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This is the paper I prepared for Domenici on reform - D. Mann

CONGRESSIONAL REFORM

AREAS OF EXAMINATION AND PRELIMINARY SUGGESTIONS

Is Congressional reform intended to alleviate members' frustration, to change negative public perceptions of Congress, or to change the way Congress deals with issues? Members and voters have different concerns and perspectives, so solutions designed from one perspective may not be satisfactory from another. A statement of problems, objectives and goals is the first task of any reform effort.

Reform studies should identify objective measures which may indicate the sources of problems in Congress: numbers and types of bills; analysis of their content; allocation of staff and member efforts. We should consider what Congress produces, and the quality of that product, rather than reforming Congressional processes without reference to management and policy results.

The public holds Congress in low esteem because they believe Congress is not doing a good job. While the specific reasons for this disaffection need to be better defined, any reform effort which ignores this opinion will fail to win public acceptance. Some major public concerns are: lack of responsiveness, lack of accountability and the belief that legislators act in their own interest rather than for the public good. These and similar standards should be used to judge specific proposals and topics such as those discussed below.

COMMITTEE REFORM. At least three aspects of committees merit examination: jurisdiction, scheduling, and the relation of committees to the agencies and groups they affect.

Scheduling problems are due to the large number of committees (and subcommittees) driven by a desire for publicity to jam hearings into the morning hours mid-week. Deconfliction of schedules is nearly impossible to enforce (chairmen will not submit schedules for approval to a central office), thus, reducing the number of committees is the step most likely to alleviate scheduling overload.

Jurisdictional battles and overlapping jurisdiction would also be remedied partially by reducing the number of committees. Realigning jurisdiction would eliminate some conflicts, but some overlap and ambiguity would necessarily remain, especially with the broad proposals most likely to be controversial. A further solution to jurisdictional battles is to abolish or limit joint or sequential referrals.

"Iron triangle" aptly describes committee relations with

agencies and interests. Selection (members from rural areas seek seats on the Agriculture Committee) and professional bias (after long service on a committee, members' views change) make committees less able to apply disinterested judgment. Tenure limits on committee leadership or service seek to address this problem.

Abolishing most standing committees is a more radical approach to all three problems. As in early Congresses, major legislation could be referred to select committees after a brief initial debate. Such committees would be less subject to entrenched interests and more likely to resolve issues speedily. Arrangements for staffing and institutional expertise would have to be worked out. Some ability to control details would inevitably be lost, offset by a greater certainty and speed in addressing major issues. Such a scheme would probably not work well with appropriations, and a few other standing committees might be retained to handle routine matters.

BUDGET PROCESS/SPENDING. The current budget process has failed to control federal spending or the deficit. A primary reason is the expansionary bias of the current services baseline. Of recent reforms, Gramm-Rudman, though politically painful, worked to control the deficit and limit spending growth. Several productive incremental steps are possible short of a major rewrite of the budget act. These include: adding a system for periodic mandatory review of entitlements and mandatory spending; replacing the current services baseline with current dollar scoring; restoring Gramm-Rudman; and, making the budget resolution a joint resolution signed by the President.

While allowing the President to veto the budget resolution would appear to diminish Congressional power, as a practical matter the President and Congress have been forced to conclude broad budget agreements covering every year since 1986. Establishing a legislative mechanism to force early agreement would lead to a much more orderly process. Presidential enforcement powers under a Gramm-Rudman regime could be tied to an annual budget joint resolution, controlling the President much better than under the current informal system of multi-year agreements.

EXECUTIVE-LEGISLATIVE RELATIONS. Executive agencies complain often about Congressional micromanagement. Many measures support the contention that Congress has exercised greater control over executive agencies over time: length of bills, length of committee reports, number of reports to Congress, letters, phone calls, and meetings have all grown far more rapidly than the budget. Many of these measures correlate closely to the growth in Congressional staff. The danger for Congress is that it has become so mired in detail that it cannot see the forest for the trees. The HUD and S&L scandals show major failures in Congressional oversight as well as in executive management. Reconsideration of the concept of standing committees is again indicated, as is consideration of appropriate staff size.

Growth in Congressional oversight has not improved government management. Alternatives include: comprehensive sunset schedules, closer cooperation with inspectors general, and reassigning oversight responsibilities. It may be useful to link oversight and legislative action more directly.

CONGRESSIONAL COVERAGE. The practice of the legislature exempting itself from laws is a genuine threat to democratic governance. The separation of powers need not be a bar to subjecting Congress to the laws it applies to the remainder of the government and to the private sector. A generic solution to this problem is needed, and must recognize that enforcement is critical. Application of a law with lax -- or merely different-- enforcement amounts to a different law. The threat of unpredictable juries has much to do with concerns about new laws and rights of action. If Congress must exempt itself from executive enforcement, Congressional enforcement must be independent. The same standards, regulations and rules used for executive agencies should apply, including appeal rights.

It may be useful to draw a distinction between institutional prerogatives related to legislation and individual members' or staffers actions, which, even in an official capacity, need not be shielded. (State and federal officials and agencies are often subject to penalties for violation of various laws.) There is no reason why the EPA should be allowed to fine other federal agencies and state and local governments and not be able to fine Congress. If Congress feels its institutional prerogatives may be threatened, it should establish a procedure for formally invoking "Congressional privilege" by a record vote after an enforcement or regulatory action is begun.

ETHICS REFORM. The public has little confidence in existing Congressional enforcement of legal and ethical standards. Light penalties, laxity and log rolling appear to prevail. With or without Congressional coverage reform, a more independent system than the present "peer review" ethics committees is essential. Replacing the ethics committees with panels of retired judges, retired members, or a combination thereof, would introduce a measure of detachment.

INCUMBENCY. Reform efforts must recognize the incentives and demands that the electoral process places on members, even if finance and election law are not addressed directly. At a minimum, the use of official resources for campaign-related purposes should be limited, including franking reform. Broadcast production and distribution facilities should also be scrutinized.

PROCEDURE. In the House in particular procedural limitations are used to avoid addressing important but divisive issues and to frustrate popular proposals without accountability. Rules and practices should be reformed to make it easier to advance legislation or amendments which may be opposed by committee or House leadership and to protect the ability of various minorities

to secure a hearing and vote on issues of interest to them.

NON-LEGISLATIVE ACTIVITY. Large staffs and the number of non-legislative actions by subcommittees and committees create accountability problems. Systemic controls such as freedom of information, inspectors general, and in many cases, routine audits, do not exist on Capitol Hill. In preference to bureaucratic solutions such as those, Congress should track and limit the volume and type of non-legislative policy-directed activity.

PAY RAISE. Many reform proposals include the "Madison Amendment" or a similar requirement that an election intervene between a vote on and implementation of a pay raise. This is a reasonable step. Certainly the existing COLA raise provision should be abolished. They very fact that recent raises were so controversial argues that Congress must address raises through open votes, subject to public scrutiny.

STAFF. Many reform proposals assume that staffs are too large. More consideration might be given to what staffers do, how they do it and to how they are supervised. Growth in staff size has changed duties and behavior. To the extent that size, per se, is a problem, small cuts will not make a difference. Only a reduction of 25% or more will cause significant changes in staff roles and behavior.

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February 1992

This is an outline of a paper in progress by Steve Schwalm.

THE UNITED STATES CONGRESS: AN INSTITUTION IN NEED OF REFORM

"The most dangerous time for a bad government is when it starts to reform itself."
Alexis de Toqueville anent Turgot & Louis XIV

A notable rise in anti-incumbent sentiment among the American public, fueled by an unremitting series of scandals and failures in Congress, has finally caught the attention of the Barons of the Hill. Regard have for Congress is at an abysmal low. A Washington Post survey showed only about 20% of Americans have confidence in Congress as an institution. Frustrated Americans, seeing their Government as at once intrusive and impotent, and discouraged at having the power to change it, have stayed away from the polls in record numbers. Yet the incumbency reelection rate has never been higher.

Stung by criticism, and prompted by calls for reform by pundits and public during this election season, Congress has been introducing reform proposals at a rapid pace, ranging from Committee restructuring proposals to term limits to a line-item veto. Even a two-hundred year old James Madison amemdment on Congressional pay has been resurrected.

What kind of reforms have been proposed, and what effects would they have? Congressional reforms have never taken place in a vacuum, and great shifts in the operations of the legislature historically have not taken place without tremendous external influence. Public ire at the repeated "appearances of impropriety" displayed by Congress, and frustration with their inability to meet the demands of their office, are behind many of the reform proposals, and dissatisfaction with the stagnation of the bloated legislative process is behind others.

Congress is ripe for a change, and the marshalled forces of reform now have the impetus to effect needed changes. The question is: Which reforms does Congress really need? Which will make it an effective legislative body capable of implementing beneficial national policies with dispatch, and which will prevent the abuses that have so angered the American people?

1) The Reform Proposals
List of the reform proposals out there Boren, Thomas, Kerry, Coats, Fawell, House Freshmen (La Rocco, Moran, Santorum), Nussle,

A) Boren\Domenici\Hamilton\Gradison
Among the first reform packages to be introduced in the lastest spate was a bi-partisan proposal by Senators Boren and Domenici, and Representatives Hamilton and Gradison.

a) Problems cited
staff increases
committee proliferation/conflicting assignments

lower production - fewer bills passed \
size of bills has increased / (accountability)
time wasted

b) Solutions proposed
establish a joint committee on the Organization of Congress
little other detail to date

B) Coats

Senator Coats has introduced a four-part Congressional reform package aimed at ethical practices and accountability.

a) Problems cited
public loss of confidence in Congress
hypocrisy of exempting themselves from their laws
Ethics committee protecting Senators
entrenched politicians whose first concern is their own careers

b) Solutions proposed
light of day pay raises
Senate Ethics Committee reform
Congressional Term limits
apply laws passed by Congress to themselves

C) Fawell

Congressman Fawell jumped on the bandwagon with a proposal January 28, 1992.

a) Problems cited
public dissatisfaction with Congress
high Congressional expenses
calcified committee tenure
capricious floor proceedings
self exemption

b) Solutions proposed
reducing congressional expenses
rotating committee membership
change rule-waiving procedures
apply laws to Congress univocally

D) Freshman reform group

Three-quarters (35) of the House freshman have signed onto a proposal.

a) Problems cited
public perceptions
member pay raises
floor and committee scheduling

b) Solutions proposed
Resolution for Constitutional amdt. (Madison Amdt) to limit the pay-raise authority of Congress
reworking the House schedule

E) Nussle

a) Problems cited
American people are fed up

Congress is out-of-touch, arrogant, isolated

b) Solutions proposed
tear down the walls! with:
congressional term limits
congressional coverage of laws
cut back on perks

F) Kerry (Presidential -ha ha- hopeful)

a) Problems cited
Government waste is a moral issue
lack of confidence in government

b) Solutions proposed
halve Cabinet-level agencies
cut executive branch spending 25 percent
eliminate 75 percent of congressional committees
cut staffs 30%
cut defense to the bone

G) Outside proposals

a) Problems cited

"Stained by corruption, scandal and political hypocrisy that have corroded and eaten wasay its very foundation, Congres is suffereing its worst public disapproval ratings in modern memory.

Indeed, there is a growing belief that among voters of all political persuasions that Congress has failed to fulfill ist legislative obligations to address the economic and social problems facing America; that nearly half the money is spends is wasted; that it has become a self-serrving, politically unaccountable branch of government critically in need of radical reform."

dirty campaigns,
Candidates' badmouthing
million dollar war chests
special interest money driving politics
priority of reelection for many politicians
lack of party discipline, hampering efficacy
insulated from their constituents
behaving like an elected bureacracy, outside proper constitutional role
public irresponsibility/low voter turnout

b) Solutions proposed
Term Limits
abolish incumbent election advantages, including franking abuse
shorten sessions to 6 months/year
overhaul the committee system
congressional coverage
balanced budget amendment

Public financing and spending limits
limit PACs

tighter party control
consolidate power in leadership
more work, more time in session
less time in session
slash staff
cutting committees and subcommittees
better organization and scheduling
enforcing the Rules better
two-year budget cycle

2) Delineate the problems and distinguish the types of reforms by Who is in office, Why they're there, and How they got there, and What is accomplished, How, and Why.

Who - Incumbents John Dingell...
Bob Byrd...
Jamie Whitten...
Barney Frank...

People who bounce checks, don't pay for their meals, take bribes, pimps. People who go on junkets at taxpayer expense or special interest expense, have everything paid for by tax money or picked up by others, are constantly surrounded by obsequious sycophants. Incumbents engulfed in the culture of spending, convinced of the need and efficacy of government programs. People insulated and isolated from the everyday concerns of most Americans, some of whom have been "public servants" their entire lives. Elections and Term limits.

Why - Constituent service and job security.

What do Legislators see as their primary function. Why are they in office, and why do they conduct themselves the way they do? Note shift in emphasis from legislation, and avoidance of divisive issues, to universally popular constituent service activities.

Clues to whose good they are attending - constant fundraising, payraises with gargantuan pension plans, junkets and other perks dying in office, shifting political stances.

How - Big confusing bills with special interest provisions.

Legislation principally occurs through allocation of funds, and a great deal happens in conference and deal cutting. Senate operates 97% of the time by U.C. - pre-cut deals only brought to the floor fait accompli.

Internal problems in passing legislation. Complexity of the process, the increased demands on legislators' time, need for expanding expertise.

Committee structure, and jurisdiction (bill referal and administrative oversight of the executive and private sector)

Size of bills
Staff
Legislative budget
Changing procedures

Collapse of a budget process authorization, appropriation, reconciliation

no balance of costs vs. benefits
Nature of Hearings
Micromanagement,
Rifle shots
Special interests, lobbying for constituent service

What - 1990 budget agreement, huge annual budget deficit, detailed regulatory legislation, Wetlands, CAFE standards, criminal proceedings (trial-like hearings and actual prosecution) against executive branch over jurisdictional differences, laws from which they are exempt, which contain special interest provisions as a matter of course... Constituent service, acting as ombudsmen, and being lionized for samaritanship intervening with the bureacracy of their own creation.

A) Into the first category fall
Term limits
Campaign finance reform
Congressional coverage
Congressional pay
Ethics committee reform/abuses of power
cutback on perks,/ incumbent advantages

B) Into the second category fall
tighter party control
consolidate power in leadership
more work, more time in session
less time in session
slash staff
cutting committees and subcommittees
better organization and scheduling
enforcing the Rules better
two-year budget cycle
balanced budget amendment
rotating committee membership A&B?
reducing congressional expenses A&B?

quotes

"He who has never learned to obey cannot be a good commander."
Aristotle - Politics, Book III, Ch 5

"The best (form of government) must be that which is administered by the best, and in which there is one man, or a whole family, or many persons, excelling all the others together in virtue..." Aristotle - Politics, Book III, Ch 13

"In all well-attempered governments there is nothing which should be more jealously maintained than the spirit of obedience to law, more especially in small matters; for transgression creeps in unpercieved and at last ruins the state..."
Politics, Book V, Ch 8

"First, do no Harm."

Hippocrates,

"It is not easy for a person to do any great harm when his tenure of office is short."

Politics, Book V, Ch 8

"But above all every state should be so adminstered and so regulated by law that its magistrates cannot possibly make money." For "...what irritates (the people) is to think that their rulers are stealing the public money..." (use for Pay raise)

"In order to avoid peculation of the public money, the transfer of the revenue should be made at a general assembly of the citizens, and duplicates of the accounts should be deposited with the different brotherhoods, companies, and tribes." ibid

(use for Pork) Politics, Book V, Ch 8

Note the NTU spending reports and the way that has changed legislation.

"In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself." Federalist No. 51 (Madison)

"The aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for deeping them virtuous, whilst they continue to hold their public trust."

"The elective mode of obtaining rulers is the characteristic policy of republican government. The menas relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one is such a limitation of the term of appointments, as will maintain a proper responsibility to the people."

"I will add as a fifth circumstance in the situation of the House of Representatives, restraining thme from opporessive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society. This has alway been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and syumpathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny."

Federalist No. 57

"... in aristocratic states the rulers are rarely accessible to corruption and have little craveing for money, while the reverse is the case in democratic nations."

"But to pillage the public purse and and to sell the favors of the state are arts that the meanest villain can understand and hope to practice in his turn."

Democracy in America Ch XIII

"While overhaul may be necessary and even useful, the problem with Congress is not structure, procedure, or even age. The main problem with Congess is the people in it."

Imperial Congress, Pg. 205

THE CONGRESSIONAL WAY OF LIFE: AMERICA'S HOUSE OF LORDS

THE PERKS OF CONGRESS

Last year, while George Mitchell, Senate Majority Leader, exhorted the American people to "do more with less", Congress continued to amass the perks of office that allow them to live like millionaire barons while in office, and retain their seats at over a 98% rate. Last July, the Senate voted to raise its pay to $125,100 a year to match an earlier House pay raise, putting members of both Houses among the richest two percent of Americans. Amidst the outrage over the overt pay raise, a covert one escaped virtually unnoticed: an automatic Cost of Living Adjustment (COLA) for Congressmen, which kicked in this January to raise Congressional pay to $129,500. All told, it costs almost $3 billion a year to run Congress -- or $5.6 million per member.

Congressmen also spend millions indirectly through perks of office: Jim Coyne calls it "creating a $300,000 lifestyle on a $129,000 salary." Taxpayers pick up the tab for gyms, barber shops, meals, and beauty salons, merchandise at special stores, and medical care. They even keep a Members-only ambulance waiting outside the Capitol steps for themselves. And only for themselves. Four times in 1991 people injured in and around the Capitol waited as long as half an hour for a D.C. ambulance to arrive, while the Capitol ambulance stood idly by. Most recently (Oct 10, 1991) a Capitol staffer died of a heart attack while waiting 18 minutes for a DC ambulance to arrive. It seems that the land of equal opportunity is more equal

for some than for others. Voters learn the hard way that they are second-class citizens when they visit the Imperial Congress.

In addition to personal perks, Congress seeks more political clout through Taxpayer subsidized...

* MAIL - Congressional mailings are flooding the U.S. Postal Service. Congress spends well over $100 million per year on postage for direct mail, **only 8 percent** of which is in response to constituents. In addition to postage, taxpayers subsidize printing costs, and increasing expenses for facilities and employees to handle this vast volume of mail that Members send out to insure their reelection. In fact, House rules have allowed Chairman of the House Ways and Means committee Dan Rostenkowski to send "constituent mail" out, not to his own constituents, but to voters who will be in his district **after** redistricting.

* EXPANDED TELEVISION COVERAGE - The House appropriated $130,000 for a videoconferencing demonstration project, and the Senate provided $375,000 for expanded closed-circuit coverage of committee hearings. House and Senate have Radio TV recording studios and satellite transmission facilities. Being a media star also boosts reelection prospects.

* LEGAL SERVICES - The House endorsed a legal brief filed by Congressman Larry Smith asking the Florida Supreme Court to remove

a term limit initiative from the ballot. The brief was prepared by the U.S. House of Representatives legal counsel, and cost taxpayers, including Floridans who support the term limits initiative, an estimated $25,000.

* COMPUTERIZED VOTER REGISTRATION ROLLS - The House has also granted a $250,000 "developmental loan" to Aristotle Industries, a Capitol Hill campaign software company, to compile extremely valuable voter registration lists to file on a high speed computer for all Members. The House Administration has refused to make the contract a matter of public record.

* STAFF - Including state office directors, field representatives, press secretaries, and "legislative correspondents", to keep the re-election wheels greased year-round.

* TRIPS - The trips Congress takes make John Sununu look like a Xenophobe. Almost unlimited travel reimbursements give incumbents a huge advantage over challengers, who foot their own bill to hoof it around their state. Incumbents often combine official business on taxpayer-paid trips with fundraisers and stump stops.

Even with the banning of honoraria for speeches, rules still permit members to turn speeches into four day all-expense- paid vacations. Overall, Members of the House took 4,000 privately

funded trips during 1989 and 1990, two-thirds of which were paid for by corporations and trade associations. Trips to balmy California and sun-filled Florida accounted for more than **one quarter** of all these trips.

* ALMOST EVERYTHING ELSE - State offices, mobile offices, photography services, news clipping services, photocopy machines, unlimited long distance telephone usage, free research services to prepare reports on any topic, publicity nominations to honorary Federal offices, Government gifts to give the folks back home... and much, much more! Their cost of living is cushioned -- and has detached our leaders from the realities the rest of us live with. (So detached, in fact, that a House Agriculture hearing on dairy prices had to call Safeway for the price of a gallon of milk -- not a single person in the room had any idea what it was.)

When members of Congress are not flitting about on free trips, they're in Washington making "hard choices", hard on somebody else, that is! Congress regularly exempts itself from the laws it passes, including the Social Security Act, the Equal Pay and Minimum Wage Acts, the Civil Rights Act, and the recently passed Americans with Disabilities Act. It is virtually impossible to sue a Congressman, no matter what the crime - from embezzlement or fraud or taking bribes to harassing employees or firing without cause, to running a brothel out of his apartment. This double standard affects policy decisions, too.

INCUMBENCY

With such arrogance and hypocrisy rampant in Congress, one would think we would "Throw the Bums Out"! Yet 99.3 percent of **unindicted** incumbent federal and state legislators across the country were returned to office over the past decade. In 1986 and 1988, 98 percent and 98.5 percent, respectively, of all House incumbents won - a turnover rate lower than that of the Supreme Soviet. So Americans are satisfied with the way Congress runs? Polls show that the approval rate has dropped to 22 percent, the lowest in modern times. Americans have come to view Congress with disdain, and distrust its ability to govern.

Why, then, do Americans keep returning their Congressmen to office? Maybe because Congressional incumbents get to make the rules that govern the financing of campaigns. Or perhaps because Congress can orchestrate the legislative rules to duck those politically inconvenient votes. Maybe it is the advantage incumbents get from the changed job description in Congress from Federal lawmaker to ombudsman in the Federal bureaucracy. You couldn't vote against the guy who found Aunt Sophie's lost social security check, after all. Or lastly, though they hate the way Congress raises taxes, too many voters love the way their own Congressman ladles out the pork in their home districts.

All of these offer partial explanation of why Americans who hate Congress keep returning their own Congressmen to office. Yet

term limits initiatives have enjoyed massive popular support. Virtually every state now has a grassroots term limit group, and statewide legislation has been passed in California, Colorado, and Oklahoma limiting terms. Colorado's initiative applies to Federal legislators, and Washington state's tough retroactive initiative barely lost after a scare campaign by almost every elected official in the state, including the Speaker of the House. Why do Americans seem ready to make such a change in the way Federal officials are elected?

Democrats have controlled Congress for 37 years. In that time the British House of Commons has changed hands 4 times, the French Chamber of Deputies 3 times, both the West German Bundestag and the Canadian House of Commons 5 times, and the Italian government some 40 times. Only the Communist Party has equalled the Congress in stagnating power.

In 1974, incumbents spent just over $50,000 on reelection campaigns, challengers slightly less. In 1988, incumbents spent an average of nearly $400,000, challengers just over $100,000. In the 1990 election cycle House incumbents had 12 times as much money as challengers, and only 23 of 435 House incumbents had "financially competitive" challengers. What is Congress' answer to this unfairness? Campaign finance reform that imposes a "limit" of $600,000 for the House, and into the millions for the Senate, with rules controlled by and favorable to Incumbents. They also do

nothing about the taxpayer financed mail or other advantages they enjoy, which are all outside the "limits."

When Members of Congress finally become ex-members, they then help themselves to funds from their own campaign coffers. A few examples: 16 year House veteran Gene Taylor left Congress with $452,000 in his campaign war chest, of which he donated $345,000 to himself. Fernand St. Germain (D-RI) spent $67,500 out of his campaign fund coffers on legal expenses incurred in ethics committee and Justice Department investigations.

COSTLY CONGRESS

Congress has grown more costly in other ways, in addition to the cost of pampering Congressmen themselves. Since 1946, the cost of running Congress has soared by more than 3,000 percent, while the consumer price index has risen only 500 percent. The daily operations of Congress has increased at a rate six times that of inflation. The estimated budget for Congress in 1992 stands at about $3 **BILLION** dollars.

Much of this is spent on the ballooning Congressional staffs that help keep Congressmen in office and in charge of the permanent bureaucracy in the Executive branch. Congress has the largest legislative staff in the world nine times over. The support staff working directly for members of Congress has almost tripled since 1960, from 6,791, to more than 19,000 today. Committee staff,

meanwhile, has also more than tripled, from 910 in 1960 to more than 2,800 today. Overall, there are now over 38,000 Federal employees on the Congressional payroll.

MICROMANAGEMENT WITHOUT OVERSIGHT

The excessive staff contributes to other problems that impede the function and purpose of Congress. It has turned from a legislative to an administrative body, micromanaging the operations of the Executive, and functioning more as ombudsmen to constituents than as statesmen to the nation. This does not mean that the Executive branch is better run, however. The HUD scandal erupted despite 111 House and Senate committees and subcommittees with jurisdiction over HUD, despite an average of over 2,425 Congressional phone calls a **month** to HUD between 1986 and 1987, and despite dozens of Congressionally mandated reports from the HUD Inspector General's office detailing abuses over the course of several years. Congress remained either ignorant of or unconcerned with the HUD scandal until it turned up in the Washington press.

THE ARGUMENT TO LET THEM PLAY

Perhaps we ought not complain about the make-work projects, wasted time, and holiday junkets, after all. The records of personal malfeasance among our Federal elected officials pale in significance when compared to the inestimable damage done to American taxpayers when Congress actually works.

For instance, Congress has a disastrous record of mis-handling the Federal budget. But we can't say that they don't handle our money as if it were our own, since the "Rubbergate" scandal! Some 355 current and former Congressmen passed at least one bad check on the House bank during the three years under investigation, and nearly 200 were overdrawn at one time by at least a month's salary. The 12 months previous to June 30, 1990 alone, House members wrote 8,331 rubber checks, an average of 19 bad checks per lawmaker. As with their mismanagement of the Federal Budget, they have controlled damage by obfuscation. Unlike the American taxpayer, most Congressmen will not be penalized for their misdeeds.

Why can't Presidents rein in congressional spending these days? Congress passed the Budget Act in 1974. It was supposed to provide an overall picture of revenues and spending, and help the Federal government better control of Federal finances. What it did was effectively strip the executive branch of any actual power regarding the Federal budget, assuring Congress complete control of government finances.

Since that time, spending has tripled, from $330 billion to $1 trillion per year, the deficit is six times higher, and the Federal debt increased 600%. [FYI, from $540 billion to $3.2 trillion.]

As Congress was poised to adopt the Budget Act, Senator William Roth (R-DE) stated prophetically, "'My concern is that no

fiscal discipline is built into the process.' " Congress will not have the guts to cut back its spending plans and instead will increase the size of the budget deficit."

Where budget summits are concerned, the U.S. Congress sides with Lenin: "Promises are like pie crusts - made to be broken." Congress sorted our Federal finances through closed-door "budget Summits" in 1982, 84, 87, 89, and 1990. Each of these agreements included tax increases that were supposed to help lower the deficit. While the summits have delivered on the tax increases, each has resulted, not in a lower, but a higher deficit, with no restraints on spending.

Upon close inspection, it is almost in the nature of Budget summits to fail the taxpayer. Budget summits remove all accountability, and allow the longtime leaders of the Congress to make the budget rules outside the representative process. These are typically the big spenders who have been around forever because they "know how take it and how to dish it out." It is a system designed by the foxes to guard the chicken coop.

The 1990 budget summit promises to be the worst of them all. The $137 billion in new taxes agreed to in 1990 will not result in any deficit reduction. Congress has instead raised Federal domestic spending $1.83 for every new dollar in taxes, and lost more revenue from the economic crunch of the tax increases.

The single year deficit will be over one third of a billion dollars for the first time in 1992.

CONCLUSION

The Federal Government is increasingly legislating, regulating, and administrating its way into every crevice of American life. With confiscatory taxes on private transactions, income, and production; a bloated bureaucracy eating up revenues and consuming the time of businesses and ordinary citizens, regulations on every aspect of business, from safety to sizing; Federal violations of fifth amendment property rights occurring almost daily through "wetlands protection" and other ostensibly environmental measures, soon the only thing that will remain to be freely bought and sold at market will be Congress itself.

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Congressional Analyst
The Heritage Foundation.

* (NOTE Congress has exempted itself from at least 15 major pieces of legislation: Social Security Act of 1933, National Labor Relations Act of 1935, Minimum Wage Act of 1938, Equal Pay Act of 1963, Civil Rights Act of 1964, Freedom of Information Act of 1966, Age Discrimination Act of 1967, Occupational Safety and Health Act of 1970, Equal Employment Opportunity Act of 1972, Title 9 of Higher Education Act Amendments of 1972, Rehabilitation Act of 1973, Privacy Act of 1974, Age Discrimination Act Amendments of 1975, Ethics in Government Act of 1978, Civil Rights Restoration Act of 1988, and all amendatory legislation thereto.)

These 2 papers provide some background on why you might want to apply the Ind. Counsel law to Congress, or at least to unleash Jay Stevens.

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Ethics As Politics: Congress vs. the Executive Branch

By L. Gordon Crovitz

The Heritage Foundation

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Ethics As Politics: Congress vs. the Executive Branch

by L. Gordon Crovitz

This is an ideal time to discuss the twin issues of the "Imperial Congress" and its creation, the independent counsel. No one in Congress could have imagined a decade ago, as Congress passed the first special prosecutor law, that in 1989 the Speaker of the House himself would be under attack for "ethics" violations. Certainly no one forecast that, by creating a special prosecutor to investigate high-ranking members of the executive branch, Congress would be opening itself up for closer scrutiny. The irony is that the "sleaze factor" issue, which Congress has used against every President since Richard Nixon, is now turned against Congress.

Indeed, President Bush has recommended that Congress pass legislation to cover itself by independent counsel. It is highly unlikely that Congress will ever do any such thing. Congress knows only too well the dangers Members would face. These prosecutors have turned out to be highly zealous, pursuing allegations of wrongdoing often so spurious or technical that no normal federal prosecutor would ever pursue them. Congress understands this – indeed, Congress intended that independent counsel would harass executive branch officials with trivial or even trumped-up charges.

The Imperial Congress thus is faced with its own creation. As The Heritage Foundation book of that title argues, the highly entrenched Congress, dominated by one party for the past 35 years, practices the arrogance of power. One of the most dangerous acts of arrogance has been what I would call the "criminalization of policy differences" most notably by a liberal-dominated Congress against a conservative White House.

Indictment Bait. This took the separation-of-powers battle into a new and politically dangerous dimension. What was started as a tool to cripple the Jimmy Carter presidency was developed and perfected by Congress during the eight years of the Reagan Administration into the art of transforming political differences into potentially indictable offenses. What better way to intimidate executive branch officials than to threaten them with jail? Even though President Reagan made good on his pledge to strengthen the nation's economy and defenses, it is indeed ironic that he left the office itself even weaker than he found it, largely because defending the presidency and the President's policies became indictment bait – loyal officials were often falsely accused of crimes, when the only crime was pursuing policies opposed by liberals in Congress.

This prosecutorial politics could constrain the presidency in ways that would soon make the government increasingly ineffective. The risk is paralysis in the branch that the Founders intended would have the energy to ensure effective government. Excessive legal controls, extending to possible criminal indictment, will naturally tend to divert attention from substantive policy issues to the formalities of legal compliance. The results already include less of the discretion that is necessary to carry out executive branch functions, a

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long list of officials made victims of irresponsible criminal investigations, and continued weakening of a branch of government in decline.

INDEPENDENT COUNSEL

The modern era of criminalizing of policy differences dates from the 1978 Ethics in Government Act. Passed as post-Watergate legislation of "good government," the law has actually led to a demeaning of politics by transforming what are often entirely innocent events and activities into "ethical" concerns, some of which also become legal matters. The law mandated new financial disclosures that were so complex and cumbersome that innocent mistakes became almost inevitable. These completed forms served as time bombs, primed to go off when an official's political opponents decided the timing was right.

The law is entirely hypocritical. Only executive branch officials are subject to the law's most threatening innovation, the institution of the independent counsel, originally given the more accurate title of special prosecutor. In cases from the Iran-Contra affair to an infamous dispute over executive privilege during congressional testimony, these specially appointed lawyers investigated and prosecuted Reagan Administration officials with a vengeance.

Recipe for Aggressive Prosecutions. These counsel are unique prosecutors in many ways. They do not investigate "ethics" in "government," but only alleged breaches of law that may or may not have anything to do with common conceptions of ethics and are committed only by executive branch officials. The most notable characteristic of these prosecutors is that they are the only ones in the federal system who are not under the control and supervision of the Department of Justice. Also unlike other prosecutors, they are given the names of officials they must investigate, not merely events that might be crimes, committed by suspects unknown. They have unlimited resources; indeed, the independent counsel investigation and prosecution of Oliver North by Lawrence Walsh, including staff borrowed from other parts of the government, cost some $40 million in taxpayer funds. For independent counsel, there are thus no other cases against which to balance otherwise limited prosecutorial resources. This is a recipe for extremely aggressive prosecutions, and even the most widely respected private lawyers have been guilty of prosecutorial indiscretions once anointed as independent counsel.

Congress wrote the Ethics in Government Act to force the appointment of an independent counsel with a very low threshold of evidence of a crime. The hair-trigger appointment of an independent counsel occurs under the law, in its words, "whenever the Attorney General receives information sufficient to constitute grounds to investigate," and he then has 90 days to consider whether a crime might have been committed. The law expressly gives a majority of either the minority or majority members on the Judiciary Committee of either House of Congress the power to request the appointment of an independent counsel. In this case, the attorney general then has 30 days to explain in writing the results of his investigation.

Limiting the Attorney General. The only way for the attorney general to avoid naming an independent counsel is if "upon completion of the preliminary investigation,... [he] finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted." This is well below the standard for asking for an indictment, which is the standard of probable cause. It is also below the standard used by the House Ethics Committee in the Jim Wright case, which was "reason to believe" the acts violated House

rules. In addition, unlike the usual procedure in alleged federal crimes, the attorney general is expressly prohibited from using the most important investigative tools. The law says that, during this preliminary investigation to determine whether an independent counsel must be appointed, the attorney general "shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas."

Threats to Civil Rights. Every President and attorney general has opposed independent counsel on constitutional and practical grounds. The Supreme Court has upheld independent counsel as constitutional, but the policy question of whether there should be such freelance prosecutors remains very much open. These independent counsel have created serious threats to the civil rights of their targeted executive branch officials. This was the theme of the amicus brief that former Attorneys General Edward H. Levi, Griffin B. Bell, and William French Smith filed in the Supreme Court in *Morrison v. Olson*, the independent counsel case. Their argument was simple, yet compelling. They noted that criminal prosecutors have great power over their targets, and their decisions can affect other government interests, such as foreign policy considerations. The principal checks on prosecutors are supposed to come from the executive branch, but independent counsel are intentionally freed of such constraints. The former attorneys general concluded by showing the link between their constitutional and pragmatic concerns about independent counsel:

> These internal checks and balances are the direct result of the Framers' decision to establish a unitary Executive Branch. They function precisely as the Framers intended the system of check and balances to function: they prevent a prosecutor from being overtaken by an excess of zeal or ambition, or by the loss of perspective caused by too narrow a focus on one case.

This argument against an overly aggressive prosecutor should appeal to the civil libertarians. It is hard to imagine any governmental power over individual rights greater than the power to prosecute.

Long-Time Concerns. Indeed, concerns about overly aggressive prosecutors prompted by political considerations predated the establishment of independent counsel. Back in 1940, when he was attorney general, Supreme Court Justice Robert H. Jackson warned the federal prosecutors under his supervision that, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous." The modern independent counsel is the creation of a single-minded, single-tasked prosecutor, which Justice Jackson considered the greatest domestic threat to civil rights.

Justice Jackson warned:

> Law enforcement is not automatic. It isn't blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff will be inadequate. We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning. What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain.

> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

The problem becomes entirely political in the case of independent counsel because Congressmen often choose the targets of investigation. Justice Jackson's fear as applied to independent counsel might be as follows: It is here that law enforcement becomes political, and the real crime becomes that of being unpopular with the predominant group in Congress, being attached to wrong political views, or being personally obnoxious to or in the way of the legislative branch itself.

INDEPENDENT COUNSEL INVESTIGATION CASE STUDIES

There have been serious problems with nearly all ten independent counsel investigations, starting with the ones against Jimmy Carter's top aides, Hamilton Jordan and Timothy Kraft. They were investigated for alleged cocaine use at New York's Studio 54. This was certainly the first and only time the entire resources of federal law enforcement were brought to bear on alleged drug use. Both men were eventually cleared. Then there was the outrageous case of Ray Donovan, who was forced to resign as Ronald Reagan's Labor Secretary to undergo independent counsel investigations based on false charges. He eventually was cleared of all charges, and left to ask the poignant question, "Which office do I go to to get my reputation back?" Edwin Meese suffered through several independent counsel investigations, cleared each time of any criminal wrongdoing. The criminalizing of the battle over the President's ability to pursue foreign policy independent of Congress is reaching a crescendo in a criminal court room this week. The federal government has spent the $40 million investigating and prosecuting Oliver North, among other things for an alleged "illegal gratuity" in the form of a security fence at his home to keep Abu Nidal out.

I would like to spend some time, however, on a leading illustration of the independent counsel as a political tool of Congress: the investigation of former Justice Department official Theodore Olson, arising from his 1983 congressional testimony, which led to the case that reached the Supreme Court.

The relatively low profile of this case highlights the personal risks that all executive branch officials now face when they dare to do their jobs, perhaps especially when this means defending the Presidency against legislative usurpations.

Mr. Olson's "crime" was trying to protect the executive privileges of President Reagan against an overreaching Congress. His reward was six years under the threat of indictment first by Congress and later by independent counsel Alexia Morrison. His case has special resonance. As Assistant Attorney General for the Office of Legal Counsel, Theodore Olson was the chief adviser on issues of separation of power for the President. Previous occupants of the position include Chief Justice William Rehnquist and Associate Justice Antonin Scalia. And his case, *Morrison v. Olson*, was the challenge to the constitutionality of independent counsel in the Supreme Court.

The Olson controversy began when two subcommittees in the House of Representatives issued broadly worded subpoenas in 1982 for volumes of documents from the Environmental Protection Agency and the Land and Natural Resources Division of the Department of Justice. These documents concerned Superfund, the big budget, hazardous waste removal program. Most of the documents were produced, but President Reagan sent a memorandum to the Administrator of the EPA, Anne Burford, that many of the subpoenaed files were covered by executive privilege. These were the documents "generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties," which are traditionally kept confidential between investigators and possible violators. The Reagan memorandum concluded that "dissemination of such documents would impair my solemn responsibility to enforce the law."

Embattled Administrator. This assertion of executive rights sparked fireworks in the House of Representatives. There had been a history of budget battles with the Reagan Administration urging limits to increased budgets for the EPA generally and the Superfund program in particular, which had made Mrs. Burford a frequent target of Democratic complaints. The documents themselves came to seem less important than the battle over them. In mid-December 1982, the House passed a resolution finding Mrs. Burford in contempt for invoking executive privilege and refusing to turn over the documents. The executive branch tried to sue the House over the matter, but the case was dismissed as nonjusticiable. A deal was struck that gave Congress restricted, nonpublic access to some of the controversial documents. The House purged its contempt resolution. The embattled Mrs. Burford resigned on March 9, 1983.

This set the scene for Olson's testimony to Congress on March 10, 1983, the day after the Burford resignation. Olson was called to testify in a previously scheduled hearing on the Department of Justice authorization – a budget hearing. Olson testified without being sworn, voluntarily, not in response to any subpoena, and without any forewarning that the authorization hearing would become largely a hearing on the Superfund matter. The tone of the hearing was extremely hostile with most of the accusations concerning Olson's role in defending the executive privilege claim.

During the hearing, Olson was asked about the extent of the release of subpoenaed documents. He said that his office had delivered all such "finalized" documents that "were relevant to the questions that you have asked and to the formal advice that we have given." He emphasized that not all the documents had been made public, which reflected the

compromise struck between the two branches of government. Several Congressmen urged that more documents be turned over. His testimony, despite the contentiousness, was not considered important enough even to be printed by the subcommittee.

Partisan Report. The next time Theodore Olson heard about the Superfund matter from Congress was December, 11, 1985, when the House Judiciary Committee released a highly critical 1,300-page report on the Department of Justice role in the executive privilege claim. This was the result of a more than two-year investigation by Democratic committee staff members who held informal interviews and reviewed the documentary records. It was approved by a party-line vote.

This report would have been dismissed as simply another case of the legislative branch taking umbrage at executive branch officials who dare to question the appropriateness of congressional subpoenas, except for the charge that the Department of Justice officials had committed crimes in the process. The report charged that Mr. Olson's March 10, 1983, testimony at the authorization hearing was false and misleading.

Political Hatchet Job. The report itself was controversial from the start, with thirteen dissenting Congressmen dismissing it as sensationalized. Indeed, the dissenters noted that there was no committee or subcommittee meeting to discuss the objective of the investigation and no vote to authorize what looked from the start like a political hatchet job. The Republican dissenters said that the report was "solely the work of three majority staff counsels." No case could be clearer than this: Democratic staffers crafted a report to criminalize the political differences between the liberal majority on the House committee and representatives of a conservative administration.

The next step came the following day, December 12, 1985, when the chairman of the House Judiciary Committee sent a copy of the report to Attorney General Edwin Meese with a demand under the Ethics in Government Act that he appoint an independent counsel to investigate the three Department of Justice officials. So, based on a dubious staff report, Congressmen criminalized the matter by making the request provided under the ethics law for appointment of a prosecutor. Without being able to conduct any investigation because of the prohibitions against subpoenas or a grand jury, Attorney General Meese was forced to ask the special court panel to appoint an independent counsel to investigate Theodore Olson for his 1983 testimony.

$1 Million Defense Bill. Alexia Morrison was appointed and then investigated Olson for about half a year, and in November 1986, issued a preliminary report. She acknowledged that Mr. Olson had done nothing wrong. In her request to expand her jurisdiction to other Justice Department officials, she stated that "standing in isolation...Mr. Olson's testimony of March 10, 1983 probably does not constitute a prosecutable violation of any federal criminal law." Despite this affirmation of Mr. Olson's innocence, she continued her investigation. Theodore Olson and his family lived for several years with the constant threat of criminal indictment over his head.

It was not until after the Supreme Court case on independent counsel that Morrison finally announced that she would not seek any indictment on any charge against Olson. She finally released a report clearing him a few months ago. Alexia Morrison managed to spend about $1.5 million of taxpayer funds. She caused Theodore Olson to run up legal bills for his defense also of more than $1 million.

PRESIDENTIAL ACQUIESCENCE TO PROSECUTORIAL POLITICS

There is a political lesson in the suffering of individual executive branch officials. The system of checks and balances obligates each branch of government to use its constitutional authority to properly limit the powers the other branches exercise. This control on government officials is the leading protection for limited government and, ultimately, for our political freedom. Thus, the prime responsibility of each branch must be to protect its own powers and privileges so that it is not powerless to stop the abuses of the other branches. The greatest failure of the Reagan Administration may have been this failure to guard the powers of the executive branch.

There almost certainly will be more victims of prosecutorial politics in coming administrations. President Reagan contributed to this risk when he failed to veto the renewal of the Ethics in Government Act, despite the recommendations of the Department of Justice. He signed the bill, adding that he thought independent counsel were unconstitutional, yet expressing the vain hope that the courts would eventually invalidate them. The Supreme Court would have been more likely to help a branch of government that at least tried to help itself.

CONCLUSION

The abuses of prosecutorial politics led to some of the most vicious attacks against the Reagan Administration. By the end of the second term, the nature of this new, low level of politics became clear to many political observers. For some, the question was not simply Democrat versus Republican, liberal versus conservative. It was whether highly qualified individuals would risk serious dangers to their reputations by coming to Washington to serve in the government. It also became an issue of what the demeaned tenor of our political debate would do to the substance of that debate. Only an ultra-safe and risk-averse individual could be completely confident of avoiding prosecutorial politics. How many more Ray Donovans or Theodore Olsons will come to Washington to implement policy changes, knowing how great the personal price has become?

One of the most eloquent criticisms of this phenomenon came from an unlikely source, one of the most liberal members of the Congress that passed the original Ethics in Government Act. Father Robert Drinan spoke at a bipartisan conference of lawyers and ethicists on ethics in government sponsored last year by the Administrative Conference of the United States. He said,

> I'm going to suggest that maybe the day has come for a little bit of deregulation....[I] would like to have something come out of this conference that suggests a cautious note that maybe we've gone too far in some things. Regardless of who is elected, I can foresee some government bureaucrats saying, 'We don't want any scandals in this new administration,' and they are going to put on the form, 'Have you ever smoked pot, yes or no?' Question two: 'Have you ever been unfaithful to your wife? If so, how many times?' Three: 'Do you have any homosexual tendencies?' I think we've come to a point where a group like this should say quietly that enough is enough.

The John Tower fight showed that Father Drinan's forecast may have been an understatement.

Equalizing Treatment. So, finally, what to do about the problem? The answer from President Bush is to bring Congress under independent counsel. This would equalize treatment. Congress should ask itself how long Speaker Wright could last with an Alexia Morrison investigating *Reflections of a Public Man*. Or how long many Members would last with a Lawrence Walsh investigating the relationship between PAC contributions and the Savings and Loan crisis.

But appealing as it might be to give Congress some of its own bitter medicine, having even more public officials subject to prosecutors, who are not bound by the usual federal guidelines of prosecutorial discretion, does not seem the best solution. Instead, Congress should equalize treatment of the two branches by abolishing independent counsel for everyone. Congress should recognize that independent counsel were a mistake. If Washington wants to debate issues of ethics, it should by all means do so – but it should not in the process criminalize the political battle over separation of powers.

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The Heritage Foundation Backgrounder

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A U.S. Congress Assessment Project Study

December 13, 1989

CONGRESSIONAL ETHICS AND THE ADMINISTRATIVE STATE

INTRODUCTION

Two leaders of the House of Representatives resigned in July, accused of using their public office for private gain. This sensational news soon was eclipsed by revelations of deepseated and longstanding corruption at the Department of Housing and Urban Development. Five senators, meanwhile, are under scrutiny for their role in the $250 billion savings and loan scandal. And these and other related incidents, according to many veteran Washington observers, are just the tip of the iceberg.

Washington's ethics crisis is far more than the transgressions of individual members of Congress. It is systemic to the way the federal government operates today, the inevitable consequence of the modern administrative state, which has institutionalized favoritism and graft.

Complex and Secret. America's constitutional principles of federalism and separated powers have been eroded by a highly bureaucratic "administrative state." The result: What was once called the rule of law has given way, in many instances, to the complex and often secret interaction between congressmen, executive agencies, and special interest groups. Corruption and lawlessness necessarily follow, just as the framers of the Constitution predicted. Thomas Jefferson advised in 1823:

> I believe the states can best govern our home concerns, and the general government our foreign ones. I wish, therefore, to see maintained that wholesome distribution of powers established by the Constitution for the limitation of both; and never see all the offices transferred to Washington, where further

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> withdrawn from the eyes of the people, they may be more secretly bought and sold at market.[1]

The current ethics in government crisis is a challenge for George Bush. To meet it, he must chart a course between base partisanship and benign neglect. Public concern over ethics should not be used to continue or escalate the trend set by the congressional majority that criminalizes political differences for partisan gain, typically at the expense of the executive branch. But at the same time, it would be tragic to dismiss the ethics crisis as partisanship run amok or "mindless cannibalism," as former Speaker of the House Jim Wright put it. The reason: The Washington ethics crisis is a bipartisan scandal.

THE ROLE OF CONGRESSMEN IN THE ADMINISTRATIVE STATE

The administrative state is a highly centralized, heavily bureaucratic system of government. It defines current Washington, where decisions affecting virtually all aspects of Americans' everyday life are made by a centrally administered bureaucracy charged with redistributing fairly and wisely a massive largess of federal tax dollars. This has turned congressmen increasingly into ombudsmen for the administrative state. Today's legislators are engaged less in the traditional legislative functions of debating and voting on compelling national issues, and more in the details of administering the federal bureaucracy – intervening on behalf of constituents seeking benefits from the complex and often unresponsive bureaucracy.

As ombudsmen, congressmen have little interest in new policy directions that would alter the fundamental composition of the administrative state. Such a change could diminish their role as ombudsmen, one which exposes them to little political risk and serves them quite well in reelection campaigns. A scaling down of the administrative state would force congressmen to take on the politically more risky role of legislators who must propose innovative policies to help resolve national problems. The interest of the rational congressmen in the administrative state, therefore, is to protect and preserve the administrative state, while ensuring that it delivers benefits to his or her constituents.

Enormous Temptation. The administrative state, however, is beginning to crumble under the corruption inherent in any such system of massive funds controlled and distributed by bureaucrats and politicians far removed from the people they are supposed to serve. Notes University of Dallas Political Scientist Thomas West:

> The current system is corrupting because when the government hands out such vast sums of money for local projects...not [according to] publicly voted-on

1 Albert Ellery Bergh, ed., *The Writings of Thomas Jefferson*, Vol. 15 (Washington, D.C.: Thomas Jefferson Memorial Association, 1907), pp. 450-451.

> law but by *ad hoc* grants, regulations, and exceptions to regulations arrived at privately, the temptation is enormous, given the realities of human nature, for Congressmen to think that the public good is served by helping their local friends with government money or regulatory relief.[2]

Congressmen, it seems, are tempted to give the most help to those friends who can return the favor with large campaign contributions, personal honoraria, and other financial benefits. Take the case of former Speaker of the House Jim Wright, the Texas Democrat. In addition to his lucrative book publishing arrangement, Wright allegedly intervened on behalf of campaign contributors to pressure the Federal Home Loan Bank Board to allow certain Texas savings and loans (S&Ls) to remain open even though the Board had sought to shut them down as insolvent.[3]

Under a Cloud. And now five senators are being investigated for their role in the $250 billion savings and loan scandal. The senators are said to have intervened with federal regulators at the request Charles H. Keating, a wealthy Phoenix businessman and former chairman of the failed Lincoln Savings and Loan of Irving, California. According to the *New York Times*, Keating and his friends donated a total of more than $1 million to political organizations controlled by the five senators.[4]

Those now under the cloud of investigation well understand how Washington works. The system of government that has transformed congressmen from legislators to ombudsmen has spawned the corrupt favoritism that once defined New York's Tammany Hall, but now defines Washington and its emerging scandals. The framers of the Constitution understood the inevitable corruption of the administrative state, and had sought to avoid it with their constitutional prescriptions of federalism and separated powers.

THE FRAMERS' DESIGN: FEDERALISM AND SEPARATED POWERS

The Constitution gives the national government great and important powers, as it does to state and local governments. This scheme of distinct local and national powers is, of course, what Americans mean by "federalism."

Without some degree of centralized government, the United States would not have progressed beyond the paralysis of the Articles of Confederation period when the weak national Congress was incapable of defending against foreign threats or preventing state legislatures from violating property rights. Yet without decentralized administration, fair and effective government is im-

2 Thomas G. West, "President and Congress: A Bicentennial Perspective," *The Heritage Lectures*, No. 222, May 10, 1989.

3 See "Wright, Coelho, and the S&L Fiasco," *U.S. News and World Report*, June 12, 1989, pp. 21-22.

4 Richard L. Berke, "Constituent Service," *The New York Times*, November 5, 1989, p. 1.

possible because no central power can comprehend the myriad of changing circumstances and particular needs in different parts of the country and among diverse individuals. Under the Constitution, therefore, the framers granted to the national government extensive powers to conduct foreign policy and to regulate domestic commerce. Other powers – such as education and managing the day-to-day economic life of the nation – were left to the states and localities.

Within the national government, the separation of powers was meant to prevent tyrannical government by dividing the powers and providing checks and balances. The separation also was designed to make government work better. This it did by designing each power to fit its task. Example: Since execution of the law requires decision, secrecy, and dispatch, and since these are by nature the attributes of an individual rather than of a group of individuals, the executive power was placed in the hands of one person. The three separate branches of government, moreover, are distinguished by their different constituencies and modes of election.

THE RISE OF THE ADMINISTRATIVE STATE

Power began to be centralized in Washington during the New Deal and was accelerated by the National Mobilization during World War II. Centralization then increased enormously during the Great Society programs of the 1960s. After 1964, there seemed no limit on what the federal government might try to do. It became accepted virtually beyond debate, for example, that a "War on Poverty" required massive effort by the national government rather than by state or local governments.

This could not be accomplished in the old way, it was assumed, by passing general laws to be executed by a modest national bureaucracy. Instead, executive branch agencies with very broad regulatory powers were created and manned with the social technicians who flocked to Washington from American universities. The late John Wettergreen, a San Jose University political scientist, identified the Nixon years of 1970-1974 as the decisive period in which 70 percent of the bureaucratic apparatus now in place was created, including such agencies as the Environmental Protection Agency, the Equal Employment Opportunity Commission, the Federal Election Commission, and the Occupational Safety and Health Administration.[5]

Adversarial Relationship. As administering the details of everyday life replaced general legislation as the chief business of national government, oversight of the regulatory agencies in the executive branch replaced deliberation as the main business of Congress. From this transformation stemmed the increasingly adversarial relationship between Congress and the President.

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5 See John A. Wettergreen, "The Regulatory Revolution and the New Bureaucratic State," *The Heritage Lectures* No. 153, February 1988.

THE IRON TRIANGLE

After the Watergate scandal weakened the White House, executive power was partially eroded by what is called the "iron triangle"; its sides are Congress (or individual congressmen), the executive agencies controlled by Congress, and special interest groups. Together they determine national priorities and policies. By 1980, this governing arrangement had created a public sector so large that over 50 percent of American citizens were dependent in full or in part on public support. Though Ronald Reagan promised a return to constitutional forms and made some inroads against expanding government, his administration merely slowed the growth of the bureaucracy; no fundamental changes in the means or ends of government were effected.

Mutual Dependence. Harvard political scientist Morris Fiorina, in *Congress – Keystone of the Washington Establishment*,[6] describes the "iron triangle" at work. The national regulatory power, he writes, resides in executive agencies created and funded by Congress. These agencies are empowered to deliver benefits and services to a congressman's constituents, relieving congressmen of the difficulties inherent in distant, impersonal, and unaccountable bureaucratic rule. In this way, congressmen are dependent on the agencies for keeping their constituents grateful to them, and the voters depend upon congressmen for acting as go-betweens. The agencies, however, are dependent upon Congress for their budgets. Together, as the current ethics in government crisis well illustrates, the mutual powers and dependencies create government by backroom dealmaking.

The "iron triangle" forms a three-sided system of dependency in which the driving force on all sides is special interest.

The effect upon the power of the President is obvious: He is neither needed nor included in the process.

The effect on congressmen: They are able to retain office, often regardless of their political views or actions, by acting and campaigning first and foremost as ombudsmen.

The effect on the bureaucracy: It prospers and grows, despite massive nationwide opposition to it as demonstrated in presidential elections.

From Master to Petitioner. And the effect on the citizen: He or she is encouraged to consider himself or herself a member of an interest or of various interests and to relate with the government not as its master, but as a dependent or a petitioner. This is why today, no business or professional interest or any sort of private association that wishes to succeed can afford not to have a Washington presence in order to lobby Congress and the bureaucracy.

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6 Morris Fiorina, *Congress – Keystone of the Washington Establishment* (New Haven, Connecticut: Yale University Press, 1977).

From the Founding Fathers' point of view at least, the effect of this is that the nation is ill-served. Interests are neither moderated or molded to form a principled consensus. No conception of a common good concerns or drives the government. Government has become – to use James Madison's famous definition of a faction in *Federalist 10* – "united and actuated" by interests "adverse to the rights of other citizens, or of the permanent and aggregate interests of the community." That this is the case was expressed clearly by Representative Jamie L. Whitten, the Mississippi Democrat, who in 1987 said: "Don't you see? All anyone ever wants is a special advantage over the next fellow. Understand that, and you've understood the intent of every law ever passed."[7]

The Effect on Congress

The iron triangle makes incumbent congressmen virtually immune from electoral defeat. Today, 99 percent of the House incumbents who run are reelected. The reason: Congress has been depoliticized by its participation and interest in the administrative state. Most congressmen now customarily campaign in their home districts on the basis of their effective ombudsmanship and their ability to deliver pork. There seems nothing more distasteful to them than having their voting records on the few controversial issues they do vote upon made prominently public. Example: George E. Brown, Jr., the California Democrat whose congressional tenure dates back to the Kennedy Administration, is remarkably open about the fact that he waffles when confronted with his liberal voting record on controversial issues like defense appropriations and capital punishment. "I'm not happy having to do this," he told *The Wall Street Journal*, "but what can you do? That's the way politics is run these days."[8]

More often than not, congressmen present themselves as equally opposed as their constituents to the burgeoning bureaucracy, even as they reap the benefits in safe elections, and vote to maintain and increase the bureaucratic burden on those they only nominally represent.

Congressional Micromanagement

One way that congressmen keep control over a bureaucracy that otherwise might be more responsive to the President is through micromanagement: congressional control of the minute details of executive branch operations. Attaching special riders to spending bills is one of Congress's preferred methods of micromanaging the executive branch. Such riders have included

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7 John Hirom Caldwell, "Congressional Micromanagement: Domestic Policy," in Gordon S. Jones and John A. Marini, eds., *The Imperial Congress: Crisis in the Separation of Powers* (New York: Pharos Books, 1988), p. 133.

8 Paul A. Gigot, "I, Dingell," *The Wall Street Journal*, February 17, 1989, p. A14.

extraordinarily specific instructions on such matters as staff to be hired or fired, specific grants to be approved, and whether a particular agency or department may open or shut an office. Other congressional riders have prohibited agencies from even studying innovative reforms such as privatization or contracting out of government services. These detailed riders to legislation raise a constitutional concern: is the executive branch or the legislative branch "executing" the law?[9]

Congressional micromanagement of the executive branch manifests itself in other ways as well. Among them: 1) overlapping jurisdiction of congressional committees overseeing the bureaucracy; 2) onerous congressional reporting requirements imposed on the bureaucracy; 3) numerous phone calls and written requests for action levied at the bureaucracy by members of Congress and staff; 4) requirements that executive branch officials testify regularly before numerous congressional committees, and: 5) private lobbying by members of Congress and staff to pressure bureaucrats to execute the law to the benefit of a particular interest.

Pentagon Overkill. All of these elements of congressional micromanagement are pervasive at the Department of Defense, the largest executive branch department. In a study submitted this June 12 to the President, Secretary of Defense Richard Cheney, himself a former congressman, reported that 107 congressional committees and subcommittees oversee his department. Every day, the Pentagon is required to submit to Congress nearly three separate written reports – with preparation costs of more than 1,000 man-hours and $50,000 for each report. Cheney notes that on every working day, the Defense Department receives 450 written inquiries and more that 2,500 telephone inquiries from Capitol Hill. Senior Pentagon officials, meanwhile, spend 40 hours preparing for the average 14 hours of congressional testimony they provide each day that Congress is in session.

Yet none of this congressional overkill prevented such scandals as the Defense Department procurement fraud discovered by the Federal Bureau of Investigation in 1988. The reason: The purpose of congressional micromanagement is not to improve the efficiency of the federal bureaucracy, but to deliver political benefits to congressmen, the most valuable of which are achieved by convincing bureaucrats to give special treatment to a congressman's favored constituent.

Curbing Micromanagement

One way to curb congressional micromanagement and the kind of high pressure congressional lobbying that has contributed to the Department of Housing and Urban Development and savings and loan industry scandals is to require executive branch officials to keep records of all their contacts with

9 Appropriation bill riders also restrict the President's constitutional duty to recommend legislation to Congress. See, e.g., J. Gregory Sidak, "The Recommendation Clause," *The Georgetown Law Journal*, Volume 77, Number 6, August 1989, p. 2079.

congressmen and staff, and to report such contacts to the public regularly. This would give the public an opportunity to distinguish between legitimate congressional oversight and politically motivated arm-twisting. An effort to compile such a list of contacts was undertaken at the Department of the Interior by Secretary Manuel Lujan, who had himself served in Congress for 20 years. Lujan's policy, however, was torpedoed by Congress, which attached a rider to the fiscal 1990 Interior appropriations bill that read: "None of the funds available under this [bill] may be used to prepare reports on contacts between employees of the Department of the Interior and Members and Committees of Congress and their staff."[10] Thus, Congress used one of its favorite micromanagement tools – a rider to a funding bill – to prevent the executive branch from exposing congressional micromanagement.

THE ETHICS IN GOVERNMENT CRISIS

Whereas bureaucracy was supposed to eliminate political graft by placing a rational, objective, nonpartisan structure in charge, it has resulted instead in merely a different form of corruption. Not only is there more opportunity for graft with the direct participation by special interests in government, but corruption has effectively become institutionalized and even legitimized.

The HUD Scandal and Congressional Hypocrisy

Like the S&L scandal, the Housing and Urban Development scandal is rooted in the inherent corruption of the modern administrative state. Charles L. Dempsey, Inspector General at HUD from 1977 to 1985 writes that during the years that the scandal was occurring, "Congress was more interested in getting favors from HUD than in overseeing its operation."[11] Indeed, the record shows that Congress routinely ignored reports of long-time abuse at HUD. As Barbara Volbejda of the *Washington Post* reported last July: "Taken together, the department's Inspector General reports add up to a year-by-year chronicle of abuses beginning before the Reagan Administration took office."[12] But as former Inspector General Dempsey writes, "Through all these investigations, I never heard from Congress...From 1981 until I retired in 1985, I cannot recall *one* telephone call from our House oversight committee."[13] This, although HUD records show that the department received thousands of inquiries from Capitol Hill during the same period. Obviously, the calls were more about "favors," as Dempsey notes, than about legitimate oversight.

Government grant-giving is a lucrative business, with billions of dollars each year going to localities for such general purposes as "cleaning up the en-

10 See Mark B. Liedl, "What Is Congress Trying to Hide?" *The Wall Street Journal*, August 15, 1989, p. A10.
11 Charles L. Dempsey, "Formula For Scandal," *Government Executive*, October 1989, p. 23.
12 *Ibid.*, p. 48.
13 *Ibid.*

vironment," "improving education," or "aiding low income areas." HUD alone is a huge source of largess, spending $20 billion per year.

Selective Finger Pointing. Throughout its well publicized hearings on the HUD scandal, however, Congress ignored the root causes, including any scrutiny of the role that congressmen themselves may have played in funneling HUD dollars to friends and campaign contributors. Instead, the hearings chaired by Tom Lantos, the Ohio Democrat, who heads the House Government Operations Subcommittee on Employment and Housing, focused on influence peddling by Republicans during the Reagan Administration. The finger pointing was highly selective.

There is no doubt that prominent Republicans received inordinate "consulting fees" from developers for directing HUD grant money their way, nor that great amounts of tax money were wasted as a result. Example: One Republican consultant was responsible for a developer obtaining a $47 million grant to remodel 326 housing units in New Jersey, despite the fact that the township neither wanted nor needed the housing. The consultant's actions are no less corrupt by virtue of his insistence that he "worked within the system."[14] But there is also no doubt that if Congress is serious about stopping such bureaucratic waste and corruption, it could do so. It does not and will not because its members benefit from the way things work, and they have supported it for a long time.

Balking at Reform. HUD is a political pork barrel of long standing. Examples: The Carter Administration was expert at the use of HUD grants to raise campaign money. Some 70 percent of the money Carter raised in Massachusetts in 1979 for his presidential campaign came from developers who had benefited from HUD, and no developer who contributed failed to get a HUD grant.[15] A 1976 *Reader's Digest* story on HUD, moreover, led to widespread public hand wringing over scandal and corruption there. But when the noise dimmed, nothing had changed, no funds had been slashed. Indeed, when Reagan's HUD chief Samuel Pierce attempted to shut down the very housing rehabilitation program now under attack for corruption, it was Congress that balked.

And congressmen now are objecting to HUD Secretary Jack Kemp's proposals to reform HUD programs by targeting directly to the poor funds that currently are "discretionary." Said Representative Mary Rose Oakar, the Ohio Democrat who had sought such discretionary funds to help build a $48 million rock-n'-roll museum in Cleveland: "To stifle the certain degree of flexibility that [the program] has...would be absolutely outrageous to me. I don't want some guidelines changed to inhibit my city's opportunity to use that money."[16]

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14 See William J. Eaton, "GOP Consultant Admits Using Influence to Obtain HUD Grant But Defends Action," *The Los Angeles Times*, June 29, 1989, p. A6.

15 Douglas Frantz and Dan Morain, "Playing Favorites at HUD: Latest Twist on Old Game," *The Los Angeles Times*, July 30, 1989, pp. 1, 8.

16 "Kemp's Reform Measures too Strict, Lawmakers Say," *The Washington Times*, October 13, 1989.

As powerful brokers, congressmen in the administrative state have much to gain in a system of influence peddling, and too much electoral security to lose should it be abandoned. Congress is the key to "the system" that leads to corruption in government today, yet Congress itself is not going to take steps to clean things up. The impetus to do so will have to come from the President, who the framers designated expressly to undertake just such great tasks in the defense of the national interest.

RESTORING ETHICAL GOVERNMENT

Returning to ethical, accountable, good government will require reviving the principles of separated powers and federalism. George Bush's first step toward doing so will require publicizing and severing the current relationship between Congress and the executive bureaucracy, which will compel Congress, and allow the executive, to return to fulfilling their proper constitutional roles. Bush should:

1) Expose for the American people the inherently corrupt way that Washington operates behind the scenes.

Congress increasingly makes important decisions affecting millions of Americans and vast sums of taxpayer dollars not in an open legislative process, but secretly in behind-the-scenes interaction between federal bureaucrats and members of Congress and their staff. Ordinary Americans typically are excluded from and uniformed of such decision-making. This leads to the corruption that now is being uncovered in the HUD and S&L scandals.

Bush should instruct executive branch agencies and departments to compile and publicize examples of behind-the-scenes congressional lobbying and politically motivated congressional micromanagement, explaining how they make it impossible for the executive to do its work and corrupt the policy process. Examples should include:

- ♦ ♦ Overlapping and excessive jurisdiction of congressional committees over executive branch agencies and departments;
- ♦ ♦ Massive congressional reporting requirements imposed on executive branch agencies and departments;
- ♦ ♦ Numbers of hours of congressional testimony required of executive branch officials;
- ♦ ♦ Numbers of phone calls and written requests for action levied at executive branch agencies and departments by members of Congress and staff;
- ♦ ♦ Riders to appropriation bills and other legislation that instruct executive agencies and departments how to execute the law, and;
- ♦ ♦ Private lobbying by members of Congress and staff to pressure executive agencies and departments to execute the law in such a way as to benefit a particular congressman or his or her constituents.

2) Publicly invite Congress to join in a campaign to clean up government.

The President should welcome investigations of HUD and the agencies and departments, but make clear that the objective should be to expose all ethical lapses, including influence peddling by members of Congress.

3) Order all executive agencies and departments to begin making a contemporaneous record of all contacts with congressmen and their staffs.

Congressional lobbying and micromanagement of the executive branch contributes to waste, inefficiency, and corruption in the administration of federal programs. In order to begin correcting the problem, there needs to be a public record of the extent to which congressional lobbying and micromanagement occur. Such a record will help Congress, the President, and the public distinguish between legitimate congressional oversight over the federal bureaucracy and the self-serving favoritism apparent in the HUD and S&L scandals.

The President, therefore, should order all executive agencies and departments to record their contacts with Capitol Hill. Bush should require that such records be compiled and released to the public quarterly by the Office of Management and Budget or another appropriate agency.

4) Instruct executive branch officials to resist demands on behalf of private or special interests that contradict good policy, even if those demands come from Congress, and give personal public support to employees who follow such instructions.

Too often, executive branch employees who have challenged Congress and the special interests have been left unprotected by the President. Many, in fact, were publicly chastised, and some lost their jobs. If the President is to break the alliance between executive branch employees and Congress on the one hand, and the fear-based compliance of executive branch staff toward Congress on the other, he must set out his policy to do so unambiguously. And he must stand fully and visibly behind those who risk following his orders.

CONCLUSION

The essential quality of government in the administrative state is not the dominance of an imperial Congress over the executive, but rather what underlies that dominance: the extent to which factions or special interests dominate policy, and the extent to which pork-barrel government has ceased being the exception to the rule and has become the rule.

Given human nature, it is safe to say that human government will never be free of corruption. But in contemporary Washington corruption defines government. The reason: American government has departed from the principles of federalism and separation of powers bequeathed by the Framers of the Constitution.

In practical terms, overcoming this situation means first rejecting the resignation expressed in an editorial, written during the congressional pay raise controversy last February:

> Of course it would be better if our political system could make these tough, detailed, politically divisive decisions by up-or-down congressional roll-call votes based on each member's view of the national interest. But that is a Civics 101 idea of how a modern democratic nation of 250 million people should govern itself.[17]

Fundamental Alternative. To the extent that the writer meant to ridicule a "Mr. Smith Goes to Washington" idealism about how politics does or should proceed, so be it. But to the extent that he meant to ridicule the realistic intention behind Article I of the Constitution – an intention that was put into practice quite well prior to the erection of the administrative state – his resigned defeatism embodies a rejection of the idea of representative democracy itself.

Many liberals as well as conservatives now sense that the interest group liberalism experiment has spawned corrupt and unaccountable government. Now they must be convinced that a fundamental alternative exists – employing the Framers' mechanisms of federalism and the separation of powers.

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17 Lloyd Cutler, "The Pay Raise: This Isn't Civics 101," *The Washington Post*, February 2, 1989, p. A15.

Executive Memorandum

The Heritage Foundation

214 Massachusetts Avenue, N.E. Washington, D.C. 20002-4999 (202) 546-4400

10/09/91 Number 310

RUSH!

"RUBBERGATE": FIVE STEPS TO AVOID A WHITEWASH

After two weeks of national outrage over the "Rubbergate" check-kiting scandal, the House of Representatives on October 3 adopted H. Res. 236, which closed the Congressmen's private bank and ordered an Ethics Committee investigation.[1] The delayed action and continuing denials of wrongdoing raise concerns of a whitewash. The challenge now for outraged citizens and concerned Congressmen is to demand that the Committee follow procedures that will result in a thorough and impartial investigation. If the Committee fails to hire an outside counsel, conduct public hearings, expedite proceedings and emphasize the seriousness of the allegations, it will be clear that a whitewash is in the works.

The check-kiting scandal came to light in a September 18 General Accounting Office (GAO) audit of the House of Representatives' private bank. The GAO report detailed widespread abuse: Members of Congress had written 8,331 bad checks in one year, an average of nearly twenty per Congressman; 134 House Members wrote 581 rubber checks for over $1,000; and 24 Congressmen floated over $1,000 in checks for six months in a row. In each case the taxpayer-financed bank covered the overdrafts without penalty.

The reaction of House leaders was all too typical. House Speaker Tom Foley acknowledged that the scandalous behavior "was a matter that had been raised before, and I thought had been corrected," but he denied that the bad checks were "any violation, as far as I can tell, of ethical standards." House leaders refused to reveal the names of offenders, claiming privacy, even though the bank's structure, taxpayer-financed salaries and location in the Capitol Building indisputably make it an official organization. Commentators linked the Congressmen's inability to manage their personal finances with the nation's budget deficit. Voters realized that if they had repeatedly written $1,000 bad checks, or failed to report interest-free loans to the IRS, they'd be subject to arrest and prosecution.

The House Ethics Committee has been criticized for its handling of certain investigations, but others offer useful models for the bad check inquiry. If it wishes to pursue a serious investigation, the Committee will take these five steps, sanctioned by rules and previous practices:

Hiring an outside counsel. The outside counsel hired for the 1989 investigation of former Speaker Jim Wright was key to a vigorous inquiry. The involvement of an outside counsel in the Senate's "Keating Five" investigation has made it far more difficult to sweep that scandal under the rug. Without an outside counsel the investigation will be directed by Members who have shown reluctance to

[1] The Committee on Standards of Official Conduct is the formal name of the body referred to here as the "Ethics Committee".

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

subject their colleagues to serious scrutiny. Allegations involving such a large number of House Members cannot be pursued impartially without an independent investigator.

Recognizing the seriousness of the crimes. The Ethics Committee should issue a statement outlining violations being investigated. These could include fraud, tax evasion, violations of financial disclosure laws and of House Rule XLIII, which prohibits use of office for financial gain. As the investigation proceeds, the Committee should refer the most serious cases of abuse to the Internal Revenue Service and the Department of Justice for possible criminal action.

Conducting public proceedings. Under H. Res. 236, the Ethics Committee is to investigate practices at the House bank and then proceed against individual Members where warranted. If the Committee refuses to hold public hearings until after it takes up cases against individual Members, the public, and most Members of Congress, will be kept in the dark about the standards applied.

Setting a reasonable deadline. The investigation's first phase should be completed by year's end. The American public deserves answers well before the 1992 Congressional elections, and innocent Members deserve to be cleared of suspicion as soon as possible. The Committee should also order an expedited GAO audit for the sixteen months since June 1990, which are not covered in the latest report.

Expanding the scope of the investigation. H.Res. 236 explicitly excuses occasional violations, in spite of the fact that one disputed allegation involves a $23,000 check. Crimes of that magnitude, even if committed only once, should be punished. Further, H.Res. 236 exempts violations committed before June 1988. While some limitation is reasonable, three years is too short. Government officials are now facing charges for actions related to Iran-Contra five years ago, and the Ethics Committee itself has investigated incidents even further in the past. The Committee has authority to conduct its own investigations, and it should use that power to fill these gaps in H.Res. 236.

One major issue remains outside the scope of the Ethics Committee: revealing the names of all Members who bounced checks at the House bank. Voters should be fully informed about their Representatives' actions. Taxpayers paid for the bank, and are entitled to know how it was used. Further, the House should publish the GAO audit. The report noted that as much as $200,000 in bad checks were outstanding at any one time. Some Members question whether the small bank had balances sufficient to cover the overdrafts, or whether taxpayer funds may have been used.

While these recommendations would make a fair investigation possible, this latest scandal challenges the notion that a committee of House Members can impartially judge their peers.[2] Congress recognized a similar conflict in the Executive Branch when it established the Independent Counsel system, which has, however, been abused by overzealous prosecutors. The House should replace the Ethics Committee with a panel of retired federal judges to assure fair but aggressive ethics enforcement.

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[2] In fact, the Chairman of the Ethics Committee, Rep. Louis Stokes (D-OH) found it necessary yesterday to recuse himself from this investigation.

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UPDATE
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THE CONGRESSIONAL BUDGET PROCESS: THE REAL CULPRIT IN WASHINGTON'S FISCAL CRISIS

(Updating Gordon S. Jones and John Marini, eds., *The Imperial Congress: Crisis in the Separation of Powers* [New York: Pharos Books, 1989].)

Washington's latest fiscal crisis is one in a series of budget nightmares that have plagued the capital for nearly two decades. They are the result of a Congress-dominated budget process that is out of control and in desperate need of wide-scale reform. As noted in the 1989 book *The Imperial Congress*:

> ... the current budget process has evolved into a procedure which promotes confrontation rather than negotiation between the executive and legislative branches. The Congress largely dominates budget decisions, leading to higher spending and larger deficits that in the period preceding the enactment of the Congressional Budget Act.[1]

The current federal budget process was established by the 1974 Congressional Budget and Impoundment Control Act. Passed by an assertive Congress in the wake of the Watergate scandal, the Act expanded congressional control over the budget process while limiting the President's ability to curb congressional spending and otherwise set national budget policy. As the sponsors of the Act explained at the time, its purpose was to "assure congressional budget control; provide for congressional determination of the appropriate level of federal revenues and expenditures...[and]...establish national budget priorities."

Everyone to Blame. Although the Act achieved its goal of increasing Congress's control over spending, it created an unwieldy budget process in which 535 Congressmen and Congresswomen each can secure funding for pet projects while avoiding responsibility for the resulting deficits. By curtailing the President's power to check congressional spending, the Act obliterated political accountability for the bottom line. Thus, while 535 politicians in Washington are empowered under the Budget Act to spend money, no one is responsible for cutting spending. The result has been spiraling federal deficits accompanied by higher taxes and partisan finger-pointing. The tragedy of the system is that because everyone is to blame, no one is to blame.

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1 Gordon S. Jones and John Marini, eds., *The Imperial Congress: Crisis in the Separation of Powers* (New York: Pharos Books and The Heritage Foundation, 1989), p. 181.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Lack of Discipline. As a body of legislators, each representing separate and diverse constituencies, Congress inherently lacks the fiscal discipline needed to balance the budget. This was demonstrated during fiscal year 1976, the first year of budgeting under the new Act. Then Congress produced a budget with a deficit $22 billion higher than that proposed by President Gerald Ford. Since then, federal spending has increased at a pace double the rate of inflation, and federal revenues have nearly doubled. In inflation adjusted dollars, federal spending has grown by more than one-half trillion dollars in the fifteen years of budgeting under the Act, compared to an increase of $220 billion during the fifteen years of Great Society spending prior to passage of the Budget Act. Even during the Reagan years, when federal revenues grew by a record $474 billion, spending increased by $606 billion, including a 60 percent increase in domestic spending. And to feed its spending addiction, Congress since 1982 has passed fourteen separate tax increases.

Congress's lack of fiscal discipline also is demonstrated by its consistent failure to abide by the provisions of its own budget law. Lawmakers routinely have ignored the budget deadlines set forth in the Act. For thirteen of the sixteen years under the Act, Congress has failed to pass its First Budget Resolution on time, and for seven of the last eight years it has failed to complete its budget before the start of the new fiscal year. Instead, Congress stalls, avoiding spending cuts that may alienate constituents until a "budget crisis" ensues that will create a political environment more conducive to raising taxes. In recent years, such congressional inaction has resulted in the need for frequent emergency stop-gap spending measures passed in lieu of a budget. Often the President is faced with a choice of signing such emergency spending measures or shutting down the federal government. Since 1975, Congress has passed 46 emergency stop-gap spending bills, and in six of the last ten years the federal government has run out of funds.[2]

Ignoring Promises. When Congress does reach a budget agreement it routinely ignores its promises to cut spending. Perhaps the most troubling case of congressional budget chicanery occurred after the 1982 "budget summit agreement" between Congress and Ronald Reagan. In exchange for a record $98 billion tax increase, Congress pledged to cut $3 in spending for every $1 raised in new taxes. Instead, Congress spent an additional $200 billion. In fact, Congress has reneged on each of the five "budget summit agreements" reached between 1982 and 1989, failing to reduce spending to agreed-upon levels, even though tax increases were included in four of the agreements.[3] The failed 1990 budget agreement and the proposed alternative are no different. In each case Congress will receive higher revenues in exchange for future unspecified cuts to be determined by congressional committees. Yet as previous budget agreements have shown, these committees are incapable of cutting spending.

In recognition of its inability to enforce its own budget laws, Congress in 1985 passed the Gramm-Rudman-Hollings (GRH) Balanced Budget and Emergency Deficit Control Act. Its purpose was to ensure automatic across the board spending cuts if Congress failed to cut on its own. Yet as with the Budget Act itself, Congress simply ignores or modifies the GRH law to avoid spending cuts. One way it does this is by waiving the law's provision that spending increases must be accompanied by offsetting cuts elsewhere. Since 1985 Congress has voted sixteen times to waive the law, and thus increase spending freely. Congress also sidesteps the law by underestimating the deficit and thus, the

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2 *Congressional Quarterly Almanacs*, 1975 - 1989.

3 Paul G. Merski, "A Decade of Budget Summitry," Tax Foundation *Issue Brief*, June 1990.

level of spending cuts necessary to meet GRH deficit reduction targets. The result: Congress has failed to meet GRH deficit ceilings every year since the law was enacted, exceeding the deficit limits by an average of $25 billion per year.[4]

Congress's lack of budget discipline is fueled by a pro-spending bias that inevitably dominates the congressional budget process. Driven by special interest demands for increased funding and an overriding hunger for reelection, Congressmen simply cannot say "no" to more federal spending. Nowhere is this more clearly illustrated than in Congress's spending record so far this year. While Congress on one hand was negotiating with the White House over a deficit reduction package, on the other hand it was passing record spending increases. Appropriation bills passed by the House amid budget negotiations this year call for increasing federal spending by $59 billion next year, or 17 percent more than last year. Even the bipartisan 1990 budget agreement rejected by the House on October 4 called for increasing spending by $222 billion over five years.

Return to Discipline. No deficit solution is possible without reforms that return discipline to the federal budget process. And such discipline will exist only when it becomes possible to hold policy makers accountable to the bottom line: the deficit. Yet no Congressman alone can be held accountable for the deficit. Rather, Congressmen primarily are accountable to their own state or district interests, which generally demand a greater return of their federal tax dollars – or more spending. Only the President represents a national constituency and the national interest that primarily is served by saying "no" to more spending. Yet the 1974 Budget Act stripped from the President that power.

Prior to the 1974 Budget Act, Presidents had the authority to refuse to spend funds appropriated by Congress. Examples: Thomas Jefferson in 1801 refused to spend funds Congress had appropriated for gunboats. Franklin Roosevelt in 1941 refused to spend funds for flood control projects that Congress had included in the War Department appropriations bill. And Lyndon Johnson, the father of the Great Society, refused to spend large amounts of funds appropriated by Congress for domestic programs, including public housing and highway construction. In 1967 Johnson impounded $10.6 billion, or 6.7 percent of the federal budget.[5] Yet under the 1974 Budget Act, a President's decision to rescind appropriated funds has no effect unless Congress votes to accept the rescission. Since passage of the Act, Presidents have requested from Congress 894 spending rescissions, yet Congress has approved only 315. All told, Congress has rejected $37.4 billion in rescissions requested by Presidents since the Budget Act was passed.[6]

Line-Item Veto. One way to check congressional spending and restore accountability to the budget process is to grant to the President line-item veto authority that currently is enjoyed by governors in 43 states.*[7] This reform will restore to the budget process a practice available to every President from George Washington until 1974: the power to rescind particular items of congressional spending that the President deems incompatible with the national interest.

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4 Stephen Moore, "Congress vs. America: How Congress Raises Its Own Pay," Heritage Foundation *Backgrounder* No. 744, December 14, 1989.

5 Jones and Marini, *op. cit.*, pp. 155-156.

6 General Accounting Office report, March 6, 1989.

7 Daniel J. Mitchell, "Eleven Conditions for a Budget Summit," Heritage Foundation *Backgrounder* No. 779, July 23, 1990.

False Spending Cuts. Another necessary budget reform is eliminating Congress's "baseline" approach to federal budgeting. Under the 1974 Budget Act, a "current services" budget must be established. This budget projects to future years the level of increased spending necessary to continue existing government policies by factoring in such considerations as changing demographics, program growth in previous congressional budgets, and inflation. Once established, this baseline locks in higher federal spending and treats as budget "cuts" any reduction in the planned increases in spending. This is how Congress routinely can decry massive spending cuts that in fact are not actual reductions in federal spending, but reductions in the rate of increase of federal spending. It allows Congress to increase spending while claiming that spending is cut.

Congress and the press, for example, have claimed with much success that Ronald Reagan cut domestic spending to the bone. In fact, however, Reagan only reduced the rate of spending growth, as domestic spending increased every year of his administration for a total increase of $240 billion. So too is the case with the 1990 budget resolution currently moving through Congress. Although described as "painful" budget cuts, the deficit reduction plan, passed by the House October 16 and currently before the Senate, does not actually cut spending from previous year levels. Instead, it would increase domestic spending by $245 billion, which excludes costs of the Savings and Loan bailout and interest payments on the national debt.[8] If Congress did not use the deceiving "baseline" approach to budgeting, it could not count such spending hikes as spending cuts.

Real Reform Proposal. Representative Christopher Cox, the California Republican, has introduced a comprehensive package of budget reforms that would amend the 1974 Budget Act to inject discipline into the congressional budget process and empower the President to enforce federal spending limits. The Cox bill would require Congress to pass a binding budget law each year, rather than the current nonbinding budget resolution. The budget law would establish legal ceilings on spending rather than the unenforceable "targets" under the Budget Act. If Congress fails to pass a budget, the President may rescind any spending Congress passes that exceeds previous year levels. Once Congress passes its budget law, it cannot exceed the law's spending ceilings without two-thirds approval from each house and the President's agreement. Should Congress exceed the ceilings in an appropriations bill, the President may sign the bill and rescind any spending above the ceilings. And in a reversal of the current practice under the 1974 Budget Act, the President's rescissions would stand unless Congress voted to restore the funding, subject to a presidential veto. Finally, the Cox plan would eliminate the need for emergency spending bills by providing for automatic funding of government at previous year levels should Congress and the President fail to reach a budget agreement.

The 1990 budget debacle should persuade Congress and the President to scrap the 1974 Budget Act and adopt reforms that will distribute more evenly between the President and Congress responsibility and accountability for the federal budget. Immediately upon completion of this year's budget, George Bush should begin drafting a comprehensive reform plan to be submitted to the next Congress. The plan should include a line-item veto, an end to baseline budgeting, and elements of the Cox reform package. Bush should make budget reform his top domestic priority for the remainder of his term.

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8 Scott A. Hodge, "The 'New' Budget Agreement: Part II, Back to Carternomics," Heritage Foundation *Backgrounder Update* No. 147, October 12, 1990.

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A U.S. Congress Assessment Project Study

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BACK TO THE CONGRESS: CAMPAIGN FINANCE REFORM IN 1992

INTRODUCTION

In reaction to Congressional scandals and anti-incumbent sentiment, Congress is considering a complex revision of the campaign finance system. Billed as an effort to make elections fairer, the Congressional proposals will actually only further entrench incumbent members and hinder challengers. Meanwhile, real reforms that would produce a more competitive electoral system are ignored. Late last year, the House passed H.R. 3750, a Rube Goldberg-style combination of new regulations, subsidies, spending limits, public election financing and unspecified tax increases. The House bill was initially sponsored by Connecticut Democratic Representative Sam Gejdenson, and was substantially revised by North Carolina Democratic Representative Charles Rose before passage. In the Senate, Democrat David Boren of Oklahoma, sponsored similar legislation, S. 3, which passed May 23, 1991. A House-Senate conference committee is expected to complete a compromise version as early as March.

Both bills would impose a purportedly voluntary system of campaign spending limits. Candidates who comply with the limits would receive government subsidies in the form of vouchers, cash grants, and government-mandated discounts on postal rates and on purchases of advertising from private radio and TV stations. Candidates who refuse to abide by the spending limits would both forego these subsidies and trigger a windfall of new benefits for their opponents. The House bill institutes a spending limit of $600,000, with several exceptions, for House primary and general elections. Candidates would also be limited in how they could raise funds within this overall cap. No more than one-third of the limit (generally $200,000) could be raised from each of three sources: political action committees (PACs), large individual donations (over $200) and government matching funds. Individual donations below $200 would be limited only by the overall spending cap, and would serve as a way to make up for a candidate's failure to raise the allowed maximum limits in other categories. Exceptions to the spending limits include provisions for run-off elections, closely contested primaries and spending

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

for accounting and legal fees to comply with the complex new law. Advertised spending limits in the Senate bill vary from $950,000 to $5.5 million, depending on state population, though effective limits would be 2 to 3 times these amounts due to a series of exceptions and subsidies. Funds for Senate races could be raised only through individual donations of $1,000 or less, but no sub-limits such as those in the House bill would apply. The source of revenues for federal matching funds and vouchers is not specified in either bill, but is likely to include new taxes on businesses, unions, and political organizations.

H.R. 3750 and S. 3 would maintain most existing features of federal campaign finance law, including limits on the amounts individuals and organizations may give to campaigns, and reporting and disclosure requirements. However, the bills would expand vastly the scope and detail of federal regulation of campaigns, political parties, non-partisan organizations, and other groups associated with the political process. This represents an intensification of the Watergate-era theory: that political activity must be regulated, and as far as possible funded, by the government. But the Watergate reforms only increased the power of monied interests and incumbents. Overall campaign spending, PAC spending and incumbent re-election rates have risen steadily since the 1974 reforms. The new bills would make the critical task of raising money for non-incumbents even more difficult. For instance, most incumbents raise the $200,000 in PAC funds allowed by the House bill; challengers average only about $25,000. Yet a challenger can offset $5,000 PAC gifts only through donations of $200 or less. At least 875 individual contributions would be needed to offset the average incumbent PAC advantage.

President Bush has vowed to veto legislation which includes either campaign spending limits or public financing – and he should. But the startling increases in regulation of political activity contained in both bills are at least as alarming. Such regulations will inevitably favor those who write them – in this case incumbent politicians – and will only serve to stifle the free and vigorous political debate essential to a democracy. Cementing the impression that the campaign reform bills are incumbent-protection plans is the fact that the House bill applies only to the House and the Senate bill only to the Senate. This allows incumbents to tailor subsidy and fundraising provisions to their differing needs, rather than to objective standards of fairness. Rather than a greater government role in elections, true campaign reform should eliminate existing overwhelming government support for incumbents. Steps needed to level the playing field for challengers include:

- **eliminating tax-funded ("franked") campaign mailings by incumbents;**
- **restricting the use of Congressional staff in campaigns;**
- **ending incumbents' ability to transfer campaign funds from one election to the next;**
- **easing fundraising restrictions on non-incumbent candidates;**
- **prohibiting unions from using mandatory dues for political activity, and;**

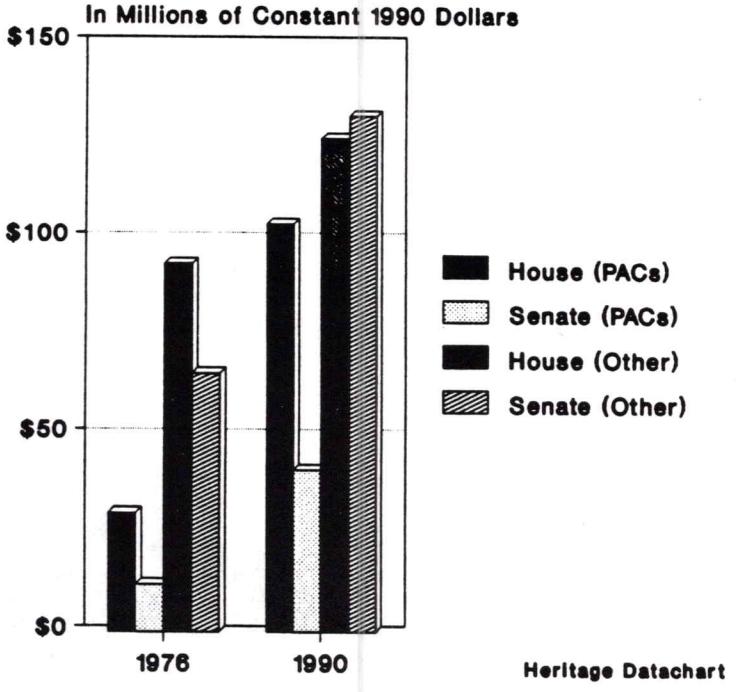
- **eliminating favored treatment of PACs by equalizing PAC and individual donation limits.**

THE HISTORY OF CAMPAIGN FINANCE REFORM

The Watergate scandal inspired the first major wave of campaign finance regulation. In 1974 Congress created a system of spending and fund-raising limits,[1] in an attempt to clean up campaigns, open up the process to average citizens and reduce the influence of big special interest donors. Instead, incumbent re-election rates increased sharply and funding from monied interests exploded. Between 1974 and 1990 incumbent re-election rates rose from 85 to 97 percent in the Senate and from 80 to 96 percent in the House. In 1988 the House re-election rate was above 98 percent.[2]

Chart 1

PAC Spending Skyrockets
Effects of Campaign Finance Reform



Sources: *1976 House of Representatives Campaigns' Receipts and Expenditures, Sept. 1977,* pp. 4, 10, and *1976 Senatorial Campaigns' Receipts and Expenditures, April 1977,* pp. 3, 5. All 1990 data from unpublished FEC computer tapes, Apr. 1991

While the 1974 law outlawed corporate donations and severely limited individual contributions, it gave political action committees (PACs) – then used primarily by labor unions – a five-

1 The 1974 law, which was partially invalidated by the Supreme Court in *Buckley v. Valeo*, 424 US 1, 19 (1976) declared the mandatory spending limits of the 1974 campaign finance reform bill, S. 3044, unconstitutional, as a possible infringement on contributors' free speech rights in contributing to the candidate of their choice. The Supreme Court also ruled that under the First Amendment's guarantee of free speech, individual campaign contributor limits cannot be so low as to prevent "candidates from amassing the resources necessary for effective advocacy," giving rise to questions about the $1,000 individual donor limit, which has remained the same since 1974.

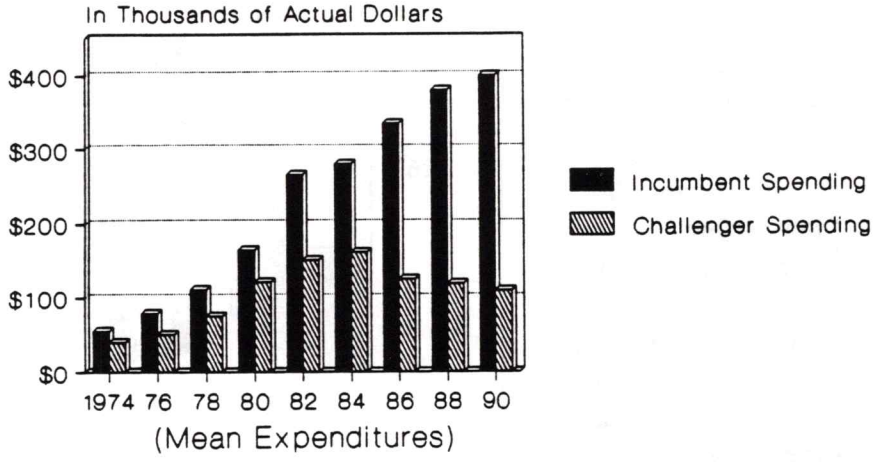
2 Norman J. Ornstein, Thomas E. Mann, Michael J. Malbin, *Vital Statistics on Congress, 1991-1992*, Washington, D.C.: American Enterprise Institute, pp. 58-59, 1992.

fold advantage over individual contributors. While individual donors can give a maximum of $1,000 to a campaign, PACs may donate up to $5,000. The predictable, if unintended, result was an explosion in the number of PACs, which grew 600 percent, from 608 in 1974 to 4,268 in 1988.[3] PAC spending in Congressional elections grew from $20 million in 1976 to $150 million in 1990, and overall campaign spending quadrupled, from $98 million to over $400 million between 1976 and 1990.[4] In short, a law designed to curb special interest money and open up elections using means similar to H.R. 3750 and S. 3, had precisely the opposite effect (See Chart 1 on previous page).

The great majority of this new money has flowed to incumbents rather than challengers. Of the $108.6 million PACs contributed to House candidates in 1990, only 6 percent went to challengers.[5] PAC contributions now account for more than 50 percent of Democratic incumbents' war chests, and 40 percent of incumbent Republicans' funding; dozens of House members receive more than three-fourths of their funds from PACs.[6]

Chart 2

Challengers Fall Further Behind Campaign Finance Since 1974



Source: *Vital Statistics on Congress, 1991-1992,* Table 3-1, p.74.

NOTE: GNP price deflators are from the *Economic Report of the President, 1991*

Heritage Datachart

3 *Ibid.* p. 97, Table 3-11.

4 1976 House data from FEC disclosure series #9: *1976 House of Representatives Campaigns' Receipts and Expenditures, September 1977*, pp. 4, 10. 1976 Senate data from FEC disclosure series #6: *1976 Senatorial Campaigns' Receipts and Expenditures, April 1977*, pp. 3, 5. All 1990 data from unpublished FEC computer tape of U.S. Senate and House campaigns, April 1991. (NOTE: Unless otherwise indicated, all figures in nominal dollars).

5 *Vital Statistics on Congress, 1991-1992*, p. 100.

6 *Vital Statistics on Congress, 1991-1992*, p. 93; and Representative Bill Thomas, "Campaign Funds Should Be Raised Within the District" San Luis Obispo *County Telegram-Tribune*, September 15, 1989.

Seventeen years after the passage of the monumental 1974 reform bill, special interest money and the huge advantages of incumbency are even more powerful than in the pre-reform days. Incumbent re-election rates have gone up, voter participation has declined and, most strikingly, campaign spending has skyrocketed while incumbents have gained ever larger financial advantages over challengers (See Chart 2 on facing page).

CAMPAIGN FINANCE REFORM REVISITED

Even though the Watergate reforms failed miserably, arguments about campaign finance reform today are much the same as they were in 1974. The Watergate-era legislation was intended "to reduce the influence of wealthy campaign contributors and give citizens without access to such sources equal opportunity to run for public office."[7] Massachusetts Senator Edward Kennedy contended that enactment of the public financing provisions could "end the corrosive and corrupting influence of private money in public life."[8] Seventeen years later, Connecticut Democratic Congressman Sam Gejdenson introduced H.R. 3750 noting that "Elections are not supposed to be a participatory process for only the wealthy and privileged" and claiming that his bill would benefit "...the disadvantaged, the poor, and the middle class."[9] Oklahoma Senator David Boren, author of the Senate reform bill, S. 3, complained that "special interests dominate today's elections."[10]

The Senate Bill. Senator Boren's bill would replace alleged special interest dominance with a reign of federal regulators by prohibiting or restricting campaign contributions and other political activity by disfavored groups. Among these provisions are an outright ban on PAC contributions to Senate candidates and restrictions on small contributors who combine their individual checks for forwarding to a candidate (a practice known as "bundling"). The bill would for the first time impose spending limits and significant federal regulation on spending not associated with a particular campaign. This so-called "soft-money" is now used by unions, businesses and state and local political parties for registration drives, get-out-the-vote efforts and similar activities.

While S. 3 includes spending caps, they are largely cosmetic. General election spending would vary from $950,000 to $5.5 million, depending on state population. In addition, candidates may spend: 67 percent of the general election limit in a primary (to a maximum of $2.75 million); another 20 percent in the case of a runoff; 15 percent for legal and accounting fees (maximum $300,000); and, another 25 percent with contributions in amounts of $100 or less. In addition, S. 3 would shift many campaign costs from candidates to taxpayers, broadcasters and the postal service. Candidates would receive government vouchers worth 50 percent dis-

7 *Congressional Quarterly Almanac*, 1974, p. 611.
8 *Congressional Quarterly Almanac*, 1974, p. 618.
9 *Congressional Record*, November 12, 1991, Extensions of Remarks, E 3795.
10 *Congressional Record*, January 14, 1991, S 480.

count on their lowest rates for ads purchased with the vouchers or with other funds. Senate candidates would get a 75 percent discount on first class mail (or 2 cents less for third class), up to 5 percent of their general election limit. Finally, candidates would receive government matching funds to totally offset "independent" expenditures (spending by non-candidates) over $10,000, and to offset spending by candidates who refuse to comply with the limits. (Non-complying candidates would also be forced to include disclaimers in their advertising.) All told, the various add-ons and subsidies could triple the advertised limits.[11]

S. 3 was approved by the Senate by a vote of 56-42 last May 23. A Republican alternative would have restricted PACs and "bundling" in ways similar to S. 3, but would have also restricted unregulated labor union spending, and enhanced the role of political parties. The Republican plan did not include spending limits or public funding.

The House Bill. H.R. 3750 also contains complex spending limits, new regulations, public financing, and advertising subsidies, accompanied by undefined new taxes and fees to pay for public financing. The centerpiece of H.R. 3750 is a $600,000 "voluntary" limit on total campaign spending, with restrictions on sources in three categories. One-third of a candidate's money could come from PACs, one-third in large individual donations (those between $200 and $1,000) and up to one-third in public funds matching up to $200 of individual donations.[12] The overall spending limit would be increased by $100,000 in the case of primary runoffs, and by another $150,000 if the winning primary margins was less than 10 percent. House candidates would not receive vouchers or advertising discounts as in the Senate bill, but would be eligible for generous postal discounts. Like their Senate colleagues, House candidates would get federal funds to offset independent expenditures and spending by candidates who ignore the spending limits. Also like S. 3, H.R. 3750 would extend federal regulation to many groups and activities for the first time. A Republican proposal, which would have required a majority of funds to be raised in a candidate's district, was defeated on the House floor.

Agreeing to Disagree. It is important to note that while the stated objective of both bills is to clean up campaigns, the House and Senate have apparently agreed to disagree on how to do it. Two years ago the House and Senate passed competing versions of campaign finance legislation, but failed to reach a compromise in conference – with each side holding out for provisions it felt were vital. The Senate has now passed a bill that applies only to Senate races, while House legislation applies only to House races. Breaking all precedent, apparently the two legislative bodies intend to pass a bill with two entirely different sets of regulations cobbled onto each other, one set tailored to the needs of House incumbents, the other set designed for Senators.

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11 Senate bill, *Congressional Record*, January 14, 1991, p. S. 465.

12 *Congressional Record*, November 12, 1991, pp. E 3795, 3796.

If the bills are both intended to keep campaigns clean, why could not the House and Senate agree on provisions at least roughly similar in principle? Why, for instance, would the Senate view PACs as evil special interests and abolish them, while the House would perpetuate the five-fold PAC advantage in donation limits? Why would one scheme emphasize discounted postal rates, and the other focus on radio and TV broadcast prices? The answer is that, given the different dynamics of their campaigns, the favored funding and expenditure sources in each bill are those most favored by House or Senate incumbents, respectively.

There is no reason to believe that these new and more complex schemes will succeed where the 1974 reforms failed. The details of the House and Senate bills may change in conference, but each of the major elements – spending limits, public financing and bureaucratic regulation of political activities – are so fundamentally flawed that any likely compromise will impede competitive elections.

SPENDING LIMITS

Spending limits appear to be an appropriate response to concerns over soaring campaign spending. In 1976, only 31 House candidates spent over $200,000. In 1990, 428 candidates spent over $200,000, and 168 spent over $500,000.[13] The Keating Five and other fund-raising related scandals have raised concerns about widespread corruption of the political process. But in actuality spending limits only work to the incumbents' advantage. Challengers, who are not often subject to the temptations of influence-peddling or vote-selling, have a far greater need for substantial campaign treasuries than incumbents.

In fact, spending limits would cripple the ability of the few challengers capable of raising strong support to overcome the long odds. One analysis of the 1990 House elections concluded that a challenge's ability to raise money was the determining factor: "For challengers spending between $250,000 and $500,000, the odds against winning were 11-1. Those who spent $500,000 or more faced 6-1 odds, while those who spent less than $300,000 lost in every case."[14]

Particularly disastrous for challengers is the three-fold division of limits in the House bill. While an incumbent should have no trouble reaching his limit in each category, challengers may be hard pressed to raise $200,000 from incumbent-loving PACs. A challenger can make up for a dearth of PAC funds only by raising money in the least efficient and most costly way – from small individual contributions under $200. In other words, challengers may have to find 1,000 or more individual contributors to offset an incumbents' built-in PAC advantage. Further, H.R. 3750 retains the regulatory disparity between PAC and individual contributions, allowing PAC donations of $5,000, but limiting individual contributions to $1,000, while S. 3 makes the constitutionally questionable attempt to prohibit PACs from making any contributions in Senate elections.

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13 *Vital Statistics on Congress, 1991-1992*, p. 76, Table 3-3.

14 "Challengers Fall Further Behind in 1988," July 24-30, 1989, *Roll Call*, p. 8.

The spending limits written into H.R. 3750 are far from arbitrary. Because incumbency offers tremendous advantages, a challenger has to spend a significant amount to become competitive. When the challenger reaches this level, additional spending by the incumbent is less and less effective.[15] In the 1988 campaign, the mean expenditure of challengers who beat House incumbents exceeded $600,000, the limit under H.R. 3750.[16] The limit is just below the amount challengers need to get a message across, and almost assures that even a strong challenger cannot overcome the advantages of incumbency. Clearly, legislation designed to hold down challenger spending is an incumbent reelection bill, and H.R. 3750 would cap challengers below this competitive level with scientific exactitude. Should a challenger choose to give up the incentives in the House bill for an opportunity to raise more funds, he is equally disadvantaged. As soon as a non-complying candidate raises $250,000, his opponent has his $600,000 limit removed and becomes eligible for unlimited federal matching funds. The punitive nature of these provisions is evident from the fact that the advantages kick in at a point at which the publicly-funded candidate may have a two-to-one spending advantage. The trigger point is also the level at which challengers have any chance of defeating an incumbent.

Spending limits have also run afoul of the First Amendment. According to the Supreme Court ruling in *Buckley v. Valeo*,[17] mandatory spending limits can prevent citizens from meaningfully supporting a candidate. Any spending limit amounts to a contribution restriction on citizens, negating their right to influence an election for the candidate of their choice. While the spending limits in S. 3 and H.R. 3750 are advertised as "voluntary," they are for all practical purposes mandatory to challengers, because exceeding the limits would trigger a windfall of public money for their opponents. In fact, the structure of offsetting funding to counteract challenger or independent campaign spending is so coercive that it may well be disallowed by the Supreme Court. The Federal subsidies triggered to offset independent efforts, in particular, may run afoul of the *Buckley* decision, which ruled that restricting independent campaign expenditures was an unconstitutional encroachment on free speech.

Spending limits are simply unworkable. Those written into S. 3 and H.R. 3750 are so porous to anyone familiar with the legislative arcana of the bills that they amount to little more than a rhetorical ploy. To the initiated (incumbents and their legislative assistants who wrote the rules) the exemption of PAC donations for "accounting" purposes, exceptions for primaries and runoff elections, and other loopholes virtually negate the limits.

One example of how incumbents have avoided mandatory spending limits was provided by Representative Dick Gephardt (D-MO). The 1988 Gephardt

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15 *Campaign Finance Reform: The Case for Deregulation*, Tallahassee, FL: The James Madison Institute of Policy Studies, p. iii.

16 *Vital Statistics on Congress*, 1991-1992, p. 82, Figure 3-2.

17 *Buckley v. Valeo*, 424 US 1, 19 (1976).

presidential campaign used a technicality in the Federal Election Commission (FEC) rules to construe campaign ads as fund-raising expenses, which were not subject to the limits. After reviewing his claim, the FEC arbitrarily assigned half of Gephardt's television buy in the Iowa primary toward fund-raising costs, admitting that it could not make an informed accounting. (The Commission did disallow Gephardt's "effort to deduct 25 percent of all his Iowa expenses as a national campaign exemption."[18]) Gephardt received nearly $3.4 million in Federal matching funds for his presidential race.

The FEC found such gamesmanship common in regard to state-by-state spending limits, which Presidential candidates must comply with in order to obtain Federal primary matching funds. One popular technique is to rent cars in one state and use them in a campaign effort in high-priority neighboring states such as Iowa or New Hampshire.[19] Similarly, candidates frequently cross state lines to find lodging so that expenses can be shifted from one state to another.

Aside from the tricks used to evade limits, the bureaucratic burden of tracking campaigns often makes enforcement irrelevant. Four years after the fact, the Federal Election Commission is still tracking spending for the 1988 Presidential race. New Hampshire's 1990 Congressional elections, which were the first with a system of voluntary spending limits, were plagued by problems of enforcement and accounting of independent expenditures, leading to dissatisfaction among many of the participants. Former Representative Chuck Douglas (R-NH) has charged that the New Hampshire law "enables somebody to overspend in the election" by waiting to report expenditures until the final weeks of the campaign.[20]

Congress has repeatedly turned a deaf ear to the FEC's longstanding request to eliminate the state-by-state limitations on expenditures for publicly financed Presidential primary candidates. The 1990 annual report of the FEC states that abolishing state-by-state limits would:

> eliminate some rather cumbersome requirements of the Federal Election Campaign Act that have become a burden for all campaigns to follow, as well as for the Commission to track and enforce; yet the limitations could be removed with no significant impact on the process.

Instead, Congress now proposes to impose restrictions on all 535 House and Senate races as well. If the restrictions for the few presidential primary candidates have become a burden, Congress' proposals are a guaranteed bureaucratic nightmare. And at the glacial pace the FEC is able to investigate violations now, accounting for 1992 campaigns might be completed by the turn of the century.

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18 "Auditors Still Tracking '88 Trail for Signs of Errant Spending," *Washington Post*, July 15, 1991, p. A9.

19 *Ibid.*

20 "The Great N.H. Campaign Spending-Limit Experiment Proves Less Than a Big Success," *Roll Call*, January 14, 1991, p. 8.

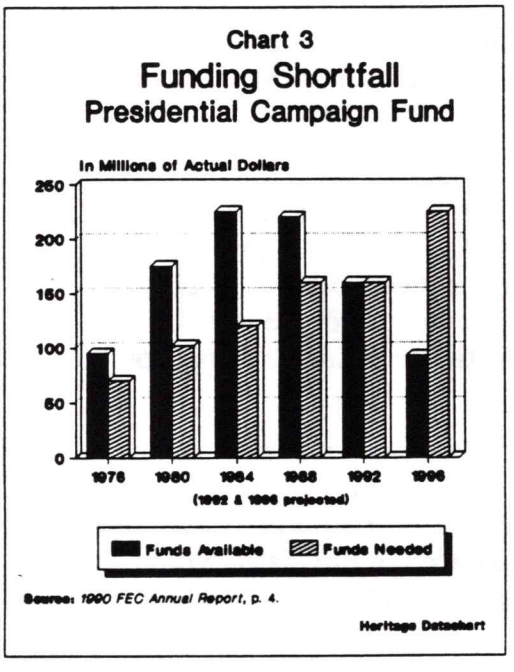
The spending limits in the new campaign reform bills are begging to be broken. By signing up for the limits, candidates receive vouchers for broadcasting, reduced mail rates, and matching funds, while repercussions for breaking the limits will be slight. The systems implemented by both bills call for random audits of about one-tenth of the candidates, so each candidate has a 90 percent chance of going completely unmonitored. Should a candidate be audited, the audit will be completed long after the election. With candidates secure in office, FEC penalties for violations will be toothless. A candidate found guilty of breaking spending limits will merely be fined, a small price for the prize, and incumbents will find it easy to recoup such losses. There are not even penalties for refusing to cooperate with the audit process, which encourages stonewalling.

PUBLIC FINANCING: TAXPAYER FUNDING, GOVERNMENT CONTROL

In making the case for S. 3's public financing provisions, Senate Majority Leader George Mitchell stated:

> I recognize there will be those who will be concerned that taxpayers could be asked to help pay for cleaner more competitive campaigns. But this isn't a novel idea; we have been doing it in Presidential elections since 1976. The cost of this is quite minor and like the presidential system would be financed by the voluntary checkoff system on the tax return.[21]

Apparently Senator Mitchell has not looked closely at the FEC reports to Congress. The Commission projects that the Presidential campaign fund will begin running a deficit beginning in February or March of this year.[22] By 1996, that deficit will be in excess of $150 million. (See Chart 3.) Thus, the FEC has recommended that this "voluntary checkoff system" be changed to an appropriated account. In other words, an election tax, paid out of the federal government's operating revenues. Of course, this is true of the current checkoff system for the Presidential campaign fund. Because it does not affect a taxpayer's bill, dollars are diverted from general tax revenues which would otherwise be available for other government programs.



21 *Congressional Record*, January 14, 1991, p. S 479.

22 *Federal Election Commission Annual Report 1990*, Washington, D.C.: p. 3, 1991.

Americans clearly do not want government financing of campaigns. The number of contributors to the Presidential election fund has declined by nearly 10 million since 1981, and the Federal Election Commission expects a $100 million shortfall in the Presidential Fund by 1996.[23] When put to popular vote, Proposition 70, a public financing proposal for state legislative races, was defeated in California last year.[24] The public financing provisions in both the House and Senate bills promise to be extremely costly. The Senate version covering only the costs of Senate races was estimated by the Congressional Budget Office (CBO) to cost the federal government alone $91 million in one Senate election cycle. This figure does not include the hundreds of millions of dollars that mandatory discounted air time will cost the broadcast industry, and consequently, American consumers. One estimate has placed the cost of S. 3 at over a billion dollars.[25]

Make Democracy Work for Incumbents: When Is a Tax Not a Tax

CBO estimates that H.R. 3750 could cost over $115 million every two years.[26] This figure, too, excludes the cost of postage and broadcast subsidies. Yet the bill contains no revenue-raising provisions. "We're working on a mechanism to put off the delicate question of how to fund the public matching portion of the package," said House Administration Committee Chairman Charles Rose on the eve of the bill's passage.[27] Proposals include fees on FEC filings, limiting tax deductions for businesses and unions and voluntary donations to a "Make Democracy Work" fund. As mentioned, however, the prospects for substantial voluntary funding are poor. The other funding options amount to further government expenses, which will ultimately be borne by individual taxpayers and consumers, even if the direct taxes are levied on businesses. In addition, using taxes to pay indiscriminately for "campaigns" compels associations or individuals to pay to support views that may run completely contrary to their own, thereby adding to the bills' First Amendment problems.

The David Duke Party?

Another danger of public financing is illustrated by the Presidential primary financing scheme. The first candidate to qualify for 1992 matching funds was not George Bush or a major Democratic hopeful, but third-party candidate Lenora Fulani. Fulani, of the leftist New Alliance Party, qualified for nearly $1 million in matching funds in the 1988 campaign. Former Ku Klux Klan member David Duke may soon qualify for Federal subsidies for his 1992 presidential campaign. Political extremists of all stripes find the lure of free tax dollars too attractive to pass up. In order to be fair to challengers, a matching-fund threshold must be set low.

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23 Federal Election Commission *Record*, October 1991, Volume 17, No. 10, p. 2.

24 "Appeals Court Upholds Campaign Financing Law," *Los Angeles Times*, April 11, 1991, p. B1.

25 "One Billion Dollars and Counting: the Costs of S. 3," Republican Policy Committee Issue Update – Campaign Finance Reform, April 19, 1991.

26 *Washington Post*, November 26, 1991, p. A4.

27 *Congress Daily*, November 22, 1991, p. 2.

But that low threshold attracts every kook with a cause and a mailing list to run for office in order to gain a platform, free money and, under the proposed Congressional schemes, discounted postal and broadcast advertising rates. In other words, there would be David Duke and Lenora Fulani clones in hundreds of Congressional districts and dozens of Senate races, with no chance of winning a general election, but a good chance at obtaining some tax dollars and a little publicity. This would drive up public financing costs drastically, and force the Post Office and broadcasters to subsidize fringe political agendas or candidates.

Public financing is particularly objectionable when used to enforce spending limits in campaigns, because spending limits disproportionately hinder challengers. Public financing will further mire elections in the morass of government regulations that already hamper challengers. Public financing is immensely expensive and voters do not wish to be compelled to pay for election campaigns. Government financing would give control of elections to the elected, severing one of the most effective controls exercised by citizens over elected officials – the ability to refuse funding or to contribute to an opponent.

REGULATORY NIGHTMARE

The *Code of Federal Regulations* contains 262 pages crammed with regulations covering every conceivable element of campaigning and political organization, ranging from vending machine sales to volunteers using their home computers for a campaign. Anyone who organizes a group to promote any federal candidate or cause is covered, and recordkeeping begins the first time a stamp or stapler is used. These rules are constantly changing, due to legislation, regulatory adjustments and the results of litigation. S. 3 and H.R. 3750 would add dozens of new provisions, and eventually hundreds of new regulations to federal election law.

Today the Federal Election Commission tracks relatively simple contribution limits for House and Senate campaigns and hands out public funds in one quadrennial election. Even so, the workload is immense. In 1990 the FEC Reports Analysis Division processed 57,982 documents and reviewed 34,726 reports. The Public Records office processed 1,134,974 pages of campaign finance material.[28] The Commission opens reviews of over 200 possible violations a year, requiring investigations and possible litigation.[29] This occupies a full-time staff of over 250 employees, and will cost over $18 million in 1992. To date, there have been no studies on the increase in workload, personnel and expense that can be expected should S. 3 and H.R. 3750 pass. However, the FEC would have responsibility for public financing in nearly 1,000 times as many races over four years as they do under present law.[30]

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28 *Federal Election Commission Annual Report 1990*, p. 72.

29 *Federal Election Commission Annual Report 1990*, p. 15.

30 The FEC would monitor 435 House races twice, plus approximately 67 Senate races and several special elections every four years, a minimum of 937 additional races involving government subsidies or grants.

Aside from the intrinsic flaws of spending limits and public financing, the sheer complexity of the schemes in both campaign reform bills argues against their adoption. The new bills would greatly increase the reporting and regulatory of the present system, which already hinders legitimate political activities.

The present legal regime imposes on candidates, political organizations and political activists a heavy – and for campaigns in particular, a costly – burden of compliance with the increasingly complex law. Constant change in legal rules sows considerable confusion within the regulated community, increases the cost of compliance, and necessarily detracts from the efficient conduct of legitimate political activities. Moreover, the readiness to make repeated changes in the laws invites a struggle for partisan advantage which is waged in the name of sound public policy but actually serves the interest of electoral advantage. This is a dangerous trend.[31]

Regulation will always favor those who do the regulating. H.R. 3750 in particular, exemplifies this. House incumbents depend heavily on PAC money, which makes up a large portion of their funding and which supports incumbents almost exclusively. Thus, the House bill limit for PAC contributions remains five times greater than that for individuals. This insures that PACs will remain an inordinately powerful incumbent protection device. The campaign legislation would also add to the administrative costs of those involved in political campaigns. The Senate bill includes an automatic 15 percent cost increase for legal and accounting fees, and the amount could go higher. This increase in expenses would be borne by every federal campaign, but would weigh heaviest on financially-strapped challengers. While S. 3 has fewer obvious disadvantages for challengers, its provisions are daunting in their complexity. There are twenty or more factors which may figure in determining the spending limit for a Senatorial candidate.

H.R. 3750 would aggravate many of the worst features of the existing campaign financing system. PAC growth, soft money and bundling came about as responses to ill-advised efforts to regulate political activity. The overall complexity of S. 3 and H.R. 3750 would compound the problems caused by the original attempts at reform. The more intricate the election financing laws, the easier it will be for insiders to manipulate the system to their advantage, and the heavier the burden of compliance for candidates, especially inexperienced challengers. S. 3 and H.R. 3750 would only multiply the hundreds of regulations, tens of thousands of reports, and millions of pages of documents that already limit free political activity in America.

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31 *Campaign Finance Reform – A Report to the Majority and Minority Leader, United States Senate*, Campaign Finance Reform Panel, March 6, 1990, p. 3.

TRICK OR TREAT?

In fact, so complex is the House bill that even the sponsor was confused. Shortly after Representative Sam Gejdenson proclaimed public financing was essential to 'balance politically driven money with non-politically driven money'[32] in the *New York Times,* he was emphasizing on the House floor that "We do not have public financing in this bill."[33] And in their haste to pass the bill before going out of session for Thanksgiving, it was easy for members to overlook provisions buried deep within the pages of regulations outlined by H.R. 3750.

One overlooked provision was a sense of the House resolution calling for legislation to overturn the constitutional prohibition on involuntary spending limits enunciated by the Supreme Court in *Buckley v. Valeo*. Another would require the FEC to record all donations over $50, rather than the current $200, a measure that would tremendously increase the bureaucratization of elections. And despite the anti-PAC rhetoric surrounding H.R. 3750, it actually increases by $5,000 the amount PACs can contribute to national parties. There is even a provision, Title VII, that would allow members to keep amounts raised in excess of the limit in a separate account "available for any lawful purpose" other than campaigning.[34] As has occurred frequently in the past, campaign contributions could be used for purposes such as country club dues, family travel, and meals at fancy restaurants.[35]

But perhaps most disingenuous of the sleeper provisions in H.R. 3750 is Title XI, an attempt to seize bureaucratic control of the grassroots term-limitation movement by subjecting ballot initiatives affecting federal offices to the yoke of FEC reporting requirements. This unprecedented provision will regulate any group that organizes to influence popular ballot initiatives involving "(A) interstate commerce; (B) the election of candidates for Federal office and the permissible terms of those so elected; (C) Federal taxation of individuals, corporations, or other entities; or (D) the regulation of speech or press, or any other right guaranteed under the United States Constitution." This provision sinks the talons of the federal government into almost any popular state referendum or initiative, ranging from insurance reform to abortion and nuclear waste.

Perhaps most important to the professional politicians in Washington, however, is the ability to regulate term-limit initiatives. This portion of Title XI will serve principally to bog down a populist threat to the perpetual governance of the Washington elite. Since most states already have disclosure requirements for groups supporting ballot initiatives, this provision is simply a Congressional attempt to squelch a grassroots effort to rein in the power of incumbency.

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32 *New York Times*, October 10, 1991, p. B16.
33 *Congressional Record*, November 25, 1991, p. H11162.
34 "The Fine Print in the Campaign Reform Bill," *Roll Call*, December 5, 1991, p. 14.
35 *Roll Call*, February 20, 1992, p. 14.

INCUMBENCY

Inherent in all of the campaign finance reform proposals is a glaring double-standard. Congressional election reform proposals consistently fail to factor the advantages of incumbency into the campaign finance equation. Free name recognition belongs to incumbents simply by virtue of holding office. Behind from the start, a challenger has to spend money on facilities, staff, postage, computers, office equipment, research and other essentials to run a campaign. All this is on the taxpayer's tab for incumbents.

Among the biggest advantages of incumbency is the ability to send out taxpayer-financed "franked" mail. In 1990, the House exceeded its $44 million franked mail budget by between $31 and $32.8 million,[36] and an attempt to tack yet another $25 million on the tab for mailing costs onto a Fiscal Year 1990 Dire Emergency Supplemental Appropriation bill failed in a vote on May 24 of that year. Fortunately for the House, "the vote [had] no immediate effect on House mailing practices because, by law, the Postal Service must deliver franked mail regardless of whether Congress pays for it."[37]

Congress has steadily increased Federal expenditures on these advantages. The Senate increased its Fiscal Year 1990 franking allowance of $24 million to $30 million for 1991, and again to $32 million in Fiscal Year 1992, while the House appropriation has exploded, from $59 million in Fiscal Year 1991 to $80 million for 1992.[38] (These figures do not include other costs associated with mass mailings, such as labor and mailing lists, or the cost of printing, which was estimated at $60 million in 1989,[39] a non-election year.)

Public outcry against franking abuses in 1990 forced the House to introduce some accountability into its franking practices with H.R. 5399, the Legislative Branch Appropriation for Fiscal Year 1991. Prior to these reforms, there had been no disclosure of mailing costs in the House, and no limits on spending. H.R. 5399 set a maximum spending limit per member calculated at three times the first class postage rate times the number of non-business addresses in a district.

The House Administration Committee moved almost immediately to negate the effect of the new limits by arranging a secret $250,000 loan for a small company to develop computerized lists of registered voters for every Congressman. The new lists, which should be ready for the 1992 campaign season, will allow incumbents to target campaign-style mailings by age, sex and voting habits.[40] Fur-

36 H.R. 3014, Legislative Branch Appropriations for FY 1990.
37 *Roll Call*, May 28, 1990, p. 1.
38 "Arsenal of Hill Perks Leaves Incumbents Well-Armed," *Washington Times*, March 5, 1990, p. A10.
39 *Washington Times*, March 5, 1990, p. A10.
40 "With Innovations Like CD-ROM Voter Lists and Laser Printers, House Entering New Era," *Roll Call*, October 21, 1991, pp. 18-19.

ther, by excluding non-voters, incumbents can take credit for reducing costs while actually increasing the amount of election-related mail.

Even after the Committee's unorthodox plan came to light, a vote last fall proved incumbents to be more than willing to use the power of office to give themselves election advantages. On October 29, 1991, the House defeated an amendment to cancel the contract 231 to 182. Federally administered public financing will let these same incumbents abuse the rules governing financing campaigns in a similar manner.

The average franking allowance is about $200,000 per year for each House member and $590,000 for the average Senator in 1992. Only about 8 percent of this avalanche of mail goes to answer constituent inquiries.[41] The rest goes out as free PR to incumbents' districts. This advantage is compounded by the fact Congress consistently sends out much less mail in off-election years, and increases the volume during election season, especially in the months immediately preceding an election, allowing some incumbents to spend much more than the average annual allowance figure during an election year. Further, a common practice among Senators has been for those not running for office to transfer portions of their franking allotment to those facing tough election campaigns.

Transferring postage allowances from office to office and year to year allows Senate and House members to send out much more mail in a campaign season than the average allowance would suggest. Many Senators spend well over a million dollars on franked mail in an election year, and some as much as three or four million. House members, too, can pour huge amounts of mail into a district during periods just before an election.[42] One of the few positive features of S. 3 is its ban on election year mass mailings by Senators. Having admitted implicitly that such mailings are a campaign device, however, the Senate should follow its own logic and abolish political junk mail during the other five years of a Senate term.

The huge congressional staff is another taxpayer-financed resource that often contributes to incumbents' campaigns. Among frequent abuses, shuttling staff between the Washington office and campaign work is a widespread practice. In some cases, staffers take "extended leave" to work on their boss's campaign off the public payroll, but receive an inflated salary for a several months upon returning. Some incumbents keep full-time campaign workers on campaign and congressional payrolls contemporaneously. Incumbents' campaigns are often run out of the same building as their home state office, with rent paid principally by the taxpayer. The Keating Five investigation unearthed a campaign staffer who was directing the official business of a Senate office.

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41 Senator Pete Wilson, "The Congressional Frank: A Simple Case of Abuse," Heritage Foundation *Lecture* No. 221.

42 "Mail Incumbents' No. 1 Weapon," *Washington Times*, February 5, 1990, p. A1.

The cost of the overall legislative budget, covering staff, facilities, supplies, mail and other expenses for the operations of Congress has ballooned at a rate far outpacing inflation, growing an astounding 1,709 percent since 1960. The 1992 Congressional budget, including Member salaries, is about $2.4 billion,[43] or $4.5 million per Congressman per year. One reason for the expense is that the number of staff Congress employs has virtually tripled since 1960 to 19,000, making it the largest legislative staff in the world nine times over.[44] Since a large portion of Congressional budgets are used for free mail, constituent service, publicity efforts, and other campaign-related activities, incumbents have a multi-million dollar head start on challengers.

These advantages of incumbency are not included under the campaign spending limits of either bill. If supporters of spending limits and public financing are serious about reducing the cost of campaigning, these enormous incumbent expenditures on mail, which drove up the amount a challenger needs to spend, have to be considered.

RECOMMENDATIONS

If lawmakers are serious about a level playing field, the best way to insure competition is to help credible challengers compensate for the huge advantages of incumbency. This could be done through easing measures that restrict contributions to challengers, or through measures to prevent incumbents from using their offices for reelection. Neither S. 3 nor H.R. 3750 addresses either of these concerns. Steps that should be taken toward this goal include:

1) Cut Taxpayer-funded Congressional Mail. Using taxpayer money to fund campaign mailings is a clear case of abuse. Use of the Congressional frank should be restricted to answering constituent mail and for legitimate legislative business, rather than for flooding a district with PR pieces.

If campaign reformers insist on spending limits, the limits for challengers should be raised to match the amount spent on printing and postage by an incumbent in an election cycle, minus a generous 10 percent for the mail sent in response to constituents. This would likely reduce one of the biggest hidden campaign costs, publicly financed incumbent mail, and would certainly raise the challengers' limit enough to insure competition. The limit for House challengers would be increased by approximately $200,000, and for Senate challengers by an average of over $700,000.

If campaign reformers insist on public financing, they could begin by offering to challengers the same public financing they already enjoy. They should give half of their allotment for mass mailings to their challengers. This would make challengers more competitive, reduce the other costs of campaigning, require no addi-

43 Congressional Quarterly Special Report, *Where the Money Goes*, December 7, 1991, Volume 49, p. 111.

44 Saenz, Luis "The Costly Congress Grows More Costly," Heritage Foundation *Backgrounder* No. 832, May 30, 1991, p. 4.

tional taxes and would not cost an extra cent. In fact, knowing that for every dollar they spent from their mail fund one dollar would go to their challengers would probably drastically reduce the amount of taxpayer money incumbents thought necessary to constituent mail.

2) Limit Campaigning by Staff. Tax dollars are funding Congressional reelection campaigns in many other ways. The use of Congressional staff for campaigning, which is effectively unregulated, could be prevented by reducing the bloated Congressional staffs, or by prohibiting campaign activity by Congressional staff as with Hatch Act limitations on other Federal employees. This would keep Congressional staffers from being put to work on campaigns, and prevent tax dollars from being put to work for incumbents. Other uses of public money on materials useful primarily in campaigning, such as voter registration information, should be eliminated.

3) Stop the Carryover of "War Chests." Incumbents make their seats impregnable by saving unused campaign money from one campaign for use in the next. By amassing huge war chests to make themselves virtually unbeatable, incumbents try to scare off potential challengers from even mounting a campaign. Prohibiting the carry-over of funds from one campaign to the next would serve to level the playing field for challengers and incumbents.

4) Boost Challengers. Challengers often need a boost at the beginning of a campaign just to get out of the blocks and into a race. Limits on contributions could be raised or eliminated for challengers in the early part of a Congressional race. Challengers with strong local or party support could then overcome an early handicap that plagues challengers.

5) Enforce *Beck*. Big Labor loves incumbents, and remains extremely potent politically. Labor funding is conscripted from the paychecks of union members, assuring a steady flow of cash that is largely used for political lobbying. The Supreme Court, in *Beck v. Communications Workers of America,*[45] mandated that unions must account to their members for the uses of dues, insisting that compulsory dues cannot be used for political purposes against the will of the dues payer. However, the burden has been left to individuals to make unions account for dues spending through the courts. The *Beck* decision needs to be enforced to assure political freedom for members of labor unions. *Beck* should be codified, and unions held accountable for the use of members' dues.

6) Defang Special Interests by Deflating PACs. The primary cause of disproportionate special interest influence in our existing campaign finance system is the dif-

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45 *Beck v. Communications Workers of America*, 468 F.Supp.93 (Md.1979) The Supreme Court ruled that unions can use mandatory dues and fees only for purposes directly related to collective bargaining and contract administration. (At the time the Communication Workers union at the time was spending 79 percent of its funds on political activity.) More specifically, *Beck* allows workers to be refunded their money if they object to the political use of their dues. However, the ruling is presently not administratively enforced, so workers generally must sue labor unions to obtain a refund.

fering limits on PAC and individual donations. Anyone with a large stake in the political process is forced to operate through a PAC because it is five times as effective. Simply equalizing contribution limits for PAC and individual donors would greatly reduce the special interest focus of fundraising.

CONCLUSION

The stated purpose of H.R. 3750 is to "cap the ever escalating costs of campaigns; second, protect the ability of all individuals, and of modest means, to participate in competitive election Federal campaigns; and third, reduce the amount of time and energy spent in soliciting campaign funds."[46]

The real aim of campaign finance reform should be to make elections competitive so that voters have real alternatives at the voting booth. The spending limits, public financing, and bureaucratic complexity of H.R. 3750 and S. 3 fail to do so. The bills passed in both houses only help Congressmen keep their jobs with less effort in fund-raising.

Spending limits are unworkable, increase challengers' difficulties, and are of dubious constitutionality. Loopholes and lack of effective enforcement make the limits ineffective. Insofar as they serve to restrict contributions, they threaten free political activity and hinder challengers, who already face slender prospects of beating incumbents.

Government financing of elections would be enormously expensive, and Americans have demonstrated that they do not want to foot the bill for politicians' campaigns. Any voluntary contribution system such as the "Make Democracy Work" fund will go broke, with the alternative being a combination of expensive requirements on broadcasters and the post office and tax money to subsidize politicians.

The complexity of the present system already contributes to the expense of elections, and especially injures non-incumbent candidates, magnifying the inherent advantages of incumbency. Intricate new rules and more bureaucratization will only exacerbate present problems.

Genuine campaign reforms would allow voters a choice between competitive candidates on election day. This would best be achieved by reducing incumbent advantages rather than by increasing regulation and government control of elections. Contributions should be limited principally by public opinions. Disclosure rules allow voters to choose not to vote for a candidate if they deem certain private donations to be corrupting. That decision should remain with the voter, however, rather than with government.

The American political system requires the same freedom it is designed to protect. If elections are to be truly democratic, they must reflect the interests of in-

46 *Congressional Record*, Extensions of Remarks, p. E 3795.

dividual citizens, not those in government. With the maze of contribution limits, public matching funds, advertising subsidies and new regulations contained in S. 3 and H.R. 3750, federal lawmakers have designed a game only they can win.

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The Heritage Foundation Backgrounder

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May 30, 1991

THE COSTLY CONGRESS BECOMES MORE COSTLY

INTRODUCTION

The American people must "do more with less," said Senate Majority Leader George Mitchell, the Maine Democrat, in his January 29 response to George Bush's 1991 State of the Union message. "Governments must do the same," added Mitchell, "to be more careful with your tax dollars."

These words ring hollow in the face of the Senate spending spree that followed. Congress cannot expect the American people to "do more with less" until Congress itself is willing to do the same. It should start by freezing its committee budgets and staffs at last year's level. Instead, Congress has been boosting its own operating budgets, even after last year's hefty pay raise and major tax increase.

Unreasonable Proposals

"Shocking," is how Senator Jesse Helms, the North Carolina Republican, on January 29 described the increases sought for the Senate Foreign Relations Committee budget by its Chairman Claiborne Pell, the Rhode Island Democrat. The reason for Helms' dismay: Pell proposed and succeeded in getting the Senate Rules Committee to ignore its rules restricting the growth of committee budgets and staff. Pell obtained an exemption to increase fiscal 1991 spending by 17 percent, or $345,000 to add eight new staff members to the Foreign Relations Committee's current staff of 59.

Pell is not alone. Almost unnoticed this year, with the public's attention focused on the Persian Gulf war, both the House and the Senate approved record increases in operating expenses for their committees. These increases were not included in last fall's trumpeted budget deal between the Congress and the White House. The Senate on February 21 approved a biennial budget, increasing committee expenditures by almost $5 million over last year's budget authority of $53.4

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

million. The House, meanwhile, on March 20 increased its annual committee budgets by 10.8 percent to $55.1 million, plus an additional $5.7 million for House Information Systems.[1] The only House committees not receiving more money for fiscal 1991 are Ethics and Intelligence.

Breach of Faith. Pell justifies the Foreign Relations Committee's request for more tax dollars by arguing that it is in response to "an expected large increase in the Committee's workload...including three major arms control treaties, five other major treaties, and activity relating to the Persian Gulf crisis."[2] Senator Conrad Burns, the Montana Republican, denounced this and similar increases sought by other committee chairmen as "a breach of faith with the American people, given last year's budget, to waste even more tax dollars."[3]

Despite such complaints, Pell and his fellow committee chairmen prevailed. In all, Congress has added roughly $14 million to congressional committee coffers. These funds will add even more employees to the Legislative Branch's current staff force of 37,388.

In addition to outright increases in committee spending, Congress approved committee hikes that remain hidden from public view. Example: The Senate Foreign Relations Committee was permitted to roll over to fiscal 1991 some $345,000 in non-recurring funds approved for last year's budget. Thus, although the public record shows that the Committee's budget this year will increase by 2 percent, it will actually increase by 17 percent. "Sleight of hand" is how Helms characterizes such budget deception by the Senate.

Committee Requests

On February 22, the Senate Committee on Rules and Administration presented the "Omnibus Committee Funding Resolution for 1991 and 1992" requesting increases in all nineteen Senate committee budgets for fiscal 1991 and 1992. Twelve of these committees are to receive spending increases, five of them beyond the amounts authorized by normal Senate rules, which only allow cost of living adjustments. In addition to the 17 percent sought by the Foreign Relations Committee, other Senate requests include: Sam Nunn, the Georgia Democrat and Chairman of the Armed Services Committee, for 14.2 percent more; Donald Riegle, the Michigan Democrat and Chairman of the Banking Committee, for 34 percent more; and Lloyd Bentsen, the Texas Democrat and Chairman of the Finance Committee, for 25.3 percent more. The biggest increase is sought by Daniel Inouye, the Hawaii Democrat; he is asking a for a 37 percent increase, or an extra $372,000 for the Senate Committee on Indian Affairs, which he chairs.

After a review of the requests, the chairmen were granted only modest increases of 2 percent for Foreign Relations, 8.6 percent for Armed Services, 24.4

1 *Congressional Monitor*, March 14, 1991, p. 2.
2 Quoted in Senator Jesse Helms' statement to the Foreign Relations Committee, January 29, 1991, p. 2.
3 *Congressional Record* - Senate, February 28, 1991, p. S. 2472.

percent for Banking, 23 percent for Finance and 21.4 percent for Indian Affairs. The increases, although seemingly reduced, do not include the rolled-over funds that Congress will allow committees to use this year.

Similar funding increases were requested by House Committee Chairmen: Henry B. Gonzalez, the Texas Democrat and Chairman of the Banking, Finance and Urban Affairs Committee asked for 25 percent more; John Dingell, the Michigan Democrat and Chairman of the Energy and Commerce Committee, for 15 percent; Morris Udall, the Arizona Democrat and Chairman of the Interior and Insular Affairs Committee, for 34 percent; Robert Roe, the New Jersey Democrat and Chairman of the Public Works and Transportation Committee, for 21 percent; and Les Aspin, the Wisconsin Democrat and Chairman of the Armed Services Committee, for 33.5 percent.

After several hours of debate, the House approved increases of 7.2 percent for Banking, 14.5 percent for Energy and Commerce, 17 percent for Interior and Insular Affairs, 10 percent for Public Works and 19 percent for Armed Services.

Request Justification. Like Pell, many members sought to justify their requests by arguing that such pressing policy concerns as the savings and loan scandal or the Persian Gulf crisis require taxpayers to give more to congressional committees. But such justifications ignore the fact that Senators surely could perform their important legislative duties by using more effectively the 8,561 staff members and $53 million budget they now have. Example: If the Senate Banking Committee's current staff of 42 were not able to provide the oversight to prevent the $300 billion S&L scandal, will more staff be able to do it?

Inouye, meanwhile, says that since he joined the Committee on Indian Affairs, it has increased in popularity and therefore needs extra funds. Senator Dale Bumpers, the Arkansas Democrat, justified one committee's request by stating that more money is necessary to hold hearings in home states of members facing reelection.[4] Representative Dingell at least is more innovative. He says: "In 1795 this was the only committee," so it had actually lost power vis-a-vis other committees since its creation.[5] He already employs 142 people on his committee staff.

Slashing Spending? Congress's funding increases for its committees came only months after the passage of the much-vaunted budget agreement that was supposed to slash spending and reduce the deficit. As expected, however, it has done neither.[6] During floor debate on committee spending this February 28, Senator Helms reminded members of their earlier budget promises by asking "what kind of message will we be sending to the taxpayers back home...increasing our own

4 *Roll Call*, February 11, 1991, p. 5.

5 *Roll Call*, March 4, 1991, p. 11.

6 For further discussion on last year's budget see: Scott Hodge, "Your New Taxes Working for You," The Heritage Foundation *Backgrounder* No. 795, November 2, 1990.

staff after a major tax increase."[7] His plea has gone unanswered, and the resolution to increase Senate committee spending was passed on a near party-line vote: 41 against and 55 for. Concluded Senator Trent Lott, the Mississippi Republican; "How can we ever convince anyone we are serious about controlling spending if we do not begin here."[8]

GROWTH IN LEGISLATIVE APPROPRIATIONS	
Year	Amount (current dollars)
1960	$131,055,385
1970	$361,024,327
1980	$1,199,061,463
1990	$2,230,497,000
1991	$2,547,961,000*
1992	$3,000,000,000*
*Estimated.	

This committee funding feast occurs annually in the House and biannually in the Senate. In fact, since 1946, the legislative budget has soared by more than 3,000 percent. During this period the consumer price index has increased by just over 500 percent.[9] As recently as 1960, the legislative budget was $131 million. By last year it was up to $2.24 billion, an increase of 1,709 percent. Estimated budgets for 1991 and 1992 are higher still: $2.55 billion and $3 billion respectively. An annual budget of $3 billion is the equivalent of $5.6 million for each member of Congress per year.[10]

Staff Increase

The explosive growth in legislative expenses certainly raises the question of what Congress is doing with these taxpayer funds. One major expenditure is the 37,388 salaries of the congressional staff. Congress now employs almost 14,000 more staff members than it did in 1980. Congress's legislative staff in 1987 was nine times greater than that of the Canadian Parliament – the second largest legislative staff in the world.[11]

Congress's staff includes cooks (for subsidized cafeterias), beauticians (for subsidized beauty parlors and barber shops), technicians (for members' personal recording studio), travel agents (to plan tax-paid trips), mail carriers (to deliver taxpayer-funded mail), and personal support staff and committee staff.

Although all areas of the congressional staff have grown, the support staff working directly for members of Congress has almost tripled since 1960, from 6,791 to more than 19,000 today. Committee staff, meanwhile, has also more than tripled, from 910 in 1960 to more than 2,800 today.

Notes the 1989 book *The Imperial Congress*: "[Congress's] most important legislation is drafted by unelected congressional staff, supported by a network of lob-

7 *Congressional Record* - Senate, February 28, 1991, p. S. 2464.
8 *Ibid.* p. S. 2469.
9 *Vital Statistics on Congress 1989-1990* (Washington, D.C.: American Enterprise Institute, 1990) p. 128.
10 *Tax Features*, Vol. 35, No. 3, March 1991.
11 *Vital Statistics on Congress 1989-1990*, p. 125.

SUPPORT STAFF GROWTH (Includes committee staff)		COMMITTEE STAFF GROWTH	
1960	6,791	1960	910
1970	11,274	1970	1,337
1980	18,306	1980	3,108
1990	19,371	1990	2,860

Sources for 1960-1980, Republican Study Committee; sources for 1990, Vital Statistics on Congress 1989-1990, American Enterprise Institute, p.132.

byists representing special interests."[12] This sentiment was echoed by Lott in his February 28, 1991, remarks on the Senate floor: "I have read in publications where staff members were attending conferences in New Orleans on subject matter on which I am supposed to be ranking member. I did not know they were going down there. We need to tighten up this ship a little." The explosive growth of congressional staff reflects the increased demands for constituent services, and the members encouragement of those demands for reelection purposes.[13]

Key Role of Staff. In addition to handling the constituent services that help incumbents get reelected, congressional staff often play a direct role in Congressmen's reelection campaigns. Congressional staff produce the massive taxpayer-funded mailings to constituents that indirectly help incumbents get reelected. Republican and Democrat campaign committees, meanwhile, conduct training seminars for congressional staff during election years to help coordinate campaign strategies with legislative operations. Committee staff also play a key role in helping incumbents obtain federal benefits for voters and campaign contributors.

The congressional staff is the vital resource that enables members of Congress to coerce the Executive Branch. It is this staff that writes the letters, makes the telephone calls, arranges the hearings, and otherwise pressures the federal bureaucracy to serve the interests of Congressmen. Thus, powerful incumbents owe much of their power to their large staffs. It is not surprising that these Congressmen want more staff members.

Congressional staff members are also the essential ingredients in Capitol Hill's micromanagement of the Executive Branch. Revealing the extent of this micromanagement are the records of the contacts between Congress and major federal departments. The Pentagon, for example, receives 2,500 phone calls every working day and more than 100,000 letters per year from Congress.[14] The Department of Housing and Urban Development, from 1986 to 1987, received an average of 2,425 phone calls per month from Congress.[15]

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12 Gordon S. Jones and John A, Marini, editors, *The Imperial Congress* (New York: The Heritage Foundation and Pharos Books, 1988) p. 1.

13 *Ibid*, pp. 125-126.

14 Mark Liedl, "Congress's Busywork," *The Washington Post Outlook*, January 28, 1990.

15 *Ibid.*

Often such communication between Congress and the federal bureaucracy is not congressional oversight, but strong-arm tactics to pressure the bureaucracy to deliver benefits to a Congressman's state, district or campaign contributors.

Sleight of Hand

Although some increases in committee spending have been approved openly this year, other increases have been disguised by the committees. To appear to be saving taxpayer money, Congress uses an accounting gimmick that allows a roll over of funds left over from a committee's previous budget without having to put such spending on the books. The result: Rolled-over funds give the committee more money to spend while making it appear as though the requested increase has not been granted.

In the case of the Senate Foreign Relations Committee, Helms revealed during floor debates that the roll over distracts attention from the actual amounts budgeted. For example, the Foreign Relations Committee originally requested a

SENATE COMMITTEES

Committee	Chairman	Funding 1990*	1991 Request*	Increase	Staff Employed 1970***	Staff Employed 1990***	Increase
Finance	Lloyd Bentsen	$2,814,065	$3,526,076	25.30%	16	57	256%
Foreign Relations	Claiborne Pell	$2,721,004	$3,183,489	17.00%	31	59	90%
Indian Affairs	Dan Inouye	$1,021,116	$1,394,043	37.00%	--	22	--
Armed Services	Sam Nunn	$2,785,811	$3,180,965	14.18%	19	52	174%
Banking	Donald Riegle, Jr.	$2,224,792	$3,241,529	45.70%	23	42	83%

HOUSE COMMITTEES

Committee	Chairman	Funding 1990	1991 Request	Increase	Staff Employed 1970***	Staff Employed 1990**	Increase
Foreign Affairs	Dante Fascell	$3,369,145	$4,137,733	22.81%	21	100	376%
Armed Services	Les Aspin	$2,070,657	$2,765,100	33.54%	37	74	100%
Energy & Commerce	John D. Dingell	$5,355,000	$6,300,000	17.65%	42	142	238%
Education & Labor	William D. Ford	$3,686,681	$4,353,264	18.08%	77	111	44%
Banking	Henry B. Gonzalez	$4,045,000	$4,900,000	21.14%	50	110	120%

*Estimated costs are from Senate Committee on Rules and Administration, Senate Committee Funding: 102nd Congress, 1st and 2nd Sessions, 1991, Committee Print No. 3.
**1991 Republican Committee Survey.
****Vital Statistics on Congress 1989-1990*, American Enterprise Institute, p.128.

17 percent increase in its budget for fiscal 1991 that would hike its budget from $2.7 million to $3.2 million. The Rules Committee ostensibly approved only a 2 percent increase, to approximately $2.8 million. Yet, according to Helms, the Rules Committee would also allow $345,000 in non-recurring funds plus unspent funds from the previous year to be rolled over. Thus, the total 1991 funding recommended by the Rules Committee is $3,183,488. That is only $1 less than their original request. All sleight of hand.[16]

CONCLUSION

Congress, obviously, should practice what it preaches. Just as obviously, Congress does not. Instead, it continues its self-indulgence at the expense of the American taxpayer. If Congress's constant claims of concern over runaway spending are genuine, it should extend line-item veto authority to the President.

For now, Congress should freeze staff and freeze its costs. It should not be allowed to pretend to be concerned with the federal deficit or federal spending, if it can't control its spending on itself.

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Research Assistant

16 *Congressional Record* - Senate, February 28, 1991, p. S. 2466.

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A U.S. Congress Assessment Project Study

July 18, 1989

INNOCENTS ABROAD: HOW THE PRESIDENT CAN DISCOURAGE CONGRESSIONAL DIPLOMACY

INTRODUCTION

The President is "the sole organ of the nation in its external relations, and its sole representative with foreign nations." So spoke Congressman John Marshall several years before he became Chief Justice of the United States. When Marshall uttered these words two centuries ago, American leaders understood the need for the young nation to speak with one voice in world affairs and to present a united front to friend and foe alike.

The U.S. faces different threats today, but unity in the conduct of negotiations and executive direction of diplomacy are as essential as ever to let allies and enemies know where the U.S. stands. And unity is even more important to prevent foreign governments from manipulating divisions within the U.S. government.

"Shared Enteprise." Although John Marshall called for an executive monopoly in the actual conduct of diplomacy, he recognized that, in the formulation of foreign policy in general, Congress and the President share some responsibilities under the U.S. Constitution. As Henry Kissinger announced a little more than a decade ago, "Congress must have both the sense and the reality of participation; foreign policy must be a shared enterprise."

This is the second in a series of studies from The Heritage Foundation's U.S. Congress Assessment Project. It was preceded by *Backgrounder* No. 701, "A Presidential Strategy for Repealing the War Powers Resolution" (April 20, 1979).

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Kissinger's words merely restate what successful Presidents have always known – that congressional support is essential to the success of long-term foreign policy initiatives. Thus Republican Senator Arthur Vandenberg, the powerful Chairman of the Senate Foreign Relations Committee, advised President Harry Truman: "If you want us in on the landing, you have to let us in on the take-off."

Yet congressional deference toward the Executive in the day-to-day conduct of foreign policy is just as important as presidential attempts to secure the support of Congress. Congress must not infringe on the President's constitutional and practical powers to negotiate with foreign nations. The reason: When individual Congressmen or Senators attempt to cut deals with foreign governments, independently of and even in opposition to the diplomacy of an Administration, foreign regimes are able to play off one part of the U.S. government against another.

Dangerous Precedent. The communist dictatorship in Nicaragua recently pursued such a divide-and-conquer policy, encouraged by the independent diplomacy of Texas Democrat Jim Wright, then Speaker of the House. Wright's attempt to act as an unofficial Secretary of State from 1987 until just recently undermined the credibility of U.S. diplomats in Central America and set a dangerous precedent for future confrontations between the branches.

Although unprecedented in degree, Wright's maverick negotiations were only the latest and worst example of "congressional diplomacy," which typically has taken the more subtle form of letters by Congressmen to foreign leaders or attempts by ideological and ethnic lobbies in Congress to influence American diplomacy in favor of particular foreign governments.

Presidents can take a number of measures to reduce the likelihood of congressional diplomacy and to mitigate the damage that it causes.

First, the President should keep Congress accurately informed. This will reduce the possibility that individual Congressmen can justify congressional diplomacy as part of their "fact-finding" function.

Second, the President should consult with Congress, when appropriate, to gauge opposition and secure support for his conduct of U.S. diplomacy. He should deputize formally those congressmen he selects to undertake particular diplomatic missions.

Third, the President should insist that Congressmen allow State Department officials or other Administration representatives to be present at meetings between Congressmen and foreign leaders. This would reduce the possibility that such meetings will provide foreign governments with an incentive to play one branch of the U.S. government against another.

Some would-be congressional diplomats, however, probably will be deterred only by retaliation: presidential political retaliation against particular Congressmen, and in some cases, legal retaliation against foreign governments and agents who attempt to corrupt the American policy-making process for their own ends.

The President should expel or deny visas to foreign diplomats who meddle in domestic politics, and he should push for legislation to stiffen the 1938 Foreign Agents Registration Act to deter foreign encouragement of congressional diplomacy. Firm presidential action to curb congressional diplomacy will be good for the country and for Congress.

"SECRETARY OF STATE" JIM WRIGHT

"At best unseemly, and at worst unconstitutional," was the verdict of Senator John McCain, the Arizona Republican. "Guerrilla theater" and "unbelievable melodrama" is what an unnamed senior Reagan Administration official called it.[1] "An intervention into the day-to-day running of foreign policy that was breathtaking in its scope and whose like is hard to recall," was *The Washington Post*'s characterization in its November 16, 1987, editorial.

What both the conservatives and the liberal newspaper were condemning was the unauthorized diplomacy of then House Speaker Jim Wright. When Ronald Reagan refused to receive Nicaraguan dictator Daniel Ortega during his trip to Washington in 1987, Wright, without notifying the White House or the State Department, met with Ortega. The Speaker, who has since resigned while being investigated for ethics violations, engaged in what amounted to full-scale negotiations with Ortega, even volunteering the services of congressional staff to facilitate proposed negotiations between the Sandinistas and the U.S.-backed rebels.

Meeting with "Friends." Claiming that he merely was acting in a private capacity in talking with "people...from foreign countries whom I regard as friends,"[2] Wright asserted: "I'm not trying to replace Secretary [of State George] Shultz."[3] Yet, others such as Massachusetts Governor Michael Dukakis, Wright's fellow Democrat, thought that the Speaker was trying to play Secretary of State. Quipped Dukakis sarcastically to an audience of supporters: "I hope every single one of you has called or written Jim Wright to thank him for taking over as Secretary of State, pro tem."[4]

When Wright was not claiming that he was acting as a private citizen – "I don't need to get permission from anybody to talk to any human being" – he was attempting to justify his exercise of the diplomatic authority of the President and the Secretary of State on dubious constitutional grounds. "I regard the relationship between the executive and legislative branch as a co-equal relationship," he said, "and I think it's my responsibility to uphold the dignity of the legislative branch."

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1 *The Washington Post*, November 15, 1987, p. A1.
2 *The Washington Times*, November 17, 1989, p. A1.
3 *The Washington Post*, November 17, 1987, p. A1.
4 *The New York Times*, January 4, 1988, p. A12.

Critical Distinction. In offering such a justification, Wright ignored the long-established constitutional tenet that, while the branches of the U.S. government are coequal, the Constitution unequivocally assigns them distinctly different powers. The President, for example, cannot supervise the daily business of the House of Representatives, decide which Congressmen shall be allowed to speak, or appoint members to congressional committees. These are duties that the Constitution assigns to the Speaker of the House. Similarly, the Speaker has no authority to conduct foreign diplomacy.

This critical distinction was brushed aside by Wright, who proclaimed that Congress "should not be subservient and subordinate to the Administrative branch on these issues." This prompted even *The Washington Post* to warn that:

> ... the proprieties of the American system come under heavy assault when the Speaker uses such power as though the actual conduct of diplomacy in this delicate passage were his responsibility. By inserting himself into a negotiation in a way that keeps the president out, he over-reaches recklessly.[5]

The Speaker's foray into diplomacy had real consequences. It reduced significantly the Administration's leverage in dealing with Nicaragua. One Sandinista official boasted that Ortega's strategy of playing Wright off against Reagan would "leave the administration totally isolated."

THE CONGRESSIONAL FOOT IN THE FOREIGN POLICY DOOR

The Speaker's adventures in congressional diplomacy are but the latest in a series of independent congressional diplomacy initiatives by members of Congress. In early May 1985, for example, less than a week after the House had rejected an Administration request for humanitarian aid for the Nicaragua Freedom Fighters, known as the Contras, Sandinista leader Ortega flew to Moscow to seek more military aid. The next weekend Representatives George Miller of California, and David Bonior of Michigan, both Democrats, flew to Managua, the Nicaraguan capital, to talk with Sandinista officials. U.S. Embassy officials were excluded from the meetings. According to press reports, the Congressmen asked the Nicaraguan Marxists to "help them (the Democrats in Washington) out of a difficult political situation" by making concessions to opposition groups in Nicaragua.[6] Ortega's trip to Moscow had embarrassed Democrats by seeming to prove Reagan's point that the Sandinista regime was a Soviet client state.

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5 *The Washington Post*, November 16, 1987.

6 Evans and Novak, *The Washington Post*, May 15, 1985.

Central America is not the only region of the world in which maverick congressional diplomats take an interest. In January 1985, during a visit to Washington, Belgian Prime Minister Wilfried Martens was handed a letter signed by thirteen House Democrats. They urged Martens to reverse his position supporting the immediate deployment of cruise missiles in Belgium. The Congressmen were asking the Belgian leader to repudiate the policy of the U.S. government and NATO.

Congressional diplomacy was not an innovation of the Reagan years or of congressional Democrats. In the Carter Administration, for example, during the controversy over the Panama Canal Treaty, Senate Majority Leader Robert Byrd, Minority Leader Howard Baker, and other Senators travelled to Panama and negotiated changes in the treaty with Panamanian officials. George Hansen, the former Republican Congressman from Idaho, traveled to Tehran in November 1979 and attempted to negotiate the release of 52 Americans held hostage in the U.S. Embassy. Hansen reported that the purpose of his ten-day visit was to "get in on an unofficial basis and do business."[7] During the 1980s, however, maverick diplomacy by Congressmen has become more aggressive, and with greater consequences for U.S. policy.

FOREIGN LOBBIES IN CONGRESS – A PATTERN OF MANIPULATION

Highly visible ventures in unofficial diplomacy by leaders of Congress are still relatively rare. Much more common is behind-the-scenes negotiation between Congressmen and domestic lobbies and agents for foreign states.

Congress is far too susceptible to lobbying by special interests to be a reliable participant in the conduct of U.S. diplomacy. Just as pork-barrel politics dominates the contemporary federal budget process, congressional foreign policy-making often serves the interests of powerful, yet narrow, constituencies.

Worldwide Pressure Groups. Such constituency pressures are not new. Examples: In the 19th and early 20th centuries, Congress often acted upon the demands of German-American and Irish-American lobbies to oppose the pro-British foreign policies of U.S. Presidents. Since the 1950s, Congress has been especially responsive to the demands of American citizens with relatives in the "captive nations" of Eastern Europe. East Asian countries also have been powerful lobbyists on Capitol Hill, from the days of the postwar "China Lobby" to the "Koreagate" of the 1970s.

The pro-Israel lobby is the most powerful domestic pressure group devoted to the national interest of a foreign power. The Eisenhower Administration's Middle Eastern diplomacy suffered an embarrassing defeat in 1956 when

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7 John Felton, "Iran, Tensions Mount as Crisis Continues," *Congressional Quarterly*, December 1, 1979, p. 2704.

Congress, under pressure from American advocates of Israeli interests, refused to fund the Administration's proposed loan to Egypt for the Aswan Dam. This congressionally imposed reversal in policy contributed in part to Egyptian strongman Gamal Nasser's decision to nationalize the Suez Canal, which provoked war between Egypt and Britain, France, and Israel, as well as a rift between these allies of the U.S. and the U.S. government. It was also a factor in the drift of Egypt into the Soviet camp for more than a decade.

In 1975, the American Israel Public Affairs Committee (AIPAC) authored "the letter of seventy-six" Senators protesting the Ford-Kissinger position in the delicate negotiations about the future of the Israeli-occupied Sinai.[8] During the Reagan Administration, pro-Israel groups pressured Congress to oppose Reagan's sale of the advanced technology of the Airborne Warning and Control System (AWACS) to Saudi Arabia and to prevent his visit to the military cemetery in Bitburg, West Germany.

Extreme Actions. Under pressure from Greek-American lobbyists, Congress defied presidential requests and imposed an embargo of arms sales to Turkey in 1975 because of the Greek-Turkish conflict over Cyprus. Congress has imposed even harsher measures against the South African government. The anti-British policies of the Ad Hoc Committee on Irish Affairs, which now includes 122 Congressmen, have been too extremist even for the Republic of Ireland; its former Prime Minister, Jack Lynch, appealed to members of Congress in the 1970s not to join the Ad Hoc Committee.

Although American citizens clearly have the right to express themselves on any issue they choose, the success of ethnic lobbies in Congress suggests that Congress is too vulnerable to special interest pressure to be trusted with the formulation of a coherent foreign policy in the American interest. Said former House Foreign Affairs Committee Chairman Clement Zablocki, the Wisconsin Democrat, in 1978, "Congress is too responsive to the lobbies of ethnic and special interests in the U.S. to be able to take the lead in foreign policy without endangering the national interest."[9]

DIPLOMACY AND THE CONSTITUTION

Although no general "foreign affairs" power explicitly is granted either the President or Congress by the Constitution, the President is granted far more diplomatic authority than Congress. One source of presidential authority in diplomacy is found in Article II of the Constitution:

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8 Sen. Charles McC. Mathias, Jr., "Ethnic Groups and Foreign Policy," *Foreign Affairs*, Summer 1981, p. 993.

9 Thomas M. Frank and Edward Weisband, *Foreign Policy by Congress* (New York: Oxford University Press, 1979), p. 165.

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur,....[10]
> [Additional authority has been derived from the President's power] to receive ambassadors and other public ministers,[11] [and the power to] nominate, and by and with the Advice and Consent of the Senate,... appoint Ambassadors, other public Ministers and Consuls....[12]

Inasmuch as treaties have the force of laws, the President is responsible for their execution. The Constitution in Article II, Section 3, provides that "He shall take care that the Laws be faithfully executed." This "take care" clause also gives the President the power to enter into executive agreements with foreign governments, without Senate ratification, in the course of carrying out the obligations of laws or treaties. Congress and the courts always have recognized the customary right of the President to appoint executive agents, who may be private citizens, to carry out particular diplomatic missions.

President's Unqualified Right. The President also is given constitutional authority over executive foreign affairs agencies by his power to "require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices...." In the Department of Foreign Affairs Act of July 27, 1789, creating what later became the Department of State, the First Congress, many of whose members had helped to draft the Constitution, ordered U.S. diplomats to conduct diplomacy "in such manner as the President of the United States shall from time to time order or instruct." The same act gives the President an unqualified right to remove the Secretary of State, demonstrating the intent of the Founders to make the Secretary the President's agent in foreign affairs.

THE ROLE OF CONGRESS

The Senate

Under the Constitution, "the treaty power" is a concurrent power, shared by the President and the Senate. Controversy has arisen from time to time over the scope of the Senate's share in the treaty power.

George Washington believed that the Constitution permits Senate advice on treaties in the negotiation as well as the ratification stage. Although Washington, after a visit to the Senate in 1789, never returned in person to

10 Article II, Sec. 2.
11 Article II, Sec. 3.
12 Article II, Sec. 2.

answer questions (a duty he considered undignified and unpleasant), he continued to consult the Senate at most stages of negotiation. He submitted the names of treaty negotiators to the Senate for confirmation, and (except in the case of the Jay Treaty with Britain) he submitted the instructions given to the negotiators for Senate approval.

Consulting the Senate. Over time, the Senate ceased insisting on its right to approve treaty negotiators or their instructions and acquiesced to more presidential discretion in treaty-making. As the great presidential scholar Edward Corwin noted, "The wording of the Constitution itself visualizes treaty-making as one continuous process to be performed by a single authority, the President acting throughout in consultation with the Senate." The Senate, over time, split "the constitutional authority into two authorities.. .a Presidential function of formulation and negotiation followed by a Senatorial function...of criticism and amendment,...or rejection."[13]

Nevertheless, subsequent chief executives followed many of the precedents set by Washington: consulting with key Senators during negotiations, appointing Members of Congress to negotiating teams, and occasionally seeking Senate confirmation for important negotiators. The 1945 United Nations Participation Act, for example, requires Senate confirmation of the U.S. representative and other delegates to the United Nations. Congress, of course, by statute, created the State Department and other federal agencies engaged in diplomacy, and defines the duties of subordinate officials in the executive branch. The Senate can influence the President's selection of ambassadors by refusing to confirm his nominees. All of this may be considered the "diplomatic policy making" for which Congress has a constitutional role.

The House of Representatives

Although the Senate has a concurrent if not clearly defined share with the President in diplomatic policy making, the House has but an indirect role. The distinction was dramatized in 1796, when George Washington notified the House that the Senate had ratified Jay's Treaty with Britain. When the House demanded a copy of the negotiator's instructions, Washington (who had shared the instructions with the Senate) refused, citing the need for secrecy and the exclusive role of the Senate as the President's partner in diplomatic policy making.

Although the Constitution does not give the House a role in treaty formulation or ratification, the power to appropriate funds and pass legislation executing a treaty gives the House considerable indirect influence. It can also use its exclusive power to appropriate funds to render executive agreements meaningless. Example: During the Ford Administration,

13 Edward Corwin, *The Constitution and World Organization* (Princeton: Princeton University Press, 1944), p. 36.

Congress in 1974 refused to enact legislation to carry out an executive agreement with Turkey which would have ended the embargo on U.S. arms sales to that country.

Its appropriations power means that the House in practice is a participant in diplomacy. And with the Senate, the House has a role in creating the State Department and defining its duties. No theory, however, justifies or condones participation by members of the House in the conduct of diplomacy, rather than in diplomatic policy-making.

Wilson's Approach vs. Washington's

A drastic break with the Washingtonian tradition of cooperative presidential leadership in diplomacy came with Woodrow Wilson, who as a professor urged the President not to consult with the Senate at all, but to pursue unilateral, independent negotiations. Wilson suggested that the President force the Senate to comply with his actions by getting the U.S. "into such scrapes, so pledged in the view of the world to certain courses of action, that the Senate hesitates to bring about the appearance of dishonor which would follow its refusals to ratify the rash promises or to support the indiscreet threats of the Department of State."

Although this view has no basis in the Constitution or the practice of the Founders who became Presidents, Wilson, who sought to replace the system of "checks and balances" in America with a European-style executive/party government, followed his own advice in connection with the League of Nations treaty, which he presented as a *fait accompli* to the Senate, refusing to permit the amendments that probably would have ensured its passage.

After Wilson, successive Presidents, without returning to Senate approval of instructions to treaty negotiations or other early practices, have been careful to secure Senate (and sometimes House) support during the negotiation of treaties.

Congressional Diplomacy at the President's Request

Certain activities, however, are forbidden to Congress under the Washingtonian as well as the Wilsonian view. Example: Neither the Senate nor the House of Representatives may appoint agents to carry on actual negotiations with foreign powers, nor may individual Senators or Congressmen carry on such negotiations themselves. The only exception is when the President appoints Members of Congress to diplomatic teams under his supervision. The President has the power to appoint Senators or Congressmen as diplomats to negotiate treaties or to undertake other diplomatic activities.

Congressional Negotiators. As early as 1814, James Madison appointed Senator James A. Bayard of Delaware and House Speaker Henry Clay of Tennessee to negotiate a peace treaty with Britain. William McKinley appointed three members of the Senate Foreign Relations Committee to negotiate the 1898 Treaty of Paris, which ended the Spanish-American War.

Theodore Roosevelt, in 1903, appointed Senator Henry Cabot Lodge of Massachusetts to an Alaskan boundary tribunal. Warren G. Harding, in 1921, appointed Lodge, then Chairman of the Senate Foreign Relations Committee, to the Conference on the Limitation of Armament. To encourage bipartisan support, Harding also appointed Senate minority leader Oscar W. Underwood of Alabama to the same disarmament conference. Herbert Hoover followed Harding's example in appointing Congressmen to the London Naval Conference in 1930.

Franklin Roosevelt appointed congressional commissioners for the World Monetary and Economic Conference in 1933 and the International Refugee Conference in 1943. More important was Truman's appointment of Members of Congress to the 1945 United Nations conference in San Francisco. Recalling the dismal fate of Wilson's projected League of Nations, Truman wanted to ensure that congressional opposition would not torpedo his plans for U.S. participation in international organizations. This strategy of securing congressional support for the U.N. was furthered by the statutory requirement that two Senators and two Representatives be alternate members of the U.S. delegation to the U.N.

DISCOURAGING CONGRESSIONAL DIPLOMACY

Congressional diplomacy can take many forms. It can be unauthorized negotiations between individual Congressmen and foreign representatives; it can be letters to foreign leaders by Members of Congress dissenting from the official U.S. diplomatic line; or it can be congressional efforts on behalf of foreign states motivated by the desire of Congressmen to please powerful domestic lobbies.

To reduce the likelihood of congressional diplomacy, the President should:

1) Keep Congress accurately informed.

Congressional diplomacy, in the form of off-the-record negotiation with foreign governments and intermediaries, is often disguised as "fact finding" by Congressmen and Senators. The President cannot easily prevent such abuses, but he can remove the ostensible justification for them by asking executive branch foreign affairs agencies to provide accurate and timely briefings to Congressmen. The Constitution gives the President a limited executive privilege in foreign affairs, which he should use only when absolutely necessary. If an Administration unreasonably withholds information which Congress needs to make informed decisions about its own duties in foreign policy making, Congress will have no choice except to try to obtain accurate information about foreign affairs from sources other than the President, including foreign governments. In such circumstances, reasonable fact-finding meetings or travel may provide a cover for an extension of unreasonable congressional diplomacy.

2) Consult with Congress.

Some Members of Congress may be tempted to engage in congressional diplomacy to remind the Executive that they belong to a coequal branch. Some Senators and Representatives who do not care about a particular policy on a given issue may want the President to show respect either to them or to their branch of government. These legislators can sometimes be convinced of a particular policy if the President and his policy makers simply keep them informed.

3) Insist that the Senate has greater prerogatives than the House in foreign policy.

Members of particular factions in the House of Representatives have been the most consistent opponents of presidential foreign policy in recent decades. Reforms of the 1970s that dispersed power in the House have increased the power of ethnic and ideological foreign policy lobbies. In addition, ethnic lobbies can have more impact on House than on Senate races, because of the smaller amounts of money that can prove decisive in a congressional district campaign. This makes Representatives more responsive to these groups even if the groups do not represent the members' constituencies. The President can minimize the effect of such pressure group politics in the House by publicly reaffirming the unique responsibilities in diplomacy that the Constitution assigns to the Senate. He can do this by following the example of George Washington: share some information with the Senate that is not shared with the House.

4) Deputize Congressmen as diplomats formally, not informally.

The Reagan Administration mistakenly solicited the cooperation of Speaker Wright in diplomacy without defining a formal and limited role for him. Whenever possible, a President who seeks to enlist congressional help in the details or conduct of diplomacy should formally appoint Members of Congress as part of a diplomatic team, with a defined mission of a limited duration. This will tend to persuade the public and Members of Congress that the President's solicitation of a Congressman's aid is neither the beginning of an indefinite congressional partnership with the President in negotiations, nor the recognition of inherent congressional prerogatives in the conduct of diplomacy. Another advantage: the presence of Administration officials on the team might impose discipline on congressional members.

5) Insist that Members of Congress notify foreign leaders that they cannot speak for the U.S. government.

The State Department recognizes that Members of Congress can communicate with foreign officials as part of their legislative duties, as long as they advise the foreign officials that they cannot negotiate on behalf of the U.S. The Bush Administration should advise all foreign embassies in the U.S. of this policy.

6) Insist that a member of the Department of State or other Administration official be present at meetings between Members of Congress and foreign leaders.

Rather than announce such a policy during a conflict with Congress and risk having the policy labeled a political move in a particular controversy, the President should consistently insist on the presence of Administration officials at all significant meetings between foreign leaders and Members of Congress.

Stiffer Measures. Sometimes these measures to limit congressional diplomacy may not be enough. A Congressman may be determined to embarrass the Administration or to pursue his or her goals or those of a constituency through independent, informal negotiation with foreign governments. In such cases, the President should punish the congressional diplomat politically. In rare instances, as when foreign agents attempt to manipulate the U.S. political process, legal penalties may be appropriate.

If necessary, the President should:

1) Expel foreign diplomats who meddle in U.S. domestic politics.

Foreign diplomats, who engage in attempts to manipulate policy divisions between the President and Congress, should be declared *persona non grata* and sent out of the country.

2) Deny visas to foreign leaders who show contempt for America's constitutional processes.

The Administration should deny visas to foreign heads of state and other foreign agents who clearly come to the U.S. to meet with Members of Congress without including any Administration officials. In extreme cases, the Administration should bring criminal prosecutions against foreign agents who impermissibly interfere in the constitutional processes of U.S. foreign policy making.

3) Stiffen the Foreign Agents Registration Act.

The 1938 Foreign Agents Registration Act[14] should be amended to stiffen the penalties for foreign inducements to congressional negotiation. The Act requires U.S. organizations that engage in activities on behalf of foreign countries and groups to identify themselves and disclose their activities and finances. The Act should be amended to increase specific requirements for disclosure of all lobbying efforts directed at Members of Congress by foreign agents. The President also should direct the Justice Department to use its discretion according to the present act to prosecute Americans who have not registered as foreign agents, even though their political activities on behalf of foreign governments would come under the Act.

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14 Foreign Agents Registration Act of 1938, Sec. 1 et seq., as amended 22 U.S.C.A. and 611 et seq.

CONCLUSION

Congressional diplomacy weakens the ability of the U.S. to carry out a consistent and effective foreign policy. The Constitution, which gives Congress as an institution important roles in foreign policy-making, does not give individual Members of Congress any authority to engage in diplomacy with foreign countries or their agents. As the success of the Nicaraguan government in exploiting divisions between the White House and Congress showed, the practice of maverick diplomacy by members of Congress encourages foreign regimes to try to take advantage of America's uniquely open and decentralized government.

Speaking with a Single Voice. Countries that attempt to play one branch of the U.S. government against another, whether dramatically as in the case of the Wright-Ortega affair, or quietly through influence over domestic pressure groups, need to be firmly discouraged by the Executive. So do Congressmen who abuse the powers of the legislative branch. The President should use all the means at his disposal and request additional, new measures, to ensure that the U.S. government speaks in the diplomatic arena with a single voice.

Michael E. Lind
Visiting Fellow

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WHITE PAPER

ON

THE DEPARTMENT OF DEFENSE

AND THE CONGRESS

This is something I did at DoD. Cheney's people also have some good follow-up information

↓ Dave Mason

call Pete Williams if you want to speak with someone at DOD

REPORT TO THE PRESIDENT
BY THE SECRETARY OF DEFENSE
JANUARY 1990

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EXECUTIVE SUMMARY

Every recent study of defense management and organization has concluded that reform of the Congressional defense oversight process is a necessary element in an effort to improve defense management. Most specific recommendations have focused on reform of the budget process, including the annual defense authorization. The scope and level of detail in the annual Congressional defense budget review has grown significantly over the past twenty years or more, with many measures of activity doubling or trebling in short periods. The nearly complete overlap of the defense authorization and appropriation processes is one of the most notable aspects of the budget review. Other notable features include the large number of budget line-item changes and other directions to the Department of Defense (particularly affecting specific programs and activities) and the activities of committees without direct defense oversight responsibilities which nonetheless significantly affect defense resources and operations.

Factors which have led to the growth in Congressional defense activity include: the large portion of discretionary spending in the federal budget represented by defense; the desire of Members of Congress to serve constituent interests; competition within the Congress due to a reduction in the power of committees and the blurring of jurisdictional lines; and, the frequently adversarial relationship between Congress and the Department of Defense.

The duplication, complexity and lack of coordination in the Congressional defense process is, in itself, a hindrance to better management of the Defense Department. Among the negative results of this process are conflicting mandates, delays and increased costs in programs (totalling over half a billion dollars at a minimum), and instability in planning. The most damaging aspect of the current Congressional defense process is the degree to which it

I. INTRODUCTION

> The Armed Services Committee now authorizes almost every element of the defense budget each year, down to almost the last screw and bolt....At its worst this tendency has spurred not unreasonable charges of congressional "micromanagement"....But even more troublesome, this trend to micromanagement has the staff and members focusing on the grains of sand on the beach while we should be looking over the broad ocean and beyond the horizon.[1]

From 1789 until the Budget and Accounting Act of 1921 and the Classification Act of 1923, Congress budgeted for practically every individual position in the executive branch with a separate line item. Control was incredibly detailed, but Congress was spending increasing amounts of time working on matters of decreasing importance. Congress had three choices: return to the inactive government of the pre-Civil War years, continue playing the role of accountants, or delegate the details. Congress chose to delegate and both Congress and the executive branch were able to operate more efficiently. Congress faces a similar choice today. It can retain control over the details or expand its vision to scan the oceans and horizon in a manner that is mutually beneficial to both branches.

This report is based on the premise that it is more important for both Congress and the executive branch to navigate the ocean than to pick at the sand grains while we let the ocean navigate us. Before a new vessel can be designed, however, it is appropriate first to make a chart of the currents.

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1. Sen. Sam Nunn, testimony before the Temporary Select Committee to Study the Senate Committee System, 98-2, Aug. 2, 1984, Part 2, pg. 64.

national security policy. The Congressional process for defense has paralleled these broader developments.

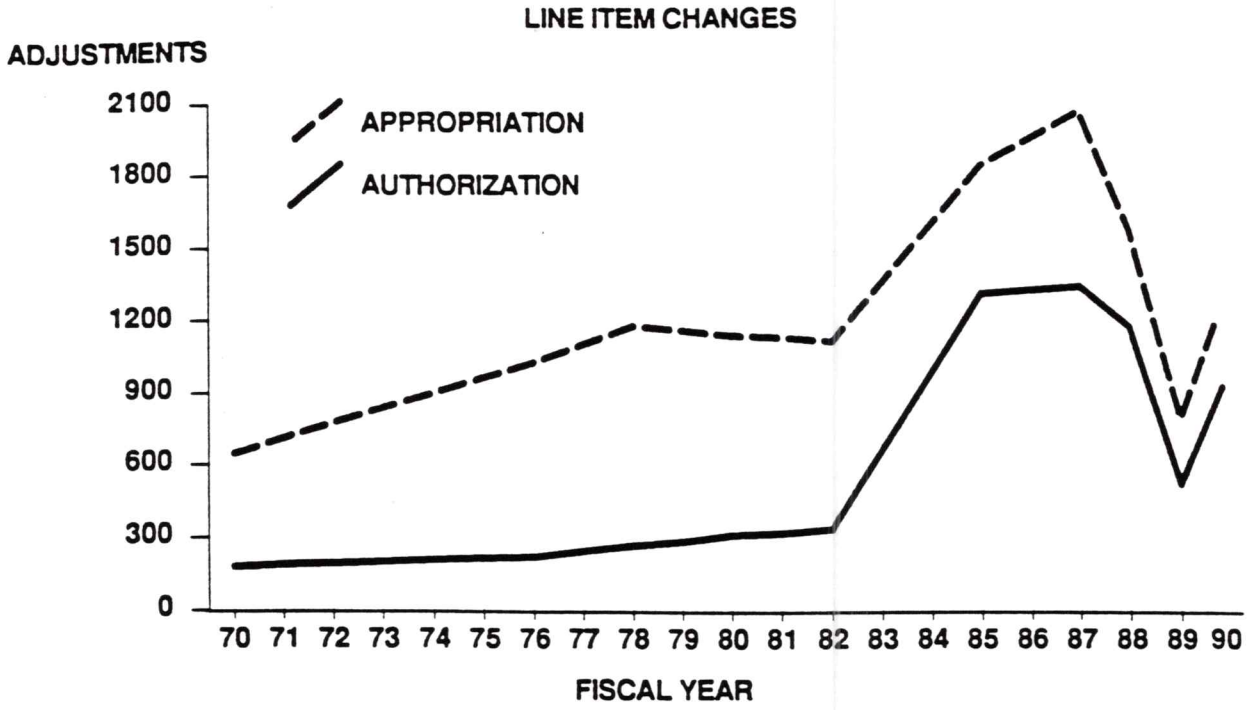
The following pages describe three aspects of the Congressional defense process: the detailed annual budget review; the proliferation of interventions designed to guarantee specific outcomes rather than providing more general policy guidance; and, the large number of committees and subcommittees that play a role in formulating defense policy.

A. The Congressional Defense Budget Process

The major features that distinguish the U.S. legislative process for defense are the number of actors and the frequency of decisions. Virtually no other country puts its defense budget through such detailed legislative scrutiny every year, and none has that budget reviewed by as many as six independently powerful committees: the Budget, Armed Services and Appropriations Committees of both the House and Senate.

1. History and Development of Annual Defense Budget Review

The annual review process was not always this cumbersome. Before 1959, Congress authorized weapons or forces without revisiting the issue annually. This changed by increments, with most of the yearly authorization mandates being adopted between 1959 and 1970. The Budget Committees were formed in 1974 and developments since that time have led to a growing preoccupation with the budget and a significant crowding out of other legislative activity. As a result, budget-related bills (including the defense authorization) have become the preferred means of enacting policy proposals even if unrelated to the budget. By 1983, annual authorizations were required for the entire defense budget. As the authorizing committees shifted away from yearly posture hearings and oversight of selected issues toward examining each line-item in every year's defense budget, their appropriations counterparts increased the scope of their review. Traditionally, the defense appropriations subcommittees

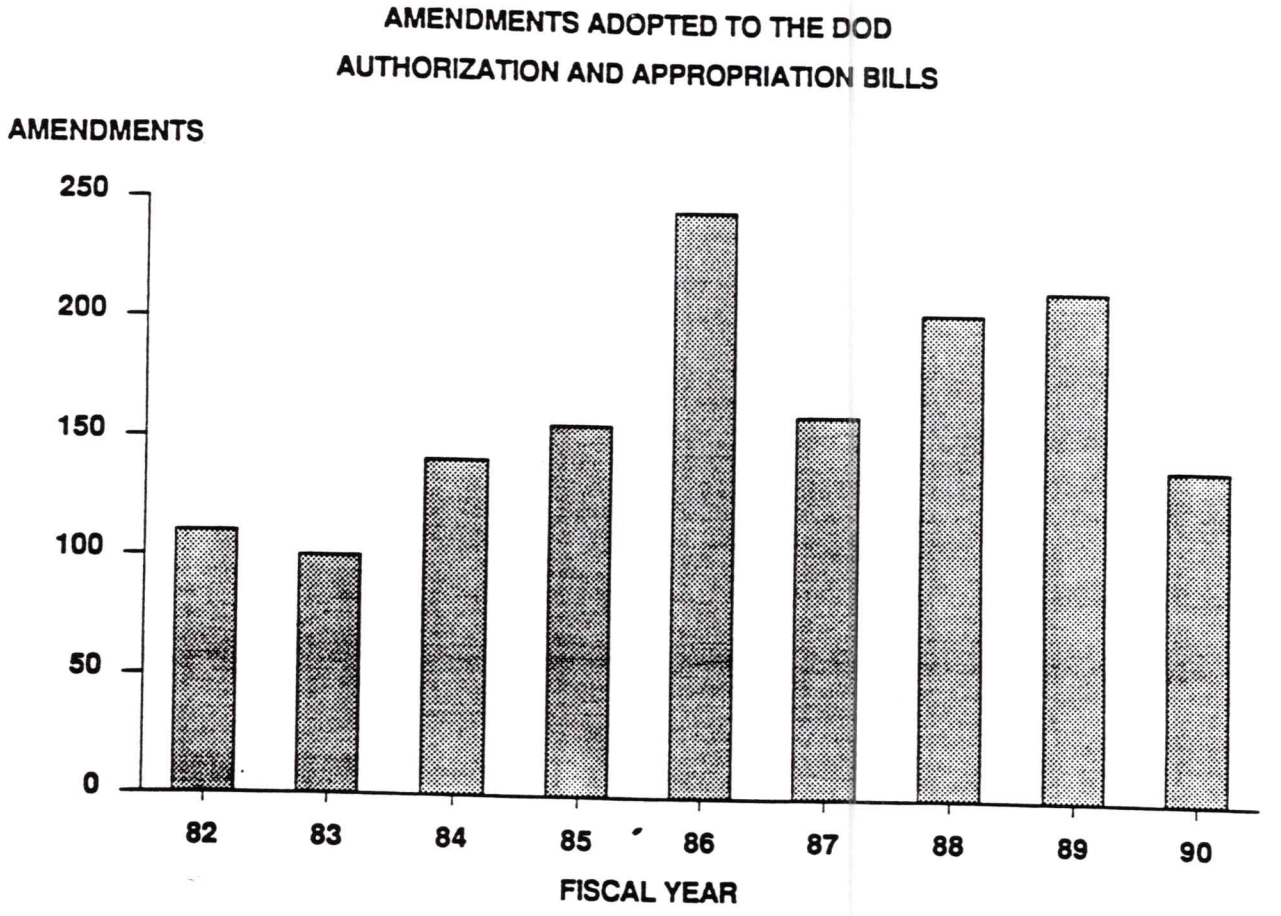


The sharp drop in 1989 reflects the second year of the Department's first two-year budget, and of a late 1987 two-year agreement between congressional leaders and the President on the aggregate or "top line" figures for the federal budget's major functional categories, including defense. The number of adjusted line-items increased with the 1990 budget, but fell short of the pre-1989 levels.

Budget justification books are another measure which shows the growth and detail of the annual review. The content of these books is largely mandated by the Armed Services and Appropriations Committees. The 1977 budget justification ran 12,350 pages. For 1988, the justification took 30,114 pages -- almost two and a half times as many pages as eleven years earlier. (SEE TABLE) The fact that no one person can comprehend this material in total contributes to a myopic and disjointed review process.

by 175%.[2] The growth of staff expands what Congress is able to do, greatly magnifying the level of detail in most of its work.

The detailed attention Congress gives the defense budget is also in evidence on the House and Senate floors. It has become almost commonplace for the House to spend more than 50 hours on the defense authorization bill -- and for the Senate to spend more. During those hours, each chamber typically adopts about 100 amendments. These are remarkable numbers to persist year after year.



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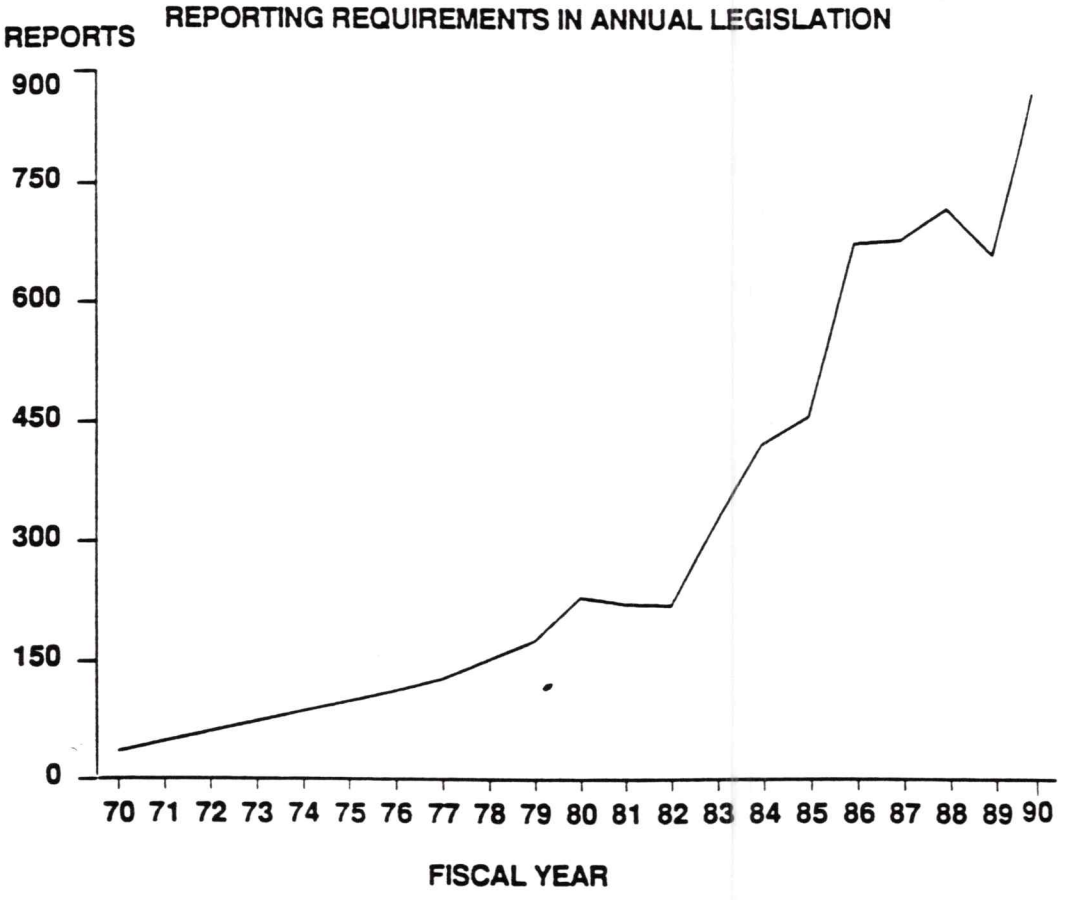
2. Wilbur D, Jones Jr., "Congressional Involvement and Relations", Defense Systems Management College, Ft. Belvoir, VA, July 1989 [Second Edition], pg.20.

reports, but referred to here simply as "reports") required by annual legislation and accompanying committee and conference reports compiled by DoD, most of which are not included in the Clerk's compilation. In 1970, at the height of the Vietnam War, the annual funding bills required only 36 such reports from DoD. In 1988, 719 were required, an increase of almost exactly 2,000%. From 1982 to 1987 alone the number more than tripled. While the number of new requirements declined for the first time in 1989, growth resumed in the 1990 budget cycle, reaching a new high of 861. Reporting requests in the House Armed Services Committee's reported authorization bill increased by over 100% over last year even before more reports were added on the House floor.



1. Volume of Intervention

As with line item adjustments, Congressional intervention has grown significantly over a long period, but exploded in the 1980s. The seven hundred or so reports required in annual authorization and appropriation acts are usually coupled with program-specific requirements for which the report is an enforcement tool. Thus, the 2,000% increase in reporting requirements discussed above largely represents increased program intervention efforts. There are other indicators of the same problem. General provisions -- non-codified statutes which usually apply for a limited time -- have shown marked growth, increasing from 64 in 1970 to a peak of 236 in 1987, a 360% increase. Fully half of the pages in appropriations acts are now filled with this policy-type guidance.

A more comprehensive measure of specific Congressional directions to the Department is a report on "Actions on Recommendations in Congressional Committee Reports and Related Authorization and Appropriation Acts". The last such report, prepared in 1986, lists 1,024 specific requests and the Department response to each. Almost none of these are matters of general policy, and the total still excludes program-specific provisos and limitations included in the main text of the authorization and appropriations bills.

2. Types of Intervention

The variety of requirements levied on defense programs in bills and reports also demonstrates the pervasive nature of Congressional intervention.

Reports. Hundreds of simple reports (those not coupled with other requirements) are required each year in legislation and committee reports. While some reports are on broad topics such as arms control options, most are on specific programs, and are intended to force a review of an activity within DoD or to provide Congress with information to monitor or direct department activities. Congress also frequently requires reports which essentially

for political or geographical reasons is of increasing concern to the scientific community, and threatens to erode U.S. technological leadership.

Enforcement. Beyond the expectation that DoD will comply with statutory and report language, Congress imposes additional enforcement mechanisms such as funding fences (to be released after a specified action), certifications, review periods, prior notification, and outside audits, tests or cost estimates. The majority of the seven hundred reports required in annual legislation are enforcement mechanisms of this nature.

C. Committee Jurisdiction

The Defense Department has to contend with many more committees than the six with direct responsibility for its budget. In 1988, 14 full committees and 43 subcommittees or panels held hearings concerning DoD. Some 30 committees and 77 subcommittees claim some degree of oversight responsibility for DoD. The activity of "non-defense" committees includes policy initiatives which have an increasing effect on DoD. Oversight activity by committees other than appropriations and armed services soared in the mid-seventies. A GAO study requested by the HASC shows that while the number of hearings at which DoD officials testify has remained relatively constant over 25 years, the number of committees calling DoD witnesses more than doubled between 1974 and 1975, rose further the next year, and has continued at a level three times as high as before 1974.

Environmental laws are only one kind among several that are passed without the participation of the Armed Services committees even though they impose substantial direct or indirect burdens on DoD. As the largest civilian employer in the government, DoD's performance is strongly affected by compensation and ethics laws, but the defense authorizing committees are not usually given an opportunity to take DoD's particular needs into account while legislation in these areas is being crafted. Similarly, the department is responsible for well over half of all federal purchases, but procurement process bills are heard by the House Government Operations and Senate Governmental Affairs Committees without referral to Armed Services.

III. FACTORS CONTRIBUTING TO THE DETAILED AND OVERLAPPING REVIEW PROCESS

Aspects of the budget and policy process which present problems for defense management represent opportunities for individual Members of Congress. The hours of debate, and stacks of amendments offered during House and Senate floor debate, say something important about the stakes and the interests involved in the defense debate. Defense consumes one-fourth of the federal budget, but represents two-thirds of discretionary spending (expenditures that can be altered without changing an underlying statute.) Members want to bring something home to the district, or to claim credit for sponsoring a useful program. Federal deficits make it tough to find new funds for programs, so the allure of controllable money makes the defense budget hard to resist.

DoD's proportion of the discretionary budget leads to reluctance to pass the Defense Appropriation bill until other appropriations are done. In 1989 the Defense Appropriation was signed eight weeks into the new (1990) Fiscal Year. In every other non-election year since 1979, the defense budget has been enacted at least two months after the start of the

to reduce spending in unspecified accounts, is applied. While major issues are reviewed in committee and on the floor, almost all line-item changes are produced in this committee process. In fact, since line items are contained in committee reports and conference explanatory statements, they are subject to amendment on the House and Senate floors only in an indirect fashion.

Intervention in individual programs through report language or statute can be an even more refined method of serving constituent interests. It is of little use to a member to increase a program's budget, only to see a competitor take the contract away from his district. Skillful use of legislative conditions can deliver money and jobs as surely as writing a check. The motivation for all of this activity was stated succinctly by Senator Ted Stevens: "Congress has made the defense bill a jobs bill."[4]

The political incentives for non-defense committees to exercise authority over DoD are similar to the ones that drive budget practices. When direct spending is constrained fiscally, Congress tends to substitute regulatory policy initiatives to promote various goals. The costs of these initiatives are borne either by the private sector, or by other government agencies whose spending is not counted -- if it can be accurately counted at all -- against the spending limit the budget resolution sets for the originating committee. The expansion of state authority to assess fines and to order DoD to undertake clean-up activities in preference to expanding direct funding of federal environmental activities is a prime example of this phenomenon.

At the same time, a diffuse policy process allows Members to go on record in support of conflicting goals. When DoD environmental policy is set by non-defense committees,

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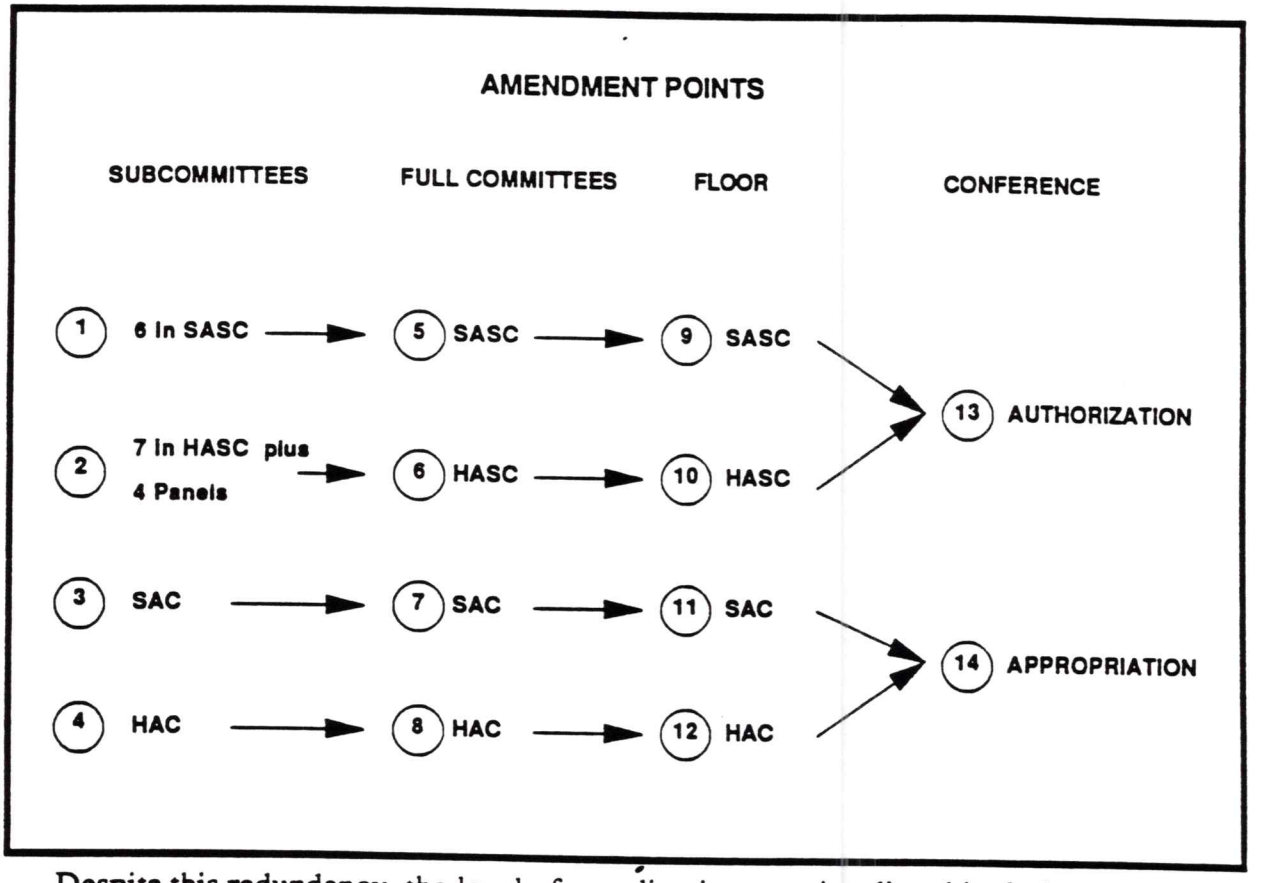
4. Quoted by Mackubin T. Owens in "Congress' Role in Defense Mismanagement", Armed Forces Journal International, Apr. '85, pg. 94.

IV. CONSEQUENCES OF THE CONGRESSIONAL DEFENSE PROCESS

A. Overlapping and Conflicting Mandates

With so many line-item changes, it is obvious that the authorizing and appropriating committees are often dealing with the same items on roughly the same level of detail, often at about the same time. A single program's budget can be adjusted in at least 14 points in the annual legislative process, not counting the budget resolution, and can be voted on even more frequently.



Despite this redundancy, the level of coordination remains disturbingly low. In past years, the committees have had running disputes about what the Armed Services Committees have considered to be unauthorized appropriations, the practice of funding projects which are not authorized or appropriating funding above the authorized level. In 1986, the divergence at the line item level between the final authorization and appropriations bills was $6.5 billion.

The problem in each case is not that any of the conflicting goals are necessarily unreasonable in isolation, but that each is treated in isolation, while the effects are combined in defense operations.

The lack of integration among the different committees which impose mandates on DoD leads to the proliferation of statutory provisions governing defense activities. The Office of Technology Assessment's recent report on the defense technology base discussed the effect of overlapping and conflicting Congressional mandates, concluding that "while Congress did not intend the [defense acquisition] system to be slow, cumbersome and inefficient, laws passed to foster goals other than efficient procurement have made it so."[5]

B. Program Costs

Congress directed specific management actions in over 100 instances in the 1989 budget cycle. A review of the 42 most significant program requirements provides some measure of the cost and effect of Congressional intervention practices. These requirements increased costs in 75% percent of the programs, at a cost (combined with the costs of similar requirements on the same programs in prior years) of over half a billion dollars over the life of the affected programs. In only one instance was a schedule accelerated and savings realized as a result of these Congressional requirements.

The inconclusiveness of the budget process along with the political incentives to keep programs in production encourage program stretch-outs and other forms of program delays. According to a 1987 study by the Congressional Budget Office, a decision to decrease the rates of production by 50 percent would increase the real unit cost of most major weapons systems by anywhere from 7 percent to 60 percent, depending on the system. Producing at

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5. *Holding the Edge: Maintaining the Defense Technology Base*, OTA, April 1989, pp. 9-10.

have been changed every year. The multi-warhead Peacekeeper (or MX) ICBM is a classic example, but instances also abound among less visible programs. Furthermore, reductions for such functions as data processing equipment or pay costs cut across budget accounts. Adjustments of this type effectively mean that every DoD activity has its budget altered by Congress every year.

Beyond instability in individual programs, the vagaries of the overall budget process make even next-year planning difficult. DoD begins to formulate its budget well over a year before it is to go into effect. The budget resolution for the fiscal year starting in several months may have been passed, but the authorization and certainly the appropriation are still months away. This budget resolution does include a defense spending figure for the following year, but likely changes make it difficult to accept that sum as guidance for defense spending plans. The only time in recent history that the budget resolution's figure for defense spending in the second year was adhered to was in FY '89, following the budget summit agreement. Even then, the lateness of the summit agreement required a last-minute revision of the 1989 budget, and the bi-partisan agreement for FY '90 required adjustments in the spring, six months behind the normal schedule. Thus, the exigencies of the budget process have required DoD substantially to revise its budget four times in the past two years. Further, frequent tardiness in budget approval forces DoD to make adjustments very late in the internal budget process to account for Congressional actions.

Several factors complicate the effect of Congressional budget alterations on DoD. The entire defense budget is considered to be discretionary spending, and therefore subject to detailed review. Most other agencies have entitlement or formula-based programs which escape line-item review. Also unique to DoD, is the lag between obligations and outlays in many defense activities. For most agencies, commitments are made and money is spent in the same

organization, having five aspects. First, the report said, the different operating styles of oversight committees "tempt factions within DoD to export conflicts to Congress". In addition, the report criticizes Congress for: its focus on accounting inputs rather than mission outputs; its failure to make program and policy trade-offs across Service lines; its focus on policy or program conflicts within DoD; and, its predilection to favor "independent subordinate offices as opposed to centralized control in DoD, in order to maximize its leverage" in resource allocation or as a referee in policy disputes.[8]

This is not an accidental feature. Congress encourages every official to see committees as "friends" to whom they can come if they have "problems". In the words of a HASC staffer, "...it is not difficult for the Services to receive a sympathetic hearing about the 'shabby treatment' they have suffered in the executive branch budget cycle....It would be difficult to overestimate the contribution to the committee's overall effectiveness that results from this natural and enduring alliance with the Services."[9]

This effort to divide is an enduring aspect of Congressional defense policy. It strongly influenced decisions in the creation of the Department of Defense in 1947. The lack of coordination within DoD in both operational and acquisition matters is due in part to Congressional insistence on highly independent structures within DoD. Mandates to increase jointness or to centralize acquisition will have little enduring effect if Congress continues to insist on strong structural divisions.

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8. "Report on Defense Organization," Senate Armed Services Committee, United States Senate, GPO, 1988, pp. 582-3.
9. Michael A. West, "The Role of Congress in the Defense Budget Process: A Positive View" Naval War College Review, Vol. XXXII, Number 3 [May-June 1979], pg. 92.

The large number of Congressional audits also represent a substantial direct burden on the Department. The House Appropriations Committee Surveys and Investigations staff conducts over thirty investigations in an average year. The General Accounting Office (GAO) spends nearly 30% of its total resources (and an even larger portion of audit time) on defense-related work, an investment of over $100 million per year. There are between 400 and 450 GAO audits of DoD activities each year, and an even larger number of reports. These congressional audits require the time of approximately 400 DoD employees on a continuing basis.

A variety of other Congressional contacts also impose substantial burdens on the department. In 1988 over 245,000 hours were spent responding to nearly 18,000 Congressional letters [relating to acquisition issues alone]. [Amended 4-2-90.] In 1984 (the latest year for which data are available) there were 599,000 telephonic inquiries from Congress. The Department presents well over 1,000 briefings to members and staff each year. Senior Department officials spend an average of 3,000 hours per year preparing for and presenting testimony to Congress.

E. Opportunity Costs

The issues that are left off the agenda are at least as important as the more obvious costs of the Congressional focus on short term decisions. Legislative-executive deliberations focus almost entirely on specific weapons systems as opposed to national defense strategy because that is exactly what the process encourages. There is literally no extended period when Members of Congress or the Administration are able to consider issues free from the pressure of passing the immediate year's budget. If a different perspective is needed, a different process would be more likely to bring it about.

V. RECOMMENDATIONS

The previous discussion set forth some ways in which the Congressional process hurts defense management. Because that process evolved to serve members' interests, suggestions for change must also accommodate those interests.

Fortunately, there is a growing recognition within Congress of the problems caused by the current defense process. As noted above, the Armed Services Committees, in particular, have already taken steps to address some of these problems. Both Committees have supported two-year budget submissions, milestone authorizations and multi-year procurements. The Senate Armed Services Committee in particular has made a conscious effort to reduce the amount of detailed program guidance, reflected in a reduction in the length of committee reports and in the number of line items adjusted. The SASC has also moved toward mission-oriented subcommittees and annual strategy hearings while the House Armed Services Committee has established panels to examine major policy issues. The HASC has worked with the House leadership to limit debate time and the number of floor amendments to the defense authorization. The recommendations below include several options for change in the budget process, committee jurisdiction and other matters. In concert with these reforms, indeed to make them possible, efforts must be made to foster trust between DoD and the Congress.

The primary objective is to produce stable decisions that allow for planning based on strategic objectives. Stability is critical in both acquisition and policy matters, and a stable process would promote efficiency in individual programs as surely as it would improve overall policy and resource allocation decisions. Encouraging each of the major participants to concentrate on their respective strengths would promote stability. Party leaders can play an enhanced role in facilitating long-term budget agreements and cross-committee cooperation.

the Packard Commission's report, Congress directed the President by law to submit a two-year budget for fiscal years 1988 and 1989. The President followed the congressional mandate, and a two-year authorization was approved, but Congress remained with a one year appropriation.

The 1988-89 experiment resulted in improvements in program stability and programmatic and policy oversight. Despite adjustments necessitated by revisions in budget totals, line item changes were cut approximately in half due in part to the biennial submission. Unfortunately, problems in the appropriations process and other issues make the biennial budget unlikely to be implemented in the near future.

As a first step toward a longer time horizon for the budget, Congress should consider a two year budget resolution, in which spending limits are set for the budget's major functional categories for two years, but the details are left for annual determination. Congress adopted a two year resolution at the end of 1987 for Fiscal Years 1988 (which had already started) and 1989. Because the agreement was forged by congressional leaders and the President, the numbers held up for Fiscal Year 1989. Knowing the top line in advance permits the executive branch to plan, and to establish its own priorities, more thoughtfully. In addition, because an early agreement makes for a more orderly congressional environment, and because such an agreement presupposes a major role for the party leaders, it should be in the interest of the party leaders as well as the President to explore whether the experience can be repeated and made regular.

C. Focus the Authorization Process Away from Budget Lines

Before the authorizing committees are willing to move away from a focus on budget line items, they must see that they can exercise a different, broader form of oversight. To achieve this objective, the authorizing committees would have to (1) shift away from an annual

multi-year contracts have to show savings of at least 10% compared to a series of annual contracts. In an era of multi-billion dollar programs, it is difficult to justify rejecting even small percentage cost savings. Elimination of this threshold and expansion of milestone authorizations for research and development programs would be helpful first steps while working on the larger issues.

D. Budget Submissions Should Reflect Missions and Forces

Another method of reducing the level of detail in annual authorizations is to change the content of budget submissions. One of the impediments to a productive executive-legislative defense policy dialog is the set of budget categories mandated by the Congress. These do not focus on defense force structure (e.g., F-15 squadrons, carrier battle groups) which in turn can readily be presented in terms of mission and regional allocation. Instead, budget categories focus on inputs -- individual planes, spare parts, fuel, maintenance, personnel, and so on. At the highest level of aggregation are the budget titles: Military Personnel, Operations and Maintenance, Research and Development, Procurement, Construction. At the lowest level of aggregation, the content of each title is different. For O&M it is element of expense; for Procurement, it is hardware line item; for Construction it is the individual project. In this situation it is not surprising that policy debates often break down into parochial squabbles over specific inputs and who benefits from them. That is the structure of the budget as Congress mandates it be submitted; that is the structure of the budget as enacted; and that is the budget structure that the Department of Defense must use in monitoring execution.

But the structure can be changed if the Congress is willing. The Department is ready to consider new structures that would focus clearly on forces, missions and regional allocation, and thus on the choices involved in defense policy. While DoD has long used categories like this on its own (and shared some with the Congress), existing categorization systems are

we should renew the effort to provide suggestions for elimination of recurring reports as requested by Congress in the Goldwater-Nichols Act. Three efforts to respond to this request have floundered since 1986.

A major weakness in past efforts in this area has been the treatment of reports as if they were cost-free. A series of "Congressional Reports Elimination Acts" ended in the early 1980s, in part due to GAO criticism that agencies had not properly determined the utility of reports to the users (Congress). The point of criticism about the reporting burden is not, however, that reports are totally useless, but that the aggregate burden is unacceptable. Further, the utility of each individual report is greatly reduced by the tremendous volume.

Report managers should be given guidelines to balance information needs with resources, rather than asking "is this report useful?" for each in isolation. Report authors are not in the best position to balance costs and benefits. Their viewpoint is limited to a tiny portion of the problem, and may be clouded if the reports at issue represent a large portion of the office or personal workload (and consequently justify the position or organization). The Department should suggest that Congress judge revisions in the same manner: agree beforehand to achieve a set cost or time reduction, and set priorities for which reports should be deleted, combined or retained. Even a successful effort of this type would solve less than half the problem, however, since a majority of DoD's reports to Congress are required by annual legislation rather than on a recurring basis. Restraint on the part of the defense oversight committees, perferably through self-imposed formal guidelines, is the only way to address that portion of the reporting burden.

In a similar manner, the Department should work with Congress to review budget justification material, with the intent of greatly reducing its overall volume and eliminating marginally useful exhibits.

would prefer to see rescissions structured like arms sales under the Arms Export Control Act. Under that act, a sale is considered approved unless Congress rejects it within a specified time period -- just the opposite of the rescission presumption. If reversing the presumption is not politically feasible, Congress at the very least should be required to vote on a proposed rescission. With a required vote, at least the most egregious special interest provisions could be surfaced for public attention by the President.

Unfortunately, trends in the related area of reprogrammings are moving in the direction of requiring more detail. Formerly, DoD was allowed to move ("reprogram") small amounts of funds among accounts to meet changing needs without notifying Congress. The Appropriations Committees recently insisted on new procedures for DoD to aggregate low level reprogrammings which were not formerly subject to Congressional review and to require that any reprogramming that has the effect of terminating a project, no matter how small, must be approved in advance by the committees.

H. Better Integrate the Multiple Policy Goals of Congress

Several commentators have described the American system as one of shared rather than separated powers.[15] Congress will never remove itself totally from administrative matters. However, Congress could do a better job integrating the many different ways in which its multiple organizational units can impose conflicting requirements on the same organization in the executive branch. It would be particularly useful for Congress to address the goals unrelated to national security which are imposed upon the Defense Department. It is clear that Congress and the American people expect DoD to do more than simply provide an efficient

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15. See Abraham Sofaer and Louis Fisher in L. Gordon Crovitz and Jeremy Rabkin, Eds, *The Fettered Presidency*, AEI, 1989.

bill or proceeding in another committee that affects defense. DoD and the Armed Services Committees have a mutual interest in scrutinizing the effect of non-Armed Services legislation on the DoD. Hearing on the effects of existing legislation would also be useful. The House Committee reforms of 1974 included a requirement for each committee to file a report of its oversight agenda. This provision has had little impact so far. However, it would be in the interest of DoD and the Armed Services Committees to work together to develop such an agenda.

Changing the Congressional process will be difficult, but the alternatives are even less attractive. Congress has a choice. It can retain control over the details, while America loses its ability to stay ahead of events. Or Congress can expand its horizons together with the executive branch in a mutually beneficial way.