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CONGRESSIONAL REFORM: TOWARD A MODERN CONGRESS

Bruce R. Hopkins*

I. Introduction

“The interest of the [movants] seeking to intervene is . . . in not being deprived of information which would normally flow to them but for an intervening act of government restraining that flow.” The foregoing language is from a brief in support of a motion to intervene in a United States District Court case.¹ This was no ordinary motion to intervene, however, but was an unusual (albeit unsuccessful) attempt by representatives of one branch of the United States Government to intervene in a case on the side of a private party being proceeded against by officials of another branch of the Government. The petitioners were twenty-seven members of the United States House of Representatives, seeking to intervene in *United States v. The Washington Post Company*,² so as to be in a position to contend that a preliminary injunction should not be granted to enjoin the defendant newspaper from publishing materials from “History of U.S. Decision-Making Process on Vietnam Policy,” a classified Department of Defense task force study on the origins of the involvement of the United States in Vietnam.³

This abortive attempt by a handful of congressmen to intervene in a federal proceeding is one of many illustrations of the plight of the Congress in its efforts to obtain adequate and current information to competently deal with the policy questions confronting it. This struggle with the executive branch for information is well known to the most casual of observers, yet there is little indication that the legislative branch is making much headway in the competition. But what is truly striking about the congressmen’s brief for intervention is its candid admission that members of Congress, who under the United States Constitution are members of a branch of the federal government supposedly co-equal with the executive and judicial branches, are heavily reliant upon the public press and other general media for information required in attempting to carry out their official, constitutional functions. Thus, the aforementioned brief speaks of a “pressing public need for immediate access to matters directly and importantly affecting [the] ongoing process in Congress” and states that the “deliberations and actions [of the movants] in participating in the formulation of national policy are crippled

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1 Brief in Support of Motion for Intervention, *United States v. The Washington Post Company*, F. Supp. (D.D.C. 1971), reprinted at 117 CONG. REC. E6356-60 (daily ed. June 23, 1971). See also Brief of 27 Members of Congress as Amici Curiae, *New York Times Company v. United States*, 403 U.S. 713 (1971), reprinted at 117 CONG. REC. E6703-6 (daily ed. June 29, 1971). These cases are discussed at 57 A.B.A.J. 918-9, 926-7 (1971).

2 F. Supp. (D.D.C. 1971).

3 Portions of these documents were subsequently published, following unauthorized public disclosure. SHEEHAN, *et al.*, THE PENTAGON PAPERS (1971). Forty-three volumes were subsequently published by the U.S. Government. DEPARTMENT OF DEFENSE, UNITED STATES—VIETNAM RELATIONS 1945-1967 (1971).

and inhibited by not having highly pertinent information which is known to exist."⁴ For these and many other reasons, the legislative branch of the federal government is too often regarded as the "sapless branch."⁵

Bridging this "information gap" is one of the many goals of adherents of congressional reform. But lack of material information is only one aspect of the inadequacies of the Congress and is only one of many indications of the critical need for congressional reorganization and refurbishing. Congressional reform in general means nothing less than the overall revitalization of the legislative branch of the United States Government, a reconstruction of the House and Senate through the discard of anachronistic practices, and the adoption of twentieth-century procedures and utilization of contemporary techniques, to enable the Congress to effectively perform for modern-day America.

The legal profession has generally ignored the legislative branch, in preference to the presidency, the myriad federal departments and agencies, and the courts, in its endeavors to study and make recommendations for improvements in the structure of government. "Today's lawyer," wrote Professors of Law Charles B. Nutting and Sheldon D. Elliott, "even more than his professional ancestors, must know how to work with both the processes and the products of the legislative branch of government."⁶ Today's lawyer should also be familiar with developments surrounding the efforts, accomplished and proposed, to reorganize the institutions of statutory law-making, as part of an overall understanding of—if not appreciation for—the legislative process. George B. Galloway once asserted that "there are few things more important than an inquiry into the organization and operation of our national legislature and methods of improving its efficiency."⁷ This article, premised on that belief, is predicated on the thesis that congressional reform merits the attention and the ideas of the legal profession.

II. The Significance of Congressional Reform

The United States Congress is not, of course, completely in reliance upon the general information media for its information. Nor can it be accurately said that the Congress plays no meaningful role in our system of national government or has no substantive impact on the development of national policy. To the contrary, the underlying hypothesis of those who are seriously concerned with modernization of the Congress is that a competent, effective, and responsive federal government is heavily dependent upon a responsible—and adaptable—national legislature. Congress is, as the Committee for Economic Development declared, "the keystone in the governmental arch."⁸ But the Congress has

⁴ *Supra* note 1, at E6356.

⁵ The term "sapless branch" as applied to the Congress apparently originated with Kenneth Crawford. See *NEWSWEEK*, Aug. 5, 1963, p. 31. See also J. CLARK, *CONGRESS: THE SAPLESS BRANCH* (1964).

⁶ G. NUTTING, S. ELLIOTT, AND R. DICKERSON, *CASES ON LEGISLATION* xi (4th ed. 1969).

⁷ G. GALLOWAY, *THE LEGISLATIVE PROCESS IN CONGRESS* 645 (1953) (reprinted by permission of Thomas Y. Crowell Co., New York). Prof. Daniel J. Dykstra concurs with those "who feel that as a [legal] profession we have been remiss in our attention to legislative activities." Dykstra, *The History Of A Legislative Power Struggle*, 1966 *Wis. L. Rev.* 402, 403 (1966).

⁸ COMMITTEE FOR ECONOMIC DEVELOPMENT, *MAKING CONGRESS MORE EFFECTIVE* (1970) (by permission of Committee for Economic Development, New York).

abandoned much of its earlier power, has all too often been the mere attender to legislative details while the President exercises nearly the whole of national leadership, and has displayed an unhealthy inability—or, more accurately, unwillingness—to organize and function as a contemporary institution of government.

The decade of the 1960's witnessed among the American public the beginnings of a deterioration in respect for and faith in their national government. There has been a growing malaise, a creeping belief that the problems besetting the United States are too great for the government, as presently structured, to cope with and resolve. Collaterally, there has evolved a general disbelief of the national government, ranging from cynicism in the face of official dogma to pessimism as a reaction to the unveiling of proposed programs. (It was in the middle of this decade that the term "credibility gap" came into popular usage.) The confidence of the American people in their governmental institutions seems to be declining.⁹

Like many institutions in the United States, the Congress is struggling to weather (in addition to a decline in public confidence) an onrush of tremendous changes, discoveries, and innovations. The industrial epoch has produced extraordinary growth, technological progress, and socioeconomic upheavals. Representative Lee H. Hamilton (D-Ind.) has pointed out, as illustrations of the correspondingly vast increase in the congressional workload, that there were 144 bills introduced in the First Congress in contrast to 25,215 measures proffered in the 91st Congress, a \$4.3 million budget during the First Congress in comparison to \$210.3 billion in expenditures generated by the 91st Congress, and that today's House member has a constituency of about 470,000 while his 1790 counterpart represented only 30,000 people.¹⁰ The convergence of these forces within the sphere of the federal government has greatly expanded the responsibilities of the Congress and has correspondingly magnified the expectations of Americans of (and thus their disappointments in) their national legislature. Most congressional reforms are, therefore, intended to empower the Congress to cope with change and to remain relevant. Suggestions for reorganization of the Congress are propounded to enable the legislative branch to master what Representative Bertram L. Podell terms the "new realities,"¹¹ to revamp itself in the face of ever-increasing demands and ever-accelerating obligations.

Not coincidentally, the 1960's also saw continuing aggregation of power and authority in national affairs unto the presidency. While noting that the Congress is far from powerless, John Bibby and Roger Davidson express concern

⁹ See, e.g., Goodwin, *Sources of the Public Unhappiness*, THE NEW YORKER, Jan. 4, 1969, at 38. William Pfaff observes: "The public confidence in government and the citizens' compact with one another—that sense of common enterprise which is necessary to democracy—are seriously weakened today." Pfaff, *Less Rhetoric, More Reform*, Wash. Post, Sept. 26, 1971, at E4. While it is dangerous to overly rely upon, let alone generalize from, public opinion polls, it should be noted that, as of this writing, the current administration's popularity among voting-age citizens, as recorded by the Gallup poll, has been hovering around the 50% approval mark, while the Harris Survey has determined that nearly two-thirds of a nationwide sample regard the performance of Congress as "only fair" or "poor," with only 25% expressing an "excellent" or "pretty good" rating—the lowest since the question was first asked by the survey in 1963.

¹⁰ Remarks of Representative Hamilton, 116 CONG. REC. E11084 (daily ed. Jan. 2, 1971).

¹¹ Remarks of Representative Podell, 115 CONG. REC. E2725 (daily ed. April 3, 1969).

that it "is losing its vitality to an even stronger presidency and an even more complex bureaucracy."¹² This process was unduly hastened by the deepening involvement of this country in the war in Vietnam, a development presided over by a succession of Presidents while the Congress was generally a passively agreeable bystander. Principally because of the general disconcertion toward the nature of our undertakings in Vietnam and the procedures of decision-making by which we became embedded there, few Americans manifest any notable degree of confidence in presidential omniscience. However, any decline of an institution of government in the public eye does not by any means insure an automatic transfer of respect and support to another institution (such as from the presidency to the Congress). Rather, such a decline produces only widespread disaffection and frustration, and a general disinclination toward affairs of government pending a notable success or the demands of an emergency. Largely unconcerned with rhetoric or doctrine as such, Americans generally display a pragmatic attitude toward the institutions of representative government. Says Arthur M. Schlesinger, Jr.: "Since the point is not to vindicate abstractions but to get the best possible policies for the country, the citizen's obligation surely is to throw his weight to one side or another [between the Congress and the presidency] depending on the practical results desired."¹³ The people of the United States are currently waiting to see signs of a new attitude by the government toward the governed, a refurbishing of public institutions to produce a viable, effective government for the coming decades.

Revolution is the solution advanced by some. Others see some answers in democratic processes and in conformance to the system of institutional interplay so carefully constructed by the makers of the United States Constitution. The structure of national government contemplated in the Constitution has as one of its basic features a dynamic and effective legislative branch. But in past years there has been a severe deviation from this fundamental concept of representative government. Stagnation in the Congress and silent acquiescence of the general public have greatly contributed to an excessive accumulation of power and responsibility in the executive branch. Simultaneously, many citizens feel powerless to make any contribution to governmental decision-making or to impact the direction of national policy.

Nowhere is the present-day imbalance in function and responsibility between the presidency and the Congress more vividly illustrated than in the area of war-making. Despite express provisions in the United States Constitution that the Congress has the power to declare war, raise and support armies, provide and maintain a navy, and other relevant powers (including the "power of the purse"), recent Presidents have gathered to themselves—some would say usurped—substantially complete unilateral discretion as to the exercise of the war power. Merlo J. Pusey has written that "[c]ommitment of the nation to war by executive

12 J. BIBBY AND R. DAVIDSON, *ON CAPITOL HILL 3* (1967) (reprinted by permission of Holt, Rinehart and Winston, Inc., New York).

13 A. SCHLESINGER AND A. DE GRAZIA, *CONGRESS AND THE PRESIDENCY: THEIR ROLE IN MODERN TIMES 102* (1967) (reprinted by permission of the American Enterprise Institute for Public Policy Research, Wash., D.C.).

action has very nearly become an established practice,"¹⁴ a practice which is a violation of our constitutional system of government and an encroachment upon what is "clearly and unmistakably a job for the nation's law-makers."¹⁵ As illustrated by this country's involvement in Vietnam and specifically by the almost unanimous congressional acceptance and unthinking passage of the Tonkin Resolution, the Congress has fallen into a state of subservience relative to the executive branch as respects the war-making power, notwithstanding the clear grants of authority in the Constitution. The outcome of our Vietnam involvement is, however, engendering considerable re-evaluation of "the way we go to war" and has produced more evidence of the dangers inherent in tolerating the existence of a servile national legislature. One of the lessons of Vietnam is the need for, and the contemporary significance of, congressional reform.

Consequently, one of the phenomena of national development early into the 1970's appears to be a significant disenchantment with the Government as presently constituted at the same time one branch of Government, the executive branch, is drawing to it greater power and influence. (As subsequent discussions will indicate, there is growing insurgency within the Congress, evidence of a reassertion of greater participation in domestic and foreign policy-making.) Aside from any need for re-evaluation of the role of the executive and the attendant bureaucracy, these developments (probably related) may suggest, they also are noteworthy support for the proposition that an independently strong and objective Congress is essential to the United States Government.

The thrust of congressional reform is an effort to reorganize the Congress in line with the requirements—and the challenges—of contemporary American society. As noted earlier, preservation of the Congress is premised on the theory that the national legislature plays a meaningful and indispensable role in the scheme of federal government, and thus congressional reform is but a component of what should be ongoing *governmental* reform. The basic design of our national government is, of course, constitutionally ordained; the ultimate goal of congressional reform is continuance of—many would say the restoration of—the fundamentals of the constitutional arrangement. Thus, Eugene H. Methvin placed congressional reform in the appropriate context when he wrote: "Unless Congress modernizes its procedures and organization, it will destroy itself as a crucial force in our constitutional system."¹⁶

This, then, is the significance of congressional reform. It means nothing less than the reinvigoration of a vital institution of the federal government. It means the resurgence of the national legislature as a full partner with the executive in the formulation of policy. It means checking and then reversing the great erosion of the role and authority of the Congress relative to that envisioned in the scheme of government embodied in the United States Constitution. It means a reawakening in the Congress, a realization that it is not preordained that the Congress be subservient to the occupant of the White House, and a recognition, within and without the Government, that it is the destiny of the Congress to resume the

14 M. PUSEY, *THE WAY WE GO TO WAR* 76 (1969) (reprinted by permission of the Houghton Mifflin Co., Boston, Mass.).

15 *Id.* at 160.

16 Methvin, *Is Congress Destroying Itself?* *THE READER'S DIGEST*, April, 1969, at 65.

posture of a co-equal participant with the executive in the conduct of the nation's affairs.

III. Congressional Reform in Perspective

A. *The Role of Congress*

A rational discussion of congressional reform must be preceded by a general conception of the fundamental character of the Congress. Suggestions for restructuring the legislative branch often appear indefectible in theory but lack practical relevance to the functions the institution is expected to perform. Once the basic congressional role is in perspective, then the multitudinous reforms advanced can be more accurately appraised.

The "official" document of the federal government describing the legislative process, authored by the late Dr. Charles J. Zinn, states the principal purpose of the Congress: "The chief function of the Congress is the making of laws."¹⁷ Thus, the Constitution vests in the Congress "[a]ll legislative powers herein granted." Article I, section 8, specifies a number of express powers, including the authority to levy taxes, borrow money, regulate commerce, declare war, and "provide for the common defense and general welfare" of the United States. Beyond these and other stated powers, the Congress has the general power "to make all laws which shall be necessary and proper" for carrying into execution the express powers and other powers vested by the Constitution elsewhere in the national government. On this constitutional foundation rests the lawmaking function of Congress, and from which its other major functions derive their support. As Stephen K. Bailey wrote, "[t]he other powers of Congress—to appropriate, to investigate, to mediate, to alleviate, and to repudiate—are all based on its power to legislate."¹⁸ Lawmaking is, then, the essence of the role of the Congress, and every congressional reform proposal should be previewed in the context of what its impact, should the reform be adopted, would be on Congress' "chief function," the making of laws.

Despite the latter-day tendency for major legislation to originate from within the executive branch and the delegation of rulemaking authority to a multitude of regulatory agencies, the lawmaking function remains as the Congress' prime role. But as Dr. Zinn indicated, there is today more to the *raison d'être* of the Congress than lawmaking. One of the Congress' most important contemporary functions is to oversee the administration of the federal government. This function is continuously carried out by the House and Senate Committees on Appropriations, as well as through hearings, staff studies, and other inquiries by the standing legislative committees and the special committees. Performance of the oversight function (newly termed "legislative review"¹⁹), as defined by the rules of the House and Senate, requires each standing committee to "review and study, on a continuing basis, the application, administration, and execution of those

17 C. ZINN, *HOW OUR LAWS ARE MADE* 3, H.R. Doc. No. 91-127, 91st Cong., 1st Sess. (1969).

18 S. BAILEY, *THE NEW CONGRESS* viii (1966) (reprinted by permission of the author).

19 See Legislative Reorganization Act of 1970 § 118, 84 Stat. 1140, 1156 (1970).

laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee."²⁰ Congressional oversight is a principal component of the constitutional power to supervise and control federal expenditures, and is another of the Congress' cardinal functions.

A third major function of the contemporary Congress is representation of the national citizenry in the policymaking processes of the federal government. Most members of the House and Senate devote considerable energy to serving—and articulating—the needs and demands of their constituents. Although performance of the representative function has its burdensome and time-consuming (and occasionally unsavory) aspects, congressmen do afford the nation's populace a voice in Washington and, conversely, often contribute to discussion of public issues—a related, educational function.

The present-day Congress has, therefore, three prime roles: legislative, oversight of administration, and representative/education. While the Congress has a host of explicit and inferred powers for fulfilling these roles, the national legislature has numerous other powers not readily identifiable with any of the triumvirate of chief powers. The Congress has various housekeeping and rule-making powers.²¹ The Senate is required to confirm most of the nominations to major government posts made by the President, and advises and consents to treaties.²² The House has the power of impeachment of officeholders²³ and the Senate the power to try the charges.²⁴ Many of these powers, such as to propose amendments to the Constitution,²⁵ to admit new states into the Union,²⁶ and to provide for the succession to the presidency,²⁷ while they serve to round out the picture of congressional authority, are not within the usual concern of congressional reform.

It is not enough, however, to simply enumerate the powers of the Congress. Students of the Congress must also come to understand how it wields these powers.²⁸ The most elementary tenet of congressional operations is that, for the most part, the work of the Congress is done in its standing committees. Generally, the fate of legislation hinges on these semi-autonomous bastions of power, the "little legislatures."²⁹ Through committee hearings and investigations, the Congress exercises considerable control over the administrative departments and agencies of the federal government (oftentimes, the sheer threat of inquiry by a congressional committee can occasion a shift in administrative practices). Whether in committee or on the floor, singularly or collectively, members of the

20 RULES OF THE HOUSE OF REPRESENTATIVES, 92nd Cong., Rule XI, clause 28(a). (THE RULES OF THE HOUSE OF REPRESENTATIVES, 92nd Cong., appear as H.R. Doc. No. 439, 91st Cong., 2d Sess. (1970).) The comparable provision as applicable to the Senate appears as Legislative Reorganization Act of 1946, as amended, § 136(a), 2 U.S.C. § 290d.

21 U.S. CONST. art. I, § 2; art. I, § 3; art. I, § 5.

22 *Id.* at art. II, § 2.

23 *Id.* at art. I, § 2.

24 *Id.* at art. I, § 3.

25 *Id.* at art. V.

26 *Id.* at art. IV, § 3.

27 *Id.* at art. II, § 1.

28 Among the better analyses of the Congress are: G. GALLOWAY, *THE LEGISLATIVE PROCESS IN CONGRESS* (1953); B. GROSS, *THE LEGISLATIVE STRUGGLE* (1953); and R. YOUNG, *THE AMERICAN CONGRESS* (1958). The classical study of the Congress remains W. WILSON, *CONGRESSIONAL GOVERNMENT* (1885).

29 *See generally* W. MORROW, *CONGRESSIONAL COMMITTEES* (1969).

House and Senate can employ what is, in a very real sense, the ultimate power—the power of legitimization. Being generally recognized as a representative assembly, the Congress can legitimize political leadership and political decisions exercised and made elsewhere in the Government.³⁰

Finally, the relative importance of and the means by which these fundamental congressional roles are accomplished must constantly be examined in the context of contemporary circumstances and requirements. For example, to what extent can the Congress carry out its traditional study and deliberative functions—an important aspect of its legislative role—in a complex society rapidly undergoing dynamic social, economic and technological transformations? Or, how is the Congress to competently monitor the overall administration of the federal government—that is, to be overseer of the burgeoning federal agencies and departments—absent modern techniques of systems analysis? Congressional reformers cannot assume that the functions of the Congress, including the traditional trio of chief roles, are immutable. Nor can the functions of the legislative branch be considered without also weighing, in context, the powers assigned to the executive and judicial branches of the national government, and the authority reserved to the states.

The Congress, therefore, plays a variety of roles having shifting emphases in the scheme of national government, in light of which the feasibility and impact of congressional reorganization proposals must be examined.

B. *Some Further Preliminary Perspectives*

The various roles and functions of the Congress must, as discussed, be kept constantly in the easily accessible background when approaching the subject of congressional reform. Additionally, there are some other perspectives to be appreciated, relating to the existing structure, organization and traditions of the Congress, as well as to the parameters of the subject of congressional reform itself.

Congressional “reform” is a deceptively simple and easily misleading term, as the concept can mean many things depending upon the beholder. The term covers a wide range of reorganization and other proposals, from abolishment of the seniority system to clarification of the *Congressional Record*, from reorganization of the jurisdiction of standing committees to modification of the pay system for congressional employees, or from the application of computer techniques to technical variations in procedural rules. “‘Reform’ is a tricky word; change *per se* is not necessarily the same as progress,” writes House Minority Leader Gerald R. Ford.³¹ Many may agree that the Congress requires reorganization; many will differ as to the aspects of congressional operation and organization which require reform and how reforms are to be accomplished.

The chief emphasis of congressional reform has traditionally been *procedural* reform, partially because procedural change is relatively easy to implement and

³⁰ See J. BIBBY AND R. DAVIDSON, *supra* note 12, at 9.

³¹ M. McINNIS (ed.), *WE PROPOSE: A MODERN CONGRESS* xii (1966) (reprinted by permission of McGraw-Hill, Inc., New York).

can often be achieved as a substitute for more meaningful, *structural* reform. Congressional reorganization proposals which principally envision modification of the procedures of the House and Senate tend to reflect, as in Joseph Kraft's observation, "the populist view that . . . if [congressional] procedure was only democratized and opened up, everything would come right."³² At the same time, what may initially appear to be a mere procedural reform can prove to have considerable substantive influence on congressional operations. The impact an alteration in the rules of procedure can have on the decision-making processes in Congress and on the legislative output was vividly illustrated early in the first session of the 92nd Congress, when the House, in casting its first recorded vote on the question of federal assistance for development of a supersonic transport plane, reversed its position of seven years and voted to end the controversial subsidy. There were a number of factors behind the turnabout, but foremost among them was the newly created recorded teller vote,³³ which forced House members to take a position in the public eye.³⁴ Nonetheless, procedural reform is often makeshift reform—a response to public insistence that the Congress improve its practices by scattered tinkering with isolated aspects of congressional operations to contrive the appearance of authentic reform of the Congress.

Overaccentuation of the importance of congressional procedure fails to take into account the many aspects of the organization of the Congress which are largely extraneous to House and Senate rules, being writ in the consequences of party government, federalism, the system of coordinate checks and balances, and the doctrine of separation of powers. (On this latter point, the term "separation of powers" is somewhat of a misnomer, as the more accurate designation is separate institutions sharing power;³⁵ Dean Ernest S. Griffith describes the relationship as "institutional mutual responsibility of coequals."³⁶) As David B. Truman wrote: "Most discussions of congressional 'reform' focus on these items [congressional procedural practices], or a fraction of them, without substantial reference to the two more fundamental sources of dissatisfaction [the constitutional separation of the Congress and the executive, and the federalized governmental structure] and as if the criticized procedures were awkward bits of machinery wholly without deeper origins or justifying function."³⁷ Thus, some aspects of congressional organization are proper subjects for explicit rules of parliamentary procedure, while others are the domain of party judgment in the House and Senate. Yet all are blithely categorized under the rubric of congressional "reform."

A congressional "reform" proposal, therefore, should be explored, preferably in advance of its proposition and certainly prior to its adoption, to ascertain whether any side effects therefrom would have as consequential an—or a greater—impact on the congressional structure as would the desired reorganization, such

32 Kraft, *The Reform Congress*, Wash. Post, Aug. 10, 1971, at A17.

33 See text accompanying note 194, *infra*.

34 See Broder, *SST: Hill Reform Victim*, Wash. Post, Mar. 23, 1971, at A19.

35 See R. NEUSTADT, *PRESIDENTIAL POWER* 33 (1960).

36 E. GRIFFITH, *CONGRESS: ITS CONTEMPORARY ROLE* 7 (3rd ed. 1961) (reprinted by permission of the New York University Press).

37 D. TRUMAN, *THE CONGRESS AND AMERICA'S FUTURE* 3 (1965) (reprinted by permission of Prentice-Hall, Inc., Englewood Cliffs, N.J.).

as by unintentionally modifying the distribution of power within either house or between the Congress and the President. As Congressman Ford advised: "Each and every proposal for reform of Congress must be weighed against other suggested reforms, and all must be weighed in the balance of power between the branches of government."³⁸ Elimination of the seniority system, severe curtailment of the filibuster,³⁹ or grant of an item veto to the President are examples of "reform" which could occasion unintended consequences, in contrast to recommendations such as a summer recess for the Congress⁴⁰ or the use of recycled paper in preparation of the *Congressional Record*.⁴¹

While congressional reform is a broad and pervasive subject, there are topics relevant to the organization and operation of the legislative branch which often seem outside the traditional scope of congressional reform. Although conceptions of what are or are not points of congressional reform may differ, there are a number of topics—admittedly having an important bearing on the quality of the Congress—which are not considered herein. These are: campaign financing,⁴² financial disclosure, development and enforcement of a congressional code of ethics, regulation of lobbying activity, congressional districting, and the problem of conflicts of interest.⁴³ There are other topics untreated herein falling squarely within the sphere of constitutional law: presidential impoundment of appropriated funds,⁴⁴ presidential exercise of the pocket veto during a congressional recess,⁴⁵ and the hoary dilemma of executive privilege versus congressional investigation.⁴⁶ These significant subjects—important as they are for believers in a strong and independent Congress—have been somewhat arbitrarily sacrificed herein to discussion of other avenues to reorganization and reform of the Congress.

Finally, the obvious must be said: There are practical limitations on the effect that formal changes in legislative procedure and practice can have in im-

38 M. McINNIS, *supra* note 31, at xii. Roger H. Davidson, David M. Kovenock, and Michael O. Leary put it this way: "Any proposed change [in congressional organization] must be examined closely for its probable effects, and not simply for its conformity to abstract models of neat or orderly structure. If we adopt reform A, we ought to be reasonably certain it will lead to desired result X rather than undesired results Y or Z." *Hearings Before the Joint Committee on the Organization of the Congress*, 89th Cong., 1st Sess., at 749 (1965) [hereinafter *JCOG Hearings*].

39 See text accompanying notes 280-3, *infra*.

40 See Legislative Reorganization Act of 1970 § 461, 84 Stat. 1140, 1193 (1970).

41 See, e.g., S. 2267, H.R. 10116, 10117, and 10451, 92nd Cong., 1st Sess. (1971). The concept of "neutral" reform proposals, as opposed to those which would cause a "dispersion of power," is discussed in D. TRUMAN, *supra* note 37, at 178-80.

42 See S. 382, 92nd Cong., 1st Sess. (1971), the proposed Federal Elections Campaign Act of 1971, which has passed the Senate and House, and is expected to clear Congress early in 1972.

43 See Lee, *Conflict of Interest: One Aspect of Congress' Problems*, 32 GEO. WASH. L. REV. 954 (1964).

44 See Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124 (1969). There are a number of proposals for a Joint Committee on Impoundment of Funds, e.g., S. Con. Res. 13, H.R. Con. Res. 244, 260, 265, 284, 285, 286, and 295, 92d Cong., 1st Sess. (1971). See also S.2581 (the proposed Impoundment Procedures Bill) and S. 2604 (the proposed Federal Impoundment Information Act), 92nd Cong., 1st Sess. (1971).

45 During the 92nd Cong., 1st Sess., the Senate Subcommittee on Separation of Powers conducted hearings on the pocket veto power of the President. See S. REP. No. 92-360, 92nd Cong., 1st Sess. (1971).

46 See Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1044 (1965).

proving and upgrading the Congress. Writing of the problems inherent in changing the national government, Wilfred E. Binkley wrote that "[w]e will undoubtedly be compelled to develop some better American procedures and habits to displace some unsatisfactory ones," although "reliance upon organizational changes alone has proved pretty futile in the past."⁴⁷ The quality of the Congress is in no small measure dependent upon the devotion, diligence and honesty of the men and women who are elected to the House and Senate and staff the legislative branch. Likewise, relations between the national legislature and the President—in instances of conflict or rapport—are often personal, and not readily susceptible to organizational management. The concept of comity underlies congressional-executive relationships. Excess trust in formal reforms of Congress will end in frustration and ultimately disillusionment. Even in the case of the imposing Legislative Reorganization Act of 1946, notes Binkley, the new rules were "not in effect six months before profound disappointment was being expressed over how much Congress was still like Congress."⁴⁸ These anti-reform thoughts were aptly summarized by a former member of the House who declared: "It is those who magnify gadgets and seek to cure the grudges that attend their malfunctioning who will be disappointed at any and every reorganization of Congress."⁴⁹ Nonetheless, congressional reform—despite its sometime inefficacies and contradictions—is an essential and continuing undertaking if the Congress is to be preserved as an integral unit of national government.

The foregoing brief observations are intended to place the subject of congressional reform in its appropriate setting. Perhaps the simplest perspective from which to view the subject is that offered by Henry George speaking of social reform in general; to paraphrase, reorganization and reform of the Congress is to be secured by "the awakening of thought and the progress of ideas."

IV. The Congressional "Information Gap"

In *Federalist Paper No. 53* (written by either Alexander Hamilton or James Madison), it is stated that "[n]o man can be a competent legislator who does not add to an upright intention and a sound judgment a certain degree of knowledge of the subjects on which he is to legislate." Despite this still-timely admonition, the Congress remains somewhere in the nineteenth century as regards the narrow scope of information largely utilized to develop legislative decisions, and the antiquated methods by which information is received, processed and disseminated. Congress' principal source of information is its system of standing, joint, and special committees—the same source of information that the Congress has chiefly relied upon since early into the 1800's. The individual congressman relies on his staff for much of his research assistance,⁵⁰ and for additional information as well

47 W. BINKLEY, *THE MAN IN THE WHITE HOUSE* 158 (1958) (reprinted by permission of The Johns Hopkins Press, Baltimore, Md.).

48 *Id.* at 159.

49 Smith, *Review of CONGRESS AT THE CROSSROADS*, XXIX SAT. REV. OF LIT. 12 (1946), quoted in W. BINKLEY, *supra* note 47, at 159. [The volume reviewed was G. GALLOWAY, *CONGRESS AT THE CROSSROADS* (1947).]

50 See Butler, *Administering Congress: The Role of the Staff*, XXVI PUBLIC ADM. REV. 3 (1966). For further insight into the contemporary role of the congressional staffs see Johnson, *Congressional Staffs: The Third Branch of Congress*, Wash. Post, Jan. 18, 1970, at A1.

as for advice on legislation he looks to colleagues possessing the requisite expertise and to his party leadership. Also, there are available such sources of information as the *Congressional Record*,⁵¹ committee and subcommittee reports and special studies, and transcripts of committee hearings.

For most of the 1900's, the Congress has utilized the services of the Congressional Research Service (formerly the Legislative Reference Service⁵²) within the Library of Congress and the General Accounting Office. The C.R.S. is the major research and analytical service arm of the Congress. The Service advises and assists all committees and individual members of the Congress in the appraisal and evaluation of legislative proposals, and provides information, research, and reference materials to members of Congress to assist them in their legislative and representative functions.⁵³ Divisions of the C.R.S. specialize in American law, education and public welfare, economics, foreign affairs, history and government, library services, and natural resources, and other fields, and the C.R.S. is served by a phalanx of various specialists.⁵⁴ The G.A.O. has the responsibility for investigating all matters relating to the receipt, disbursement, and application of public funds, and makes its reports available to the Congress. Speaking as General Counsel for the agency, Robert F. Keller said that "[w]e view the primary purpose of the [enabling] statutes as to require the General Accounting Office to make for the Congress independent examinations into the manner in which government agencies discharge their financial responsibilities."⁵⁵

Members of the House and Senate also rely for their information on the "service functions" of professional lobbying organizations, representatives of the academic and business communities, other outside consultants, and the public media. Additionally, members share ideas and obtain information by means of such informal groups as the Republicans' Wednesday Club and the Democrats' Democratic Study Group.⁵⁶

Generally, however, the operational systems of information for the Congress have changed little in decades. The rapid progress recently made and continuing in information storage, collation, and retrieval, by computer and otherwise, has almost bypassed the Congress. Concurrently, however, the Congress—its committees, members, and staff—have been overwhelmed by immense information needs and the profusion of information sources (books, articles, reports, and the

51 The *Congressional Record* is a clearinghouse of information—both important and trivial—as colorfully portrayed by Robert Bendiner: “. . . the *Congressional Record*, that humanly contradictory thesaurus of intelligence and gibberish, information and moonshine, courage and evasion, in which an indulgent tolerance of the absurd is perhaps after all not too high a price to pay for the occasional voice of wisdom.” R. BENDINER, *OBSTACLE COURSE ON CAPITOL HILL* (Preface) (1964) (reprinted by permission of McGraw-Hill, Inc., New York). See text accompanying notes 425-7, *infra*.

52 See note 198, *infra*.

53 See text accompanying notes 199-201, *infra*.

54 See D. TACHERON AND M. UDALL, *THE JOB OF THE CONGRESSMAN* 316 (1966) [Appendix, “Services performed for members by the Legislative Reference Service”].

55 Keller, *The Role of the General Accounting Office*, 21 *BUS. LAW.* 259, 260 (1965). (Mr. Keller is presently serving as Assistant Comptroller General.) See also D. TACHERON AND M. UDALL, *supra* note 54, at 318 [Appendix, “Assistance available from the General Accounting Office”], and Nossiter, *GAO Walks a Fine Line With Hill Factions*, *Wash. Post*, Mar. 28, 1971.

56 See generally Dechart, *Availability of Information for Congressional Operations*, in *THE AMERICAN ENTERPRISE INSTITUTE, CONGRESS: THE FIRST BRANCH OF GOVERNMENT* 167 (1966).

like) which has characterized the "information explosion." Thus, the "space age" responsibilities and demands being increasingly placed upon the Congress are overpowering its old-fashioned and diffuse information-handling capabilities. (Fortunately, as discussed below, the Congress is slowly—but apparently surely—adapting computer technology to some of its operations.) As Robert L. Chartrand, Specialist in Information Sciences in the Congressional Research Service, has noted, "[w]ith increasing frequency, the traditional mechanisms for handling information within the legislative framework are bogging down."⁵⁷

Today, the most striking feature of the information system of the Congress is its heavy dependence upon the President and the attendant bureaucracy for information inputs. John S. Saloma III writes: "While Congress may be viewed as an open system receptive to information from a variety of sources and at numerous stages in the decision process, it is dependent on information provided by executive agencies for many of its decisions."⁵⁸ Members of Congress often initiate requests for data and other information with experts and administrative officials within the departments and agencies of the executive branch. Nearly all of the major departments and agencies maintain "liaison offices" to handle congressional inquiries.⁵⁹ While this source of information is essential for investigating problems of constituents with the federal government (principally with the military services, and agencies such as the Social Security Administration, the Civil Service Commission, and the Veterans' Administration), congressmen all too often discover that, in legislative affairs, the legislative branch is informed only to the extent the executive branch wishes to inform it.⁶⁰ Knowledge is power, as the adage relates, and the decline in congressional power can be at least partially attributed to the inability of the legislative branch to develop information sources independent of the executive branch.

One of the basic reasons for the wane of the legislative branch in power and influence is its inability or refusal to supply itself with current, relevant information, coupled with its failure to avail itself of reasonably contemporary information storage and retrieval techniques. This was among the conclusions reached by the Arthur D. Little Company, in its report for the National Broadcasting Company, entitled "Management Study of the U.S. Congress." The management consultant team found that:

Congress is burdened by an ever-increasing workload, caused by continuing growth of the nation and government, and Congress' failure to relieve itself

57 Chartrand, *Congress: The Three-Dimensional Chessboard—The Role of Information Technology*, 1970 RUTGERS J. OF COMP. AND THE LAW 50 (1970), reprinted at 116 CONG. REC. E7624 (daily ed. Aug. 13, 1970).

58 J. SALOMA, *CONGRESS AND THE NEW POLITICS* 212 (1969) (reprinted by permission of Little, Brown and Co., Inc., Boston, Mass.).

59 See Pipe, *Congressional Liaison: The Executive Branch Consolidates Its Relations with Congress*, XXVI PUBLIC ADM. REV. 14 (1966).

60 D. TACHERON and M. UDALL, *supra* note 54, at 125, relate this *apropos* anecdote: "During the 89th Congress, the chairman of a House committee had occasion to request a specific item of information from an Executive department. Attached to the reply he received was a memorandum from one departmental employee to another. Said the memo—which the Congressman obviously was not supposed to see—'You'll note we have purposely not answered the question except in a very indirect way.'" For another illustration see Childs, *Legislators Don't Have Power to Buck Well-Funded Pentagon*, Wash. Post, Mar. 13, 1970, at A25. See text accompanying notes 94-104, *infra*.

of unnecessary work detail. The weight of this workload as felt personally by legislators is a serious impediment to a greater congressional effectiveness.⁶¹

The words of the twenty-seven congressional petitioners are recalled: “[o]ur deliberations and action . . . in participating in the formulation of national policy are crippled and inhibited by not having highly pertinent information which is known to exist.”⁶²

Serious interest in the use of data processing and distribution techniques through the use of computers for the Congress is a quite recent phenomenon. In the mid-1960's, some relatively farsighted members of the House and Senate, and staff assistants, began to realize that, for the Congress to effectively function in an increasingly complex, technology-oriented society, computerization of data for congressional use would be a fundamental necessity. Among the very first to advocate computer support for the Congress was Senator Hubert H. Humphrey (D-Minn.). Speaking in 1964, Senator Humphrey declared: “When Congress has better access to the answers it needs, it will be in a position to ask still better—more useful questions. . . . The computer could help immeasurably to open up new vistas for Congress to explore—in our people's behalf.”⁶³ The first bill introduced in the Congress in this regard was a proposal authored in 1966 by Representative Robert McClory (R-Ill.) to authorize the then-named Legislative Reference Service to make use of automatic data processing (ADP) techniques and equipment in the performance of its functions.⁶⁴ On that occasion, Representative McClory told his colleagues that they “must move to harness the technological forces that can provide us with the wherewithal to function more effectively as public servants.”⁶⁵ A number of bills reflecting the McClory and similar concepts were introduced during the 90th Congress. For example, Representative John G. Dow (D-N.Y.) submitted a proposal which would have given the Joint Committee on the Library responsibility for overseeing “the policies and procedures governing the use of automatic data processing by the Legislative Reference Service.”⁶⁶ Also, Representative William S. Moorhead (D-Pa.) sponsored legislation in the 90th and again in the 91st Congress to establish a Joint Committee on Legislative Data Processing to have jurisdiction over congressional ADP facilities.⁶⁷

The Congress was presented with its first general study on the application of ADP operations and systems analysis, entitled “Automatic Data Processing for the Congress,” in 1967.⁶⁸ This study, which paved the way for the introduction of the adaptation of automatic data processing and systems methodology for con-

61 A. D. Little Co., Inc., *Management Study of the U.S. Congress*, Report to N.B.C. News, Nov. 24, 1965, at 11.

62 *Supra* note 4.

63 Remarks of Senator Humphrey, 110 CONG. REC. 9075 (1964).

64 H.R. 18428, 89th Cong., 2d Sess. (1966).

65 Remarks of Representative McClory, 112 CONG. REC. 27824 (1966). His bill was reintroduced in 1967 as H.R. 21, 90th Cong., 1st Sess. (1967).

66 H.R. 7874, 90th Cong., 1st Sess. (1967). *See* remarks of Representative Dow, 113 CONG. REC. H3507 (daily ed. April 4, 1967).

67 H.R. 7012, 91st Cong., 1st Sess. (1969).

68 Chartrand, *Automatic Data Processing for the Congress*, LIBRARY OF CONGRESS, LEGISLATIVE REFERENCE SERVICE, MONOLITH NO. TK 6565 C (Jan. 3, 1967).

gressional tasks, recommended the application of computer technology in these diverse areas:

1. Maintenance of current information on the status of pending legislation;
2. Dissemination of selected priority information of especial significance to members of Congress and their committees on the basis of profiles reflecting specific needs;
3. Storage of appropriations statistics and information, coupled with flexible retrieval capacity;
4. Storage and retrieval of legal literature and related information;
5. Acquisition and dissemination of up-to-date information on the activities of committees; and
6. Maintenance of files on lobbying activities and federal contracts awards.⁶⁹

Private organizations have also recently begun to explore various considerations surrounding the problems of information support for the Congress. As illustrations of this development, the American Enterprise Institute for Public Policy Research initiated a series of studies on the functions of the Congress, in which information requirements, including computer methodology, were featured.⁷⁰ Additionally, as noted, the Arthur D. Little Company prepared a management study of the Congress. And, the Brookings Institution, the American Enterprise Institute,⁷¹ and the Washington Operations Research Council have sponsored seminars and other meetings to acquaint members of Congress and their staffs with the potential applications of systems analysis.⁷²

These and other efforts began to coalesce during the 91st Congress. Under the aegis of Representative John Brademas (D-Ind.), the House Democratic Study caucus (and the Democratic Study Group) endorsed the following resolution:

Resolved, that the Committee on House Administration be fully supported by Democratic members in efforts to improve the efficiency of operations of the House of Representatives, and we urge that these efforts include, but not be limited to, the use of computers and of a centralized mail processing system.⁷³

The House Administration Committee responded to this mandate by referring the matter to its Special Subcommittee on Electrical and Mechanical Office Equipment. Also, in the 91st Congress, Representative Jack Brooks (D-Tex.) introduced a bill requiring the Comptroller General to, *inter alia*, "coordinate the development, establishment, maintenance, and operation of data processing

69 *Id.* at 13-23. See also Chartrand, *Information Processing for the U.S. Congress*, paper presented before the International Federation of Information Processing Congress, PROCEEDINGS OF THE I.F.I.P. CONGRESS 68 (Booklet G) G23 (1968), and Chartrand, *Computer-Oriented Information for the U.S. Congress*, 1 LAW AND COMP. TECH. 2 (1968).

70 AMERICAN ENTERPRISE INSTITUTE, *supra* note 56. See Dechart, *supra* note 56; Robinson, *Decision Making in Congress* at 259; and Janda, *Information Systems for Congress* at 415.

71 The formal papers and the transcript of the A.E.P. seminar were published as R. CHARTRAND, JANDA, AND HUGO, *INFORMATION SUPPORT, PROGRAM BUDGETING, AND THE CONGRESS* (1968).

72 These and related developments are discussed in greater detail in Chartrand, *Computer Technology and the Congress*, 6 INFORMATION STORAGE AND RETRIEVAL 229, 232-4 (1970).

73 27 CONG. QUAR. 525 (1969).

systems necessary for the effective and efficient fulfillment of the substantive responsibilities of the Congress” and directing units of the Congress utilizing data processing techniques to adhere to the Comptroller General’s guidelines “to assure optimum effectiveness and efficiency in the overall acquisition and use of computers by the Congress.”⁷⁴ The measure was reported by the House Committee on Government Operations in May of 1969,⁷⁵ but was never considered by the House.

The initiative within the Congress for utilization of relevant computer capabilities was taken by the Office of the Clerk of the House of Representatives, the Office of the Sergeant-at-Arms of the Senate, and the Congressional Research Service. While the automated operations in the Offices of the House Clerk and Senate Sergeant-at-Arms have principally been routine ADP office functions (e.g., payroll, accounting, and inventory, and, in the case of the Senate, automated mailing), the C.R.S. has made the initial effort to implement meaningful computer systems for the storage, categorization and dissemination of pertinent legislative data.

For some time, one of the staple outputs of the C.R.S. has been the *Digest of Public General Bills*, brief summaries of the legislation currently pending before the Congress. Preparation of the *Digest* was significantly enhanced in 1967, when Administrative Terminal System units (special electric typewriters used to insert information into computers) were applied to the task. Information concerning current legislation, both synoptic and as to its status in the legislative process, is now stored, recalled and edited by means of a network of more than thirty computer terminals, and published by an offset reproduction method. (Computer facilities have also been put to limited use in the preparation of legislative calendars for four major House committees.) Other legislative research items developed by C.R.S. with computer support include a *Legislative Status Report* on major bills, an index to the multitude of reports and memoranda of interest to the Congress warehoused by the Library of Congress, and the “Current Awareness” program, by which computer printouts of subject and author indices and summaries are made available to thirty-two congressional committees and C.R.S. researchers according to their interests as indicated in a keyword list.

These long-overdue developments in the area of ADP adaptation for the Congress, achieved largely through the pioneering of Robert Chartrand, are important steps in the right direction. Yet compared to the utilization of information devices and techniques in other fields, these advancements can clearly only be the beginning. Faced with the “information overload”⁷⁶ that already burdens most congressmen and their staff and which is mounting ever-increasingly, the Congress must avail itself of the sophisticated techniques now available in the realm of computerized information systems. But the adaptation of information technology is required not simply to enable the House and Senate to keep abreast of the deluge of data and materials which sometimes threaten to engulf them. More importantly, computer techniques for the Congress are essential if that

74 See H.R. 10791, 91st Cong., 1st Sess. (1969).

75 H.R. REP. No. 91-258, 91st Cong., 1st Sess. (1969).

76 The concept of “information overload” is discussed in A. TOFFLER, *FUTURE SHOCK* 350 (1970).

institution is to play a meaningful role in the governance of American society tomorrow.⁷⁷

The Congress, on two occasions, recently came close to but shied away from the taking of some further steps toward the development of an independent congressional information system. During consideration in the Senate of the proposed Legislative Reorganization Act of 1967,⁷⁸ Senator Hugh Scott (R-Pa.) introduced an amendment to provide for the establishment of a Joint Committee on Congressional Operations, which would be responsible for "continuing study of automatic data processing and information retrieval systems for Congress."⁷⁹ On that occasion, Senator Scott stressed that the "broad spectrum of issues facing the Congress . . . can be coped with only by the utilization of all available human and technological resources."⁸⁰ Although the bill was approved by the Senate in 1968, the measure died in the House Committee on Rules.

Two years later, during consideration in the House of the Legislative Reorganization Act of 1970,⁸¹ provisions authorizing the establishment of a Joint Committee on Data Processing, which would have had broad authority to modernize the Congress' information-gathering machinery through the use of data processing facilities and professionals,⁸² were deleted from the House Rules Committee's bill.⁸³ The principal argument deployed to defeat these provisions was that the House Special Subcommittee on Electrical and Mechanical Office Equipment was in the process of developing plans for a House computer system and the subcommittee's then chairman, Representative Joe D. Waggoner (D-La.), regarded the legislation as an infringement on the committee's jurisdiction.⁸⁴ Also, there was—and still is—intense disagreement within the Congress as to the efficacy of the joint committee approach, in large part because of considerable antipathy on the subject between the House and Senate (the Senate has organized a standing Subcommittee on Computer Services and currently leases a computer for preparation of mailing-list printouts for individual senators).⁸⁵

77 See Chartrand, *Redimensioning Congressional Information Support*, 11 JURIMETRICS JOURNAL 165 (1971).

78 S. 355, 90th Cong., 1st Sess. (1967).

79 Amendment No. 63, 113 CONG. REC. S2124 (daily ed. Feb. 16, 1967).

80 Remarks of Senator Scott, 113 CONG. REC. S2124 (daily ed. Feb. 16, 1967).

81 See Part V, *infra*.

82 H.R. 17654, §§ 401-412, 91st Cong., 2d Sess. (1970), as reported by House Committee on Rules.

83 116 CONG. REC. H8887 (daily ed. Sept. 17, 1970).

84 See 116 CONG. REC. H8880 (daily ed. Sept. 17, 1970).

85 Representative Waggoner was angry because Senate Majority Leader Michael Mansfield never responded to a letter from the then Chairman of the Committee on House Administration, former Representative Samuel N. Friedel, inviting the Senate to join with the House in studying the feasibility of a congressional computer system. 116 CONG. REC. H8879 (daily ed. Sept. 17, 1970). Noting indications that the Senate Majority Leader would only communicate with the House Speaker or House Majority Leader, Representative Waggoner declared: "If we cannot communicate any better than that, there is no way under God's blue canopy of heaven that a joint committee can succeed." *Id.* at H8880. But Representative Robert McClory cautioned his colleagues about making such an important decision "on the basis of pique or on the basis of insult or something like that." *Ibid.* Representative B. F. Sisk, who was shepherding the 1970 Act through the House, produced letters from Senate Minority Leader Hugh Scott and then Assistant Majority Leader Edward Kennedy, expressing interest in a joint effort. *Id.* at H8880-1. Representative Sisk concluded that "if there is any validity to the study, the effort, and the consultation that your subcommittee [House Subcommittee on Legislative Reorganization] has gone through and has developed in the last 18 months, then we will be making a terrible mistake if we adopt the amendment of the gentleman from Louisiana [Rep. Wag-

Additionally, there is dissension within the House, as the various committees involved—Government Operations, Rules, House Administration, and Appropriations—jockey for ascendancy over the House's future computer program. For example, Representative Waggoner organized a "working group" to tap the expertise of private industry in the field⁸⁶ and, in June, 1970, negotiated contracts with the Stanford Research Institute as the primary conceptual planning contractor and eight private companies to develop an overall "system management plan" for the House,⁸⁷ before the House even had an opportunity to debate the creation of the proposed Joint Committee on Data Processing. Behind these disputes, says Andrew J. Glass, is the realization that "[a]ny group that designs and runs a computer system in Congress also has the potential to shape the legislative process."⁸⁸ As of this writing, not only is the House proceeding toward development of a separate computer capacity, it appears that the House Committee on Administration has wrested control over computer development from the Clerk of the House.⁸⁹

"The potential of the computer in assisting the Congressman is not unlimited," writes Mr. Chartrand, "but there are many repetitive tasks which consume unwarranted amounts of member and staff time which might be better performed through ADP techniques."⁹⁰ While it is reassuring to know that there are those on Capitol Hill who recognize the need for software programming and a well-stocked information storage system for the legislative branch, it must be recognized that the Congress—institutionally—has by no means espoused the concepts of today's information technology.

Despite the absolute necessity of an up-to-date ADP system for the Congress, however, the closing of the information gap cannot be accomplished by computer technology alone. Recently, the Congress has shown some signs of increased self-assertion in the area of domestic policymaking, by means of access to more current and reliable information, as part of a larger effort to re-establish the Congress as a coequal branch of today's national government.

The Congress is currently facing many problems—informational and otherwise—created by the social, political, and economic side effects of technology. Among the congressional responses to the racing tides of unrestrained technology has been preparation in the House of legislation to establish an Office of Technology Assessment for the Congress as an aid in the identification and considera-

goner]." *Id.* at H8880. Many members believed the House had progressed too far on its own in this regard to allow the Senate to join in a combined arrangement to begin studies anew, thus setting the House effort back by months. Asserted Representative Wayne Hays: "I think the Waggoner amendment is the answer. We [the House] are ready to go. We are on the threshold, and I do not want to see us back up." *Id.* at H8886. The Senate, nonetheless, continues to make limited progress in the computer field. See S. Res. 184, 92nd Cong., 1st Sess. (1971), authorizing funds to improve through the use of computers the Senate payroll and personnel system, which passed the Senate on October 21, 1971. 117 CONG. REC. S16725 (daily ed.).

86 See Schloss, *Congress Needs Computers—But They're Many Years Away*, 2 GOVERNMENT EXECUTIVE 42 (1970).

87 See remarks of Representative Waggoner, 116 CONG. REC. H8880 (daily ed. Sept. 17, 1970).

88 Center for Political Research Report, *Congress Moves into Computer Age but Divides on Control of New Systems*, in 2 NATIONAL JOURNAL 1150 (1970).

89 See note 401, *infra*.

90 Chartrand, *supra* note 72, at 231.

tion of existing and probable impacts of the applications of technology, and to extend the congressional information-gathering function in this area.⁹¹ Another proposal under consideration, in the Senate, is the proposed Full Opportunity and National Goals and Priorities Act, designed to provide the Congress with tools for long-range domestic planning and legislating.⁹² This would establish within the Congress an Office of Goals and Priorities Analysis, which would be authorized to conduct a continuing analysis of national goals and priorities, and would furnish the Congress with the information, data, and analysis necessary for "enlightened priority decisions."⁹³ These and similar efforts symbolize a renewed interest in the Congress in enhancement of congressional information-processing capabilities.

The Congress has also been active in recent years on a number of fronts in efforts to bridge the information gap by attempting to equalize the availability of current and material information as between the executive and legislative branches. This aspect of executive-legislative relationships has long been the fount of much—and often bitter—controversy, as illustrated by the conflicts between the branches generated by Senator Joseph McCarthy's investigations of the Department of the Army and the firing of former Department of State security officer Otto F. Otepka for giving secret personnel documents to the Senate Subcommittee on Internal Security.

A point of high drama in this regard was recently reached when, on July 28, 1971, the Senate Committee on Foreign Relations unanimously voted to suspend all funds for the entire U.S. military assistance program unless certain information the Committee had been seeking from the Department of Defense was provided or until the President furnished a reason for denying the request. In retaliation, the President, on August 5, 1971, invoked the doctrine of executive privilege (thereby concluding the suspension of the funds), directing the Secretaries of Defense and State not to make the information available to the Congress on the ground that the public interest would not be served by doing so.

This dispute began in 1969, when the Chairman of the Senate Committee on Foreign Relations, Senator J. W. Fulbright (D-Ark.), requested from the Department of Defense its "formal Five-Year Plan for the Military Assistance Program"⁹⁴ to assist the Committee in appraising the executive branch's legislative requests for authorization of military aid. At first, Secretary of Defense Melvin R. Laird (formerly a member of Congress) refused, for the reasons that "in the past copies have not been made available to the GAO, or to the Chairman, Committee on Foreign Affairs, House of Representatives," and because the "entire Five Year Plan was not made available . . . because it is regarded as a staff study, an entirely tentative planning document at the staff level."⁹⁵ Secretary Laird attached to his letter of refusal a description of the nature of the five-year plan in question.⁹⁶ Chairman Fulbright responded (18 months later) with the asser-

91 See text accompanying notes 291-309, *infra*.

92 See text accompanying notes 310-326, *infra*.

93 S. 5, § 201, 92nd Cong., 1st Sess. (1971). See text accompanying notes 315-325, *infra*.

94 Letter of Senator Fulbright to Secretary Laird, dated May 21, 1969, at 117 CONG. REC. S14119 (daily ed. Sept. 10, 1971).

95 Letter of Secretary Laird to Senator Fulbright, dated June 26, 1969, *ibid*.

96 *Id.* at S14120.

tion that "[i]t will be impossible for the Committee to arrive at realistic estimates of the long-range cost of the military aid program unless it has access to these materials,"⁹⁷ citing the requirement of the Legislative Reorganization Act of 1970 that each report of a Senate committee include an estimate of the cost which would be incurred in carrying out the accompanying bill's program in the current and succeeding five fiscal years.⁹⁸ Following other (apparently unanswered) letters,⁹⁹ Senator Fulbright notified Secretary Laird of his Committee's vote to render funds for the military assistance program unavailable for further obligation or expenditure.¹⁰⁰ (The Senate Foreign Relations Committee acted under authority of a provision of the Foreign Assistance Act of 1961, which provides that foreign assistance funds shall be terminated for any activity thirty-five days after the Committee requests a document relating to the foreign assistance program, unless the document is provided or the President certifies that he has forbidden that it be furnished and gives his reasons for the refusal.¹⁰¹)

Secretary Laird responded to the Foreign Relations Committee's action by stating that, since, "to the best of our knowledge, there is no such thing as a current Five-Year Plan for the Military Assistance Program," the funds cutoff provision of the 1961 Foreign Assistance Act is inapplicable.¹⁰² The Secretary, less than a month later, forwarded to Senator Fulbright a memorandum from the President, instructing the Secretaries of Defense and State "not to make available [to the Congress] any information and material which would impair the orderly function of the Executive Branch of the Government" and, specifically, not to provide the legislative branch with "any internal working documents which would disclose tentative planning data on future years of the military assistance program which are not approved Executive Branch positions."¹⁰³ Aside from the tantalizing question as to whether such a five-year plan actually exists, this episode illustrates the imbalance of power between the legislative and executive branches perpetuated by the imbalance of information resources. Thus, in the aftermath of this affair, Chairman Fulbright stated that the unwillingness of the executive branch to provide the requested materials, "even on a confidential basis, makes it most difficult to legislate in the area of foreign military assistance"; as to whether the Senate can develop sufficient information with its own resources to provide an adequate basis for objectively reviewing the military assistance

97 Letter of Senator Fulbright to Secretary Laird, dated Feb. 26, 1971, *ibid.*

98 Legislative Reorganization Act of 1970 § 252(a)(i)(A); see note 218, *infra*.

99 See *supra* note 94, at S14120-1.

100 Letter of Senator Fulbright to Secretary Laird, dated July 28, 1971, *id.* at S14121.

101 Foreign Assistance Act of 1961 § 634(c), 75 Stat. 424, 455 (1961).

102 Letter of Secretary Laird to Senator Fulbright, dated Aug. 5, 1971, *supra* note 94, at S14121-2.

103 Letter of Secretary Laird to Senator Fulbright, dated Aug. 31, 1971, *supra* note 94, at S14122. It should be noted that the President, by letter dated April 7, 1969, to Representative John E. Moss (D-Cal.), Chairman of the House Subcommittee on Foreign Operations and Government Information, said that "this Administration is dedicated to insuring a free flow of information to the Congress and the news media—and, thus, to the citizens" and that "the scope of executive privilege must be very narrowly construed." *Id.* at S14121. The President's memorandum for the heads of executive departments and agencies, dated March 24, 1969, establishing a procedure to govern compliance with congressional demands for information, appears at *ibid.*

program, Senator Fulbright indicated the answer would have to await actual examination of the President's foreign aid proposals.¹⁰⁴

The Southeast Asian experience has severely undermined the relative harmony that generally prevailed between the executive and legislative branches in the field of foreign affairs. Thus, only a few years ago, one commentator stated that "[i]t is probable that the Senate Foreign Relations and the House Foreign Affairs Committees have better working relationships with the executive branch than with other committees."¹⁰⁵ Today, the Gulf of Tonkin Resolution has been repealed and Foreign Relations Committee Chairman Fulbright has introduced legislation which would require a signed statement by the President before an employee of the executive branch could assert executive privileges as to testimony or documents sought by the Congress.¹⁰⁶ Other such examples are plentiful, typified perhaps by Representative Bella Abzug's resolution "requesting the Secretary of State to furnish the text of all communications pertaining to the forthcoming [October, 1971] Vietnamese presidential election."¹⁰⁷

Recent congressional interest in reasserting its claim to material information has not been manifested only with respect to foreign developments. Members of Congress are increasingly displaying a realization that the Congress must likewise provide itself with the means for analyzing and evaluating government programs and proposals on the domestic front, to adequately perform oversight functions, establish budget priorities, and the like. To this end, for example, Representative Joseph P. Addabbo (D-N.Y.) has proposed the creation of a Joint Committee on Classified Information, to combat the use of security classifications within the federal government "as a means for suppressing information on governmental affairs about which the public does have a right to know."¹⁰⁸ This joint committee would investigate the practices in the executive branch used to classify information and "suspected uses of such classification procedures within the executive branch for purposes contrary to the public welfare," and would be empowered to "publicly disclose any classified information the classification of which the joint committee considers not to be merited in the interests of the common defense and security and the disclosure of which the joint committee considers to be in the public interest."¹⁰⁹ Another resolution, this on a broader scale, sponsored by Representative Silvio O. Conte (R-Mass.), would establish a Joint Select Committee on Government Program Analysis and Evaluation, to ascertain how the Congress can best develop the means of "scientifically evaluating programs and activities."¹¹⁰ The Conte committee would be assigned the duties of determining what methods, procedures, or proposals would "result in the

104 See statement of Senator Fulbright, dated Aug. 31, 1971, *supra* note 94, at S14124. Subsequently, Secretary of State William P. Rogers supplied the Foreign Relations Committee with a tentative five-year projection of foreign aid outlays.

105 Rogow and Temple, *Congressional Government: Legislative Power v. Democratic Processes*, 32 GEO. WASH. L. REV. 947 (1964).

106 S. 1125, 92nd Cong., 1st Sess. (1971). The Senate Subcommittee on Separation of Powers concluded hearings on this bill on Aug. 5, 1971, and approved the measure for consideration by the Senate Committee on the Judiciary on October 28, 1971.

107 H.R. Res. 595, 92nd Cong., 1st Sess. (1971), reported on September 27, 1971. H.R. REP. NO. 92-512.

108 H.R.J. Res. 745, 92nd Cong., 1st Sess. (1971).

109 *Id.* § 3.

110 H.R. Con. Res. 13, 92nd Cong., 1st Sess. (1971).

most proper and beneficial evaluation of the efficiency and effectiveness of Federal programs and activities by objective, scientific, and empirical analysis and in the most practical, expeditious, efficient, and effective manner.¹¹¹ While these and like proposals show little indication of coming to immediate fruition, they are evidence of a growing ferment in the Congress in reaction to its informational inadequacies.

Clearly, what the Congress desperately needs are independent sources of information qualitatively equivalent to that enjoyed by the President. It would be preposterous, of course, to argue for another vast bureaucracy paralleling that which largely serves the executive.¹¹² But the means are available—ranging from the application of contemporary data processing techniques to redressing an inequity in the Internal Revenue Code—to enable the Congress to have readily accessible separate inputs of information, against which it could test out the information supplied by the executive and with which it could independently arrive at meaningful conclusions and make important policy decisions.¹¹³

The improvements implemented by the Legislative Reorganization Acts of 1946 and 1970 only begin to provide the Congress with the competency required to legislate effectively in the twentieth century. This minimum enhancement of the Congress' information-handling capacities has been achieved largely by the enactment of items which should have been instituted years beforehand and constitutes a foundation on which the Congress must build. As discussed, the Congress must do more than simply avail itself of up-to-date information technology. To fully strengthen its information resources, it is essential that the Congress make provision for the utilization of all reasonable techniques for the acquisition and processing of the hard information necessary for legislating in the face of problems of unprecedented severity and complexity.

V. Congressional Reform: The Historical Context

The information gap which so often stymies the Congress in its efforts to legislate effectively is, of course, only one aspect of the necessity of congressional reform. To fully appreciate the need for revamping the Congress, the general perpetuation of the status quo which has largely characterized the organization and procedures of the Congress must be contrasted with the wide-ranging developments of past decades which have drastically and repeatedly reshaped American society.

From the settlement of the original colonies in the early 1600's and the American revolution against the England of King George III, through the struggles over the Constitution and the transformations of Jacksonian Democracy, onward past the Civil War, the rise of industrialism and the United States to world power, two World Wars, and the Great Depression, continuing with the impact

111 *Id.* § 3.

112 It is noted without comment that the bureaucracy can subvert a President's program as well. *See, e.g.,* A. SCHLESINGER AND A. DE GRAZIA, *supra* note 13, at 94-6.

113 *See* Part VII, *infra*. *See also* the proposed Truth in Government Act of 1971, S. 2965, 92nd Cong., 1st Sess. (1971); remarks of Senator Muskie, 117 CONG. REC. S20748 (daily ed. Dec. 7, 1971).

of the New Deal and the Cold War, to the Vietnam involvement, the exploration of space, and the perils of the atomic age, the history of the United States is a panorama of sweeping change. The nation has evolved from an agrarian country to an industrialized state, from a colonial outpost to a major international power, and from an experiment in government to the oldest functioning democratic republic. Social, economic, and political institutions have been born, thrived, and either been transfigured, abandoned or disregarded during the lifetime of the United States.

Within the twentieth century, spectacular scientific, technological and socio-economic developments have occurred in the United States, shaping international events, domestic policies, and individual values. While modern man grapples with these myriad developments, it appears that the rate of change in social processes is rapidly accelerating, thereby increasing the pace of contemporary problems and concerns tumbling before decision-makers in and out of government.¹¹⁴ Against this brief backdrop of an ever-changing society, the United States Congress has basically persisted as a static—in terms of organization—institution.

From the opening days of the Congress in the spring of 1789 until the Legislative Reorganization Act of 1946,¹¹⁵ there was no major reform of the processes of lawmaking as practiced by the national legislature of the United States. Throughout the nineteenth century and the first half of the twentieth century, the Congress' institutional operations were conducted largely in adherence to the blueprint drawn by the first Congresses.

The principal task facing the membership of the initial Congresses in the closing decade of the eighteenth century was establishment of the structure of the government of the United States, that is, to implement the newly adopted Constitution. The First Congress instituted the offices of the House and Senate, developed some rudimentary standing rules, and began journals of the proceedings of each house. The early days of congressional proceedings saw the Congress decide to initiate legislation by means of committees.¹¹⁶ In 1880, the Congress, to enhance its information resources, established the Library of Congress.¹¹⁷ These two decisions, to generate legislation through the committee framework and to have a legislative library, stand as the chief decisions of the Congress as respects legislative procedures until the mid-twentieth century.

Most of the "reforms" of the Congress occasioned during the initial decades of its existence were not so much revisions of procedure but were institutional reconstitutions of the legislative branch reflecting changes in the internal distribution of political strengths. This was because the Congress was immediately dominated by the party system of legislative government, first the Federalist, then the Whig and Know-Nothing parties, and eventually the Democratic and Republican parties. The upheavals in the Congress of consequence were caused by shifting concepts of the extent of party domination of the legislative process. Leadership struggles dominated the evolution of the Congress into its present

114 This is one of the central themes of *FUTURE SHOCK*, *supra* note 76.

115 60 Stat. 812, 28 U.S.C. § 921-946.

116 G. GALLOWAY, *HISTORY OF THE HOUSE OF REPRESENTATIVES* 64 (1962).

117 See 2 U.S.C. ch. 5.

form. A highlight of the development of the Congress in this regard was the House revolt against Speaker Joseph G. Cannon in 1910, which diminished the Speaker's authority in relation to the chairmen of the standing committees and built the House Committee on Rules into an independent center of power.¹¹⁸ Similarly, Speaker Sam Rayburn, in an effort to reduce the Rules Committee's expected hostility to the legislative program of newly elected President John F. Kennedy, won a battle in 1961 to enlarge the committee by three members, in an attempt to coalesce a different informal working majority in favor of the "national" Democrats.¹¹⁹ From the party structure of the Congress has sprung the transfer of leadership from House and Senate officers to committee chairmen, the high degree of independence and specialization among committees, and the seniority system.

There were, of course, instances of congressional "reform" prior to 1946 other than through the politics of power distribution within the Congress. The seventeenth amendment to the Constitution, by which senators were subjected to direct popular vote (until then they were chosen by state legislatures), was adopted in 1913, and the twentieth amendment to the Constitution was adopted in 1933, thereby abolishing "lame duck"¹²⁰ Congresses by providing that new sessions should commence on the third day of January following the elections.¹²¹ Notable instances of statutory "reform" include fixing the size of the House at 435 members in 1912,¹²² establishment of the Legislative Reference Service (now the Congressional Research Service) in 1914,¹²³ creation of the bill-drafting Office of Legislative Counsel in 1919,¹²⁴ and the Budget and Accounting Act of 1921 which established the Bureau of the Budget (now the Office of Management and Budget, and the General Accounting Office as an agency of the Congress.¹²⁵ Also, the Reorganization Act of 1939,¹²⁶ while not an illustration of congressional "reform," had an impact on congressional operations by instituting the concept of the presidential "reorganization plan" which led, *inter alia*, to the establishment of the Executive Office of the President. Nonetheless, while these developments — the constitutional amendments and the various enactments — intro-

118 See HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES 95, H.R. Doc. No. 250, 89th Cong., 1st Sess. (1965).

119 See Peabody, *The Enlarged Rules Committee*, in R. PEABODY AND N. POLSBY, *NEW PERSPECTIVES ON THE HOUSE OF REPRESENTATIVES* 129 (1963).

120 See W. SAFFIRE, *THE NEW LANGUAGE OF POLITICS* 226 (1968). For an analysis of the "lame ducks" in the 91st Congress see U.S. NEWS AND WORLD REPORT, Nov. 23, 1970, at 20.

121 The U. S. Constitution originally provided (art. I § 4) that "The Congress shall assemble at least once in every year . . . on the first Monday in December, unless they shall by law appoint a different day." The first session of the First Congress convened in March, 1789, pursuant to a resolution of the Continental Congress (although the House first achieved a quorum on April 1, 1789, and the Senate actually became organized on April 6, 1789). Up to and including May 20, 1820, eighteen acts were passed providing for the meeting of Congress on other days. Since 1820, the Congress met regularly on the first Monday in December, until January, 1934, when the twentieth amendment became effective. See *infra* note 451.

122 37 Stat. 1723 (1912), 2 U.S.C. § 2.

123 The L.R.S. was initially established as a division of the Library of Congress. See Kravitz, *The Congressional Research Service and the Legislative Reorganization Act of 1970*, LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, MONOLITH NO. JF 522 (Jan. 8, 1971). The L.R.S. received statutory authority and status as a Department of the Library of Congress under the Legislative Reorganization Act of 1946 § 203, 2 U.S.C. 166.

124 40 Stat. 1141, § 1303 (1919).

125 42 Stat. 20 (1921).

126 53 Stat. 561 (1939).

duced meaningful and useful enhancements of congressional functions, they fall far short of constituting substantive congressional reform.

Thus, the Congress waited 156 years to undertake a comprehensive review and revision of its procedures and methods of operation. Despite momentous socioeconomic and technological changes in the society it was designed to serve, not until passage of the Legislative Reorganization Act of 1946 did the Congress seek to modernize itself. Yet once the Congress finally decided to reform its procedures, it approved a significant bill. As the late George B. Galloway, who was director of the Joint Congressional Committee on the Reorganization of Congress which produced the 1946 Act, wrote, the reform act of that year "added up to the most sweeping changes in the machinery and facilities of Congress ever adopted in a single package."¹²⁷

The thrust of the Legislative Reorganization Act of 1946 was to streamline and simplify the congressional committee structure.¹²⁸ Probably the principal single accomplishment of the 1946 Act was the reduction in the number of standing committees from 33 to 15 in the Senate and from 48 to 19 in the House. In addition, this Act augmented professional staff assistance for congressmen, strengthened the Legislative Reference Service in the Library of Congress, implemented regulation of lobbying activities, directed standing committees to continually exercise the function of oversight of administration, and increased the compensation of members of Congress. Still other objectives, as enumerated by Dr. Galloway, include clarification of committee duties and reduction of jurisdictional disputes, regularization and publicizing of committee procedures, reduction of the congressional workload, and reinforcement of the power of the purse.¹²⁹ The Legislative Reorganization Act of 1946 junked much of the Congress' antiquated machinery and introduced many long-overdue improvements in congressional operations.

However, procedures for a continuous, formal review and study of means by which the Congress might be improved were not instituted in 1946, and, although the Senate Committee on Government Operations recommended improvements in the 1946 Act in 1948 and 1951, another 25 years were to pass before a package of further reforms was implemented. In the interim, some single congressional "reforms" were made, such as in 1968, when the House established a Committee on Standards of Official Conduct.¹³⁰ Also, the groundwork was being laid for much of what was to become the Legislative Reorganization Act of 1970.¹³¹

Early in the 88th Congress (1963), former Senator Joseph S. Clark (D-Pa.)

127 G. GALLOWAY, *supra* note 7, at 646.

128 Justice Harold H. Burton once observed that "the overwhelming purpose of Congress [in enacting the Legislative Reorganization Act of 1946] was to make changes of procedure which would enable it to devote more time to major public issues." *United States v. Yellow Cab Co.*, 340 U.S. 543, 549-550 (1951).

129 For a full description of the accomplishments and omissions of the Legislative Reorganization Act of 1946, see GALLOWAY, *supra* note 7, ch. 23; see also Shull, *The Legislative Reorganization Act of 1946*, 20 TEMP. L.Q. 375 (1947).

130 For an analysis of some congressional "reforms" since the Legislative Reorganization Act of 1946 see Sittig, *The United States Congress and Internal Reform*, 20 VAND. L. REV. 61 (1966-7).

131 See text accompanying notes 142-9, *infra*.

and Senator Clifford P. Case (R-N.J.) sponsored a resolution to establish a committee to study congressional operations.¹³² However, the Senate Committee on Rules, in reporting the resolution to the Senate, limited the measure so as to remove from the study committee's jurisdiction any authority to propose alteration of the rules, precedents, or floor procedures of either House.¹³³ Controversy over the restricted resolution precluded any substantive progress toward the creation of a committee on congressional organization.

The 89th Congress, in 1965, established a Joint Committee on the Organization of Congress, to study the organization and operation of the Congress and to recommend improvements.¹³⁴ Chaired by former Senator A.S. Mike Monroney (who, with the late Robert LaFollette, was also co-architect of the 1946 reorganization act) and Representative Ray J. Madden (D-Ind.), the Joint Committee took the testimony of 76 senators and representatives and received written statements from another 30. The views of 123 public witnesses were also heard and a fifteen-volume hearing record was built. After weeks of executive sessions, the Joint Committee filed its report in July, 1966,¹³⁵ and a Special Senate Committee on the Organization of Congress was formed to draft legislation. Although a comprehensive measure was readied late in the 89th Congress, the legislation was deferred until the beginning of the 90th Congress.

Following 18 days of debate, 31 roll-call votes, and the adoption of 40 amendments, the Senate passed the Legislative Reorganization Act of 1967¹³⁶ on March 7, 1967, by a vote of 75 to 9. The controversial bill languished in the House Committee on Rules for the duration of the 90th Congress, while undergoing several but futile revisions,¹³⁷ and there died at the expiration of that Congress in October, 1968.¹³⁸ Among the various attempts to secure action on the reorganization measure during the 90th Congress was a House sit-in in September, 1968, a 32-hour continuous session generated by a coalition of Republican representatives led by then-Representative Donald Rumsfeld ("Rumsfeld's Raiders") in an unsuccessful effort to force the leadership to bring the bill to the House floor.¹³⁹

In the 91st Congress, the Senate Committee on Government Operations, on May 23, 1969, reported¹⁴⁰ the Senate's successor to the 1967 bill.¹⁴¹ Earlier, in April, 1969, the House Special Subcommittee on Legislative Reorganization was established,¹⁴² under the chairmanship of Representative B.F. Sisk (D-Cal.). The House Subcommittee, having studied the Senate-passed measure and other legislation,¹⁴³ produced a committee print bill in November, 1969, which was the

132 S. Con. Res. 1, 88th Cong., 1st Sess. (1963).

133 S. REP. No. 504, 88th Cong., 1st Sess. (1963).

134 S. Con. Res. 2, 89th Cong., 1st Sess. (1965).

135 S. REP. No. 1414, 89th Cong., 2d Sess. (1966).

136 S. 355, 90th Cong., 1st Sess. (1967).

137 See H.R. 10748, 90th Cong., 1st Sess. (1967), H.R. 18039, H.R. 15687, 90th Cong., 2d Sess. (1968).

138 See Hopkins, *Congressional Reform: The Clash With Tradition*, 54 A.B.A.J. 80 (1968).

139 See 114 CONG. REC. 30090-30103, 30209-30221 (1968).

140 S. REP. No. 91-202, 91st Cong., 1st Sess. (1969).

141 S. 844, 91st Cong., 1st Sess. (1969).

142 See H.R. REP. No. 91-1215, 91st Cong., 2d Sess. (1970), at 2.

143 See H.R. 2185, H.R. 2186, H.R. 2187, H.R. 6278, H.R. 10426, and H.R. 11475, 90th Cong., 2d Sess. (1969).

basis for eight days of open hearings and, subsequently, nearly a year of executive sessions. In May, 1970, the Subcommittee presented its recommendations to the parent House Committee on Rules,¹⁴⁴ which reported¹⁴⁵ the legislation on June 17, 1970.

After the longest House debate on any single measure in three decades (eleven days), the House passed the bill, by a vote of 326 to 19, in September, 1970.¹⁴⁶ The Senate debated the bill for two days and passed the measure by a vote of 59 to 5, on October 6, 1970.¹⁴⁷ The House agreed to the Senate amendments on October 8, 1970,¹⁴⁸ and President Nixon signed the reorganization act into law on October 26, 1970.¹⁴⁹

Thus it is that the history of congressional reform lacks little parallel to the history of the larger society. The Congress oftentimes seems immune¹⁵⁰ or even defiant to change and tends to cling, weighted by inertia, to outworn traditions and outdated procedures. Recent years have shown a greater inclination in the Congress toward procedural and organizational reform, as evidenced by the Legislative Reorganization Acts of 1946 and 1970. But if the past is indeed only prologue, then history's message is that future Congresses will have many societal changes with which to cope. The Congress no longer has the luxury of waiting 150 years or even 25 years before modernizing its practices.

VI. The Legislative Reorganization Act of 1970

Nearly a quarter of a century after passage of the 1946 Reform Act, the Congress approved another omnibus congressional reorganization measure, the Legislative Reorganization Act of 1970.¹⁵¹ However, the 1970 Act, which generally became effective with the convening of the 92nd Congress, while a modest package of improvements in congressional operations, is not the pervasive reform measure that characterizes its 1946 predecessor. Nonetheless, the 1970 Reorganization Act has some important features, and points the Congress in some right directions toward improvements in its oversight function and modernization of its information-processing systems.¹⁵² Then, too, in the face of widespread national disinterest in modernizing the Congress, the general public probably received more "congressional reform" than was warranted, as the nation continues to display more apathy toward than empathy for an improved

144 H.R. 17654, 91st Cong., 2d Sess. (1970).

145 H.R. REP. NO. 91-1215, *supra* note 142. The House Rules Committee, on June 11, 1970, reported (H.R. REP. NO. 91-1186) a resolution (H.R. Res. 1031, 91st Cong., 2d Sess. (1970)) assigning jurisdiction over lobbying and campaign expenditure measures affecting the House to the House Committee on Standards of Official Conduct, which passed the House on July 8, 1970.

146 116 CONG. REC. H8897 (daily ed. Sept. 17, 1970).

147 116 CONG. REC. S17181 (daily ed. Oct. 6, 1970).

148 116 CONG. REC. H9891 (daily ed. Oct. 8, 1970).

149 Pub. L. No. 91-510, 91st Cong., 2d Sess., 84 Stat. 1140 (1970).

150 See Nutting, *Federal Legislation Through Fifty Years*, 29 FED. B.J. 255 (1970).

151 Legislative Reorganization Act of 1970 (Pub. L. No. 91-510), 84 Stat. 1140 (1970).

152 See generally Hopkins, *Congressional Reform: A Little, but Possible, Bit*, 57 A.B.A.J. 62 (1971). See also Kravitz, *The Legislative Reorganization Act of 1970*, LIBRARY OF CONGRESS, LEGISLATIVE REFERENCE SERVICE, MONOLITH NO. JK 1000 F (Nov. 18, 1970). Some of the items contained in the Legislative Reorganization Act of 1970 are not discussed in this part but in an appropriate context elsewhere in the article.

Congress. Wrote veteran Capitol Hill reporter Richard L. Lyons, “[p]assage of the congressional reform bill . . . was something of a marvel, if simply for the fact that a bill labeled reform was passed.”¹⁵³

The Legislative Reorganization Act of 1970 fails to address many aspects of congressional reform, although the occasions of its consideration in committee and on the floor in both houses gave opportunity for discussion of nearly the entire gamut of the subject. During the course of the debates, especially in the House, numerous amendments were offered and analyzed (and some approved), many of considerable significance. Some of the proposals unsuccessfully advanced during the amending processes in the House and Senate with respect to the 1970 Act are presently under varying stages of study, and merit serious consideration.

Committee Procedures and Structures

The 1970 Reorganization Act introduced some progressive modifications in the operating procedures of the House and Senate standing committees (except Senate Appropriations and, in certain instances, House Rules and other House committees). House committees are now authorized to permit the telecasting of public hearings (House committees traditionally have not permitted televising of hearings; Senate committee hearings can be telecast under previously adopted rules¹⁵⁴) when the committee votes for coverage, subpoenaed witnesses approve, there is no commercial sponsorship, and other conditions.¹⁵⁵ Subject to these criteria, radio broadcasting and still photography are also permissible.¹⁵⁶ These methods of committee coverage must be in conformance with “acceptable standards of dignity, propriety, and decorum,” and be a means for the “education, enlightenment, and information of the general public” regarding the procedures and work of the House, as well as for the “development of the perspective and understanding of the general public with respect to the role and function of the House under the Constitution of the United States as an organ of the Federal government.”¹⁵⁷

The Act instituted an improved method whereby Senate and House committee members can initiate special meetings of their committee. Under this procedure, three committee members can inform the committee chairman in writing of their desire to have a meeting; should the chairman fail to schedule the meeting within three days afterwards, to be held within seven days of the request, a majority of the committee members can call the meeting.¹⁵⁸ The Act requires standing committees to fix their regular meeting days and clarifies the prerogative of the ranking majority party member of the committee to preside over any regular, additional, or special meeting in the absence of the committee chairman.¹⁵⁹ A proposal rejected on the House floor would have

153 Wash. Post, Oct. 12, 1970, at A14.

154 See 2 U.S.C. § 190a-1(b).

155 Legislative Reorganization Act of 1970, *supra* note 151, § 116(b).

156 *Ibid.*

157 *Ibid.* (RULES OF HOUSE OF REPRESENTATIVES, RULE XI, clause 33 (a)).

158 Legislative Reorganization Act of 1970, *supra* note 151, § 102(a) and (b).

159 *Ibid.*

provided for the designation of a temporary standing committee chairman when the majority of the committee determines that the chairman is unable to discharge his responsibilities.¹⁶⁰

House and Senate committees must now make public announcements of the date, place, and subject matter of any hearing at least one week in advance, unless there is "good cause" to begin a hearing at an earlier date.¹⁶¹ During the course of committee hearings in the House and Senate, committee members in the minority party are now entitled to have at least one day to call witnesses of their selection to testify with respect to the matter under consideration.¹⁶² Each committee of the House and Senate now must require witnesses to file a written statement of their proposed testimony in advance, unless not practicable, and, in the Senate, the committee staff can be requested to prepare a digest of such written statements in advance of the hearing.¹⁶³

The new rules require a public listing of House members' record votes in committee on all measures, amendments, and procedural motions,¹⁶⁴ and each House committee report must now state the votes cast on the motion to report the related bill or resolution.¹⁶⁵ Senate committee reports must now reflect all roll-call votes on any measure or amendment.¹⁶⁶ Blanket proxy voting in the House committees has been eliminated, although proxy voting on specific matters is still permitted,¹⁶⁷ while senators are able to vote in committee by proxy upon affirmative request and if the committee rules permit.¹⁶⁸ Most House committees are unable to meet, without special leave, while the House is in session during the period in which measures are being considered for amendment, although any committee can sit during general debate without permission.¹⁶⁹ In a move which may weaken the filibuster as a tactic for obstruction of business,¹⁷⁰ the Senate voted to allow its standing committees to meet while the Senate is in session where consent therefor has been obtained from the majority and minority leadership.¹⁷¹

Three working days are now allowed for the submission of minority or additional views by House and Senate committee members on bills reported from their committees,¹⁷² and another three-day interim (with exceptions) for all members for study between the time most committee reports become available and the accompanying bills are called up for consideration.¹⁷³ Where hearings have

160 See 116 CONG. REC. H6663, H6668 (daily ed. July 14, 1970).

161 Legislative Reorganization Act of 1970, *supra* note 151, § 111 (excepting Senate Committee on Appropriations and House Committee on Rules).

162 *Id.* § 114 (excepting Senate Committee on Appropriations).

163 *Id.* § 114 (excepting Senate Committee on Appropriations).

164 *Id.* § 104(b).

165 *Ibid.*

166 Legislative Reorganization Act of 1970, *supra* note 151, § 104(a).

167 *Id.* § 106(b).

168 *Id.* § 106(a). See also *id.* § 243.

169 *Id.* § 117(b) (excepting House Committees on Appropriations, Government Operations, Internal Security, Rules, and Standards of Official Conduct).

170 See text accompanying notes 280-90, *infra*.

171 Legislative Reorganization Act of 1970, *supra* note 151, § 117(a) (excepting Senate Committee on Appropriations).

172 *Id.* § 107 (excepting House Committee on Rules).

173 *Id.* § 108(a) and (b) (excepting House Committees on Appropriations, House Administration, Rules, and Standards of Official Conduct).

been held on the reported measure, House and Senate committees must make "every reasonable effort" to distribute the transcripts thereof prior to consideration.¹⁷⁴ Also, no general appropriation bill may be considered in the House until the printed committee hearings and the committee report thereon have been available to House members for at least three working days.¹⁷⁵ A majority of a House or Senate committee's membership is now empowered to force the filing of an approved committee report (where the chairman refuses to do so) within seven working days of its approval.¹⁷⁶ The Speaker was given discretionary authority to recognize any committee member for the purpose of consideration of a bill before the full House, where the committee has authorized the member to act and where the measure has been made in order for debate.¹⁷⁷

House and Senate standing committee business meetings are now to be open to the public unless, in the case of the House, a committee majority determines otherwise¹⁷⁸ or, in the Senate's case, when the committee meets for a marking-up session.¹⁷⁹ A proposal requiring an open session vote by House committee members to determine on a day-to-day basis whether the meeting would be open was rejected on the House floor,¹⁸⁰ largely at the insistence of committee chairmen. House committee hearings are to be open, unless a majority of the committee determines otherwise,¹⁸¹ and Senate committee hearings are to be open, unless matters of national security, the reputation of a witness, or other confidential matters are involved.¹⁸² The Act also requires the House Committee on Appropriations, which usually conducts only closed hearings, to hold open hearings at the outset of each annual session (unless national security matters are involved) to receive an overall review of the proposed federal budget from officials of the executive branch.¹⁸³ Hearings conducted by the Senate Committee on Appropriations are to be open to the public, unless national security or the reputation of a witness is involved, or other confidential matters may be divulged.¹⁸⁴

The Senate voted to make some changes in its standing committee structure, as discussed *infra*.¹⁸⁵ (The House was forbidden by the rule governing consideration of the 1970 reform bill to alter the jurisdiction of its standing committees.¹⁸⁶) The 1970 Act also limits to two the number of major committees on which any senator can prospectively serve,¹⁸⁷ with senators prohibited from

174 *Ibid.*

175 Legislative Reorganization Act of 1970, *supra* note 151, § 108(c).

176 *Id.* § 105 (excepting House Committee on Rules).

177 *Id.* § 109.

178 *Id.* § 103(b).

179 *Id.* § 103(a).

180 116 CONG. REC. H6671, H6681 (daily ed. July 14, 1970).

181 Legislative Reorganization Act of 1970, *supra* note 151, § 112(b).

182 *Id.* § 112(a) (excepting Senate Committee on Appropriations).

183 *Id.* § 242(c)(1).

184 *Id.* § 242(a).

185 See text accompanying notes 350-1, *infra*.

186 H.R. Res. 1093, 91st Cong., 2d Sess. (1970).

187 Legislative Reorganization Act of 1970, *supra* note 151, § 132(d). Rule XXV, clause 6(e), of the STANDING RULES OF THE SENATE, now provides that no senator may serve at any time on more than one of the following Senate committees: Appropriations, Armed Services, Finance, or Foreign Relations. STANDING RULES OF THE SENATE, 92nd Cong., appear as SEN. DOC. NO. 92-1, 92nd Cong., 1st Sess. (1971).

concurrently being chairman of a principal legislative committee and a joint committee, or simultaneously heading two subcommittees of the same major committee.¹⁸⁸

House Floor Procedure

The procedures relating to consideration of measures on the floor of the House have been modified somewhat under the Legislative Reorganization Act of 1970.

Nongermane amendments attached to House bills by the Senate now must, on demand of any House member, be agreed to by a separate majority vote after forty minutes of debate to survive.¹⁸⁹ The House's rules were changed to permit the installation of electronic voting, should the House decide to do so.¹⁹⁰ Quorum calls can now be taken by having House members sign tally sheets rather than by the previous practice of oral answer and can be dispensed with on achievement of a quorum, although other members would have thirty minutes thereafter to record their presence on a tally sheet.¹⁹¹ Two House parliamentary procedures are now subject to a minimum of ten minutes of debate prior to a vote on their adoption: amendments printed in advance in the *Congressional Record*¹⁹² and motions to recommit a bill to committee with instructions to modify its language.¹⁹³

Probably the most significant amendment relating to the legislative procedure of the House adopted during debate on the 1970 Act (and nearly the only provision of the measure to generate any notable public interest) was the proposal—sponsored by 182 members—to record House members' names on teller votes, either by House tally clerks or electronic equipment, with publication of the voting in the *Congressional Record* as has been done with roll-call votes.¹⁹⁴ Under the prior procedure, dating back to early British parliamentary practice, only the total votes on each side of a teller vote, which takes place in the Committee of the Whole House on the State of the Union, were published. Since any amendment defeated while the House sits in Committee of the Whole cannot be the subject of a later record vote when the Committee rises, members could vote anonymously to defeat an amendment they might feel obligated to support if their position were to be made public. Most amendments to legislation adopted in the House are decided by voice, standing, or teller votes, all—until the 1970 act—unrecorded. With recordation of teller votes, the number of members voting and thus participating in the amending process has been increased, and the outcome of the vote occasionally changed.¹⁹⁵

House conferees are now prohibited from inserting language into committee

188 *Id.* § 132(d).

189 *Id.* § 126(a).

190 *Id.* § 121(a). See text accompanying notes 397-402, *infra*.

191 *Id.* § 122(a).

192 *Id.* § 119.

193 *Id.* § 123.

194 *Id.* § 120. For a description of the operation of this new rule see 117 CONG. REC. H881 (daily ed. Feb. 25, 1971).

195 See text accompanying notes 33-4, *supra*.

reports presenting a "specific additional topic, question, issue, or proposition" not committed to the conference committee by either the House or Senate, and are specifically required to reach agreement only within the scope of the specific issues being reconciled.¹⁹⁶ Conference reports and accompanying explanatory statements are now printed in the *Congressional Record* at least three working days prior to their consideration in the House (except near the close of a session),¹⁹⁷ to enable members and their staff to study them prior to the final vote.

Information and Fiscal Controls for the Congress

The Legislative Reorganization Act of 1970 also represents an attempt to improve the means by which the Congress obtains and utilizes information.

The Legislative Reference Service in the Library of Congress was redesignated the Congressional Research Service¹⁹⁸ and converted into a more extensive research center. The C.R.S. is now expected to provide various research and analytical services for congressional committees, including a listing at the beginning of each Congress of the programs and activities scheduled to terminate during that Congress,¹⁹⁹ and of subjects and policy areas which committees "might profitably analyze in depth."²⁰⁰ The C.R.S. is to be staffed by specialists in at least twenty-two broad fields (and such other fields as the Director of the C.R.S. may consider appropriate) who will be available to members of Congress for "special work."²⁰¹

The Comptroller General is now required by law to, at the request of any House or Senate committee, explain to or discuss with any such committee any report of the General Accounting Office which would assist the committee in connection with its consideration of proposed legislation or its review of federal programs and activities.²⁰² The Comptroller General is further required to prepare, monthly and annually, a cumulative list of all GAO reports, and transmit a copy of such list to each House and Senate committee, all joint committees, and each member of the House and Senate.²⁰³

At various stages along the legislative process, the bill which became the Legislative Reorganization Act of 1970²⁰⁴ contained two significant items to upgrade congressional information-handling systems—both of which were ultimately defeated. In one instance, the House Rules Committee bill originally contained provisions authorizing the creation of a Joint Committee on Data Processing, which would have had broad authority to modernize the Congress' information-processing machinery through the use of ADP facilities and professionals.²⁰⁵

196 Legislative Reorganization Act of 1970, *supra* note 151, § 125(b)(3). See text accompanying notes 437-43, *infra*.

197 *Id.* § 125(b)(2).

198 Legislative Reorganization Act of 1970, *supra* note 151, § 321(a).

199 *Ibid.*, amending Legislative Reorganization Act of 1946, *supra* note 115, § 203(d)(2).

200 *Id.* § 203(d)(3).

201 *Id.* § 203(e). See generally Kravitz, *supra* note 123.

202 *Id.* § 231.

203 *Id.* § 234.

204 *Supra* note 151.

205 See *supra* note 82.

But this concept was deleted on the House floor, as discussed.²⁰⁶ In the other instance, the Congress had voted to entitle the minority on each standing committee of the House to at least one-third of the funds provided for the appointment of committee staff personnel.²⁰⁷ However, the Democrats bound themselves in caucus just prior to the convening of the 92nd Congress and pushed through a resolution rescinding this "minority staffing" provision.²⁰⁸

The 1970 Act also authorizes House and Senate committees to procure the services of temporary consultants,²⁰⁹ and to provide assistance in obtaining specialized training for their professional staff members.²¹⁰ The Act also increases the number of professional staff members of House and Senate standing committees to six, with two for the minority, and the number of clerical staff to six, with one for the minority committee members.²¹¹

To enable the Congress to cope with modern-day federal budgets, the Reorganization Act of 1970 requires the Department of the Treasury and the Office of Management and Budget, along with the General Accounting Office, to establish and maintain a standardized information and data processing system for budgetary and fiscal data for use by all federal agencies.²¹² The Department of the Treasury and the O.M.B., in coordination with the G.A.O., are also now required to establish and maintain standard classifications of programs, activities, receipts, and expenditures of federal agencies, to meet the needs of the branches of government and facilitate the establishment and maintenance of the aforementioned data processing system through the utilization of ADP techniques.²¹³ These governmental agencies must report to the Congress annually with respect to the performance of the foregoing duties and functions.²¹⁴ Moreover, the Treasury and the O.M.B. are further required to furnish to any congressional committee the program and fiscal data available in the executive branch, and, where feasible, prepare summaries of such data.²¹⁵ Similarly, the Comptroller General is required to review and analyze the results of government programs and activities for the Congress, and to provide expert assistance in conducting and analyzing cost-benefit studies.²¹⁶

An administration submitting a new program or change in an existing one to the Congress must now submit a budget estimate not only for the ensuing fiscal year but also for the subsequent four fiscal years.²¹⁷ Likewise, the legislative committees of the Congress generally are now obligated to make in their reports six-year projections of the estimated costs of the programs embodied in their reported bills (other than revenue measures), as well as a comparison of such

206 See text accompanying notes 83-9, *supra*.

207 Legislative Reorganization Act of 1970, *supra* note 151, § 110(b), amending RULES OF THE HOUSE OF REPRESENTATIVES, Rule XI, clause 32(c).

208 See text accompanying notes 432-6 *infra*.

209 Legislative Reorganization Act of 1970, *supra* note 151, § 303.

210 *Id.* § 304.

211 *Id.* §§ 301, 302 (excepting the Senate Committee on Appropriations, and the House Committees on Appropriations and Standards of Official Conduct).

212 *Id.* § 201.

213 *Id.* § 202(a).

214 *Id.* § 202(b). See 117 CONG. REC. E10404 (daily ed. Oct. 4, 1971).

215 *Id.* § 203.

216 *Id.* § 204.

217 *Id.* § 221(a).

estimate with any estimate of costs made by a federal agency.²¹⁸ After the annual budget is presented to the Congress, and by June 1 of each year, the President must (beginning in 1972) transmit a supplemental budget to the Congress, containing a complete and current summary of revised appraisals of budget estimates and obligations.²¹⁹

Miscellaneous Provisions

The Legislative Reorganization Act of 1970 established a permanent Joint Committee on Congressional Operations,²²⁰ to—

make a continuing study of the organization and operation of the Congress of the United States and . . . [to] recommend improvements in such organization and operation with a view toward strengthening Congress, simplifying its operations, improving its relationships with other branches of the United States Government, and enabling it better to meet its responsibilities under the Constitution of the United States²²¹

and to—

identify any court proceeding or action which, in the opinion of the Joint Committee, is of vital interest to the Congress, or to either House of the Congress, as a constitutionally established institution of the Federal Government and call such proceeding or action to the attention of the House of the Congress which is specifically concerned or to both Houses of the Congress if both Houses are concerned.²²²

However, as in the past, the Joint Committee is forbidden to “make any recommendations with respect to the rules, parliamentary procedure, practices, or precedents of either House or the consideration of any matter on the floor of either House.”²²³

The Resident Commissioner to the United States from Puerto Rico is now elected to House standing committees in the same manner as House members are selected (previously, the Commissioner was automatically a member of three committees) and has the right to vote in his committees.²²⁴

Other provisions of the 1970 Reorganization Act require the House Parliamentarian to revise the compilation of the House’s parliamentary precedents at least once every five years,²²⁵ establish the John W. McCormack Residential

218 *Id.* § 252 (excepting the Senate Committee on Appropriations, and the House Committees on Appropriations, House Administration, Rules, and Standards of Official Conduct). See text accompanying note 98, *supra*. It has been proposed that committee reports contain an analysis and evaluation of the environmental impact of the accompanying measure; see H.R. Res. 647, 92nd Cong., 1st Sess. (1971).

219 *Id.* § 221(b).

220 *Id.* § 401(a).

221 *Id.* § 402(a)(1).

222 *Id.* § 402(a)(2).

223 *Id.* § 402(d).

224 *Id.* § 129(b).

225 *Id.* § 331.

Page School and dormitory,²²⁶ authorize free guided tours of the Capitol,²²⁷ abolish the Joint Committee on Immigration and National Policy²²⁸ and the Office of Coordinator of Information,²²⁹ convert the "base pay" system of the House to a gross pay structure,²³⁰ and rewrite the statutory authority for the Office of Legislative Counsel in the House²³¹ to enable the O.L.A. to assist in "the achievement of a clear, faithful, and coherent expression of legislative policies."²³²

The 1970 Reorganization Act further authorizes the Speaker to appoint a Special Commission on Modernization of House Gallery Facilities, to study the structure and uses of the House gallery, and to formulate a program for modernization and improvement of the facilities.²³³ The Commission is charged with seeking ways "to improve the physical conditions under which the proceedings on the floor of the House are conducted" and "to provide for spectators in the House galleries modernized and improved accommodations for their enlightenment, information, and understanding" with respect to House floor proceedings and the role of the House in general. The program is to provide for soundproofing and enclosure of the galleries with "transparent coverage," installation of facilities by which explanation of the proceedings on the House floor may be made to visitors, and a means to facilitate the consultation of legislative materials and the taking of written notes in the galleries. The Commission's study was to be completed by the close of the first session of the 92nd Congress,²³⁴ i.e., late in 1971.

Some Rejections

During consideration of the Legislative Reorganization Act of 1970, numerous other aspects of congressional reform were discussed but failed to secure approval. The House considered but rejected two attempts, and the Senate one, to modify the system of selection of committee chairmen by seniority.²³⁵ The House refused to approve an amendment to clarify and make more accurate the *Congressional Record*.²³⁶ A challenge to the sacrosanct "closed rule" (whereby no amendments may be offered to a measure under consideration in the House without permission from the chairman of the committee which reported it, i.e., the House Committee on Ways and Means) was ruled out of order.²³⁷ The House declined to require a roll-call vote on final consideration of every appropriation bill.²³⁸

Other unsuccessful amendments include: mandatory installation in the

226 *Id.* § 492.

227 *Id.* § 441.

228 *Id.* § 421.

229 *Id.* § 322.

230 *Id.* § 474.

231 *Id.* § 501.

232 *Id.* § 502.

233 *Id.* § 499(a).

234 *Id.* § 499(c).

235 See text accompanying notes 259-65, *infra*.

236 See text accompanying notes 425-7, *infra*.

237 116 CONG. REC. H7385 (daily ed. July 29, 1970).

238 116 CONG. REC. H7153, H7154 (daily ed. July 27, 1970).

House of automatic voting procedures by 1972,²³⁹ a Minority Committee on Investigations to enable the minority party in Congress to exercise separate oversight and investigatory functions,²⁴⁰ maximum term for House committee chairmen of eight years unless the House by a two-thirds vote suspends the limitation,²⁴¹ and a change in the fiscal year of the federal government, to extend from October 1 through September 30.²⁴² Additional amendments, many technical in nature, were also rejected.

Commentary

In view of the multitudinous problems confronting the Congress and the many reforms so long overdue, the Legislative Reorganization Act of 1970 is an exiguous version of what should have been. In many ways, the 1970 Act bears out the admonition, expressed earlier,²⁴³ as to the distortions and simulations potentially inherent in procedural reform: such reform is often makeshift reform—a response to public insistence that the Congress improve its practices by scattered tinkering with isolated aspects of congressional operations to contrive the appearance of authentic reform of the Congress. Yet the Act contains some substantial reform measures, in large part due to the energetic efforts of younger members of the House who succeeded in attaching a series of important reform amendments to the bill. On balance, the Act makes important contributions toward improved congressional reorganization and, considering the framework of politics and vested interests in which it was enacted, it is another illustration of what might have been bowing to what is possible.

VII. Congressional Reform: Some Recent Events

A. The Seniority System

To anyone who has ever pondered reorganization of the Congress, the idea of congressional reform undoubtedly brings quickest to mind the seniority system. Elimination of the system of congressional seniority, whereby longevity results in committee chairmanships, is certainly the most popularized of reform proposals. Detractors of the Congress often point first to the seniority system, whether in excoriation of the Congress for inefficiency or for languor, or in lament over lost legislation or an allegedly misdirected bill.

The seniority system is the product of rigid custom, not requirement. The selection of congressional committee leadership positions is a function of the political parties: the choices are made by the Republican and Democratic caucuses, wholly outside the regulation of any statute, or House or Senate rule. (Although, for example, the House's rules provide that the House shall biannually

239 116 CONG. REC. H7177, H7187 (daily ed. July 27, 1970).

240 116 CONG. REC. H7392 (daily ed. July 29, 1970).

241 116 CONG. REC. H8723 (daily ed. Sep. 15, 1970).

242 116 CONG. REC. H8728, H8729 (daily ed. Sep. 15, 1970).

243 See text following note 34, *supra*.

elect the committee chairmen, this exercise is a pro forma ratification of the caucus' decisions.²⁴⁴)

Under the strict seniority system, length of continuous service on a particular committee and membership in the majority party at the time the chairmanship becomes open are the sole prerequisites for becoming chairman of that committee. (Of course, the two essential elements comprising length of service are to remain alive and enjoy repeated re-election.) Thus, under the seniority rule, the senior majority party member of a committee automatically becomes its chairman, and the senior minority party member is mechanically designated the ranking minority member.

The chief effect of the seniority system has been to place in committee chairmanships members from safe, essentially one-party districts, who are notorious for deserting the policy positions adopted by the national party. For example, in the 92nd Congress, ten of sixteen Senate committee chairmen and nine of twenty-one House committee chairmen are Democrats from Southern states, who traditionally withhold support from—or openly attack—various issue positions (e.g., support of civil rights legislation) of the "national" Democrats. Most of the committee chairmen, at a time of great urbanization and urgency in finding solutions to the dilemma of the cities, hail from rural districts.

Perhaps the most visible—and most often discussed—aspect of the congressional seniority system is the age of the chairmen, for generally members must wait many years (sometimes decades) before assuming a committee leadership position.²⁴⁵ In the 92nd Congress, six committee chairmen and five ranking minority members in the Senate are over the age of 70. In the House, ten committee chairmen and two ranking minority members are over 70, and three chairmen are over 80.²⁴⁶ Nonetheless, as Dr. Robert N. Butler has written: "The crucial issue is not how old the committee chairmen should be, but how much power they should have, how it should be used, and how the committee chairmen should be chosen."²⁴⁷ It is now commonplace to say that the real work of the Congress is performed in committees, and thus chairmanships are a major source of congressional power: the chairmen appoint subcommittees, manage staff activities, generally regulate the testimony at committee hearings, and determine the scope of committee investigations.²⁴⁸

The rationales underlying the congressional seniority system, as well as

244 See text accompanying note 263, *infra*. Says Representative Richard Bolling (D-Mo.): "The present rules of the House provide—and everybody knows that it is a pro forma act—that the House will elect chairmen of committees." 116 CONG. REC. H7253 (daily ed. July 27, 1970).

245 For example, the present Chairman of the House Committee on Rules, Representative William M. Colmer (D-Miss.), waited 34 years to become Chairman; Representative Chet Holifield (D-Cal.) spent 28 years on the House Committee on Government Operations before attaining the chairmanship.

246 By contrast, the average age of Presidents and Vice-Presidents at the time of inauguration for the period 1789 to 1969 is about 55.0 years and 55.5 years, respectively; the average age of Supreme Court Justices at the time of appointment for the same period is 52.9 years. See Rubin, *The Age Structure of Political Power*, 24 AMERICAN STATISTICIAN No. 5 at 33 (1970).

247 Butler, *Fighting Seniority With Bigotry*, THE WASHINGTON MONTHLY, June, 1971, at 37-42. Dr. Butler adds: "[r]eformers have focused on seniority as that system which perpetuates an impervious wrinkled wall of old men guarding against democracy." *Id.* at 37.

248 See generally Goodwin, *The Seniority System In Congress*, 53 AM. POL. SCI. REV. 416 (1959).

the arguments for its abolition, are manifold.²⁴⁹ Inevitably, proponents of seniority paraphrase Winston Churchill on democracy by saying that seniority may be "the worst possible system except for all the alternatives."²⁵⁰ Clearly, the strict seniority rule has the virtue of rendering succession to committee chairmanships automatic, thereby avoiding major disagreements over politics, power, and personality during the initial days in odd-numbered years when the Congress organizes. Congressman James Burke (D-Mass.) sees in the seniority rule an assurance of independence from vested interests on the part of members—an assurance that "[t]here is a future for men like myself here who come in here [the House] and do not depend on the powerful tycoons of this Nation to get elected."²⁵¹ The other principal consideration favoring seniority is that the system assures the accession to a chairmanship of a member presumably experienced in the operations of his committee and possessed of expertise in the field of his committee's jurisdiction. Representative Emanuel Celler (D-N.Y.), Chairman of the House Committee on the Judiciary, summarizes this view: "Fundamentally, the seniority system avoids the waste implicit in instability of committee composition and management. It invokes the presumption that, other things being equal, the man or woman with the greatest experience in a particular job is best fitted to participate and to lead in its performance."²⁵²

Opponents of the seniority rule emphasize that it enthrones chairmen on the basis of chance rather than merit, it disregards ability in favor of undue age,²⁵³ it renders chairmen immune from accountability and unresponsive to the majority party leadership and the public, and it discourages active and dynamic legislators by causing younger members to lose interest and occasionally leave congressional service. Capitol Hill observer David S. Broder writes that the seniority system vitiates the principle of "access"—the idea that "all those with a stake in a decision ought to have reasonable equality of opportunity to bring their influence to bear on the decision-makers"—by removing committee chairmen "from the arena of access competition."²⁵⁴ Repeatedly, critics of seniority disparage the system for estranging the Congress from the populace and rendering the national legislature insensitive to public interests and needs. "Absolute reliance . . . upon the seniority system," says Representative Michael Harrington (D-Mass.), has removed the House "from the mainstream of American life and has blighted its chances of focusing on those national issues most relevant to Americans today."²⁵⁵ Then, too, the great virtue ascribed to seniority—

249 See, e.g., *Six Virtues of the Seniority System*, remarks of Donald E. Deuster, reprinted at 117 CONG. REC. E338 (daily ed. Feb. 1, 1971). See also remarks of Representative John G. Schmitz (R-Cal.), *The Seniority System in Congress*, 116 CONG. REC. E9898-9 (daily ed. Nov. 25, 1970).

250 See, e.g., comment of the then House Majority Leader (now Speaker) Carl Albert (D-Okl.), quoted in Lyons, *Seniority Rule Stirs Discontent in Congress*, Wash. Post, Mar. 16, 1970, at A6. See also remarks of Representative Emanuel Celler (D-N.Y.) at 116 CONG. REC. H7255 (daily ed. July 27, 1970).

251 Remarks of Representative Burke, 116 CONG. REC. H1692 (daily ed. March 11, 1970).

252 Celler, *The Seniority Rule in Congress*, 14 W. POL. Q. 161 (1961).

253 As an illustration, the *New York Times* editorialized, on Jan. 18, 1971, that numbered among the beneficiaries and defenders of the seniority system are the "deaf, doddering, cantankerous, prejudiced and irascible [committee] chairmen" (p. 38).

254 Broder, *Modernizing Congress*, Wash. Post, Jan. 19, 1971, at A17.

255 Remarks of Representative Harrington, 116 CONG. REC. H1691 (daily ed. Mar. 11, 1970). Representative Ken Hechler (D-W.Va.) states: "[T]he longer I serve in the Congress,

the fostering of experience—can be overstressed. For, as Harold J. Laski wrote forty years ago, "expertise, it may be argued, sacrifices the insight of common sense to intensity of experience . . . [t]he wisdom that is needed for the direction of affairs is not an expert technic but a balanced equilibrium."²⁵⁶

Advocates of abolition of the seniority system have often been divided over the question of whether the selection of committee chairmen and ranking minority members falls within the province of House and Senate rules, or is the responsibility of the party caucuses within each body. Thus, although Senators Charles McC. Mathias (R-Md.) and Fred R. Harris (D-Okla.) resorted to the stratagem of holding special hearings on the seniority system just prior to the convening of the 92nd Congress, in an effort to publicize what they viewed as the need to reform the system, Senator Harris was later to state that "despite . . . possible gains to be made by floor action, I am increasingly persuaded that the party caucuses offer the best long-term prospects for Senate [seniority] reform."²⁵⁷

For the time being, at least, the Congress shows no sign of deviating from the prevailing view that the choice of committee leaders is in the domain of the party caucuses.²⁵⁸ This view was repeatedly brought out during the House and Senate debates on the Legislative Reorganization Act of 1970. On that occasion, Representative Fred Schwengel (D-Iowa) offered an amendment to require that the majority and minority committee members elect by secret ballot the chairman and ranking minority member of each House committee from the three most senior members of each party within the committees.²⁵⁹ Senator Robert Packwood (D-Ore.) proposed that the chairman and ranking minority member of each standing, select, and special committee of the Senate be chosen by majority vote.²⁶⁰ The Schwengel amendment was defeated 196 to 28,²⁶¹ and the Packwood amendment failed to win approval by a 46 to 22 vote.²⁶²

Representative Henry S. Reuss (D-Wis.) was also unsuccessful in his attempt to amend the 1970 Reform Act with respect to seniority, despite the rela-

the more evils I see in the seniority system, which puts a premium on those who can survive, election after election, regardless of their ability, their responsiveness to public attitudes, and their philosophy as it relates to the policies of their political party." 116 CONG. REC. H7190 (daily ed. July 27, 1970).

256 Laski, *The Limitations of the Expert*, 162 HARPER'S 101, 105 (1930).

257 Harris, *The Senate Can Be Reformed*, Wash. Post, Jan. 17, 1971, at B6.

258 See text preceding note 279, *infra*. The collective viewpoint of the Congress in this regard was probably expressed by Representative Robert C. Eckhardt (D-Tex.), when he said: "I think the caucus of the majority party, and its opposition on the minority side, is the ultimate basis of Anglo-American effectiveness in a legislative body." 116 CONG. REC. H7258 (daily ed. July 28, 1970). Or, as Representative Barber Conable (R-N.Y.) has stated, "it seems to me entirely appropriate to handle this issue [seniority] on a party basis and not by changing the rules of the House." 116 CONG. REC. H7252 (daily ed. July 27, 1970). At any rate, Representative B. F. Sisk (D-Cal.), during debate on the Legislative Reorganization Act of 1970, told the House that "this is not the bill and not the time in which to get involved in this subject." *Ibid*.

259 116 CONG. REC. H7190 (daily ed. July 27, 1970). During debate on this proposal, then House Speaker John McCormack said: "You could have the worst scandals in the world if an election from among the first three members of a committee happens to take place in the House." 116 CONG. REC. H7257 (daily ed. July 7, 1970).

260 116 CONG. REC. S17149 (daily ed. Oct. 6, 1970).

261 116 CONG. REC. H7272 (daily ed. July 28, 1970).

262 116 CONG. REC. S17160 (daily ed. Oct. 6, 1970).

tive innocuousness of his proposal. Representative Reuss wanted to simply amend the House rule which provides that “[a]t the commencement of each Congress, the House shall elect as chairman of each standing committee one of the Members thereof” by adding “who need not be the Member with the longest consecutive service on the committee.”²⁶³ As Representative Reuss explained it, his amendment would have meant that “length of service shall not be the sole and exclusive consideration in selecting committee chairmen” and that it would leave to both the parties [the responsibility for] work[ing] out the details and the modalities.”²⁶⁴ Nonetheless, the Reuss amendment was defeated 160 to 73.²⁶⁵

Despite sixty years of resistance, the seniority rule was somewhat modified at the outset of the 92nd Congress. Wrought by the forces of public opinion, continuous pressure from younger members of both parties (known as the “young turks”), and some “public interest” lobbying, the system of automatic strict seniority in the Congress, at least as evidenced in the formal rules, was discarded. The vehicles for this historic change were not the rules of the House and Senate but the rules of the party caucuses.

The Republicans in the House devised the more substantive of the changes (occasioned in part because, as members of the minority party, they are not immediately destined for committee chairmanships in any case). The Republicans adopted a procedure, developed by a task force led by Representative Barber Conable (N.Y.), requiring an automatic secret vote by all Republican members on nominations for ranking minority committee members or, when the majority party, committee chairmen. Furthermore, the Republican caucus rules were revised to contain a statement that the Committee on Committees (composed of one Republican member from each state having Republican representation in the House) need not follow seniority when preparing committee assignments for approval (which has normally been pro forma) by the caucus.

The Democratic caucus, following the recommendations of a study committee headed by Representative Julia B. Hansen (Wash.), approved a plan instituting a caucus vote, when requested by ten members, on any nomination for chairman or on the committee seniority of any member (unlike the Republican approach, however, this scheme requires members to openly challenge a nomination).²⁶⁶ Like the Republicans, the Democrats also voted to insert a statement in their caucus rules that the committee on committees (the Democratic members of

²⁶³ *Rules of the House of Representatives*, Rule X, clause 3. 116 CONG. REC. H7189 (daily ed. July 27, 1970).

²⁶⁴ 116 CONG. REC. H7190 (daily ed. July 27, 1970).

²⁶⁵ 116 CONG. REC. H7272 (daily ed. July 27, 1970).

²⁶⁶ House Democrats acted swiftly to try out this new rule. The Democratic committee on committees, despite the caucus revision of the seniority rule, recommended chairmanships for the 92nd Congress according to strict seniority. Critics of Representative John L. McMillan (D-S.C.), Chairman of the House Committee on the District of Columbia, announced, prior to the caucus, that they would seek his removal from that post. At the meeting on Feb. 3, 1971, the ouster attempt was defeated, 126 to 96, enabling Representative McMillan to continue as Chairman of the District of Columbia committee. (A subsequent move to challenge Representative McMillan at the time the House approved the caucus-selected committee assignments—generally a routine matter—also failed.) Ironically, Chairman McMillan disregarded the seniority rule in selecting chairmen for his committee's subcommittees, although one of the subcommittee chairmen, Representative John Dowdy (D-Tex.), was forced to resign several weeks later because of physical and mental ailments.

the House Committee on Ways and Means) is not bound by seniority in drawing up committee assignments. Additionally, the Democratic caucus voted to generally restrict members to one subcommittee chairmanship apiece, thereby making about thirty of such positions available to younger members,²⁶⁷ and to limit the chairman of a parent committee to chairmanship of only one of such full committee's subcommittees.²⁶⁸

The seniority reform movement also reached the Senate, in part because of the efforts of Senators Mathias, Harris and others. The Senate Committee on Rules, in February, 1971, rejected a Mathias-Harris resolution²⁶⁹ to modify the Senate seniority rule by requiring the party caucuses to nominate committee chairmen and ranking minority members, with election by the full Senate. However, Senator Mathias was successful in securing modification of the Senate Republicans' caucus rules to prohibit senators of that party from being ranking minority members of more than one standing committee, thereby making committee minority leadership positions available to other—and generally younger—Republican senators.²⁷⁰ Senate Republicans also voted to establish a special committee to study seniority, with the obligation to report to the caucus prior to the

267 See text accompanying note 444, *infra*.

268 Early in 1970, at the outset of the second session of the 91st Congress, leaders of the Democratic Study Group (an informal organization of liberal House Democrats) announced a move to explore the issue of seniority in the coming Democratic caucus. The plan was to create a special study committee to consider modification of the seniority rule. The caucus met on Feb. 18, 1970, but, after tabling a resolution offered by Representative Jerome R. Waldie (D-Cal.) expressing lack of confidence in the House leadership (particularly Speaker John W. McCormack, who announced his retirement three months later), postponed for one month consideration of the question of initiating the seniority study. When the Democratic caucus reconvened on March 18, 1970, establishment of the study committee was approved, but with the condition that its findings be delayed until after the November congressional elections (this so enraged some reformers in the Democratic party that they threatened to vote with the Republicans in organizing the House in January, 1971, although that failed to materialize). The Republican plan, which was endorsed by the House Republican leadership, was likewise put off for a vote until the 92nd Congress convened.

269 S. Res. 17, 92nd Cong., 1st Sess. (1971).

270 Among the unexpected consequences of adoption of the Mathias revision of the Republicans' caucus rules was elevation of Senator Mathias to the ranking minority position on the Senate Committee on the District of Columbia. This is how it came about: Senator Wallace F. Bennett (Utah) had dual minority leadership positions on the Senate Committees on Finance and Banking, Housing and Urban Affairs; Senator George D. Aiken (Vt.) held dual positions on the Committees on Foreign Relations and Agriculture and Forestry; and Senator Margaret C. Smith (Me.) held dual positions on the Committees on Armed Services and Aeronautical and Space Sciences. Senator Bennett chose the Finance Committee, thereby elevating Senator John G. Tower (Tex.) on the Banking, Housing and Urban Affairs Committee; Senator Aiken selected the Foreign Relations Committee, thereby elevating Senator Jack Miller (Iowa) on the Agriculture and Forestry Committee; and Senator Smith opted for the Armed Services Committee, thereby elevating Senator Carl T. Curtis (Neb.) on the Aeronautical and Space Sciences Committee. However, Senator Curtis was already the ranking minority member on the Rules and Administration Committee; he chose the Aeronautical and Space Sciences Committee, elevating Senator John S. Cooper (Ky.) on the Committee on Rules and Administration. But since Senator Cooper was already ranking on the Public Works Committee and as he elected to retain that position, the minority leadership post fell to Senator Hugh Scott (Pa.). Senator Scott was ineligible, as minority floor leader, as was the next in line, Senator Robert P. Griffin (Mich.), who is the deputy floor leader. The next available senator was Senator Strom Thurmond (S.C.), who was scheduled to become the ranking minority member on the new Senate Committee on Veterans' Affairs. Senator Winston L. Prouty (Vt.) decided to give up his position on the District of Columbia Committee and assume the top minority post on the Rules and Administration Committee, thereby rendering available the ranking minority position on the D.C. Committee to the next eligible senator, Senator Mathias. Measured either in terms of individual age or length of service, the minority leadership positions thus became available to younger and/or newer senators.

convening of the 93rd Congress. The Democrats in the Senate, in their caucus, agreed that Steering Committee appointments of chairmen and members of Senate committees must receive the approval of the caucus. And, the Senate Democrats decided to hold regular monthly caucus meetings to enable, in the words of Senator John V. Tunney (D-Cal.), "the majority to impress their views upon the committee chairmen and the Democratic leadership."²⁷¹

The basic importance of these changes in the seniority system in the Congress is the establishment of the principle—in theory if not in practice—that longevity is no longer the sole precondition to a chairmanship or ranking minority member position. It does not, however, herald any imminent drastic change in the existing roster of committee chairmen, although, as noted,²⁷² several Senate ranking minority positions exchanged hands as a result of the new seniority guidelines. (Of course, most of the proponents of abolition of the seniority rule do not actually advocate the complete abandonment of seniority as a prerequisite to becoming chairman but seek to institute a procedure whereby those who are incapable of assuming such a position are either sidetracked or removed.²⁷³) Nonetheless, these changes have introduced a certain flexibility in the Senate and House seniority rules. As *Time* magazine observed, the ferment over seniority indicates a "changing tone in the tradition-minded House of Representatives; the seniority system is no longer sacrosanct."²⁷⁴

Proposals abound for reforming the seniority system still further. Representative Paul N. McCloskey, Jr. (R-Cal.) has recommended a procedure whereby a slate of proposed chairmen would be presented to the caucus, which would select committee chairmen by secret ballot; in the case of non-unanimous choices, the caucus dissenters could propose alternate candidates to the full House, which would choose, again by secret ballot, between the two nominees.²⁷⁵ Representative Richard Bolling (D-Mo.) would have the Speaker of the House nominate committee chairmen, with the selections subject to the confirmation or disapproval of the majority party caucus.²⁷⁶ Representative Schwengel's and Senator Packwood's plans have been discussed.²⁷⁷ Some have proposed that, seniority notwithstanding, a committee chairman or ranking minority member should relinquish his position at a prescribed age—usually 65 or 70.²⁷⁸ Other variations are legion.

Realistic reform of the seniority rule appears, at least for the well-foreseeable future, to mean implementation of a means by which the incompetent—what-

271 Tunney, *Congressional Reform—Bridging the Confidence Gap*, 117 CONG. REC. E5436 (daily ed. June 4, 1971).

272 See note 270, *supra*.

273 Former Representative Clark MacGregor (R-Minn.) stated, during debate on the Legislative Reorganization Act of 1970, that "we all know that you are not going to see this amended rule [House Rule X, cl. 3] used very much even if it is adopted. Neither the Schwengel nor the Reuss amendment [notes 259, 263-5, *supra*] would result in the most senior Member failing to be elected committee chairman except in the highly unusual situation of gross incompetence or arrogance in the exercise of the chairman's prerogatives." 116 CONG. REC. H7268 (daily ed. July 28, 1970).

274 *TIME*, Feb. 15, 1971, at 17.

275 Remarks of Representative McCloskey, 116 CONG. REC. E10483 (daily ed. Dec. 18, 1970).

276 R. BOLLING, *POWER IN THE HOUSE* 267 (1968).

277 See text accompanying notes 259-62, *supra*.

278 See, e.g., S. J. Res. 57, H.R. Res. 35, 134, 385, H.R. 4364 and 6364, 92nd Cong., 1st Sess. (1971).

ever the infirmity—or party dissident can be removed from consideration for committee leadership posts; otherwise, seniority will dictate the progression to the committee chairmanships and minority positions. Recent developments appear to assure that the matter of congressional seniority is solely within the discretion of the party caucuses, and is not a subject for determination through House and Senate rules. At the same time, these and other actions by the caucuses may have a greater impact on the prospects for future congressional reform, in that the caucuses have the potential for playing a greater role in subsequent modifications of congressional processes (assuming that the committee chairmen and other leaders are willing to work within the caucus framework). Should this materialize, inclusion of the leadership in the formative stages of reform developments by this method would likely result in less dramatic and more gradual (and perhaps diluted) reforms than the more radical proposals generally advocated outside the congressional establishment.²⁷⁹

B. *The Senate Cloture Rule*

The opening days of the 92nd Congress were witness to a historic seven-week debate in the Senate on the question of changing that body's Rule XXII²⁸⁰ by lowering, from two-thirds to three-fifths of senators present and voting, the number of votes necessary to invoke cloture (that is, a limitation on debate, better known as breaking a filibuster²⁸¹). The proposal ultimately failed of passage, as the resolution to make the rules change was itself filibustered to death by its opponents. Yet, challenges to the Senate's filibuster rule are becoming nearly a regular biannual exercise.

Unlike the House of Representatives, where the rules severely mitigate against extended discussion, the Senate traditionally has maintained the right of unlimited debate. (At the time of the Senate debate, cloture under the two-thirds requirement had been achieved only eight times in forty-nine attempts since 1917.) Proponents of the two-thirds cloture rule contend that it preserves the basic role of the Senate as a barrier to domination of the Congress by the executive branch and generally eliminates the possibility of hasty and unthinking legislating. Those who advocate easing the present cloture rule maintain that it throws the Senate into the hands of a small minority on major policy questions and prevents a majority of the Senate from working its will.²⁸² To some, the filibuster is an

²⁷⁹ See Kraft, *Larger Caucus Role*, Wash. Post, Jan. 21, 1971, at A19.

²⁸⁰ Rule XXII of the STANDING RULES OF THE SENATE provides, in part, that "at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, or other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the Secretary call the roll, and, upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question: 'Is it the sense of the Senate that the debate shall be brought to a close?' And if that question shall be decided in the affirmative by two-thirds of the Senators present and voting, then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of."

²⁸¹ See W. SAFIRE, *supra* note 120, at 143-4, for an essay on the filibuster.

²⁸² Some advocates of cloture reform contend that, at the beginning of a Congress, a fili-

anachronism having no place in a modern legislature; to others, a filibuster represents the Senate at its finest, attempting to exercise independent judgement during the consideration of important legislation. An effective filibuster, said Senator J. W. Fulbright (D-Ark.), Chairman of the Senate Committee on Foreign Relations, "might, God forbid, give senators a chance to think about legislation before it is enacted."²⁸³

Public attention was recently focused on the Senate's filibuster during the second session of the 91st Congress. During 1970, filibusters or threats of filibusters either killed or delayed consideration of an array of legislation: appropriations for the Department of Transportation (because of funds for the supersonic transport plane (SST)) and the Department of Defense, a special military aid bill and a regular foreign aid measure (principally because of amendments forbidding further military incursions in Cambodia), increases in social security, the administration's welfare reform program, and a package of trade measures. In the previous session, the administration's proposals for the antiballistic missile (ABM) were delayed and the measure to implement direct election of the President was sidetracked by filibusters. Senate leaders were frustrated in their efforts to schedule legislative business during the closing of the 91st Congress partially as a result of these actual and potential filibusters.

In the aftermath of these parliamentary entanglements, a resolution to reduce the number of senators required for cloture,²⁸⁴ which was introduced on January 15, 1971, by Senators Frank Church (D-Idaho) and James B. Pearson (R-Kan.), ultimately gained fifty-one (of 100) cosponsors, including Senators Michael Mansfield (D-Mont.), the Majority Leader, and Hugh Scott (R-Pa.), the Minority Leader. The debate commenced on January 26, 1971, and ended in failure on March 9, 1971, despite votes on the question on four separate occasions²⁸⁵ and an indirect endorsement of the rules revision from the President.²⁸⁶

Opposition to cloture reform was largely manned by Southern senators, mostly Democrats, aided by some Midwestern Republicans, who engineered the filibuster by subdividing into three five-man teams to effectively sustain the marathon. In the past, Southern senators have opposed the invoking of cloture and have utilized the filibuster as a tactic for forestalling or defeating legislation which they were strongly against, notably civil rights bills. However, the filibuster as a parliamentary device stands available for any Senate coalition.

During the course of the Senate debate on the Church-Pearson resolution,

buster on a proposed rule change can be ended by a majority vote under the U. S. Constitution. Then Vice-President (and President of the Senate) Hubert H. Humphrey so ruled in 1965 (but was overruled by the Senate), as the then Vice-President Richard M. Nixon indicated he would rule in 1957 and 1959, but Vice-President Spiro T. Agnew declined the opportunity to similarly rule in 1971.

283 Quoted in Rich, *Critics Irked as Senate Asserts Rights*, Wash. Post, Dec. 25, 1970, inserted at 116 CONG. REC. S21205 (daily ed. Dec. 28, 1970), by Senator Fulbright.

284 S. Res. 9, 92nd Cong., 1st Sess. (1971), in 117 CONG. REC. S146 (daily ed. Jan. 25, 1971).

285 Attempts to vote on cloture failed 48 to 37 on Feb. 18, 1971; 50 to 36 on Feb. 23, 1971; 48 to 36 on Mar. 2, 1971; and 55 to 39 on Mar. 9, 1971.

286 The President's press secretary, on Feb. 12, 1971, said that "the President would be in favor of Congress taking action that it feels necessary and that it determines as a body to reform or to adjust its work procedures and schedules in a way that allows them to deal with business more promptly and expeditiously." Wash. Post, Feb. 13, 1971, at A1.

several compromises were unveiled, some of which may figure in future cloture reform attempts. Chief among these alternatives was a proposal by Senator Jack Miller (R-Iowa) which would have retained the present two-thirds requirement for cloture on Senate rules changes but permit the termination of filibusters on other subjects either by two-thirds or by three-fifths where a majority of each party was included. Other suggestions included: (1) permitting the invoking of cloture by three-fifths of senators present except for rules changes (so as to prevent subsequent further lowering of cloture requirements), (2) allowing cloture only by a two-thirds vote until after three weeks of debate, then reducing the requirement to three-fifths, and (3) allowing cloture by a three-fifths vote only on appropriations bills and conference reports.

Undoubtedly, an attempt to modify the cloture rule will be made at the outset of the 93rd Congress in 1973 but there is little indication that any revision of the rule is forthcoming. This is partially because advocates of cloture reform have undermined the strength of their convictions in recent months by resorting to the filibuster or the threat of filibuster themselves, such as the aforementioned "unlimited debate" used to block appropriations for the supersonic transport plane late in the 91st Congress. Moreover, on the most recent filibuster attempt as of this writing, led by non-Southern Democrats, cloture was invoked by a three-vote margin to stop the filibuster being conducted against legislation to extend the military draft²⁸⁷ (the conference report on this bill²⁸⁸ was itself nearly the target of a filibuster). Most of the Southern senators, those who traditionally are opposed to cutting off debate, voted for cloture on this occasion. It is worth noting that the Chairman of the Senate Committee on Armed Services, Senator John Stennis (D-Miss.), voted to terminate debate for the first time in his twenty-three years in the Senate, while Senator Philip A. Hart (D-Mich.), generally the Senate's most outspoken filibuster foe, voted against cloture. Thus, it has been effectively demonstrated that even the present two-thirds cloture requirement does not automatically guarantee an endless filibuster.

It appears that any advantages to be derived from a rules change in the cloture requirements from, say, two-thirds to a simple majority, would be outweighed by the disadvantages of loss of extended public consideration of major legislation at the only stage in the legislative process where such consideration is, in nearly all cases, possible. "A lone, filibustering senator, if he's got the guts, may be able to make the whole country think twice before it's carried off by enthusiasm or hysteria," observes commentator Nicholas von Hoffman, adding that "[t]he problem isn't to get Congress to shut up but to get them to shout back."²⁸⁹ At the same time, modification of the cloture requirements to allow for termination of a filibuster by a three-fifths vote is no certain precaution against extended debate.

The crises attributed to filibusters are often more apparent than real, and generally these hindrances to consideration of legislation can be alleviated by the

287 H.R. 6531, 92nd Cong., 1st Sess. (1971).

288 H.R. REP. NO. 92-433, 92nd Cong., 1st Sess. (1971).

As evidence of the changing attitude, three former filibuster fees, Senators Cranston, Church, and Mathias, on Sep. 29, 1971, took the Senate floor to announce that the present Rule XXII (*supra* note 280) should be retained. 117 CONG. REC. S15266-72 (daily ed. Sep. 29, 1971). See Broder, *The Filibuster Flip-Flop*, Wash. Post, Oct. 5, 1971, at A19.

289 Von Hoffman, *Shouting Back, Not Shutting Up*, Wash. Post, Feb. 17, 1971, at B1.

invocation of some off-stage senatorial courtesies. Thus, even during the rare "lame-duck" session which concluded the 91st Congress, occasioned in part by the delay in legislation resulting from filibusters, the Senate met in an unusual secret session in an effort to break the legislative deadlock. (At the time of the meeting in secrecy, billions of dollars in appropriations were stymied and two filibusters were simultaneously in progress.) Some of the controversial legislation was the subject of compromise and some was deferred as legacies for the 92nd Congress; still, the republic stands. It is not efficiency but thorough consideration and general acceptance which counts for the most in the writing of legislation.

The filibuster is, then, a facet of the Senate scene which will continue—perhaps deservedly—with its most harmful excesses curbed by some variant of a cloture requirement. Part of the answer may lie simply in the scheduling of Senate business; obviously, this would be only of practical value where the proponents of the filibuster are seeking a full hearing, to "buy time," or to merely slow down the legislative process, rather than to obstruct the Senate until the legislation under attack is withdrawn or substantially modified. The Senate leadership has already made progress in this regard by negotiating with those directing prolonged debate for bifurcated daily sessions, where part of the day is given over to the debate and at a uniform hour other matters are taken up. (This device of daily dual sessions was resorted to in 1970, for example, when the Senate, snarled because of a major debate over U.S. military activities in Cambodia, debated the so-called "Cooper-Church resolution" during regular hours and considered other legislation in the evening.) Perhaps some filibusters—presumably those of the milder variety²⁹⁰—could be channeled into evening and weekend periods. While the tempo of American society no longer admits of protracted legislative deliberations ranging over several weeks to the exclusion of other business, some imaginative scheduling would permit more lengthy debates for those who choose to initiate and perpetuate them. Otherwise, should the traditional Senate filibuster be excessively utilized for obstructionist purposes, the public may demand severe adjustment of the cloture rule.

C. Office of Technology Assessment

As a myriad of pressing issues—nuclear power development, ecological problems, space exploration, genetic control, and new health programs, to name a few—confront the Congress, the potential solutions to these concerns increasingly involve applications of technology. Yet the Congress is critically ill-equipped to understand and to help channel the potential influences of technology. In the eyes of many, the Congress' lack of competence in the field of technology assessment, if not soon remedied, could prove to be disastrous.

²⁹⁰ Dr. Donald R. Matthews, in discussing the functions of debate in the Senate, wrote that one of the motivations for extended debate is to delay voting on legislation: "Those who engage in this tactic, and almost all senators do at one time or another, often argue that such purposely prolonged debate is intended to be 'educational,' that it sticks to the merits or demerits of the bill in question, while a filibuster is pure parliamentary obstruction. This dividing line is very hard to draw, nor is it particularly important to do so." D. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 248 (Vintage ed. 1960) (reprinted by permission of the Univ. of N.C. Press).

Following five years of study, the House Committee on Science and Astronautics, in August, 1971, reported²⁹¹ the proposed Technology Assessment Act of 1971,²⁹² to create within the legislative branch an Office of Technology Assessment. The O.T.A., which would be guided by a Technology Assessment Board, is intended to carry out the Committee's declaration of purpose: to equip the Congress with "new and effective means for securing competent, unbiased information concerning the effects, physical, economic, social, and political, of the applications of technology."²⁹³ The Board would be composed of two senators, two members of the House, the Comptroller General, the Director of the Congressional Research Service, four qualified members from the general public, and a Director.²⁹⁴ Among the Office's proposed functions would be the identification of existing or probable impacts of technology or technological programs, the preparation of estimates and comparisons of the impacts of alternative methods and programs, the presentation of findings to the appropriate legislative committees, and the identification of areas where additional research or data collection is required to provide adequate support for complete assessments and estimates.²⁹⁵ Cooperative activities and supporting services would be provided the O.T.A. by the Library of Congress,²⁹⁶ the General Accounting Office,²⁹⁷ and the National Science Foundation.²⁹⁸ Assessments could be initiated by a committee chairman, majority of committee members, or by the Board or Director.²⁹⁹

A prime mover in the struggle to affirm the role of the Congress in technological assessment and innovation was former Representative Emilio Q. Daddario (D-Conn.), once Chairman of the House Subcommittee on Science, Research, and Development. (This subcommittee, established in 1963, has as one of its objectives the strengthening of "congressional sources of information and advice in the fields of science and technology."³⁰⁰) Representative Daddario first introduced legislation in this field in 1967, primarily as a stimulant to discussion. At that time, he suggested creation of a Technology Assessment Board to "provide a method for identifying, assessing, publicizing, and dealing with the implications and effects of applied research and technology."³⁰¹ The concepts underlying this legislation stimulated a number of seminars and special studies, including a landmark review of the kinds of scientific and technological problems confronting the Congress, submitted in April, 1969, by the Science Policy Research Division of the Library of Congress.³⁰² The Subcommittee held hearings on the institutionalization of technology assessment late in 1969, resulting in a re-

291 H.R. REP. NO. 92-469, 92nd Cong., 1st Sess. (1971).

292 H.R. 10243, 92nd Cong., 1st Sess. (1971).

293 *Id.* § 2(e).

294 *Id.* §§ 4.

295 *Id.* § 3.

296 *Id.* § 7.

297 *Id.* §§ 10.

298 *Id.* §§ 8.

299 *Id.* § 3.

300 See Daddario, *Technology Assessment Legislation*, 7 HARV. J. LEGIS. 507, 508 (1969-70).

301 H.R. 6698, 90th Cong., 1st Sess. (1967).

302 *Technical Information for Congress*, prepared by the Science Policy Research Division, Legislative Reference Service, Library of Congress, for the Subcommittee on Science, Research, and Development, House Committee on Science and Astronautics, U.S. House of Representatives, 91st Cong., 1st Sess. (committee print, April 25, 1969).

vised draft of legislation,³⁰³ and by June, 1970, had developed a further revision³⁰⁴ based on additional hearings. The House, however, did not consider the proposal during the 91st Congress. At the outset of the 92nd Congress, Representative John W. Davis (D-Ga.), by then the new Chairman of the House Science, Research, and Development Subcommittee, introduced an identical bill,³⁰⁵ and Representative Richard T. Hanna (D-Cal.) and others sponsored a companion measure.³⁰⁶ The Committee on Science and Astronautics approved its Subcommittee's legislation in July, 1971, with several minor amendments, and reported a clean bill³⁰⁷ on August 16, 1971.

An entity such as the proposed O.T.A., in addition to supplying the Congress with technology assessment, would greatly assist the Congress in narrowing the information gap and provide an additional input for the broader task of general legislative assessment by the Congress. In testimony before the House Subcommittee in mid-1970, the Comptroller General of the United States, Elmer B. Staats, stated that the proposed Technology Assessment Act "will give the Congress an effective means to secure competent unbiased information on the effects of technology and the utilization of such information as one element in the legislative assessment of matters pending before the Congress."³⁰⁸ Similarly, such legislation could prove invaluable in improving the Congress' exercise of legislative oversight and review. "Because of its fragmented committee structure and the tremendous demands on the time of the individual members, Congress does not at the present time get an overview of the Federal involvement in research and development," former Representative Daddario has said, in calling for "a 'real-time management information system' for coordination and management of the Federal science research and development enterprise."³⁰⁹ Like so many congressional reform proposals, this legislation would strengthen the role of the Congress in national decision-making processes.

D. *Office of Goals and Priorities Analysis*

The inability of the Congress—as presently structured—to adequately review and assess the impacts of technology is a facet of the larger dilemma of the fundamental inadequacy of information upon which social policies and programs are based. Thus, not only is the Congress ill-equipped to develop and oversee public policies, it also lacks the means to measure and compare the costs and effectiveness of alternative programs. In the words of Senator Walter F. Mondale (D-Minn.), the Congress "devise[s] and operate[s] programs based on myth and ignoranc[er]."³¹⁰

303 H.R. 17046, 91st Cong., 2nd Sess. (1970).

304 H.R. 18469, 91st Cong., 2nd Sess. (1970).

305 H.R. 3269, 92nd Cong., 1st Sess. (1971).

306 H.R. 7728, 92nd Cong., 1st Sess. (1971).

307 H.R. 10243, *supra* note 292. See also H.R. 10246, 92nd Cong., 1st Sess. (1971).

308 H.R. REP. No. 92-469, *supra* note 291, at 16. See also Lear, *Predicting the Consequences of Technology*, SATURDAY REVIEW, Mar. 28, 1970, at 44; remarks of Representative John W. Davis, *Technology Assessment and the Congress*, 117 CONG. REC. H12396-7 (daily ed. Dec. 13, 1971).

309 Remarks of Representative Daddario before the Information Industry Association, in 116 CONG. REC. E2884 (daily ed. Apr. 7, 1970).

310 Remarks of Senator Mondale, 116 CONG. REC. S15162 (daily ed. Sep. 10, 1970).

Under the leadership of Senators Fred R. Harris (D-Okl.) and Jacob K. Javits (R-N.Y.), there was consideration in the 90th and 91st Congresses of predecessor legislation to the proposed Full Opportunity and National Goals and Priorities Act, designed to monitor developments in various social areas and to measure progress in meeting related needs. Hearings were held before the Senate Subcommittee on Government Research during the 90th Congress, resulting in a discussion bill,³¹¹ and from hearings held by the Senate Subcommittee on the Evaluation and Planning of Social Programs in the 91st Congress came a successor package,³¹² reported by the Senate Committee on Labor and Public Welfare.³¹³

The thrust of this proposal has been to establish full social opportunity for all Americans as a national goal, and to establish procedures for advancing this goal. Patterned generally after the Employment Act of 1946,³¹⁴ the measure would create in the President's Executive Office a Council of Social Advisors to monitor social programs, gather relevant authoritative information and statistical data, develop a series of "social indicators" to interpret such data and measure progress made toward achievement of certain social goals, and recommend to the President the most efficient ways to allocate federal resources and the level of government best suited to carry out various programs.³¹⁵ In addition, the proposed legislation would require the President to transmit to the Congress each year a "social report" (much like the existing annual economic report) setting forth the overall progress and effectiveness of federal efforts in advancing social goals, a review of state, local, and private efforts in such areas, and his programs and policies for carrying out the policy of the Act, together with such specific recommendations for legislation as the President may deem desirable.³¹⁶ The social report would be referred to the Senate Committee on Labor and Public Welfare, and the House Committees on Education and Labor, and Interstate and Foreign Commerce.³¹⁷ The Council of Social Advisors would assist and advise the President in the preparation of the social report.³¹⁸

The proposed Full Opportunity and National Goals and Priorities Act would also strengthen the Congress in the field of priorities analysis by establishing, within the legislative branch, an Office of Goals and Priorities Analysis.³¹⁹ As stated in the Act's declaration of purpose, there is a need for a "framework of national priorities within which individual decisions can be made in a consistent and considered manner" and, therefore a need for an entity such as the O.G.P.A. to "conduct a continuing analysis of national goals and priorities and [to] . . . provide the Congress with the information, data, and analysis necessary for en-

311 The proposed Full Opportunity and Social Accounting Act, S. 843, 90th Cong., 1st Sess. (1967). See also H.R. 10261, 10958, 10959, 12497, 13358, 14244, and 14492, 90th Cong., 1st Sess. (1967).

312 S.5, 91st Cong., 1st Sess. (1969). Originally, the bill was denominated the Full Opportunity Act. See also S. 562, H.R. 3338 and H.R. 9483, 91st Cong., 1st Sess. (1969).

313 S. REP. No. 91-998, 91st Cong., 2nd Sess. (1970).

314 60 Stat. 23 (1946).

315 S. 5, *supra* note 312, § 103(c).

316 *Id.* § 102(a).

317 *Id.* § 102(c).

318 *Id.* § 103(c) (1).

319 *Id.* § 202(a).

lightened priority decisions.³²⁰ The Office, working in conjunction with the Comptroller General and the Office of Management and Budget,³²¹ would supply the Congress with priorities analyses for pending legislation, submit to the Congress an annual national goals and priorities report, and analyze the President's annual budget requests.³²² As envisioned by its creator, Senator Javits, the Office of Goals and Priorities Analysis would be a "service staff agency" for the Congress, and would supply the Joint Economic Committee and other interested committees with the expertise to enable the Congress to make informed priority decisions among alternative programs.³²³

The Senate passed the Full Opportunity and National Goals and Priorities Act late in the 91st Congress,³²⁴ and the House was unable to act. The bill has been re-introduced in the 92nd Congress,³²⁵ and one day of hearings was held in July, 1971. This measure deserves further consideration as a means for increasing the quantity and quality of information needed to pursue national social objectives, and to advance the nation's prospects for meaningful social action. In the view of the Senate Committee on Labor and Public Welfare, the proposed O.G.P.A. "could do much to restore the growing erosion of congressional power and give substance to the admittedly ill-defined contentions about national priorities, peace and growth dividends, and fiscal responsibility."³²⁶

E. Other Recent Reform Efforts

Some additional recent developments falling within the broad sphere of topics labeled "congressional reform" merit mention.

The general discontent arising from the nation's current war experiences has generated a spate of legislation attempting to define principles to govern deployment of the armed forces of the United States by the President. For example, Senator Thomas F. Eagleton (D-Mo.) has proposed a joint resolution which would write into statutory law a series of relatively explicit provisions regarding the powers of the Congress and the President to commit the nation's armed forces to hostilities.³²⁷ This resolution would establish the general rule that the President may only commit the armed forces to hostilities to the extent authorized by the Congress through a formal declaration of war, statute, or joint resolution (and that such authorization could not be inferred from general legislative enactments, including appropriations bills).³²⁸ The Eagleton resolution recognizes that, once the Congress has authorized a troop commitment, the President's powers as Commander-in-Chief and Chief Executive provide him with further authority to invade the territory or airspace of a country with which the United

320 *Id.* § 201.

321 *Id.* § 204(b).

322 *Id.* § 203(a) and (b).

323 Remarks of Senator Javits, 116 CONG. REC. S15165 (daily ed. Sep. 10, 1970).

324 116 CONG. REC. S15167 (daily ed. Sep. 10, 1970).

325 S. 5, 92nd Cong., 1st Sess. (1971). This measure was reported from the Senate Special Subcommittee on Evaluation and Planning of Social Programs to the Senate Committee on Labor and Public Welfare on December 9, 1971.

326 S. REP. NO. 91-998, *supra* note 313, at 5.

327 S.J. RES. 59, 92nd Cong., 1st Sess. (1971).

328 *Id.* § 2.

States is not then engaged in hostilities in two instances: when in hot pursuit of a fleeing enemy who has engaged in battle with U.S. armed forces or when there is a clear and present danger of an imminent attack on the United States or its armed forces.³²⁹ This measure would further spell out instances when the President could commit armed forces to hostilities absent congressional authorization, such as when necessary to repel an attack on the United States or to withdraw U.S. citizens from a country in which their lives are being endangered,³³⁰ and would require the President to promptly report commitments to the Congress³³¹ and apprise the Congress periodically as to the status of hostilities in progress.³³²

Similar legislation has also been introduced in the Senate, such as Senator Jacob Javits' (R-N.Y.) proposal³³³ to establish certain rules respecting military hostilities in the absence of a declaration of war, which would forbid the continuation of hostilities beyond thirty days from the date of their initiation unless the Congress enacts legislation to sustain the commitment beyond that period.³³⁴ Senator Robert Taft, Jr. (R-Ohio), in like legislation, has expressly tied his recommendations to U.S. foreign policy objectives in Southeast Asia.³³⁵ The Taft resolution would provide restrictions on executive warmaking comparable to the Eagleton and Javits approaches, and would specifically authorize the "continued deployment" of U.S. armed forces in South Vietnam "for such time and in such manner as the President, as Commander-in-Chief, shall deem necessary and appropriate to accomplish a responsible and irreversible withdrawal of such Armed Forces of the United States and the assumption by the Armed Forces of the Republic of South Vietnam at the earliest feasible date of the responsibility for the defense of the territorial integrity of the Republic of South Vietnam."³³⁶ These proposals have been the subject of hearings before the Senate Committee on Foreign Relations.^{336a}

In the House, a resolution³³⁷ concerning the war powers of the Congress and the President was reported³³⁸ by the House Committee on Foreign Affairs, and passed the House on August 2, 1971. This measure expresses the "sense of Congress that the President should seek appropriate consultation with the Congress before involving the Armed Forces of the United States in armed conflict, and should continue such consultation periodically during such armed conflict."³³⁹ The resolution would require the President, where military forces are committed to armed conflict, to report the action to the House and Senate, setting forth the circumstances necessitating the commitment, his constitutional and legislative

329 *Ibid.*

330 *Id.* § 3.

331 *Id.* § 4.

332 *Id.* § 5.

333 S. 731, 92nd Cong., 1st Sess. (1971).

334 *Id.* § 1(C).

335 S.J. Res. 18, 92nd Cong., 1st Sess. (1971).

336 *Id.* Part II. Related proposals to the Eagleton, Javits, and Taft resolutions include S. Con. Res. 27, H.R.J. Res. 275, 342, 431, 644, H.R. 4194, 4293, and 7290, 92nd Cong., 1st Sess. (1971).

336a The Senate Committee on Foreign Relations, on Dec. 7, 1971, ordered favorably reported S. 2956, 92nd Cong., 1st Sess. (1971), a bill to govern the use of Armed Forces by the President in the absence of a declaration of war.

337 H.R.J. Res. 1, 92nd Cong., 1st Sess. (1971).

338 H.R. REP. No. 92-383, 92nd Cong., 1st Sess. (1971).

339 H.R.J. Res. 1, *supra* note 337, § 2.

authority for so acting, the estimated scope of activities, and "such other information as the President may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad."³⁴⁰ The Congress, in its zeal to reclaim full participation in the conduct of military affairs, appears to be heeding the advice tendered in Proverbs: "Wise men are better than warriors, brain is better than brawn; for you need policy in war: what saves the state is many a counsellor."³⁴¹

Mention should also be made of the efforts thus far of the new Joint Committee on Congressional Operations.³⁴² The Joint Committee has largely been immersed in the problems of demarcating its jurisdiction and devising means by which to carry out its statutory assignments. (The committee is, for example, attempting to establish regular procedures by which it can monitor legal proceedings of "vital interest" to the Congress.³⁴³) As of this writing, the Joint Committee's only exploration of congressional reform proposals has been a set of hearings inquiring into the ramifications surrounding conversion of the federal government's fiscal year so as to coincide with the calendar year in an effort to improve the congressional budget-consideration process.³⁴⁴

Thus, during recent months, there has been active consideration of several varied proposals to modernize the Congress and strengthen its capabilities for full participation in policy-making processes. Most of these undertakings are in various stages of planning and their outcome remains uncertain—in some instances, unlikely. While there is little evidence that the work of the 92nd Congress will prove to be a watershed period in the annals of congressional reform, these and related efforts offer some promise that, in the not-too-far-distant future, the Congress will act further to update its operations.

VIII. Congressional Reform: What Must Be Done

As has been stressed throughout, much remains to be done to improve the procedures of the Congress, and to enhance the performance of its legislative, oversight, and representative functions. A list of congressional reforms which should be implemented or given thoughtful study would include reorganization of standing committee jurisdictions, increased usage of joint committees, improvement of conference committee operations, further adaptation of computers for the Congress, encouragement of public interest lobbying, and other proposals.

340 *Id.* § 3. Section 4 states: "Nothing in this joint resolution is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties."

341 See generally Church, *Of Presidents and Caesars*, 6 IDAHO L. REV. 1 (1969); Mikva and Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449 (1971).

342 See text accompanying notes 220-3, *supra*. See also THE JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS: PURPOSE, LEGISLATIVE HISTORY, JURISDICTION, AND RULES, H. Doc. No. . . . , 92nd Cong., 1st Sess. (1971).

343 See text accompanying note 222, *supra*.

344 *Hearings on the Federal Year As It Relates to the Congressional Budget Process Before the Joint Committee on Congressional Operations*, 92nd Cong., 1st Sess. (1971).

The Joint Committee prepared a report on the basis of its hearings ("Changing the Federal Fiscal Year: Testimony and Analysis," H. Rep. No. 92-614, 92nd Cong., 1st Sess. (1971)), but declined to recommend a change in the Federal Fiscal year.

A. *Standing Committee Jurisdiction*

Not since the Legislative Reorganization Act of 1946 has the Congress undertaken to reorganize its overall committee structure. While some committees have been added since that legislation, the system of standing committees has basically remained the same for twenty-five years. If there is any discernible trend in this area, it is for a greater proliferation of standing committees, such as for urban affairs,³⁴⁵ transportation,³⁴⁶ small business,³⁴⁷ constitutional litigation,³⁴⁸ and the environment,³⁴⁹ rather than for consolidation. For example, as part of the Legislative Reorganization Act of 1970, the Senate created a standing committee on Veterans' Affairs,³⁵⁰ although it also assigned jurisdiction over urban affairs in general to the former Committee on Banking and Currency, renamed the Committee on Banking, Housing and Urban Affairs.³⁵¹

The current state of congressional committee organization is largely one of uncommunicated specializations. The circumscribed viewpoints of standing committees often segregate segments of public problems which are in fact highly integrated, and denies the Congress an essential comprehensive overview. In testimony before the Joint Committee on the Organization of Congress in 1965, Representative John Brademas (D-Ind.) illustrated the problem: "In my own committee, the Committee on Education and Labor, we have jurisdiction over national educational policy, but the work of the National Science Foundation, which makes such important contributions to education and research, falls under the jurisdiction of the Science and Astronautics Committee, and there is little communication between the committees."³⁵² In similar testimony, former House Member Thomas B. Curtis recalled how he personally tried to alleviate the paucity of intercommittee communication. The committee on which he served, the House Committee on Ways and Means, considers, *inter alia*, problems relating to lead and zinc because of their relationship to tariffs and imports. When a proposed lead and zinc program was referred for consideration to the House Committee on Interior and Insular Affairs, Representative Curtis testified before that committee to alert them to the background material available in his committee. He noted: "This was done only on an informal basis and was regarded as something unusual rather than something that would seem to be routine and recognized as the desirable thing to do."³⁵³

There are other aspects of the detrimental nature of the existing committee structure, other than specialization and failure of communication. For example, there is considerable overlapping of committee jurisdictions, such as between the

345 *See e.g.*, H.R. Res. 33, 47, 111, 133, 165, 166, and 252, 92nd Cong., 1st Sess. (1971).

346 *See, e.g.*, H.R. Res. 370, 92nd Cong., 1st Sess. (1971).

347 *See, e.g.*, H.R. Res. 84, 92nd Cong., 1st Sess. (1971).

348 *See e.g.*, H.R. Res. 52, 92nd Cong., 1st Sess. (1971).

349 *See e.g.*, H.R. Res. 39, 42, 51, 58, 59, 60, 61, 62, 63, 64, 99, 101, 106, 140, 152, 174, 191, 224, 249, 352, 386, and 604, 92nd Cong., 1st Sess. (1971).

350 STANDING RULES OF THE SENATE, Rule XXV, clause 1 (g).

351 *Id.* Rule XXV, clause 1(e).

352 *JCOG Hearings, supra* note 38, at 590.

353 *Id.* at 602.

House Committee on Interstate and Foreign Commerce and the House Committee on the Judiciary, the House Interstate and Foreign Commerce Committee and the House Committee on Ways and Means, and the House Committee on Banking and Currency and the House Committee on Foreign Affairs.³⁵⁴ (Apparently this problem has become so exacerbated in the Senate that Senator Margaret C. Smith (R-Me.) has called for a temporary Special Committee on Jurisdictional Rules to propose means necessary to prevent jurisdictional conflict among Senate standing committees.³⁵⁵) Also, an immoderate number of committees oftentimes overburdens members of Congress, especially in the Senate, as committee and subcommittee meetings are usually scheduled for the same time. Finally, in some instances, the relative workload of congressional committees is unequal, in that a few committees have jurisdiction over most of the major legislation. As former Representative Glenn R. Davis observed, “[s]ome of the committees, in my opinion, have atrophied into a somewhat less significant position, so that some committee assignments have become very demanding of time, and others very little.”³⁵⁶ In less charitable fashion, William V. Shannon alleges that of the twenty legislative committees in the House, “only ten have interesting substantive work to do”; the House Committees on the District of Columbia, Internal Security, and Merchant Marine and Fisheries are, he charges, “permanent floating bull sessions.”³⁵⁷ The time is past for the Congress to realign these areas of responsibility.

The system of congressional standing committees has been largely constructed in response to the organization of the executive branch. That is, the basic arrangement of committee jurisdiction, as presently constituted, was designed to cover the problems confronting the Congress with respect to each department or agency of the federal government. However, the rapid flow of “Great Society” and like legislation in recent years has given rise to programs involving more than one agency and falling within more than one committee’s jurisdiction.

The existing committee structure of the Congress has become solidified and the power distributed by the present arrangement deeply entrenched. This was recently powerfully illustrated by the President’s proposal for a vast reshuffling of the federal bureaucracy, made in his State of the Union message to the 92nd Congress.³⁵⁸ This recommendation has received no consideration in the Congress, largely because it would require, in turn, a sweeping realignment of standing committee jurisdictions. “What this Congress can be remembered for,” the President said, “is opening the way to a New American Revolution—a peaceful revolution in which power was turned back to the people—in which government at all levels was refreshed and renewed, and made truly responsive.”³⁵⁹ As part of this “revolution,” the President asked the Congress to reduce the number of Cabinet departments from twelve to eight, to “match our structure to our purposes.” This would be accomplished by consolidating the Departments of Agri-

354 *Id.* at 251, 254.

355 S. Res. 147, 92nd Cong., 1st Sess. (1971).

356 *JCOC Hearings*, *supra* note 38, at 1598.

357 Shannon, *The Lopsided House*, N.Y. Times, Sep. 22, 1971, at 43.

358 H.R. Doc. No. 92-1, 91st Cong., 1st Sess. (1971), at 117 CONG. REC. H92 (daily ed. Jan. 22, 1971).

359 *Id.* at H95.

culture, Labor, Housing and Urban Development, Health, Education, and Welfare, Commerce, Interior and Transportation into four cabinet agencies designated the Departments of Community Development, Economic Affairs, Human Resources, and Natural Resources.³⁶⁰ (The Departments of State, Treasury, Justice and Defense would be unaffected by the plan, and the Post Office Department has been absorbed into a government corporation.)

If the Congress were to approve this massive reorganization plan, and if it were to continue to base its committee structure on the framework of the executive branch, then the House and Senate committee system would have to be substantially revised. But the proposal has received a cool reception in Congress, with the prospects of enactment during the 92nd Congress dubious at best. Senator John L. McClelland (D-Ark.), Chairman of the Senate Committee on Government Operations, was quoted as saying: "It's such a stupendous task that it's highly unlikely it could be disposed of at one session of Congress."³⁶¹ And his counterpart, Representative Chet Holifield (D-Cal.), Chairman of the House Committee on Government Operations, expressing anger that the appropriate committee chairmen were not consulted by the President in advance, complained that "[n]obody showed me the courtesy of telling me in advance of what Mr. Nixon rightly called a 'revolutionary' concept of government."³⁶²

Although not a suggestion destined for immediate implementation, in view of the vested interests which would be shaken, the congressional standing committee system should be revamped, beginning with some consolidation of existing committees. For example, Senator William Proxmire (D-Wis.) has suggested that the Senate Committees on Rules, Post Office and Civil Service, and Government Operations be combined into one committee, the Agriculture, Interior and Insular Affairs, and Public Works Committees be compressed into another, and the Aeronautical and Space Sciences and Commerce Committees from a third. "In all three proposed mergers," asserts Senator Proxmire, "there is enough overlapping of jurisdiction and activity to justify the combination."³⁶³ As another illustration, Representative F. Bradford Morse (R-Mass.) contends that the activities of the eight House standing committees in the field of urban affairs should be under the auspices of one committee, and that the areas of health and welfare, presently scattered among four standing committees, be consolidated.³⁶⁴ Also, a number of House members have proposed that the House Committee on Internal Security be abolished and the jurisdiction of the House Judiciary Committee be enlarged.³⁶⁵

The jurisdictions of the legislative standing committees, as Representative Morse has suggested, should reflect not so much the organization of the executive bureaucracy but broad fields of policy-making. Frank H. Weitzel, then Acting

360 *Id.* at H94. Legislation to implement these proposals was subsequently introduced; see H.R. 6959 - 6966, 92nd Cong., 1st Sess. (1971).

361 Wash. Post, Jan. 24, 1971, at A1.

362 *Ibid.* Overview hearings on the President's plan were held by the House Subcommittee on Legislation and Military Operations in June and July, 1971, and on the proposed Department of Community Development (H.R. 6962) in November, 1971.

363 *JOC Hearings*, *supra* note 38, at 105.

364 M. McINNIS, *supra* note 31, at 59, 61.

365 See, e.g., H.R. Res. 71, 72, 78, 85, 86, 231, 451, 458, 462, 463, 477, 560, 565, 600, and 620, 92nd Cong., 1st Sess. (1971).

Comptroller General of the United States, among others, has suggested this approach: "[T]here could be improved oversight and coordination of similar and related programs that are under the cognizance of two or more existing legislative committees, if there were created the legislative machinery for a unified review of the similar and related laws enacted over a period of years for programs assigned to several agencies."³⁶⁶ As illustrated by the President's proposed "New American Revolution" reorganization plan, the executive is flexible in terms of remodeling; the Congress, however, is not.

Even without restructuring the committee system and realigning standing committee jurisdictions, there are, nonetheless, several other solutions to the related problems of committee overspecialization and undercommunication. One approach, which has been resorted to on occasion but merits greater usage, is for one committee to consider (including hearings) one phase of a particular bill and another committee of the same house to consider (concurrently or otherwise) another phase of the same legislation. (For example, the Airport and Airway Development Act of 1970³⁶⁷ was considered in the House by the Committees on Ways and Means and Interstate and Foreign Commerce.) A more elemental approach in the same direction would be to refer bills to all of the committees having relevant jurisdiction (at present, once a bill is introduced, in either the House or Senate, it is referred to only one committee). Another idea which deserves at least a trial implementation is joint hearings before those committees having a common interest in the subject matter of the proposed legislation. Still another device to promote intercommittee consideration, offered by Representative William L. Springer (R-Ill.), ranking minority member of the House Committee on Interstate and Foreign Commerce, is the House's procedural motion to recommit, which now follows (if at all) the conclusion of debate on a measure. Representative Springer, upon finding no prohibition in the House rules, has suggested that, where a committee other than the committee which originally reported a bill has not given the measure consideration and a majority of the House believes it should have, the measure should be committed to the review of the second committee.³⁶⁸ Similar problems of jurisdiction obtain as between legislative and appropriations committees, and committees of the House and Senate.

Prime consideration should be given this state of affairs in both the House and Senate, to enable congressional committees to better grasp the totality of the issues before them.

B. *The Joint Committee Approach*

In addition to reorganization of the standing committee structure, consideration needs to be given in the Congress to further reliance on joint committees. Joint committees have a number of virtues: they serve as additional information-processing vehicles for the Congress, reduce the necessity for separate sets of full hearings in the House and Senate standing committees, allow for

366 *JCOG Hearings, supra* note 38, at 1378.

367 Pub. L. No. 91-258, 91st Cong., 2d Sess. (1970).

368 *JCOG Hearings, supra* note 38, at 254.

greater specialization within the congressional committee structure (while enabling the standing committees to pursue more general overviews), and furnish additional staff support and expertise for the standing committees. In the face of technological and other complex demands being made upon an already-burdened Congress, the joint committee approach has a multitude of advantages.

This is not, however, to advocate a unicameral Congress. The dual-house anatomy of the national legislature serves to generally insure a more thorough consideration of legislation and a broader hearing for all parties potentially affected than would a one-stop Congress. In a sense, the second house, in considering the other's legislative products, performs an appellate function as underlying policies are re-evaluated and the text of the proposed legislation reviewed. Further reliance on the joint committee should be as an enhancement of, not a substitute for, a standing committee system. Nor should this proposal for additional joint committees be interpreted as a call for return to the pre-1946 standing committee structure, where tens of committees having narrow jurisdictional bases proliferated in both the House and Senate. Thus, the grant of legislative power—the power to consider and report out legislation—to joint committees should be resorted to sparingly, if at all.

Within the structure of the Congress, as presently fabricated, there is one joint committee possessing legislative power—the influential Joint Committee on Atomic Energy. This joint committee, which was established in 1946,³⁶⁹ enables the Congress to constructively legislate and perform the oversight function in the area of the development, use, and control of atomic energy. In the words of Professor of Law Harold P. Green, the Joint Committee on Atomic Energy is “an extraordinary congressional committee created as a legislative counterweight to the exceptional powers granted the executive branch in dealing with atomic energy, which was regarded as a governmental problem of unprecedented magnitude and complexity.”³⁷⁰ Because of the legislative power this joint committee enjoys, there are no standing committees having jurisdiction over atomic energy matters in the House or Senate, leaving to it alone (except for consideration in both houses during debate) the performance of the congressional role in this field.

The joint committee approach to legislation and oversight, as illustrated by the performance of the Joint Committee on Atomic Energy, has a significant potential in the context of securing complete and current information for the Congress from the executive branch. As an illustration, the Joint Committee has the authority, not only to “make continuing studies of the activities of the Atomic Energy Commission,” but to be kept “fully and currently informed with respect to all matters within the Department of Defense relating to the development, utilization, or application of atomic energy.”³⁷¹ Furthermore, all government agencies are directed to furnish any information requested by the Joint

369 Atomic Energy Act of 1946 § 15(a), 60 Stat. 772 (1946). See Atomic Energy Act of 1954 § 201, 68 Stat. 956 (1954).

370 Green, *The Joint Committee on Atomic Energy: A Model for Legislative Reform?* 34 GEO. WASH. L. REV. 932 (1964).

371 42 U.S. 2252 (1964).

Committee with respect to the agencies' activities or responsibilities in the field of atomic energy.³⁷²

Despite the successes of the Joint Committee on Atomic Energy, however, a joint committee does not necessarily have to possess legislative power to be effective. Joint committees can, as Professor Green noted, operate as "service committees"³⁷³ by augmenting the activities of the appropriate House and Senate standing committees. This is best illustrated by the functions of the joint committee which nearly dominates the preparation within the Congress of legislation in its field—the Joint Committee on Internal Revenue Taxation. Reviewing the federal tax legislative process from the standpoint of the House, former Congressman Thomas B. Curtis wrote: "That the Ways and Means Committee has been able to write sound revenue legislation is primarily a tribute to the professional staff of the Joint Committee on Internal Revenue Taxation."³⁷⁴ For example, the members of the House Committee on Ways and Means and the Senate Committee on Finance relied heavily on the staff of this joint committee during the drafting and amending processes which preceded enactment of the massive Tax Reform Act of 1969. Thus, as a revenue measure wends its way through the legislative process, the Joint Committee staff is available to interpret and explain the intent and the impact of pending—and often complicated—proposals.³⁷⁵ Mr. Curtis states the role of this joint committee and, in so doing, articulates the contributions a joint committee can make in general: "The Joint Committee staff works closely with the professional staff of the two finance committees [House Ways and Means, and Senate Finance] to follow the testimony of expert witnesses in the public hearings and to write the technical language which supplements and explains each provision of every bill."³⁷⁶

Another illustration of a valuable "service" joint committee is the Joint Economic Committee, which, through its hearings and reports, processes and disseminates information on economic developments for the benefit of all pertinent committees and interested members. It is significant, for example, that, while the Congress was officially out of session during the 1971 summer recess, the Joint Economic Committee held the initial series of hearings on the President's proposals to stabilize the economy through income tax revision. Other joint committees serving the Congress include the Joint Committees on Defense Production, Printing, and Reduction of Federal Expenditures.

The House recently demonstrated awareness of the potential value of joint committees in passing legislation³⁷⁷ to establish a Joint Committee on the Environment.³⁷⁸ This Joint Committee would have the duty to "conduct a com-

372 *Ibid.*

373 Green, *supra* note 370, at 935.

374 Curtis, *The House Committee on Ways and Means: Congress Seen Through A Key Committee*, 1966 WIS. L. REV. 121 (1966).

375 See Woodworth, *Procedures Followed in Tax Legislation and the Role of the Joint Committee on Internal Revenue Taxation*, 18 S. CAL. TAX. INST. 21 (1966). See also Silverstein, *Legislative Language and the Tax Legislative Process*, 15 N.Y.U. INST. ON FED. TAX. 1, 3-5 (1957).

376 Curtis, *supra* note 374, at 127.

377 H.R.J. Res. 3, 92nd Cong., 1st Sess. (1971), reported from the House Committee on Rules on May 5, 1971, H.R. REP. No. 92-181, 92nd Cong., 1st Sess. (1971).

378 117 CONG. REC. H6918 (daily ed. July 20, 1971).

prehensive study and review of the character and extent of environmental changes" and to develop policies to encourage private investment in means of improving environmental quality and review recommendations of the President relating to environmental policy.³⁷⁹ The committee would not have any legislative authority³⁸⁰ and would be required to avoid unnecessary duplication with any investigation undertaken by any other joint committee or House or Senate standing committee.³⁸¹ Nonetheless, the Joint Committee would enhance the information resources of the Congress generally and of relevant standing committees in particular, in such fields as water resources, pollution control, fish and wildlife, transportation, power supplies, and other services and facilities.

Increased reliance on joint committees as a complement to a system of standing committees would be of considerable assistance to the Congress. There is no dearth of proposals suggesting fields a joint committee might explore for the Congress: crime,³⁸² foreign intelligence,³⁸³ classified information,³⁸⁴ simplification of tax returns,³⁸⁵ and treatment of prisoners of war,³⁸⁶ to name some current suggestions. The joint committee has proven to be a useful mechanism for securing information for the Congress, especially from the executive and the bureaucracy. As a somewhat related function, the joint committee approach can enable the Congress to cope, at least initially, with the more complex of the problems it confronts. As realignment of the boundaries of the standing committee provinces is not immediately forthcoming, heavier reliance on joint committees would enable the Congress to better grasp today's issues.

C. Conference Committees

The legislative impasse which characterized the 91st Congress in its final throes has been blamed in large part on the rash of filibusters in the Senate.³⁸⁷ However, that congressional standstill was also a product of another, but less appreciated, development: a breakdown of the workings of House-Senate conferences. Yet the Congress has long avoided conference committee reform. The Congress, asserts former Senator Albert Gore (D-Tenn.), "has never come to grips with the archaic ways and the often dictatorial-like powers of conference committees."³⁸⁸

The conference committee is an indispensable feature of any bicameral legislature and certainly of the United States Congress, where nearly every item of major legislation passes the House and Senate in differing forms, requiring

379 H.R.J. Res. 3, *supra* note 377, § 2(a).

380 *Id.* § 1(f).

381 *Id.* § 2(d).

382 *See, e.g.*, H.R. Con. Res. 46, 55, and 380, 92nd Cong., 1st Sess. (1971).

383 *See, e.g.*, H.R. Con. Res. 3 and 186, H.R.J. Res. 167, 92nd Cong., 1st Sess. (1971).

384 *See, e.g.*, H.R.J. Res. 745, 794, 830, 839, 845, H.R. 10102, and H.R. Con. Res. 409, 92nd Cong., 1st Sess. (1971).

385 *See, e.g.*, H.R.J. Res. 588, 662, 663, and 685, 92nd Cong., 1st Sess. (1971).

386 *See, e.g.*, H.R. Con. Res. 18, 70, and 279, S. Con. Res. 5, 92nd Cong., 1st Sess. (1971). Still other suggestions include Joint Committees on Nuclear Development, Peace, Senior Citizens, Energy, and National Security.

387 *See* text preceding note 284, *supra*.

388 Gore, *The Conference Committee: Congress' Final Filter*, THE WASHINGTON MONTHLY, June, 1971, at 43.

reconciliation to become law. (Occasionally, where the differences are insubstantial and noncontroversial, one house will agree to the amendments of the other, thereby obviating the necessity for arbitration in joint conference.) The House conferees are appointed by the Speaker and the Senate conferees by that house's presiding officer; both sets of appointments are customarily made in accordance with the preferences of the chairmen of the committees which originally considered the legislation. In general, the conferees may consider only those matters in disagreement between the two houses (although, in practice, this standard has occasionally been loosely adhered to³⁸⁹) and are not supposed to insert new matter not germane to such differences. The conference compromise appears in the form of a conference report, which cannot be amended in either the House or Senate, and thus must be accepted or rejected (the latter rarely occurs) in its entirety. To become law, the House's and Senate's versions of legislation must ultimately be identical; hence, the action of the conferees can potentially undo months of legislative endeavor.

The House and Senate conferees are always members of the standing committees having jurisdiction over the legislation in disagreement, and the party affiliations of the conferees generally reflect the political composition of their respective houses. Also, the conferees are largely only those members enjoying considerable committee (or subcommittee) seniority. Newly enacted rules require the conferees to generally negotiate within the positions taken by the House and Senate, as noted.³⁹⁰ Nonetheless, in actuality the individual position of some conferees may be more in accord with the nature of the legislation as passed by the other house—and they may follow that inclination. For example, on the controversial bill to continue federal funding for the supersonic transport plane, the House had voted to authorize \$290 million, while the Senate refused to authorize any financial assistance. Yet the conferees "compromised" at \$210 million after a brief conference. Of the seven Senate conferees, four had voted to provide federal funding for the aircraft, and one, Senator Warren G. Magnuson (D-Wash.), a staunch SST-supporter, openly declared before the conference agreement was reported that he was still seeking the full \$290 million.³⁹¹ In such situations, the adversity comes when the respective houses are called upon to approve the conference report. When the conferees are out-of-step with the posture of their respective house (as were the Senate's SST conferees), the result is often obstruction, internal quarrels, and—in the Senate—filibuster.

Professor Daniel Berman and others have proposed that the practice of appointing to conference members of the House and Senate who are in disagreement with the bill as passed by their respective chambers be abolished.³⁹² Albert Gore has suggested that the slates of conferees be approved in advance by the full membership of each house, to insure that conferees will represent their views.³⁹³ He has further recommended that: (1) a record of conference proceedings be made, with all votes taken therein published in the *Congressional*

389 See text accompanying notes 437-43, *infra*.

390 See text accompanying note 196, *supra*.

391 N.Y. Times, Dec. 21, 1970, at 26.

392 JCOG Hearings, *supra* note 38, at 823.

393 Gore, *supra* note 388, at 47.

Record, (2) the conference report contain a general explanation of the compromises reached (House conferees have generally included an explanatory statement — usually brief — in conference reports³⁹⁴), and (3) the conference report contain a statement by the “minority” conferees.³⁹⁵

These recommendations—especially those relating to the selection of House and Senate conferees—deserve immediate consideration. Decisions made by a small group of congressmen, contrary to the wishes of the majority of one house, can destroy weeks or months of legislative effort. Such a state of affairs is antithetical to established concepts of representative government.

D. *Computers for Congress*

Enhancement of the operations and effectiveness of the legislative branch with computers, through adaptation of contemporary automatic data processing techniques in the sphere of information processing and dissemination, is, as discussed,³⁹⁶ essential to the establishment of a modern Congress. The computer and other electronic devices, however, holds out additional promise for improved congressional performance and efficiency.

Among the most celebrated and desirable of these potential improvements is electronic voting. Congress expends an undue amount of time on lengthy and tedious quorum call and voting procedures. It has been estimated, for example, based on an average of a five-hour daily session and a 35-minute average for roll calls and quorum calls (and now recorded teller votes³⁹⁷), that in a twelve-month session the Congress will consume seventy of such days in record voting and determining attendance.³⁹⁸ This calculation may be somewhat of an exaggeration, in that quorum calls seldom occupy quite that much time (nor do Senate roll-call votes) and that annual sessions rarely, if ever, consist of twelve months of full legislative activity. Nonetheless, during an average congressional session, at least a month of typical workdays is unnecessarily expended on counting votes and calling the roll.

Over one-half of the state legislatures now utilize some form of electronic voting,³⁹⁹ as does the General Assembly of the United Nations. The successful experiences of these legislative bodies—stretching over more than fifty years—have demonstrated the sensibility of this procedure. The prime responsibility of the legislator is to legislate, not waste untold hours roving Capitol Hill to answer

394 This idea was implemented by the Legislative Reorganization Act of 1970, *supra* note 151, § 125, whereby the Legislative Reorganization Act of 1946 and the Rules of the House of Representatives were amended to provide that each report of a committee of conference must be accompanied by “an explanatory statement prepared jointly by the conferees on the part of the House and the conferees on the part of the Senate.”

395 Gore, *supra* note 388, at 48. Senator Gore also suggested that conference reports should be made available at least 48 hours prior to the final vote. This idea was, as has been discussed (see text accompanying note 197, *supra*), also implemented by the Legislative Reorganization Act of 1970, *supra* note 151, § 125.

396 See Part III, *supra*.

397 See text accompanying notes 194-5, *supra*.

398 *JCOG Hearings*, *supra* note 38, at 6.

399 See FIRST PROGRESS OF THE SPECIAL SUBCOMMITTEE ON ELECTRICAL AND MECHANICAL OFFICE EQUIPMENT (prepared by the Working Group [see text accompanying note 86, *supra*] on Automatic Data Processing for the House of Representatives), at 60, *U.S. House of Representatives, Committee on House Administration* (October, 1969).

for quorums and await the calling of their names through interminable roll calls. Representative Durward G. Hall (R-Mo.), formerly a practicing surgeon, wrote that “[a]s a doctor in the House, I abhor the unnecessary waste of human energy occasioned by frequent running to the floor and by the fretful wait while 435 names are called in alphabetical order.”⁴⁰⁰

While there are many variations on the theme, a system of electronic voting might work as follows: Members’ names would be listed on a display board in the House and Senate chambers, on which the votes would be indicated along with running totals. Following the debate, the vote would be called, the voting switches centrally unlocked, and each member would cast a yea or nay vote (or simply indicate “present”) from strategically-located voting stations. When the few-minute voting period was over, the tally would be considered complete, the switches locked, and the individual and total votes would be recorded, by machine, photograph, or otherwise.⁴⁰¹

There are other benefits, somewhat intangible, yet no less important, which would be derived from electronic voting. The public image of the Congress would be improved if visitors, expecting to view a representative assembly at work, are not subjected to the monotony and confusion surrounding the recording of a vote or the ascertainment of a quorum. Certainly mechanical voting minimizes the opportunity for erroneous vote tallies, something of a minor scandal in recent sessions. Also, like institution of the recorded teller vote, electronic voting would discourage absenteeism and encourage greater participation in voting.

Critics of electronic voting fear that it would introduce such inflexibility into the voting procedure that the party leadership would be robbed of the opportunity to maneuver for additional votes.⁴⁰² However, because of the inbred nature of congressional life, there seems little doubt that ad hoc conferences and vote-trading would manage to continue without unnecessarily stalling the actual vote. Automatic voting, moreover, does not have to mean instantaneous voting. A reasonable procedure could include advance announcement of the vote (e.g., 15 minutes beforehand) during the debate or, as noted, a standard period for voting (e.g., 5 minutes), or both. Nor would electronic voting have to compel continuous attendance during the legislative sessions. While a typical congressman’s day involves committee and office work and other pursuits off the floor, this dilemma is less a matter of automatic voting and more a question of present practices of scheduling votes and arranging individual appointments. Finally, some members are reluctant to go on record with respect to certain issues. This aspect of electronic voting could be alleviated somewhat by not utilizing the automatic tally for every vote; the voice vote and unrecorded teller vote could still be utilized. Yet, constituencies are entitled to know of their representatives’ posi-

400 M. McINNIS, *supra*, note 31, at 218.

401 See letter of Representative Samuel N. Friedel, then Chairman of the House Committee on Administration, to House Members, at 116 CONG. REC. H10862-3 (daily ed. Nov. 25, 1970). The House Administration Committee, in November, 1971, approved a contract containing the design and specifications of an operational electronic voting system. This system envisions House Members casting their vote from one of 48 voting stations, with the running tally and final result posted on display panels located behind the House press gallery in the chamber. The present schedule calls for preliminary installation of the system in February, 1972, with the system fully ready for use by late 1972.

402 See, e.g., *JCOC Hearings*, *supra* note 38, at 698.

tion, and in most instances, the public interest is better served by a congressman having to explain a vote rather than hide from it.

Technological advances which would augment the legislative process extend far beyond the acts of ascertaining attendance and voting. For example, as Professor Mary Ellen Caldwell has discussed, a machine system has the functional capabilities to perform various record-keeping and record-preparing tasks, such as preparation of legislative journals, committee reports, and other documents.⁴⁰³ Also, as she has pointed out, the computer can be used in properly drafting, introducing, processing, and enrolling, as well as for publication of, legislation.⁴⁰⁴

Colin F. H. Tapper has further canvassed the potential application of computer techniques at various stages of the legislative process.⁴⁰⁵ Tapper visualizes use of the computer during four key phases in the preparation of legislation: (1) research, through the identification and retrieval of relevant information, including the scanning of statutory materials; (2) drafting, by reducing "syntactic ambiguity";⁴⁰⁶ (3) passage, by scheduling consideration of measures, video displays of proposed amendments in context, electronic voting, and proofreading of legislation; and (4) printing, through photocomposition techniques, which could be repeated for preparation of the volumes of each session's laws (United States Statutes at Large) and for use in developing revised codes.⁴⁰⁷

Although Thomas A. Edison invented the first electric legislative voting device over a century ago, fifty years elapsed before an American legislature (the Assembly of Wisconsin) installed an electronic voting system (in 1917). "The computer is much younger and far more precocious," muses Professor Caldwell, "[h]opefully, it will be incorporated into the legislative process before it, too, reaches a settled middle age."⁴⁰⁸ The uses of computers in the legislative process are manifold, and a substantial computer capability is essential for an effective Congress.

E. Public Interest Lobbying

As stressed throughout, there is much the Congress can do to augment the extent and quality of the information transmitted to it. There has been a considerable emphasis thus far herein on improving the Congress' information resources, by various methods, as for example, automatic data processing, joint committees, and institutions such as an Office of Technology Assessment and an Office of Priorities Goals and Analysis. Yet much information lies within the private sector as well. This is an era of the organized cause, a time when private citizens in unprecedented numbers are joining together in attempts to act in the

403 Caldwell, *Legislative Record Keeping in a Computer Journal*, 5 HARV. JOUR. LEGIS. 1, 4-5 (1967).

404 *Id.* at 6-28.

405 Tapper, *Computers and Legislation*, 23 ALA. L. REV. 1 (1970).

406 Tapper writes that "syntactic ambiguity" occurs in legislation "when the structure of a whole sentence is considered, and it yields more than one possible interpretation of the relationship between its constituent parts." *Id.* at 31. *E.g.*, the U.S. Constitution prohibits "cruel and unusual punishments." Is this prohibition applicable to punishments that are both cruel and unusual, or those which are either? He contrasts this concept with "semantic ambiguity," which is a "consequence of the relative imprecision of language." *Ibid.* *E.g.*, a typed letter is a "document," but is a bottle label, an autographed baseball bat, or a roll of computer tape?

407 *Id.* at 28-41.

408 Caldwell, *supra* note 403, at 32.

public interest. These group endeavors range over a wide spectrum of matters: environmental protection, housing, minority and civil rights, urban transportation, manpower training, care for the aged, poverty, adult education, and a host of other current social problems and concerns.

These organizations generally develop a wealth of information concerning their particular work and often are staffed by highly motivated and energetic individuals, who should be encouraged to forward their group's findings and ideas to the Congress. But the Congress has, perhaps unwittingly, largely cut off potential lines of communication with these public interest organizations while at the same time has fostered lobbying by private business and groups seeking to advance special interests.

This unfair and unbalanced state of affairs has come about because of the current disposition of the federal tax laws. In most instances, public interest, as well as special interest, groups require two tax features to exist: they must be exempt from income taxation and must be able to attract contributions which are tax deductible by the contributors. Private interest groups are tax-exempt under the Internal Revenue Code as "business leagues"⁴⁰⁹ and payments from private business for their operation are deductible as "ordinary and necessary" trade or business expenses.⁴¹⁰ The only relevant limitations on this deduction are that the legislation being influenced must be of direct interest to the taxpayer or must be the subject of communication between the taxpayer and an organization having a direct interest in the legislation, of which he is a member, and that the deduction will not be allowed for payments to political campaigns or for grass-roots (i.e., influencing the general public) lobbying.⁴¹¹ Public interest groups desiring to acquire both of these federal tax characteristics must obtain classification as "charitable" organizations, which also are tax-exempt⁴¹² and eligible to attract contributions, which are deductible by the donor for federal income, gift, and estate tax purposes.⁴¹³ But "charitable" organizations are proscribed from "carrying on propaganda, or otherwise attempting, to influence legislation" as a "substantial part of [their] activities."⁴¹⁴ This means that private industry, with these preferred tax attributes, is able to—and is encouraged to—communicate with the Congress, while groups acting in the public interest may speak to Congress at the peril of losing their federal tax status.⁴¹⁵

Congress should no longer deny itself access to expertise available on legislative matters from public interest groups but should revise the Internal Revenue

409 INTERNAL REVENUE CODE [hereinafter I.R.C.] § 501(c) (6).

410 I.R.C. § 162(a).

411 I.R.C. § 162(e). See Cooper, *The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining the Public Policy Objectives*, 68 COLUM. L. REV. 801 (1968).

412 I.R.C. § 501(c) (3).

413 I.R.C. §§ 170(c) (2), 2055 (a) (2), and 2522 (a) (2).

414 I.R.C. §§ 501 (c) (3), 170(c) (2) (D), 2055(a) (2), and 2522 (a) (2). The law offers no explicit formula for computing "substantial" or "insubstantial" activities. The Sixth Circuit has suggested that "something less" than five percent of an organization's time and effort is not "substantial." *Seasongood v. Commissioner*, 227 F.2d 907, 912 (6th Cir. 1955).

415 The Internal Revenue Service has ruled that a "charitable" organization will not be considered engaged in prohibitive legislative activity if at the request of a congressional committee a representative of the organization testifies as an expert witness on pending legislation affecting the organization. Rev. Rul. 70-449, 1970, INT. REV. BULL. No. 35, at 9.

Code to permit publicly supported tax-exempt organizations⁴¹⁶ to communicate directly with the Congress (and state legislatures), as well as with such organizations' members, to affect legislation of direct interest to them. This would redress the present imbalance between the permissible activities of special interest and public interest groups (both should continue to be prohibited from political campaign activities⁴¹⁷ and grass-roots lobbying) and would enhance the flow of information to the legislative branch. As Senator Edmund Muskie (D-Me.) said on the occasion of introducing such legislation,⁴¹⁸ "if we are to maintain a democratic form of government in practice, and if the Congress is to reach reasoned judgments on the important issues before it, we must assure that every segment of our society is able to communicate with Congress."⁴¹⁹

There seems little point in determining that publicly supported charitable groups act in the public interest and to grant them exemption from federal taxation, and then silence these organizations when they attempt to contribute to public policy formulation. However, at the same time this inequity between public interest and private lobbying organizations is rectified, the Congress would also make available to itself valuable information, data, and expertise, to assist it in legislating more effectively.

F. *Some Additional Reforms*

The foregoing discussion has focused on five particular congressional reforms which, once implemented and properly adapted, would considerably improve the operations of the Congress. There are, in addition, a host of other potential revisions in practice and procedure which merit either adoption or deserve serious study. A partial list of such important congressional reforms would include:

1. Establishment of a legislative-executive council or cabinet, to exchange advice on legislative proposals, and to formally have available lines of communication between the congressional leadership and the President. Professor Edward S. Corwin, for example, has proposed that the President "construct his Cabinet from a joint Legislative Council to be created by the two houses of Congress and

416 The Tax Reform Act of 1969 introduced a statutory distinction between "publicly supported" organizations exempt from federal income taxation under I.R.C. § 501(c) (3) and "private foundations," which are likewise exempt. See I.R.C. § 509. Separate proscriptions on legislative activities of private foundations appear in I.R.C. § 4945(e).

417 See I.R.C. §§ 501(c) (3), 170(c) (2) (D), 2055(a) (2), and 2522(a) (2).

418 S. 1408, 92nd Cong., 1st Sess. (1971). As of this writing, the bill has 24 co-sponsors. In the House, identical legislation has been introduced, under the leadership of Representative James W. Symington (D-Mo.); as of this writing, 78 House members have sponsored or co-sponsored the Symington bill. H.R. 8176, H.R. 8645, H.R. 8920, H.R. 9403, H.R. 9476, H.R. 9691, H.R. 9743, H.R. 9837, H.R. 9934, H.R. 9988, H.R. 10073, H.R. 10152, H.R. 10273, H.R. 10274, and H.R. 10403, H.R. 10583, H.R. 10584, H.R. 11594, and H.R. 11719, 92nd Cong., 1st Sess. (1970).

419 117 CONG. REC. S 4070 (daily ed. Mar. 30, 1971). Representative Jonathan B. Bingham (D-N.Y.), a sponsor of the Muskie-Symington legislation, has declared the measure "only equitable and . . . in the best interests of all of the American public and of our political system." 117 CONG. REC. H6014 (daily ed. June 29, 1971). Representative Jerome R. Waldie (D-Cal.) believes that both business leagues and "charitable" organizations are "among the most valuable sources of information and opinion that a Congressman has" and that "it is unreasonable that Congress be expected not to have the benefit of their views." 117 CONG. REC. H6822 (daily ed. July 15, 1971). See also remarks of Delegate Walter E. Fauntroy (D-D.C.), 117 CONG. REC. E9406 (daily ed. Sep. 9, 1971).

to contain its leading members."⁴²⁰ To this central body of advisors could be added department heads and chairmen of independent regulatory agencies as required.

2. Similarly, establishment of a structured means by which the Congress can participate in the decisions to involve the country in war. In addition to legislation defining the President's power to commit the armed forces to hostilities,⁴²¹ the Congress should be represented at the consultation and advisory stages of decision-making which precede engagements in foreign adventures. Thus, Alfred de Grazia has suggested that the Congress elect one member to "share" with the President "the power to retaliate against foreign aggression."⁴²²

3. Authorization of telecasting or radio broadcasting of floor debates in both houses of the Congress on major legislation, to evoke greater public awareness of the Congress' activities and to enhance Congress' educational function. Likewise, a closed circuit broadcasting system should be installed on Capitol Hill and elsewhere in the government complex, to enable members unable to attend debates, staff, and interested government officials to follow the proceedings of the Congress.

4. Minimize the delays in enactment of appropriations legislation. Early each year, the White House budget requests for the following fiscal year (beginning July 1) are transmitted to the Congress. The House Committee on Appropriations initiates legislative consideration of the proposed budget package by subdividing the requests into fourteen portions, which are separately reviewed by subcommittees and framed as separate appropriations measures. An unfortunate result of this annual ritual, from the standpoint of governmental—federal, state and local—administration, is that rarely does a fiscal year begin with all appropriations measures even close to enactment. Of the 86 regular appropriations bills enacted from 1964 to 1970, only six became law before the beginning of the government's fiscal year.⁴²³ In the first session of the 91st Congress (1969), for example, the House had not passed all of the fiscal year 1970 appropriations bills even by December and the Senate had only approved one measure by the opening of the fiscal year. The Congress should consider the institution of separate legislative and appropriations periods during each annual session.⁴²⁴ The yearly flowering of a cluster of appropriations bills creates legislative confusion and funding delays, and this aspect of the budget-consideration process requires urgent reform.

5. Change in the mode of publication of the *Congressional Record* to reflect floor speeches and debate as actually spoken, and to print remarks that are merely inserted in the *Record* in a different typeface, in a separate location,

420 E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 297 (4th ed. 1957) (reprinted by permission of the New York University Press, New York).

421 See text accompanying notes 327-41, *supra*.

422 A. SCHLESINGER AND A. DE GRAZIA, *supra* note 13, at 65.

423 AMERICAN ENTERPRISE INSTITUTE, *LEGISLATIVE ANALYSIS* No. 8 (June 25, 1971), in 117 CONG. REC. S12806 (daily ed. Aug. 2, 1971).

424 See S. 1875, 92nd Cong., 1st Sess. (1971). Some have proposed that the appropriations requests of various regulatory agencies be submitted directly to the Congress. See S. 448, H.R. 656, H.R. 5443, 92nd Cong., 1st Sess. (1971). For other suggestion see H.R. Res. 75, 80, 176, 241, and H.R. 4699, 92nd Cong., 1st Sess. (1971).

in brackets, or in similar fashion.⁴²⁵ Present practice not only makes no distinction between verbatim remarks and speeches subsequently inserted into the transcript of the general debate, but also enables members to retroactively change the context or substance of their remarks as they finally appear in the *Record*. Members in both the House and Senate have unlimited authority to revise their remarks, and revisions are so commonplace that Representative Robert C. Eckhardt (D-Tex.) has warned his colleagues that they can "actually mislead the courts as to what the legislative history of a bill is in certain circumstances."⁴²⁶ Not only does this practice muddle legislative histories but it is misleading—especially when overabused—to the general public. As an illustration, the *Congressional Record* of March 24, 1971, contains eight addresses by Sen. Birch Bayh (D-Ind.)—who was in fact concluding a skiing trip to Colorado at the time.⁴²⁷ While allowance can be made for correction of grammatical and typographical errors, the *Record* should be converted into a faithful account of congressional proceedings.

6. Abolishment of the practice in the House of considering legislation emanating from the Committee on Ways and Means under "closed rules"⁴²⁸ which prohibit amendments. It is inappropriate that one committee alone undertakes the preparation of major legislation—in such fields as taxation, tariffs, and international trade—for which the entire House bears responsibility. At a minimum, the House membership should have the opportunity to vote separately on each title of a bill under consideration.⁴²⁹

These and other suggestions of congressional "reforms"—organizational changes and alterations in procedure and practice—are by no means exhaustive. Depending upon one's conception of the ideal, model legislature and its role in American government, many more reforms can be added to the list. Yet, as Robert Bendiner has noted, "there is no dearth of prescriptions but only a general reluctance to take medicine."⁴³⁰ This attests to the need for an effective representative assembly; the means can reasonably be debated but the goal is clear.

IX. Congressional Reform: The Realistic Prospects

The Congress has taken many steps toward modernization since 1946, although much remains to be done to bring the legislative branch into conformance with the needs and demands of contemporary America. A survey of the successes and failures in congressional reform over the past thirty years teaches that, of all the "reforms" that are periodically advocated, reform of the legislative branch comes the hardest. Executive Office reform and court reform, as well as numerous issue reforms—tax reform, draft reform, education reform, and

425 See e.g., H.R. 10571, 92nd Cong., 1st Sess. (1971).

426 116 CONG. REC. H7388 (daily ed. July 29, 1970). See also remarks of Representative John N. Erlenborn, *Truth in the Congressional Record*, 117 CONG. REC. H11285 (daily ed. Nov. 18, 1971).

427 Wash. Post, Mar. 29, 1971, at A7. For additional examples see Lyons, *Hill Record Doesn't Tell It Like It Is*, Wash. Post, July 5, 1970, at A7.

428 See text accompanying note 237, *supra*.

429 See e.g., remarks of Representative Richard T. Hanna (D-Cal.) 116 CONG. REC. E7521 (daily ed. Aug. 11, 1970).

430 R. BENDINER, *supra* note 51, at 208.

others—come and go with accomplishments but the Congress basically remains the same.

There are several reasons as to why these circumstances persist (including more exposure in the media, more public interest, and considerably more direct relevance to the average citizen), although one is obvious: only the Congress can reform itself. Congress frequently undertakes to reform an area of the law (e.g., the Tax Reform Act of 1969) or direct the private sector to better conduct its affairs in the public interest (e.g., the Occupational Health and Safety Act of 1970) or to gratuitously instruct another branch of the federal government on how to exercise its responsibilities (e.g., the Economic Stabilization Act of 1970). But the Congress is slow to put its own houses in order. Congressional reform is—at best—infrequent reform because it is a bootstrapping process.

Senator Clifford P. Case (R-N.J.) explains the aversion of the Congress in general toward reorganization: "Left to its own devices, Congress will not take action to do the job of self-reform which urgently needs doing. Too many members have vested interests in maintaining the status quo."⁴³¹ For congressional reform to be accomplished, the acceptance—however grudging—of or perhaps the withholding of opposition by the congressional leadership and/or committee chairmen must be obtained. And, of course, men and women in positions of power and influence are rarely willing to relinquish their stations of authority to advance the general goal of "congressional reform." The reluctance within the Congress to institute reforms and the accompanying disinclination to accept or comply with them has been illustrated threefold thus far in the 92nd Congress.

Minority Staffing

Among the hotly contested items which survived to enactment in the Legislative Reorganization Act of 1970 was a provision earmarking at least one-third of House standing committees' funds for appointment of committee staff personnel solely by the minority party.⁴³² This addition to the House rules, which was adopted on a floor amendment offered by Representatives Fred Schwengel (R-Iowa) and Frank Thompson (D-N.J.),⁴³³ represented an effort to build into the committee system an improved and more dynamic adversary process, an aspect of congressional reform championed by the Republican party since 1962. The adoption of this provision was considered a victory for the proponents of "minority staffing."

However, on January 20, 1971, on the eve of the convening of the 92nd Congress, House Democrats, in their caucus, voted to support repeal of the minority staffing funding provision and further invoked the rarely used "binding caucus" rule, thereby obligating all Democrats to adhere to that position at the time of the House vote.⁴³⁴ Once the current Congress opened, the House, on

431 Case, *The Growing Concern With the Legislative Process*, 32 GEO. WASH. L. REV. 929, 931 (1964).

432 See text accompanying note 207, *supra*.

433 116 CONG. REC. H6750 (daily ed. July 15, 1970).

434 Under the rules of the House Democratic caucus, a member who votes in contradiction

January 22, 1971, voted 226 (all Democrats) to 155 (all Republicans) to, *inter alia*, delete the minority staffing provision.⁴³⁵

The question of funding requirements for staff for the minority party is not one-sided (many believe, for example, that the majority party alone has the right and responsibility for organizing the Congress) and the dialogue over the propriety of such a funding rule is far from quieted.⁴³⁶ It is unfortunate, nonetheless, that the majority party resorted to the harsh device of the caucus unit rule to stifle open discussion on repeal of an untried House rule enacted by the previous Congress. This crude parliamentary tactic worked to deny individual House members an opportunity to vote as their conscience and constituency may have wished, and serves to further erode public confidence in the ability of the Congress to perform its deliberative functions.

Conference Rules

Only six months after operation under the Legislative Reorganization Act of 1970 was under way, a set of House-Senate conferees apparently violated an integral provision of the new House rules. These rules now provide a clear definition of the authority of conference committees to adjust differences in legislation between the House and Senate versions, by stating that a report of conferees

shall not include matter not committed to the conference committee by either House, nor shall their report include a modification of any specific topic, question, issue, or proposition committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific topic, question, issue, or proposition as so committed to the conference committee.⁴³⁷

The issue arose in connection with the manner in which House-Senate conferees reconciled provisions of the House and Senate bills to extend the military

to caucus direction is automatically excluded from the caucus (and thereby loses committee seniority), unless he states in advance of the House vote that he considers the proposal unconstitutional or that he had previously pledged to his constituents that he would adopt a contrary position. The caucus rules are reprinted at 117 CONG. REC. H111 (daily ed. Jan. 25, 1971).

435 H.R. Res. 5, 92nd Cong., 1st Sess. (1971). Rule XI, clause 32(c) now reads: "The minority party on any such standing committee [other than House Appropriations] is entitled to and shall receive fair consideration in the appointment of committee staff personnel pursuant to each such primary or additional expense resolution."

436 Resolutions to re-enact the minority staffing funding provision were introduced by 155 Republican House Members on June 22, 1971. H.R. Res. 499, 500, 501, 502, 503, 504, 505, and 506, 92nd Cong., 1st Sess. (1971). See 117 CONG. REC. H5721 (daily ed. June 22, 1971).

437 House Rule XXVIII, clause 3(2), added by the Legislative Reorganization Act of 1970 (see text accompanying note 196, *supra*). This section of the Act originated as an amendment offered by Representative B. F. Sisk (D-Cal.), the floor manager of the bill. See 116 CONG. REC. H8703 (daily ed. Sep. 15, 1970). During debate, Representative Sisk stated that his amendment "simply proposes to make it impossible to bring in new material, material that has not been considered in one or the other body's consideration of the matter," and attempts "to make certain that the proceedings of a conference committee which is held in executive session cannot go beyond the scope of what the committees of the two bodies in their floor debate held in the initial handling of the legislation." 116 CONG. REC. H8703-4 (daily ed. Sep. 15, 1970).

draft.⁴³⁸ Both the House and Senate had approved an annual military pay increase of approximately \$2.7 billion, but through different formulas; the conferees settled on about \$2.4 billion. The conference committee, in effecting this reduction, ignored earlier-established congressional intent concerning the concept of "regular military compensation"⁴³⁹ and relied on an outmoded distinction between basic military pay and quarters allowance⁴⁴⁰ (the Senate had voted most of its increases in basic pay and for an enlistment bonus, and the House in both basic pay and quarters and subsistence allowances). The conferees, of course, asserted that they attempted to individually adjust each of the different pay elements at issue and that the reduction in the total annual cost was purely incidental.⁴⁴¹

Representative William A. Steiger (R-Wis.) sought to raise a point of order against the compromise version of the military pay increases.⁴⁴² Initially, the House Committee on Rules, in writing the resolution governing consideration of the draft legislation, refused to waive points of order against the contested provisions, but subsequently reversed itself and granted the waivers pursuant to advice from the Parliamentarian of the House that, should a point of order against the compromise be upheld, the full conference report would be returned to the conference committee. Thus, the House approved the conference report on the military draft extension bill—including the conferees' reductions—on August 4, 1971, and the Senate passed the final version on September 21, 1971. But this example of adroit parliamentary maneuvering leaves the future viability of the new conference report rule uncertain; as Representative Steiger remarked, "as a proponent of the Legislative Reorganization Act, I fear that this reform [concerning conferees' reports] will be rendered meaningless."⁴⁴³

Subcommittee Chairmanships

Still another example of the negative spirit in which the House received its new rules is the ultimately unsuccessful attempt by Representative Chet Holifield (D-Cal.), to thwart a move by the House Democratic caucus to make more subcommittee chairmanships available to junior members. The caucus approved a rule which confines an otherwise eligible Democrat House member to chairmanship of no more than one "legislative" subcommittee.

But Representative Holifield, the new chairman of the House Committee on Government Operations, sought to deny chairmanships to younger members by decreeing that five of his committee's subcommittees (then headed by members who were chairmen of other subcommittees) were "investigative" not "legislative" and thus not bound by the caucus rule, and by consolidating the

438 H.R. 6531, 92nd Cong., 1st Sess. (1971).

439 See e.g., H.R. REP. NO. 90-787, 90th Cong., 2nd Sess. (1968).

440 See remarks of Representative William A. Steiger (R-Wis.) 117 CONG. REC. H6426 (daily ed. July 7, 1971).

441 See, e.g., remarks of Senate John C. Stennis, Chairman of the Senate Committee on Armed Services, 117 CONG. REC. S14105 (daily ed. Sep. 10, 1971). See Friedman, *The Draft Uncompromise*, NEWSWEEK, Sep. 6, 1971, at 117 CONG. REC. E9296 (daily ed. Sep. 8, 1971).

442 See 117 CONG. REC. E8758 (daily ed. Aug. 4, 1971) (remarks of Representative Steiger in the House on August 2, 1971).

443 117 CONG. REC. H6426 (daily ed. July 7, 1971).

two most important subcommittees, with himself as chairman.⁴⁴⁴ However, the original task force which initially developed this and other changes for the Democratic caucus was reconvened for the purpose of clarifying the rule on subcommittee chairmanships. Representative Holifield subsequently abided by the clarified version of the rule.

X. Conclusion

Despite the potential reorganizations of the legislative branch which are in varying stages of consideration,⁴⁴⁵ there is nothing to indicate that large-scale congressional reforms are in the offing. The permanent Joint Committee on Congressional Operations is not inclined at this juncture to embark on a campaign for extensive reform and the members of the Congress most uniquely situated to bring about significant reforms are generally indisposed to do so. As Dean Ernest S. Griffith has warned, “[a]ncient procedures are jealously guarded by those who have learned how to use them.”⁴⁴⁶

Clearly, then, the energetic efforts of many of the younger members of the House and Senate notwithstanding, for meaningful congressional reform to become a reality, a more active interest in the Congress and its processes on the part of the general public—and, specifically, the legal profession—must be stimulated. Unfortunately, this development is not imminent either. Several years ago, two commentators wrote: “Congress has had little interest in reforming itself, and the public has been largely indifferent.”⁴⁴⁷ Some progress has been made on the first-mentioned front, none on the latter.

The American people must come to expect and demand that the Congress fully participate in the formulation of national policy and not avoid the larger issues or not respond to presidential requests with reflex affirmations. (Senator William Proxmire recently displayed the appropriate attitude when, in discussing the nature of wage and price controls following expiration of the administration’s ninety-day “freeze,” he said: “I think we [the Congress] should step in and formulate some sort of framework.”⁴⁴⁸) However, such expectations and demands may be idly made if the public continues to tolerate the Congress’ plodding reliance on obsolete traditions and inadequate procedures. William Pfaff, of the Hudson Institute, writes that if “we really take seriously the argument that this country is experiencing a serious political crisis, and that the crisis derives from uses and misuses of power, then a restructuring of power and of the in-

444 See Viorst, *Holifield’s Naked Power Grab*, (Washington) Evening Star, Mar. 1, 1971, at A9.

445 See Parts III and VII.

446 E. GRIFFITH, *supra* note 36, at 74.

447 Rogow and Temple, *Congressional Government: Legislative Power v. Democratic Processes*, 32 GEO. WASH. L. REV. 947 (1964). Senator Hubert H. Humphrey has proposed a Citizen’s Committee to Study Congress in S. 2728, 92nd Cong., 1st Sess. (1971); see his remarks at 117 CONG. REC. S 16612-5 (daily ed. Oct. 20, 1971).

448 As quoted in the Wash. Post, Sep. 20, 1971, at A1. The Congress, in extending the President’s power to control wages and prices until April 30, 1973, imposed only moderate economic controls or exemptions of its own; see the Economic Stabilization Act of 1971, S. 2891, 92nd Cong., 1st Sess. (1971). See also Mathias, *The Optional Congress*, III RIFON FORUM (No. 13) 3 (1971), reprinted at 117 CONG. REC. S20975-6 (1971).

stitutions of public accountability is necessarily implied."⁴⁴⁹ Merlo J. Pusey, in his study of how the nation goes to war, concluded that the "first avenue of hope for restoring legislative control over the making of war lies in the development of a lusty public opinion."⁴⁵⁰ To paraphrase Mr. Pusey, the first avenue of hope for restoration of the United States Congress as a sensitive and productive participant in the shaping of national affairs lies in the development and articulation of a lusty public opinion.

The Congress is nearing completion of the first two centuries of its existence. The 100th Congress presumably will adjourn late in 1988, thus closing this nation's first two hundred years of representative government.⁴⁵¹ The Legislative Reorganization Act of 1970 was the product of nearly six years' work; if the Congress of the 1980's is to have effective legislative procedures, access to material information, a responsible oversight of government, and the capacity to competently represent its constituencies in the national government, the time to begin is now.

449 Pfaff, *Less Rhetoric, More Reform*, Wash. Post, Sep. 26, 1971, at E1, E4.

450 M. PUSEY, *supra* note 14, at 167.

451 Since the inception of the Congress in 1789, each Congress has had a duration encompassing two years, usually with the years of a particular Congress marked by a first and second session. This pattern has been firmly adhered to since the 77th Congress, which commenced in 1941. However, 24 Congresses held three sessions within two years and one (the 67th) had four.