a sad thing if the investigative power of Congress were actually "the strongest weapon against corruption in executive departments."²⁰ But perhaps the phrase is ambiguous. Certainly when administrators are able to slam the door in the face of a legislature anxious to inspect the dirty linen hidden somewhere, bureaucratic self-sufficiency and even fiscal laxity will have a favorable climate. The right of Congress to inform itself about administrative conduct is an important right. One may grant readily that awareness by administrative agencies of the very presence of this right will have a wholesome effect, even though it is not easy to measure the effect in concrete terms.

On the other hand, suspicion of corruption in the usual sense of the word is today a very small worry in the attitude of Congress toward the executive branch, if one may judge by the contents of the *Congressional Record*.²¹ Administrative ethics have their roots far less in fear of disclosure

²⁰ Glassie and Cooley, *op. cit.* supra note 14, at 345. The authors suggest that executive departments are "notoriously lax in policing themselves." *Ibid.* Perhaps they detract from this contention unintentionally by citing as supporting evidence one reference to the daily output of a Washington columnist (Drew Pearson).

²¹ That there is increasingly less ground for such worry is also indicated in the annual reports of the Comptroller General.

and punishment than in professional outlook and a philosophy of service.²² In a career establishment, those who seek personal enrichment by reaching around legal prohibitions know that they must reckon with the hostility of all of their professional associates. This is much more discouraging to speculation than the possibility of detection by congressional investigation.

When the decision to shoot the arrow of investigation is seldom the outcome of an institutional position taken by Congress as a whole in furtherance of its legislative goals; when the relationship of this decision to the legislative program often finds little attention on the floor; when the decision, for all practical purposes, may be that of only a few members who are neither the best spokesmen for their respective parties nor the voice of Congress at large—then it is very hard to correlate the aims of the investigation with administrative responsibility. Executive officials, far from feeling properly chastised, either are aroused to moral fervor or fatalistically bemoan the evil gale as something beyond point and purpose. In these responses they may in fact get not a little support from good friends in Congress, who sometimes do not mind holding hands with the administrative underdog in public while the rumpus goes on. Conversely, the prime movers of the congressional investigation may get many a cue by courtesy of political friends within the administrative agency that is being investigated. With so much perfection in government statistics, it is too bad that statistical data on these matters are lacking.

At least one legal problem arising in this area is aggravated by weak institutional control over congressional investigators: the privilege occasionally claimed by the executive branch in refusing to submit documents and other papers to a congressional committee.* The state of law is perhaps adequately described by saying that the controversies over this privilege are "unresolved."²³ And well might they so remain. For it is rather obvious that nobody likes to put his head into the mouth of a highly temperamental lion. But it would be wrong to assume that the claim of privilege with regard to administrative records stems only from the natural urge of self-protection. There is also fear on the part of officials with a strong sense of responsibility that surrender of certain kinds of docu-

* Consult McGeary, *Historical Development*, page 425 *supra*.

²² For further discussion, consult Morstein Marx, *Administrative Ethics and the Rule of Law*, 43 *Am. Pol. Sci. Rev.* 1119 (1949).

²³ Glassie and Cooley, *op. cit. supra* note 14, at 353 n. 41. A defense of the privilege to withhold documents is offered in Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 *Fed. Bar J.* 103 (1949). See also *Government Privilege against Disclosure of Official Documents*, 58 *Yale L.J.* 993 (1949); *Discovery of Government Documents under the Federal Rules*, 18 *Univ. Chi. L. Rev.* 122 (1950).

ments to congressional probers may be equal to public disclosure. Here, once more, the weakness of control in Congress is a potent consideration.

Variety of Motives for Investigations

If it did not play havoc with language, one might divide the motives for congressional investigations of administrative conduct into those which are objective and those which are subjective. The objective ones would relate to general public ends—to stop mismanagement; to overcome lag-gard attention to important programs; to show up conditions in administration that might need organizational or procedural reform; to cause an agency to do the right thing, as the sponsors of the investigation conceive it; to expose weak departmental leadership; to look into matters of fiscal propriety; or simply to cut down some people who seem to be getting too big for their breeches.

The subjective motives run on a different scale; they relate to special personal ends. For instance, a lawmaker may be eager for a chance of getting even with an administrator he happens to detest. Or an investigation may soften up an agency that has refused to play ball with a particular interest with which the legislator sees very much eye to eye. Or, for similar reasons, he may hope to knock some teeth out of the law which the agency is enforcing. Then too, re-election may be around the corner, and he may feel that his estate in Congress needs a boost. As one student of the subject observes, "perhaps no swifter escalator to national prominence" exists "than the direction of an important inquiry."²⁴

The motives here called objective and subjective keep close company with one another. The objective ones provide a protective shield for the subjective ones. The individual legislator, indeed, may not be able fully to account for the diversity of motives. He shares this difficulty with other mortals, and his difficulty is made greater by the fact of his elevation on the political stage.²⁵ It is natural for him to be concerned with *all* of the effects of the particular investigation, including those affecting his own political fortunes in a personal way. When membership in a legislative body is a highly individualized business, it is not astonishing that personal considerations gain an emphasis which is out of proportion to public ends. It is easy to pass disdainful moral judgment, but it is much harder to put such judgment on a secure institutional foundation. The only hope for a practical

²⁴ McGeary, *op. cit.* supra note 3, at 119. Consult Voorhis, *Inner Workings*, page 455 supra.

²⁵ The range of pertinent factors is explored with great skill in Lasswell, *Psychopathology and Politics* (1930). Subsequent amplification by others has not carried the matter much beyond this study.

check on excessive concern with personal interest lies in reinforcement of institutional arrangements designed to increase the weight of public purposes.

Lack of Commonly Accepted Institutional Objectives

It has been suggested earlier that because of the present condition of the party system there is a marked deficiency of internal congressional authority. This deficiency, as might be expected, hampers the legislative body in committing itself to the pursuit of commonly accepted institutional objectives. Administrators who set out to live by the word of Congress are bound to discover to their dismay that the word of Congress is in fact many words, with little synchronization of voices. As a result, when administrative officials do right by some voices they are likely to do quite wrong by others.²⁶

What happens when legislative concern with administrative performance lacks general orientation? One answer was given recently by a thoughtful member of Congress, who brought himself to the reluctant conclusion that "since World War II Congressional probes have slipped to a new all-time low in public disfavor."²⁷ Perhaps this suggestion is unduly influenced by fresh instances painfully remembered. At least it appears quite possible that careful historical analysis might reassure us on an equally uncomfortable past. Be that as it may, there is undoubtedly room for the question of the origin of an unsatisfactory state. On this point, our legislative authority says, "[T]he chief cause of the general disrepute into which Congressional inquiries have fallen . . . is the fact that the Congress itself has allowed serious abuses to permeate the entire investigative process."²⁸

Not a few other astute observers in and out of Congress have fixed the blame in the same manner. But such an allocation of responsibility has a somewhat artificial touch. For what is Congress when spoken of as an agency that allows or disallows? Congress appears here as the equivalent of the man who wasn't there. The abuses it is charged with allowing are abuses that flourish because of congressional incapacity for policing itself. In the light of the preceding discussion, that incapacity cannot be understood as the kind of sloppy disregard of consequences which to moralists is the mark of weak character. Incapacity for self-policing is but one mani-

²⁶ For a retracing of these difficulties in a critical area of public policy, consult Dahl, *Congress and Foreign Policy* (1950); McCamy, *The Administration of American Foreign Affairs* (1950).

²⁷ Ives, *op. cit.* supra note 1.

²⁸ *Ibid.*

festation of the difficulty which confronts Congress in attaining the necessary degree of institutional identity, of being Congress rather than so many senators and so many representatives.

The matter would not be worth mention if the difference in congressional anticipation were only a necessary part of that honorable theorem which places responsibility for government on the one side and responsibility for opposition on the other. In a diversified society, the necessary degree of consent in support of public policy must be hammered out in free competition of interests and ideas. No course of policy is ever sanctified as the only one. Disagreements yield to make room for consent, but they do not disappear. Like watchful dogs, they stay around the yard. The organized expression of such disagreements is the essential job of the political opposition. The opposition is not there just to bark; it is there to bite, too. In bark and bite the opposition is vital to resourceful and responsible government. Administrators who know their place in the political system never have reason to complain about the bark and bite of a responsible opposition.

But a responsible opposition is one of party unified by program. The effects of opposition on administrative conduct are vastly different when the negative is carried by a loose conglomeration of lawmakers whose agreements do not far exceed those one might discover among the customers of a chain store. Moreover, when this is the state of opposition, the legislative majority is also apt to be quite heterogeneous. Administrators who like to look upon Congress as a board of directors are then driven to the awkward conclusion that the board of directors has been replaced by a stockholders' meeting.

Add now another problem—the gulf a legislator has to ferry across in seeking to understand the technical intricacies of the administrative process. Individual members of Congress, it is true, may gain much information about it, if their interests so prompt them. But the down-to-earth skepticism toward all experts which flowers in Congress is not sympathetic even to the deliberate use of congressional expertise. In organizing an investigation of administrative activities, little importance is usually attached to the question of the individual member's special knowledge of administrative organization and procedure. Perhaps a case can be made for intentional choice of members who will show keener curiosity and sharper grasp just because their minds are not dulled by familiarity with the methods of conducting administrative business.

In any event, both in point of view and in yardstick of measurement legislators and administrators tend to stand apart when they try to come to

judgments in detail about what an agency ought to do and what not, and how it ought to do it and how not. To some extent, these differences are the contrasts one might expect to find between the accused and the accuser. But that is considerably less than the whole story. There is also the great difference between the occupational worlds of legislators and administrators,²⁹ besides the obvious difference between the backseat driver and the one who faces the traffic behind the steering wheel.

The influence of these differences upon congressional investigations of administrative conduct can be reduced in great measure when the legislative body reflects a reasonably well consolidated point of view toward the administrative function. Then the exercise of the investigative power can be held more closely to commonly accepted institutional objectives of the legislative branch. Then congressional surveillance over the executive branch is kept more easily on the track of constructive effort. Then the results may be expected to redound more often to the good of administration.

There has never been a dearth of helpful proposals to press the exercise of the investigative power into a procedural mold.³⁰ Nobody would want to minimize the unquestionable value of orderly procedure in the handling of public business. Nobody would seriously doubt the need for procedural safeguards in the investigative process not only of crucial individual rights but also of effective fact-finding in general. But when everything is said and done, one is still left face-to-face with the condition of internal organization in the legislative body, which, it is being submitted here, is equal to the condition of congressional party organization. Justice, lawyers tell us, is the product of both judicial procedure and judicial temperament. Similarly, what we need in congressional investigations is both respectable processes and an attitude that places general public ends above special personal ends. This kind of focus does not emerge unless the parties succeed in bringing forth programs that gain recognition among the congressional party membership as common plans for the attainment of general public ends.

Decreasing Importance of Investigating Administrative Conduct

Short of a reformation of the party system, which cannot be said to be in immediate prospect, congressional inquiries into the business of the

²⁹ Leiserson's observations on the differences between Congress and the executive branch with respect to administrative reorganization are very much to the point in connection with the problem here referred to. Leiserson, *op. cit. supra* note 16.

³⁰ Some of these proposals of more recent vintage may be found in Glassie and Cooley, *op. cit. supra* note 14. Consult Galloway, *Proposed Reforms*, page 478 *supra*.

executive branch appear likely to become less important as means of achieving accountability or of raising the standards of administration. This does not mean that investigations will be less frequent. Nor does it mean that the investigative function will lose importance as a source of harassment to the President as well as administrative officials or as a device to be manipulated for various ends in the great game of politics.

By and large, when administrative systems mature they likewise tend to acquire greater transparency, making it easier for outsiders to penetrate a defensive curtain of artificial fog.³¹ Another factor, as was indicated earlier, is the freer flow of information from administrative agencies to congressional committees as a result of legislative staffing. If there is something to be explained on higher authority, a telephone call from the chairman of any of the standing committees of Congress will cause the head of even the busiest department to scurry to "the Hill." What is more significant still, in most instances the needed explanation can be produced on such short notice, and the department head is free to scamper back to his desk after a few hours of interrogation, feeling a great deal better than when the summons came.

In addition, it is very probable that members of Congress will continue to feel less than confident in trying to tell administrators how to solve administrative problems. One recent illustration was the establishment by legislation of the Commission on Organization of the Executive Branch of the Government, popularly known as the Hoover Commission. This large-scale inquiry, under joint congressional-executive-public auspices but very much headed by a knowledgeable former President, kept itself at quite a distance from the political bargain counter and rather close to the facts. Thus the Commission managed to complete its assignment without giving anybody a chance to make personal capital of its findings and recommendations.

The contribution made by the Hoover Commission is significant for our subject from yet another angle. With administrative accountability regularly achieved by a variety of internal and external controls, there is correspondingly greater need for forward-looking inquiries than for backward-looking ones. As has been pointed out by students of the power of inquiry, investigations "have the same shortcomings as annual reports

³¹ As one aspect of the matter, it might be well to mention the progress made during the past decade in the methods of record management, which has drawn needed attention to the role documentation should play in the administrative process. A recent legislative approach to the subject is the Federal Records Act of 1950, 64 Stat. 583 (1950), 41 U.S.C.A. § 281 (Supp., 1951).

and appropriation hearings—they come too late.”³² At least they come after the event. The reference sometimes made in this context to British royal commissions³³ suggests the advantages to be expected from pointing the investigative function as often into the future as into the past. For such purposes the precedent of the Hoover Commission may invite organizational arrangements quite different from the usual investigating committee of Congress.

Investigations during the Emergency Period

The point was made earlier that there is a special place for the investigative function in periods when the government is called upon to enlarge its traditional structure with great rapidity and when government orders for all kinds of products pour all over the economy. In the current emergency, again, this kind of continuous congressional vigilance, so well remembered from the work of the Truman Committee in World War II, may come to assume new importance.* Such investigative effort, however, requires for its greatest effectiveness both considerable restraint on the side of publicity and self-glorification and much interplay with the agencies of the executive branch.

It has already been suggested that congressional investigations of administrative conduct on the familiar model might not become less frequent. As a matter of fact, when the nation is faced with adversity, legislative tempers flare on small provocation. This is merely the other side of the coin of political individualism in the congressional arena. There is no reason to expect a lack of investigative sideshows, all things remaining equal. But, temporarily at least, some factors will conceivably exert a dampening influence.

One of these, and perhaps the most important, is the informal embargo on excessive partisanship imposed by the stern demands of national crisis. When it comes to saving our skins we are all walking exhibits of bipartisanship. If past experience can be trusted to furnish guidance, even the executive branch is likely to turn bipartisan in many a corner. The presence of an emergency is likely to result in at least partial cessation of interparty hostilities. To the extent the investigative power is used as a weapon in this conflict, its use will diminish accordingly.³⁴

* Consult Cook, Senate Preparedness Subcommittee, page 634 *infra*.

³² Dimock and Dimock, *American Government in Action* 392 (1946). For a preceding special study, which has retained its place in the literature, consult Dimock, *Congressional Investigating Committees* (1929).

³³ Dimock and Dimock, *American Government in Action* 392 (1946).

³⁴ But it is not a peculiarly American phenomenon, of course. Interparty truces or all-inclusive coalitions in times of dire emergency are common experiences even in countries with a multiparty tradition.

Another very tangible possibility is an investigative monopoly successfully claimed by a single committee to exercise oversight with respect to all emergency activities. A committee of this kind, to repeat, tends to acquire characteristics of its own, setting it apart from the garden variety of investigation. Members of Congress, out of their own personal sense of responsibility, find it desirable on the whole to defer to a general committee of inquiry if the committee appears to be in competent hands.

One final factor is the matter of security requirements, real and imagined. The inevitable effect of such requirements is the containment of information. In this matter, the executive branch has something of an upper hand. The operative arm of government is closer to the point of action; it can therefore speak with an air of authority on what security requirements must be maintained in the interest of effective action. In the name of security it may keep even members of Congress at arm's length, feeling righteously that it must.

Likely Effects of a Stronger Party System

These speculations about the future are, one would hope, of a short-range character. What of the long-range development? After all that has been said thus far, the reader will be prepared for the conclusion that technical improvements in the organization and procedure of investigative action, though highly desirable, may not accomplish much. They hold little promise to change the essence of the thing, which is the state of internal congressional structure, or, still more specifically, the state of party management in the legislative body.

The question then is: What can be done to change the state of party management in Congress? This question, in turn, is tied up with the larger one of party organization in general. One answer has recently been outlined by a group of political scientists, who explored the subject for several years.³⁵ To put it in one paragraph is almost impossible, because political scientists seem to be allergic to brief answers. But the matter comes down to a set of proposals, for the most part within the range of autonomous action by both major parties, to increase their ability to act as parties in national terms. Suppose the membership of each party formed something like a partnership for accomplishing the commitments of the party program; suppose the members, as a rule, felt an obligation to the party by which they designate themselves politically; suppose to investigate or not to investigate were a matter of party decision—with

³⁵ Committee on Political Parties of the American Political Science Association, *Toward a More Responsible Two-Party System* (1950). This report is also available as a supplement to the September issue, 44 *Am. Pol. Sci. Rev.* (1950).

these conditions present there would be a steady hand to bring the investigative power to bear upon administration. Then the congressional majority, whether or not of the President's party, would be able to proceed on a line of consistency in relation to the party program. Then the majority could convey its position to the executive branch in a clear voice.