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Congress and the Faithful Execution of Laws — Should Legislators Supervise Administrators?

Frank C. Newman* and Harry J. Keaton**

"He [the President of the United States] . . . shall take Care that the Laws be faithfully executed"¹

IN 1953 the problem of legislative interference with administrative action became a headline issue. It is more than the problem dramatized by struggles between Executive and Legislative — between strong or weak Presidents and strong or weak Congresses.² It is more than the problem

* Professor, University of California School of Law, Berkeley; Visiting Professor of Law 1953-54, Harvard University. This article will later appear in a chapter on "Legislative-Administrative Relations" in a Legislation coursebook now being prepared by Professor Newman and Professor Stanley S. Surrey of the Harvard Law School, for publication by Prentice-Hall, Inc.

**LL.B., June 1953, University of California School of Law, Berkeley; member, California Bar.

¹ U. S. CONST. Art. II, § 3; see CROSSKEY, *POLITICS AND THE CONSTITUTION* 433-43 (1953); cf. § 136 of the Legislative Reorganization Act, 60 STAT. 832 (1946): "To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise *continuous watchfulness* of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee" (Emphasis added.) Generally, see GALLOWAY, *THE LEGISLATIVE PROCESS IN CONGRESS* cc. 4-8 (1953); KEFAUVER AND LEVIN, *A TWENTIETH-CENTURY CONGRESS* cc. 6, 11 (1947); cf. McKinley, *Federal Administrative Pathology and the Separation of Powers*, 11 PUB. ADMIN. REV. 17 (1951).

² See BINKLEY, *PRESIDENT AND CONGRESS* (1947); FINLETTER, *CAN REPRESENTATIVE GOVERNMENT DO THE JOB?* (1945); ARMSTRONG, *The President and the Congress: Unsolved Problems of Leadership and Powers*, 33 A.B.A.J. 417 (1947); cf. Marquis Childs' column of April 10, 1953 ("Power Battle With Congress Growing"); Ray Tucker's column of July 23, 1953 ("The Eisenhower-Adams lack of political savvy explains why there have been so many clashes . . .").

The Democrats, fiddling while the Eisenhower Administration burned, enjoyed their minority role immensely. *E.g.*, see DEMOCRATIC DIGEST, Aug. 1953, p. 8; *id.*, Oct. 1953, p. 57. But the holier-than-thou attitude was scarcely justified. See 7 CONG. Q. ALMANAC 72 (1951) ("Republicans Stick Together More Often Than Democrats"); *Has Congress Broken Down?*, 45 FORTUNE, Feb. 1952, p. 81; cf. 11 CONG. Q. 1073 (1953) ("Eisenhower's Friendly Congress"); A.P. dispatch from Washington of Sept. 2, 1953 ("Sen. Ferguson . . . declared that Republicans in the 83rd Congress gave overwhelming support to the Eisenhower Administration."). Raymond Moley is reported to have stated that "The most significant achievement of the new [Eisenhower] Administration is the re-establishment of Congress as an equal in Government with the President" San Francisco Chronicle, Aug. 1, 1953, p. 9, col. 3.

whether the late Senator Taft, as Majority Leader, had too much control over foreign policy,³ or Representative Reed, through the Ways and Means Committee, too much influence on tax policy.⁴ It relates to a wide range of questions that arise when Congress, or committees of Congress, or individual Senators and Representatives take action intended to affect administrative rule making, administrative adjudication, and administrative management.

To illustrate: As citizens (and particularly as lawyer citizens) should we care when the Food and Drug Administration and the Department of Agriculture, allegedly because of pressure from the Senate Agricultural Committee, abandon their program of grain inspection?⁵ Or when the Air Force, allegedly because of a pending Senate investigation, cancels the Kaiser-Frazer contract for flying boxcars?⁶ Or when a Senator announces that he and other members of the Appropriations Committee intend to "knock out of the policy-making shops [of the State Department] . . . about a hundred or two hundred top people," for the reason that the incumbent Secretary refuses to purge these "hold-overs" from a prior Administration?⁷

Unhappily, fair comment on this kind of question is muddled by many commentators' failure to identify the exact issues that should cause concern. There is a tendency to overlook the distinction between (1) the merits of a controversy, and (2) the governmental powers and procedures that led to a decision on the merits. In the Kaiser-Frazer case, for instance, some

³ Cf. A.P. dispatch from Washington of June 27, 1953 ("No One Sabotaging GOP's Foreign Policy, Taft Says"); Drew Pearson's column of June 4, 1953 ("[O]ne of the most amazing advices ever given to a Cabinet regarding a particular Senator has just been suggested to Eisenhower Cabinetees—namely, to clear all major policy matters informally with Senator Taft."); Shannon, *The Vacuum in the Senate*, NEW REPUBLIC, Aug. 10, 1953, p. 9; Walter Lippman's and Roscoe Drummond's columns of Oct. 12, 1953.

⁴ Cf. Robert Allen's column of June 29, 1953 ("Mr. President," replied Reed, "I am afraid you don't understand how the democratic processes operate in Congress. I have not usurped any powers in opposing this [excess profits tax] legislation. In dealing with your recommendation, I have at all times proceeded wholly within my authority as chairman of the Ways and Means Committee."); and see Rep. Phillips' letter reprinted in 99 Cong. Rec. A4096 (June 27, 1953) (suggests that excess profits tax maneuvers involved usurpation by Executive of Congress' responsibilities).

⁵ See Drew Pearson's column of May 18, 1953.

⁶ The contracts were cancelled while Mr. Kaiser was testifying before a Senate Armed Services subcommittee. See remarks of Rep. John J. Allen, 99 Cong. Rec. A4012 (June 25, 1953). Whether the subcommittee's activities in fact caused the cancellation seems doubtful. See U.P. dispatch from Washington of July 4, 1953 ("Air Force Says Kaiser Wasted Men"); 48 FORTUNE 76, 78 (Aug. 1953). But cf. A.P. dispatch from Detroit of July 4, 1953; Drew Pearson's column of July 26, 1953 ("... [Sen.] Ferguson sat down for two hours with Secretary of the Air Force Talbott and helped pave the way . . ."); CIO News, June 29, 1953 ("Emil Mazey . . . wired to Talbott charging the latter 'yielded to fear and political pressure' . . .").

⁷ The Alsops' column of April 17, 1953.

people argue that senatorial interference was good or bad by reference to their opinions on Kaiser-Frazer's handling of the flying boxcar contract. As citizens we do care about the merits of flying boxcars, and of contracts for their production; but in this article the inquiry will be restricted to the powers and procedures problem. There will be no attempt to assess Kaiser-Frazer's performance, or to resolve the pros and cons of matters like grain inspection, or to defend or deprecate the "top people" in Dulles' State Department.

Even when the issue of powers or procedures has been isolated, many commentators forget that our Constitution plainly sanctions *some* Congressional interference with administrative action. Thus, aside from the merits of the controversies, OBJECTION IS NOT APPROPRIATE:

(1) *When Congress by law revokes the authority of administrative officials, or prescribes their future action.*⁸ For example, whatever our views on agencies such as the NLRB and the ICC, we can hardly argue that Congress in a Taft-Hartley Act or a Motor Carrier Trip-Leasing Bill cannot legitimately alter the administration of a law, as well as its substance.⁹ And

⁸ "Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal." *F.C.C. v. Broadcasting Co.*, 309 U.S. 134, 146 (1940). *Cf.* these excerpts from the Steel Seizure case, *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952):

JUSTICE DOUGLAS: "[A]s MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER point out, the power to execute the laws starts and ends with the laws Congress has enacted." *Id.* at 633.

JUSTICE BLACK: "The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control." *Id.* at 588.

JUSTICE FRANKFURTER: "I shall not attempt to delineate what belongs to him [the President] by virtue of his office beyond the power even of Congress to contract . . ." *Id.* at 597. [But on p. 610 he suggests that the President's authority—apart from foreign affairs—has been "comprehensively indicated" by this excerpt from Holmes' opinion in *Myers v. United States*, 272 U.S. 52, 177 (1926): "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."]

JUSTICE JACKSON: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." 343 U.S. at 655.

JUSTICE BURTON: "[Congress] has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency . . . [T]he President's order of April 8 [therefore] invaded the jurisdiction of Congress." *Id.* at 660.

JUSTICE CLARK: "[W]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures . . ." *Id.* at 662.

CHIEF JUSTICE VINSON (with JUSTICES REED and MINTON), dissenting: "[Here] there is no evidence whatever of any Presidential purpose to defy Congress or act in any way inconsistent with the legislative will." *Id.* at 703.

⁹ "From the course of the Congressional debates on the Taft-Hartley Act, it is clear that many members of Congress were concerned about possible 'sabotage in the administration of the law' . . ." Jones, *"Watchdog Committees" in the 80th Congress*, 34 A.B.A.J. 726 (1948). Regarding the Motor Carrier Trip-Leasing Bill, see debate led by Rep. Wolverton, 99 Cong. Rec. 7403 (June 24, 1953); *cf.* ICC Ann. Rep. 70 (1949) ("The Legislative Committee responded to 126 requests from committee chairmen and other members of the Eighty-first Congress for reports on bills having a bearing on our administrative functions.").

if Mr. Bailey from West Virginia convinces his Congressional colleagues that the oil rates President Truman applied in the Venezuelan trade agreement were unauthorized, there is no impropriety in a joint resolution which for the future declares those rates to be null and void.¹⁰

(2) *When Congress in reviewing the President's budget concludes that funds should not be appropriated for certain purposes, or that for other purposes the amounts budgeted are inadequate.* For example, the decision of a Congressional majority to slash foreign aid funds, or to reduce appropriations for enforcing the labeling laws,¹¹ or to withhold grants "for further construction of the Garrison Dam until an investigation can be made,"¹² is surely contemplated by the Constitution.¹³ Nor is there any usurpation of power if the majority decides we need a 143-wing and not a 120-wing air force,¹⁴ 21 instead of 17 teams of FCC field examiners,¹⁵ or \$125 million instead of nothing for Franco Spain.¹⁶

(3) *When the Senate, by refusing to approve a man nominated for high*

¹⁰ See 99 Cong. Rec. 7431 (June 24, 1953); cf. *Littlejohn & Co. v. United States*, 270 U.S. 215, 226 (1926); Nutting, *The Treaty Power: A Legislative Footnote*, 39 A.B.A.J. 920 (1953); 65 Stat. 75 (1951) ("The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade."). Joint resolutions are like statutes, and require the President's signature. Concurrent and simple resolutions raise different problems, since they are not binding on the Executive. *FHE Oil Co. v. Comm'r of Internal Revenue*, 150 F.2d 857 (5th Cir. 1945); 19 Ops. Atty. Gen. 385 (1889); cf. Note, 31 TEX. L. REV. 417 (1953); *infra* note 104.

¹¹ Cf. statement of Sen. Wiley noted in 97 Cong. Rec. 697 (Jan. 25, 1951) ("Such a pitiful sum . . . constitutes no enforcement whatever.").

¹² See remarks of Rep. Burdick, 99 Cong. Rec. 3443 (April 20, 1953); cf. DAVIS, ADMINISTRATIVE LAW 55 n.70 (1951) ("The CAB granted the certificate to American Export Lines. But Congress then refused the necessary appropriation for airmail subsidies.").

¹³ "While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army and navy to command." Justice Jackson, in *Youngstown Co. v. Sawyer*, 343 U.S. 579, 644 (1952); cf. CORWIN, THE PRESIDENT (3d ed. 1948) 444 (n. 58)-447 (n. 63); see Joseph Harris, *Needed Reforms in the Federal Budget System*, 12 PUB. ADMIN. REV. 242 (1952); Gates, *New Strings for the Public Purse*, 9 NAT'L INDUS. CONF. BD. BUS. REC. 26 (1952); BAILEY AND SAMUEL, CONGRESS AT WORK 358 (1952) ("National Military Establishment Appropriation 1949"); Note, 36 GEO. L.J. 34 (1947); remarks of Senators Benton, Wherry, and Thye, 97 Cong. Rec. 865 (1951) (Department of State).

¹⁴ See remarks of Sen. Symington, 99 Cong. Rec. 7461 (June 25, 1953); cf. Spaatz, *Economy and Air Personnel*, Newsweek, Sept. 7, 1953, p. 23; Time, Sept. 7, 1953, p. 18 ("Tailored to Fit"). But cf. Ray Tucker's column of July 30, 1953, 47 FORTUNE 90 (May 1953), and 47 FORTUNE 94 (June 1953).

¹⁶ See Draper, *The Deal We Haven't Made With Franco*, The Reporter, May 26, 1953, pp. 23, 25; Drew Pearson's column of April 14, 1953; cf. C. L. Sulzberger's and George Sokolsky's columns of Oct. 3, 1953. On how Congressmen resent agency refusals to spend money appropriated, see remarks of Sen. McCarran, 99 Cong. Rec. 8889 (July 13, 1953); Rep. Mahon, *id.* at 8041 (July 1, 1953). But cf. H. H. Harris, *Crustiest Crusader: John Taber, Knight of the Shining Meat Ax*, The Reporter, May 26, 1953, p. 27 ("After a quiet conference with the White House, Taber agreed to restore the full funds if the government would promise, honor bright, not to spend the three million dollars, but merely announce the sum for propaganda purposes.").

public office, in effect calls for more (or less) vigorous enforcement of the laws he would have administered.¹⁷ This point is illustrated by the proceedings involving Tom Lyon, nominated by President Eisenhower to be Director of the Bureau of Mines,¹⁸ and Leland Olds, nominated by President Truman for a third term on the Federal Power Commission.¹⁹

(4) *When the Senate and the House, or their committees, or individual Congressmen decide they ought to look into agency activities and make whatever comments are inspired by the inquiry.* For example: If there is a chance that subsidies were iniquitously granted to publishers favoring the Fair Deal,²⁰ or that the Housing Expediter illicitly conspired with parties opposing the decontrol of rents,²¹ or that our fighting men were endangered by ammunition shortages in Korea,²² Congressmen are entitled (perhaps even obligated) to find out what the story is.²³ If they become convinced that only a warped Secretary of Defense would say he was "not interested as a military project in why potatoes turn brown when they are fried,"²⁴ or that an agency ought to formulate or publicize certain policies,²⁵

¹⁷ May the Senate, via advice-and-consent, subvert the powers of the House of Representatives? Cf. Bricker, *Bringing the Constitution Up to Date*, 26 OHIO BAR 409, 413 (1953) ("[The treaty-making power] is now being employed as a substitute for national legislation on purely domestic matters . . ."). But cf. Dean Griswold's letter to Sen. Wiley, 99 Cong. Rec. A4336 (July 6, 1953).

¹⁸ Lyon, whose nomination was later withdrawn, told the Senate committee that Congress never should have passed the mine safety law, which is "just that much more Federal control", but that if confirmed he would do his best to administer it. A.P. dispatch from Washington of June 23, 1953; see remarks of Rep. Kelley, 99 Cong. Rec. A5668 (Aug. 28, 1953); Fleeson, *Administration Made Ridiculous*, reprinted in 99 Cong. Rec. A4473 (July 10, 1953); cf. *Behind Committee Doors: The Appointees Refute the Promises*, New Republic, May 4, 1953, p. 12; discussion of Armed Services Committee's stock disposal rule for Defense Dept. appointees, in A.P. dispatch from Washington of April 10, 1953, and in Robert Allen's column of March 10, 1953.

¹⁹ See Joseph Harris, *The Senatorial Rejection of Leland Olds: A Case Study*, 45 AM. POL. SCI. REV. 674 (1951) ("The real issue was federal regulation of the price of natural gas . . ."); cf. Joseph Harris, *The Courtesy of the Senate*, 67 POL. SCI. Q. 36 (1952).

²⁰ See A.P. dispatch from Washington of April 13, 1953 ("McCarthy said the inquiry is an outgrowth of his investigation of the State Department's Overseas Information program").

²¹ See A.P. dispatch from Washington of June 30, 1953; cf. H. RES. NO. 856, 81st Cong., 2d Sess. (Sept. 18, 1950).

²² See A.P. dispatch from Washington of May 23, 1953, concerning the Smith-Byrd-Cooper-Hendrickson report (Kefauver dissenting); cf. U.P. dispatch from Washington of Aug. 6, 1953 ("McCarthy Revives Plea for U.S. Ammo Probe"); *Hearings before Senate Committee on Armed Services*, 83d Cong., 1st Sess. (1953) ("Ammunition Supplies in the Far East").

²³ See Morstein Marx, *Congressional Investigation: Significance for the Administrative Process*, 18 U. OF CHI. L. REV. 503 (1951); cf. SWENSON, *FEDERAL ADMINISTRATIVE LAW* c. 10 (1952).

²⁴ See remarks of Rep. Engle, 99 Cong. Rec. A4007 (June 24, 1953). But cf. Rep. Andresen's comments, *id.* at 8038 (July 1, 1953) ("[A] great deal of money is being spent on research to get the proper dishes to go with the sterling silver that the Navy uses.").

²⁵ See remarks of Sen. Daniel, 99 Cong. Rec. A1932 (April 9, 1953) ("FCC Ruling on Horserace Gambling Information"); of Rep. Sutton, 99 Cong. Rec. 3456 (April 20, 1953) (on-channel booster stations); cf. SEN. REP. NO. 2627, 81st Cong., 2d Sess. 3 (1950) (FTC and competitive freight absorption).

or that "[t]he Interior Department should be concerned with only those functions or activities which private enterprise cannot or will not undertake . . .,"²⁶ there is no reason why they should not tell us their views.

IN SUMMARY, the mere fact that administrative action might be affected does not give rise to constitutional issues when Congressmen pass laws, make appropriations, reject nominations, or inquire, expose, comment, criticize, request, recommend, prod, cajole, and castigate. The bothersome issues appear when we examine this kind of question:

- I. Are there any limits on scope?
- II. Are there abuses in method?
- III. What about the requirement of "advice and consent"?
- IV. What about Senator McCarthy?
- V. Do we need law reform?

I. ARE THERE ANY LIMITS ON SCOPE?

There are a few situations where administrators are constitutionally immune from Congressional interference. Thus, the President's power to fire certain officials²⁷ and to retain others²⁸ cannot be abrogated, even by statute. And he apparently enjoys some autonomy in conducting military and foreign affairs, though no one knows just what the bounds are.²⁹ Further, it seems that he and his subordinates have a right of privacy greater than that of mere citizens, though as yet this point remains untested.³⁰ At

²⁶ See statement of Sen. Hennings, 99 Cong. Rec. 7637 (June 27, 1953).

²⁷ See *Myers v. United States*, 272 U.S. 52 (1926); Corwin, *The President as Administrative Chief*, 1 J. OF POLITICAL 17, 42 (1939); Notes, 9 GEO. WASH. L. REV. 703 (1941); 39 MICH. L. REV. 1410 (1941).

²⁸ See *United States v. Lovett*, 328 U.S. 303 (1946); Schuman, *American Government and Politics: "Bill of Attainder" in the Seventy-eighth Congress*, 37 AM. POL. SCI. REV. 819 (1943); cf. attempt by House Republicans to cut off Acheson's salary as Sec. of State, N.Y. Herald Tribune, July 26, 1951, p. 1; Sen. Downey's threats against Reclamation Bureau chiefs, reported in Drew Pearson's column of Nov. 17, 1949.

²⁹ See, e.g., Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COL. L. REV. 53 (1953); Freund, *Foreward: The Year of the Steel Case*, 66 HARV. L. REV. 89, 95 (1952); cf. Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281 (1953); Jones, *Further Notes on the Presidential Powers Issue*, 37 A.B.A.J. 468 (1951).

³⁰ See Collins, *The Power of Congressional Committees of Investigation to Obtain Information from the Executive Branch: The Argument for the Legislative Branch*, 39 GEO. L.J. 563 (1951); authorities cited in McGeary, *Congressional Investigations: Historical Development*, 18 U. OF CHI. L. REV. 425, 436-8 (1951), and Morstein Marx, *supra* note 23 at 512 n. 23; Note, 1 STAN. L. REV. 256 (1949); cf. *United States v. Reynolds*, 345 U.S. 1, 6, n. 9 (1953).

Concerning recent imbroglis involving Sen. McCarthy, see A.P. dispatch from Washington of July 15, 1953 ("McCarthy Ponders Quiz of CIA Aide"); *id.* Sept. 8, 1953 ("Solon Denied Data on Army Security Ban . . ."); Marder, *State Dept. Files Sought by McCarthy*, Washington Post, April 1, 1953; Marquis Childs' column of April 10, 1953 (FBI files on Ambassador

most, however, these insulations are of limited significance, and in general the Constitution gives little immunity to the Executive.³¹

Are there immunities apart from the Constitution? Can we find, for example, a doctrine of good government or principle of good sense to tell us when Congress intrudes illegitimately? Is some meddling with administrative affairs officious, though legal?

One point seems obvious. Congress goes too far if it spends so much time supervising that not enough time is left for legislating.³² Conversely, administrators can hardly do the jobs that statutes declare they must do if they have to spend most of their workweek on Capitol Hill, testifying before committees.³³

Bohlen); *cf.* Sen. McCarran's disclosure in 99 Cong. Rec. 2237 (March 20, 1953) ("For years, as chairman of the Judiciary Committee, I had the FBI files handed to me . . ."); Atty. Gen. Brownell's views, *id.* at A1919 (April 8, 1953); remarks of Sen. Wiley, 97 Cong. Rec. A3192 (May 24, 1951) ("Proposal to Have the President Testify in the MacArthur Controversy"); Truman's statement on the Harry Dexter White subpoena, N.Y. Times, Nov. 13, 1953, p.14, col.4.

Concerning the risks of disclosure to Congress, see N.Y. Times, Sept. 13, 1953, pp. 2E, col.1 and 10E, col.3 (McCarthy's release of classified information); A.P. dispatch from Washington of July 1, 1953 ("... existence of new U.S. weapons was disclosed by publication of testimony given the House Appropriations Committee."); Elmer Davis, *Security and the News*, 12 PUB. ADMIN. REV. 85 (1952); *cf.* speech of Rep. Condon dealing with revocation of AEC invitation that he witness A-bomb blast, 99 Cong. Rec. 8956 (July 14, 1953); Rep. Keating's comments thereon in U.P. dispatch from Washington of July 7, 1953; *id.* Aug. 4, 1953 (Atomic Energy Committee accepts "full explanation" of AEC officials, after Condon rejects invitation to appear before committee).

Concerning possible abuses of the executive right of privacy, see remarks of Rep. Dawson, 99 Cong. Rec. 7715 (June 27, 1953) (suggests Defense Dept. used classified information for political purposes); Robert Allen's column of July 20, 1953 ("Previously, the information had been withheld from the legislators who voted money—although it is fully known to officials of the countries that get this assistance."); *cf.* remarks of Sen. Williams, 99 Cong. Rec. 7267 (June 23, 1953) ("Disappearance of Treasury Agent's Report on Tax Delinquencies of John LaRocco"); of Sen. Magnuson, *id.* at A4037 (June 25, 1953) ("Suppressed Report Favors Hells Canyon"); of Rep. Burdick, *id.* A2178 (April 21, 1953) ("No Retaliation Should Be Permitted Against Any Member of the Armed Forces for Any Testimony Given Before Committees of Congress"); H. R. 446, 83d Cong., 1st Sess. (1953); remarks of Sen. Nixon, 97 Cong. Rec. 4393 (April 26, 1951); of Rep. Hillings, *id.* at A2386.

³¹ "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . ." Justice Jackson, in *Youngstown Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

³² See BAILEY AND SAMUEL, CONGRESS AT WORK 6 (1952) ("[T]he amount of time given to 130 separate investigations on such subjects as crime, our China Policy, ethics, and maladministration made the scheduling of committee work on substantive legislation extremely difficult."). Reforms related to this problem would include "... elimination of the thousands of private bills that jam the legislative mills, . . . and termination of Congress' role as the board of aldermen for the District of Columbia." Levy, Book Review, 53 COL. L. REV. 888, 889 (1953); *cf.* Time, August 29, 1949, col.3, p.11 ("... at the behest of Congress' Library Committee, Librarian Luther H. Evans announced that the library will discontinue all prizes . . ."). But *cf.* BAILEY AND SAMUEL, *supra*, c.6 ("Private Bills"); see Field, *Administration by Statute—The Question of Special Laws*, 6 PUB. ADMIN. REV. 325 (1946); Carr, *Private Bill Legislation*, 66 LAW Q. REV. 216 (1950).

³³ "Some Cabinet members spend as much as a third of each working day on Capitol Hill answering congressional committee questions." P-H, Lawyer's Weekly Report, Sec. 2, p.2

But can we pick and choose among the *subjects* of Congressional activity and as to some say to Congressmen, "Mind your own business"? People often assert that Congress should be concerned with high policy only, leaving the details to agency discretion.³⁴ But does this mean that statutes dealing with matters like price control and monopoly, where the standards are extremely vague,³⁵ are always more wisely conceived than statutes like the Internal Revenue Code³⁶ and the conservation laws,³⁷ where Congress has dealt with a multitude of minutiae?³⁸ And while normally we want experts to decide what kind of ships we need, to advise where dams ought to be built, and to manage the postal system, do we conclude that only a buttinsky Congress would ever inquire into oil tankers³⁹ and supercarriers,⁴⁰ or

(June 29, 1953); cf. Fred Othman's column of July 20, 1953 ("On the fourth day of his ordeal, the postmaster general had to beg off because he had a cabinet meeting . . ."); Holmes Alexander's column of July 6, 1953 ("Secretary Dulles . . . made 60 official trips [to the Hill] during his first 90 days in office . . . , and he holds weekly seminars at the State Department for subcommittees").

³⁴ See BAILEY AND SAMUEL, *CONGRESS AT WORK* vi (1952) ("The present atomization of energy and dispersal of power in the Congress is, to us, the central problem of modern American Government."). But cf. CARR, *CONDITIONS OF PEACE* 161 (1942) ("The most significant part of the work of the House of Commons at the present time is that which is directly concerned with the administrative functions of the executive. It [the House of Commons] is never more effective than when it is criticizing the actions or the composition of the Government, never less effective than when it is attempting to legislate or to direct policy.").

³⁵ See *Yakus v. United States*, 321 U.S. 414 (1944); *FTC v. Cement Institute*, 333 U.S. 683, 708 (1948); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1152 (1952).

³⁶ Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477 (1945); Surrey and Warren, *The Income Tax Project of The American Law Institute*, 66 HARV. L. REV. 761, 822 (1953).

³⁷ See 16 U.S.C. (1946).

³⁸ Our contention is not that detailed statutes are wiser. We merely stress that vague statutes do not necessarily ensure better governing. Cf. Bowe, *Congress or the Courts as Final Arbiter in Tax Disputes*, 6 VAND. L. REV. 101, 106 (1952) ("More and more tax lawyers are seeking to persuade Congress to clarify the law, to finally determine the rule where the circuit courts are in conflict or to overrule unrealistic Supreme Court decisions."); Weisbard, *The Role of Court Decisions in Legislative History*, 27 TAXES 295 (1949).

Concerning the dangers of attempts to supplement a vague statute with detailed amendments, see Burt and Kennedy, *Congressional Review of Price Control*, 101 U. OF PA. LAW REV. 333 (1952); Durham, *Congressional Response to Administrative Regulation: The 1951 and 1952 Price Control Amendments*, 62 YALE L.J. 1, 51 (1952) ("[T]op agency officials spend much of their time administering and defending their construction of the detailed amendments, and almost no time working toward the basic purpose of the Act; nor does Congress have the opportunity fully to consider the Act's basic economic policy or to make improvements in the Act's fundamental plan."); cf. DAVIS, *ADMINISTRATIVE LAW* 55 (1951) ("[S]ometimes the most effective method for expression of legislative will may be delegation, with virtually no standards, but with strong legislative influence upon policy creation after the delegation has been made."); Lowry, *The Renegotiation Act: A Study in Government Litigation Tactics*, 37 CALIF. L. REV. 382, 398 (1949).

³⁹ Cf. STEIN, *PUBLIC ADMINISTRATION AND POLICY DEVELOPMENT* 445, 501 (1952) ("The Sale of the Tankers").

⁴⁰ Cf. remarks of Rep. Yorty, 99 Cong. Rec. A4001 (June 24, 1953); of Rep. Pelly, *id.* at 8071 (July 1, 1953).

the merits of reclamation projects,⁴¹ or whether postal clerks should be made to check in and out when they go to the bathroom?⁴² Even President Eisenhower, perhaps the most expert Chief Executive we have had on military appropriations, has stated that of course he would not rule out the possibility that Congress, "without impairing national security," could find room for budget cuts.⁴³ And regarding naval affairs, what happens to dead pets at sea is surely esoteric. Yet if the Navy's dead pet rule is stupid, requiring among other things radiograms and an inquisition by three commissioned officers,⁴⁴ is Congressional criticism *ultra vires*?

The New York Bar Report

Four years ago the Administrative Law Committee of the New York City Bar filed a thoughtful report called "Congressional Oversight of Administrative Agencies", which deals with a variety of problems of legislative supervision.⁴⁵ With respect to functions other than law-making, the Committee's conclusions on "scope" were as follows:

1. *When an agency has requested that interested persons state their views on proposed substantive rules, informed Congressmen (specifically, members of the appropriate standing committees) should not hesitate to*

⁴¹ Cf. Earl Behrens' column in the San Francisco Chronicle, July 24, 1953 (Rep. Scudder "... believes that if congressional action is required for the authorization of projects costing \$5,000,000 or more many projects which the people in a watershed do not want will be blocked. This instead of a 'finding of engineering by the Interior Department' will correct an inequity in present law, Scudder contends."). But cf. BAILEY AND SAMUEL, CONGRESS AT WORK c. 7 (1952) ("Pork"); Maass, *Congress and Water Resources*, 44 AM. POL. SCI. REV. 577 (1950); Walla Walla Union Bulletin editorial reprinted in 99 Cong. Rec. 7659 (June 27, 1953) ("Disintegration of a Plan").

⁴² See remarks of Rep. O'Hara, 99 Cong. Rec. A2047 (April 15, 1953); cf. support pledged by six Congressmen at postal workers' mass meeting protesting "inhuman working conditions," N.Y. Times, Oct. 26, 1953, p. 35, col. 1; remarks of Rep. Gross, 99 Cong. Rec. A4047 (June 25, 1953) ("... I have served notice on the Post Office Department that I will object to the closing as an economy measure of any postoffice in the Third Iowa Congressional District where there is substantial opposition to such closing on the part of interested citizens."); H. REP. No. 367, 83d Cong., 1st Sess. (1953) (recommendations on Department's accounting system).

⁴³ See A.P. dispatch from Washington of July 1, 1953. Concerning Truman's allegedly contra attitude, see San Francisco Chronicle editorial of Feb. 9, 1951 ("Presidential Dare Is in a Schoolyard Vein"); cf. note 13 *supra*; BAILEY AND SAMUEL, CONGRESS AT WORK 294 (1952) ("The Truman Committee . . ."); Maurer, *Congressional Oversight of Defense Production*, 21 GEO. WASH. L. REV. 26 (1952). But see Milton Lehman, *The Watchful Congressmen and the Wasteful Army*, The Reporter, July 7, 1953, p. 23.

⁴⁴ See A.P. dispatch from Washington of July 2, 1953 ("Dead Navy Pets Cost Too Much, Congressman Thinks"), 99 Cong. Rec. 8170 (July 2, 1953); cf. the bill to restrict importation of certain giant snails, to which was added an amendment dealing with the impact of the hydrogen bomb on peanut growers in South Carolina, 96 Cong. Rec. 16786 (Dec. 15, 1950).

⁴⁵ 5 N. Y. BAR RECORD 11 (1950), summarized by Beryl Levy, chairman of the key subcommittee, in 36 A.B.A.J. 236 (1950); cf. Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 COL. L. REV. 359, 366 (1947); Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 421 (1946).

speaking up.⁴⁶ Similarly, they should feel free to suggest that agencies revise "procedures or internal organization."⁴⁷

2. However, (A) "a Congress dissatisfied with agency interpretation of the governing statute should amend the statute, not coerce the agency to change its view . . .";⁴⁸ (B) legislative committees ought not suggest how the agency should decide particular cases or issues pending in those cases . . . [even as to] the manner in which [for the priority with which]⁴⁹ a particular case is being processed . . .; ⁵⁰ and (C) "the same constraints

⁴⁶ 5 N. Y. BAR RECORD 18. The report seems to be silent on *existing* substantive rules. Aside from the merits of the particular controversies, we see no objection to items like these:

- (1) H. Con. Res. 98, urging "That the Federal Reserve Board . . . support the price of United States Government securities at par . . . as was done before the so-called Treasury-Federal Reserve accord which was announced March 4, 1951." See 99 Cong. Rec. 7846 (June 30, 1953); *id.* at 7534 (June 25, 1953); *cf.* N.Y. Times, Oct. 11, 1953, p. L1, col. 1 (House Committee formally requests Sec. Benson to extend price supports to cattle).
- (2) Statements by the chairman of a committee investigating color T-V, requesting (A) that the NPA revoke its rule suspending the manufacture of color T-V sets, and (B) that the FCC comment on industry proposals calling for relaxed rules on color telecasting. See remarks of Rep. Wolverton, 99 Cong. Rec. A1483 (March 19, 1953); *id.* at A1744 (March 30, 1953), A5624 (Aug. 28, 1953); Gould, *Color Video in 3 or 4 Months Forecast After F. C. C. Test*, N.Y. Times, Oct. 16, 1953, p. C27, col. 6; *cf.* Plea Addressed to Treasury Secretary Humphrey for Temporary Suspension of Tariff on Aluminum by Representatives Blatnick, Celler, Deane, Eberharter, Fine, Forand, Morano, and Rodino, 99 Cong. Rec. A3113 (May 26, 1953).
- (3) Continued questioning by the chairman of the Joint Committee on Defense Production, indicating his doubts as to the legal authority for Defense Manpower Policy No. 4. See 99 Cong. Rec. 3364 (April 17, 1953).
- (4) Sen. Margaret Chase Smith's column of June 26, 1951, protesting "[T]he President's suspension, through an 'escape clause', of a ban on foreign aid to countries trading behind the Iron Curtain."
- (5) A statement advising the Secretary of Agriculture that the members of a subcommittee of the California Delegation in the House, together with Senator Nixon and miscellaneous Congressmen from Oregon and Washington ("after conferences jointly with representatives of the . . . Department of Agriculture and of the affected industries"), all oppose "the policy of imposing Federal or Federal-state inspection services under the Federal Marketing Agreements and Orders for prunes, raisins, and walnuts." See attachment to Dried Fruit Association of California form-letter of June 30, 1950, addressed to all members. *Cf.* Albright, *Nixon Making a Real Job of Vice President*, reprinted in 99 Cong. Rec. A3893 (June 22, 1953) ("[Nixon] has instructed his staff not to handle any 'case work' involving intercession with Government agencies").

⁴⁷ 5 N. Y. BAR RECORD 17.

⁴⁸ *Id.* at 22.

⁴⁹ *Cf.* these remarks of Sen. Langer, 99 Cong. Rec. 1154 (Feb. 8, 1953): "[A]ny lawyer practicing in North Dakota, no matter how young or old he may be, can do a better job than has been done in . . . [a named FTC monopoly case], in which 13 years have passed without the taking of action . . . [Therefore,] if any member of the Commission has served on it for as long as 10 years . . . he should resign his office and should let a competent person take his place."

⁵⁰ 5 N. Y. BAR RECORD at 15-16. The committee was specifically concerned with Taft-Hartley cases. *Cf.* Rowe, *Cooperation or Conflict?—The President's Relationships With an Opposition Congress*, 36 GEO. L.J. 1, 3 (1947); 98 Cong. Rec. 8023-31 (1952) (Truman and steel strike injunction); A.P. dispatch from Washington of Sept. 22, 1948 ("Green . . . Accuses Senator of 'Intimidating' NLRB in ITU Case").

apply to comment on cases already decided by the agency where such comment is intended in any way to influence the agency to reverse its previous ruling or . . . to limit the trend indicated by that ruling".⁵¹

Are the constraints recommended in Point 2 really workable? The reasons for the Point 1 premise were first, that as to proposed substantive rules informed Congressmen can often "comment helpfully"; and second, that "[i]t is not practicable to process through a busy Congress a statute which does no more than change a procedural regulation or revise an agency's internal organization in some particular."⁵² But do not these reasons similarly justify many of the Congressional attacks on agency interpretations, mentioned in Point 2A? Some Congressmen are remarkably well-informed as to the meaning of statutes;⁵³ also, there are countless instances where the interpretive question, like questions of procedure or organization, cannot efficiently be handled via an amendatory statute.⁵⁴

Regarding Point 2B (cases which are pending), the Report states that since a legislature could hardly presume to tell judges how they should decide a case, like comment addressed to administrators is presumptuous. But legislators do speak up on issues in court cases⁵⁵ (as do newsmen, law

⁵¹ 5 N.Y. BAR RECORD 17 (1950).

⁵² *Id.* at 18.

⁵³ *E.g.*, see NLRB v. *Nina Dye Works Co.*, 198 F.2d 362, 365 (3d Cir. 1952), comparing Senator Taft's "Supplemental Analysis of Labor Bill [Taft-Hartley Act] as Passed" with Congressman Hartley's *Our New National Labor Policy* (1948); *cf.* notes 61-2 *infra*; *The Congress Should Watch and Correct the Interpretation of Statutes*, 33 A.B.A.J. 666 (1947); Jones, *Legislature-Agency Disagreements Concerning the Construction of Regulatory Statutes*, 36 A.B.A.J. 859 (1950).

⁵⁴ "[T]here are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business." *Cleveland v. United States*, 329 U.S. 14, 22 (1946); *cf.* Note, *Congressional Reaction to Recent Supreme Court Decisions in Taxation and Criminal Law*, 36 GEO. L.J. 48 (1947).

⁵⁵ *E.g.*, see Rep. Hobbs' brief amicus curiae entered by special leave of Court (on authorization of the House Judiciary Committee) in *Henderson v. United States*, 339 U.S. 816, 817 (1950), reprinted in 96 Cong. Rec. A8384 (Jan. 1, 1951); Washington Post editorial of Feb. 8, 1944 ("What the amendment [on insurance under antitrust laws] amounts to, in fact, is a congressional directive to the Supreme Court as to how existing statutes ought to be interpreted."); *cf.* Nathan Robertson's PM story of June 23, 1944, p. 11 ("The refusal to exempt the pending case, in which the Supreme Court recently upheld the indictment, showed clearly the intent of the majority to block . . . the Justice Dept's criminal prosecution of 200 fire-insurance companies . . ."); and see Sen. Knowland's discussion of the *Fallbrook* case, 99 Cong. Rec. 848 (Feb. 4, 1953); *cf.* 97 Cong. Rec. A7036 (Oct. 20, 1951); Note, 31 TEX. L. REV. 404, 416 (1953); and see *United States v. California*, 332 U.S. 19, 28 (1947); HART AND WECHSLER, *FEDERAL COURTS AND THE FEDERAL SYSTEM* 109 (1953) (" . . . The Problem of Legislative Revision"); Note, 171 A.L.R. 1352 (1947). *But cf.* *Onslow's and Whalley's Case*, L.R. 9 Q.B. 218 (1873), where two members of Parliament were held in contempt and fined for addressing a public meeting concerning the merits of a pending prosecution.

For an illustration of how, via the doctrine of "legislative silence," courts may in effect force Congressmen to speak up on pending cases, see *United States v. FPC*, 345 U.S. 153, 167, 173 (1953); *cf.* *Congressional Silence and the Supreme Court*, 26 IND. L.J. 388 (1951). On declaratory legislation that is not amendatory, see Notes, 36 CALIF. L. REV. 634 (1948);

review writers, and many others⁵⁶); and one wonders — assuming an adjudicator of even moderate integrity — why a never-any-comment rule is necessarily desirable.⁵⁷

The difficulty in articulating such a rule is shown by this excerpt from the Report, concerning Point 2C (cases already decided):⁵⁸

Criticism of decided cases designed to influence future agency action under the existing statute, with respect to some doctrine the agency is evolving, intrudes upon the agency's area of responsibility in the same way as suggestions on how to decide pending cases.

If, however, the [Congressional] committee is genuinely considering changing the terms of the statute, the committee's discussion of such proposed (or considered) changes may unavoidably involve criticism of agency decisions. Where there is this proper legislative objective of a general and constructive nature, such collateral criticism of decided cases is not objectionable The appropriate test would appear to be: *Is the criticism genuinely a phase of the committee's consideration of a legislative reorientation?* Indeed, the same criterion might, in extraordinary instances, justify reference even to a pending case where such reference is integral to a bona fide contemplation of statutory change of a general policy nature and is *not intended to exert pressure on the agency to decide one way or the other*

Is it feasible to decide when criticism really is "genuinely a phase of the committee's consideration of a legislative reorientation" and "not in-

49 HARV. L. REV. 137 (1935); cf. *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 92, 104 (2d Cir. 1953); *United States v. O'Connell*, 165 F.2d 697, 699 (2d Cir. 1948); *Textile Mills v. Comm'r.*, 314 U.S. 326, 334 n. 14 (court discusses impact of pending amendment); Gibson, *Congressional Concurrent Resolutions: An Aid to Statutory Interpretation?*, 37 A.B.A.J. 421 (1951); Note, 15 U. OF CHI. L. REV. 984 (1948).

Concerning possible senatorial pressure on federal judges who do not have tenure, see Prof. Hart's letter regarding Chief Justice Warren's recess appointment, 17 HARV. L. SCH. REC., Oct. 8, 1953, p. 2, col. 2; cf. Hawkins, *"During Good Behavior"—The National Judiciary*, 21 MISS. L.J. 446, 453 (1950) ("That decisions of our Supreme Court are legislation or forbidden policymaking has been stated countless times by the justices The constitutional remedy is impeachment . . . [and] no member of Congress should countenance the evil by 'giving his assent to these acts of pretended legislation'").

⁵⁶ See Lois Forer, *A Free Press and a Fair Trial*, 39 A.B.A.J. 800 (1953); 1 STAN. L. REV. No. 4, p. x (1949) (California Supreme Court believes ". . . it would be preferable if the law reviews would refrain from commenting on pending cases . . ."); Harper and Etherington, *Lobbyists Before the Court*, 101 U. OF PA. L. REV. 1172 (1953).

⁵⁷ For how long does a case "pend"? Cf. Sen. Bricker's discussion of baseball and the anti-trust laws, 99 Cong. Rec. 8445 (July 8, 1953). And exactly when would a no-comment rule apply in the hierarchy of decision-making: Would comment on decisions of all subordinate officers be outlawed? On final agency decisions, pending rehearing or judicial review? On the first reviewing court's decision, pending further appeal? Cf. Shafer, *The Administrative Time Lag*, 20 I.C.C.P.J. 715 (1953); Note, *id.* at 502; DAVIS, ADMINISTRATIVE LAW § 84 (1951).

⁵⁸ 5 N.Y. BAR RECORD 17 (1950) (emphasis added). The report further states, "Traditional repugnance to special legislation would suggest, however, that recommendations for statutory change should not be designed to secure a particular result in a particular case in aid of a special interest or litigant . . ." *Id.* n. 5; cf. last sentence of note 32 *supra*; veto message in 96 Cong. Rec. 17077 (1951); Bowe, *Congress or the Courts as Final Arbiter in Tax Disputes*, *supra* note 38.

tended to exert pressure on the agency to decide one way or the other"? Consider this plaint:⁵⁹

[I]n the interest of all parties, I [a Representative from Michigan] respectfully request that the Committee on Education and Labor of this House forthwith summon the Chairman of the NLRB, the General Counsel of NLRB, and such other person or persons as it deems necessary and proper, for questioning and explanation as to the actions of the Board in the case I have described [*Albion Malleable Iron Co.*, 104 N.L.R.B. 31 (1953)]. Such action by the committee is, I believe, abundantly justified alike in the interest of securing the full facts in this case and *in the interest of determining the bearing of these facts upon proposed labor legislation now before the committee . . .*

Not only the interests and rights of workers, management, and owners are urgently involved, but the hope of restoring confidence, stability, and tranquility to a small but typically American community is at stake. What is done, or left undone, in this matter will affect for good or ill the way in which many of my constituents and of your fellow citizens will read, in the future, those noble words: "Equal justice under law."

Is it ever an intrusion on administrative responsibility when Congressmen merely inquire and comment?⁶⁰ If, for instance, the legislators who served on the Conference Committee are convinced that the Attorney General is undermining the Internal Security Act by "absurd interpretation", should they not say so — regardless of proceedings involving Italian opera stars, Spanish Falangists, and other aliens that may be pending?⁶¹ When

⁵⁹ Remarks of Rep. Shafer, 99 Cong. Rec. 3778-80 (April 23, 1953); cf. Hyneman, *Bureaucracy and the Democratic System*, 6 LA. L. REV. 309, 335 (1945) ("If Congressmen get close enough to the bureaucracy to get the information they need for proper legislative action, they are pretty certain to make suggestions as to how the department can do a better job of carrying out the intent of statutes . . ."); Madden *Condemns NAM, CCG Move to Coerce Wage Board*, CIO News, March 3, 1952, reporting Rep. Madden's denunciation of a proposed investigation of the WSB by the House Labor Committee as ". . . an attempt at undue influence on the WSB in the first major dispute case to come before it.").

⁶⁰ Most Congressional comments relate to law or policy, and when facts are disputed they are usually "legislative" facts. See DAVIS, *ADMINISTRATIVE LAW* § 153 (1951). But cf. Robert Albright's story in the *Washington Post* of April 8, 1944, reporting a letter from Rep. Smith to Atty. Gen. Biddle regarding the CIO Political Action Committee, in which the Congressman states: "In three minutes I could have given your investigators enough evidence from the files in my office to justify presentation of the case to a grand jury, but no investigator from your department ever communicated with me or evinced the slightest interest in any evidence which I could supply." See *Sinclair v. United States*, 279 U.S. 263 (1929); last sentence of note 64 *infra*.

⁶¹ See 96 Cong. Rec. 17103 (1951). The Attorney General retorted that his was not an "absurd interpretation." A.P. dispatch from Washington of Dec. 22, 1950; cf. *Time*, Oct. 23, 1950, p. 20 ("Revenge at Ellis Island"). Also see U.P. dispatch from Washington of Feb. 6, 1951, concerning Eric Johnston's decision to let the Justice Dept. handle OPS prosecutions ("DiSalle's defeat on the enforcement issue had been foreshadowed earlier by a statement from . . . [Sen. Maybank], Chairman of the congressional watchdog Committee on Economic Controls. He said the price law, which he helped draft, clearly intended the Justice Department to handle all court actions."); cf. Sen. Bricker's remarks in 97 Cong. Rec. 944 (1951); U.P. dispatch from Washington of June 4, 1947 ("Chairman Wiley of the Senate Judiciary Committee said today he would ask his group to investigate a case in the U.S. District Court . . . in which, he charged, the Government falsely interpreted the new portal pay law.").

Representative Smith vehemently denied that the Smith-Connally Act authorized the Montgomery Ward seizure, should his opinion have been kept secret?⁶² Did the Michigan congressional delegation exceed its jurisdiction when it sat in on the Pentagon's public hearing concerning the Kaiser-Frazer cancellation?⁶³ Are any improprieties disclosed by the following report of incidents in the daily life of Congressman John F. Shelley?⁶⁴

Several weeks ago, Shelley demanded an investigation of the Agriculture Department's secret sale of 80,000 tons of dried peas to three firms on the West Coast, for \$2.4 million, not much more than half the price at which the peas had been offered to other grain dealers.

Shelley forced a probe by the House Agriculture Committee. It reported that it found no "political favoritism" in the deal, but the Agriculture Department promised not to make such secret deals again. Instead, it will give everyone a chance to submit "competitive bids" for surplus farm products.

Dr. Astin and Battery Additives

AD-X2 is a controversial chemical that purportedly makes batteries last longer. The climax of its whirlwindy career in government was a political tornado that forced the resignation and then the reinstatement of Dr.

⁶² See Washington Post editorial of April 28, 1944; *cf.* Rep. Baker's statement on rent control, CIO News, July 13, 1953, p. 3 ("my amendment"); Washington Post editorial of April 22, 1944 ("[A] House committee is trying to induce the Army and Navy to stretch the law to relieve Congress of the responsibility of enacting national service legislation in an election year."); and see Rep. Poage's remarks in 99 Cong. Rec. 4416 (April 30, 1953) (protesting CAB's refusal to permit a feeder-line carrier to use late-model aircraft).

⁶³ See U.P. dispatch from Washington of July 9, 1953; *cf.* Trans-Texas Certificate Renewal Case, 12 C.A.B. 606, 628 n.18 (1951) ("During the pendency of this case, the Board received 44 letters from U.S. Senators and Representatives expressing interest in the application, and 5 Representatives appeared before the Board in person during oral argument . . . [I]t is unrealistic to assume that any Board will be completely indifferent to such efforts."); statements on New England fisheries by Sen. Kennedy and Rep. Bates before Tariff Commission, Boston Globe, Oct. 20, 1953, p. 36, col. 5; Opening Statement of Congressman Wolverton, Protesting Increased Toll Charges on Camden-Philadelphia Bridge, at the Hearing Conducted Before Otis L. Mohundro, Examiner Designated by Secretary of the Army, 99 Cong. Rec. A5632 (Aug. 28, 1953); Statement by the Honorable Gracie Pfof, of Idaho, on Hells Canyon Dam, *id.* at A4385 (July 8, 1953); and on the Hells Canyon proceeding generally, *cf.* Sen. Morse's speech on July 11, 1953, *id.* at 8806. ("The Army engineers, the reclamation engineers, the solicitors of the Department of the Interior . . . should [all] be in the hearing room . . . But . . . The Secretary sent them to the showers. We have a marked-card game being played at the hearing."). For special statute regarding Ct. of Claims, where Congressmen may not "practice", see 18 U.S.C. § 282 (1948); *cf.* ATT'Y GEN. COMM. AD. PROC., *Veterans' Administration*, SEN. DOC. NO. 186, Part 2, 76th Cong., 3d Sess. 39 (1940).

⁶⁴ Calif. AFL News Service dispatch in East Bay Labor Journal of July 10, 1953; *cf.* Sen. Williams' letter to RFC reprinted in 99 Cong. Rec. 3169 (April 14, 1953) (requests "complete record" of all loans made during past year contra to recommendation of Review Board, with explanation of why loan was made). Because of facts disclosed in a 1952 congressional investigation of why, in 1949, certain liquor distillers were not prosecuted under the antitrust laws, the Department of Justice in 1953 decided to order its own investigation. N.Y. Times, Oct. 3, 1953, p. 25, col. 4.

Allen V. Astin, Director of the National Bureau of Standards in the Department of Commerce. Congressmen battled notably in several skirmishes, and an analysis of their role may highlight our inquiry into "scope".

Yes, I'm Getting Quite a Charge Out of It

Beginning in 1948 Pioneers Inc., the manufacturer of AD-X2, for four years tried to persuade the Bureau of Standards that its product differed from other additives the Bureau previously had condemned as ineffective. With an unsolicited assist from a private group known as the National Better Business Bureau, which was worried about "the flood of battery dopes," Pioneers managed to persuade the Federal Trade Commission to launch an AD-X2 investigation, which in turn led to Bureau of Standards tests.⁶⁵ But in 1951 the Bureau of Standards announced that *all* additives

⁶⁵ The Bureau of Standards had indicated to the National Better Business Bureau that tests would be run if requested by the FTC. Statement of Sec. Weeks, *Hearing before Senate Select Committee on Small Business* (March 31, 1953), p. 2 of mimeo. transcript. At the same time Mr. Jess M. Ritchie, President of Pioneers, independently requested the FTC to investigate. Interview in July 1953 with Mr. William M. Hager, Executive Vice President of Pioneers.

seemed ineffective.⁶⁶ So, armed with testimonials from reputable customers and with evidence that Army, Navy, and certain unofficial tests were more encouraging than the Bureau's, Pioneers and its associates turned to Congress for help.⁶⁷

The Bureau then agreed to run new tests and during this period, it has been reported, heard from at least a score of Senators who expressed interest in the case.⁶⁸ When the Bureau's experts held that the new results merely confirmed the old, Pioneers—undaunted—persuaded the Senate Small Business Committee to conduct further tests, through the Massachusetts Institute of Technology.⁶⁹ These MIT tests, the Committee announced in December 1952, supported a report favorable to AD-X2.⁷⁰ But in the mean-

⁶⁶ NBS Letter Circular No. 504 (Jan. 10, 1951) describes tests relating to various additives consisting largely of sodium and magnesium sulfates. AD-X2 has been reported to contain large proportions of these. See *Battery Battle: AD-X2 vs. NBS*, 72 CHEMICAL WEEK No. 17, p. 20 (April 25, 1953). Its exact formula is secret, and Ritchie refused to reveal it even to the Senate Small Business Committee. See U.P. dispatch from Washington of June 22, 1953.

In a letter to Professor Newman of Nov. 12, 1953, the Assistant to the Director of the Bureau argued that the Bureau never announces that any commercial product is ineffective. *But cf.* the statement of Sec. Weeks, *supra* note 65, describing an earlier letter circular as one "condemning all battery additives." There seems to be no question that Letter Circular No. 504 has been regarded in the industry as a condemnation of AD-X2, partly because of the Bureau's subsequent statements concerning the case.

⁶⁷ "We are now trying to bring to bear sufficient pressure to cause a Senate investigation of the National Bureau of Standards . . . A few days ago, about the time that all distributors of *Battery AD-X2* were writing their senators [illustrative letters attached] . . . Dr. Edward U. Condon, for many years the Director of the National Bureau of Standards, suddenly resigned. We believe that this is significant, and we like to believe we had something to do with the resignation." Memo of Aug. 21, 1951 to All Distributors, Prospective Distributors and Interested Persons from *Battery AD-X2* Plant No. 236, *Battery Life Corporation*, p. 5 (also see suggestion quoted on p. 8 that ". . . you fellows write your Senators and ask for a Senate investigation . . ."). Compare the comment here on Dr. Condon's resignation with the discussion in BAILEY AND SAMUEL, CONGRESS AT WORK 321 (1952).

⁶⁸ Dr. Wallace R. Brode, the Bureau's No. 2 man, testified before a Senate Appropriations subcommittee that "terrific pressure" was brought to bear and that 24 senators wrote on Pioneers' behalf. Roberts, *U.S. Scientist Says Inquiry Was Misled*, Washington Post, April 15, 1953; *cf.* N.Y. Herald Tribune dispatch from Washington of March 3, 1953 ("Altogether 28 Senators, led by former Senator Richard M. Nixon, have been involved in the case . . ."); U.P. dispatch from Washington of June 23, 1953 ("29 Senators and one Congresswoman"). Was the Bureau influenced? Compare this statement: "As nearly as we can determine, all replies to the Senators by the Bureau of Standards have been form letters. In other words, all the Senators have been written the same letters." Memo, *op. cit.* *supra* note 67, at 6.

⁶⁹ See 47 FORTUNE 108 (May 1953) ("Senator Richard Nixon urged the Senate Small Business Committee to look into the affair . . ."). The MIT tests were agreed to at a Bureau of Standards Conference on Sept. 29, 1952, in which Dr. Astin, Mr. Ritchie, staff members of the Senate Committee, Post Office representatives, and others participated. See Ritchie, *My Battle for Battery AD-X2*, CARS, July 1953, p. 3 (where author claims that Bureau later reneged on its offer to join in the tests); *cf.* Ritchie letter to Sen. Thye of April 6, 1953.

⁷⁰ Senate Small Business Committee Release No. 109, Dec. 18, 1952. *But cf.* the letter of transmittal accompanying the MIT report (committee print of April 6, 1953, p. ii): "[T]here are no recommendations included in the report, nor did our group arrive at any definitive conclusions with respect to the commercial value of the product." Later, President Killian of MIT stated it would be "unjustifiable" to conclude from the MIT tests "that the battery additive

time the Post Office Department had held fraud hearings that in February 1953 led to the issuance of a fraud order against Pioneers.⁷¹ At this point Senator Thye, Chairman of the Committee, intervened and with the aid of Secretary of Commerce Weeks arranged to have the fraud order suspended.⁷² Moreover, there were threats that the Committee would investigate fully the Bureau's handling of AD-X2.⁷³ Soon after, at the request of Assistant Secretary Sheaffer, Dr. Astin resigned; and his resignation was accepted by Secretary Weeks and President Eisenhower.⁷⁴

Weeks and Sheaffer appeared before the Committee to explain Astin's dismissal, and Weeks testified in part as follows:⁷⁵

I know that this business [Pioneers, Inc.] has suffered severely at the hands of certain bureaucrats. In fact, it is a wonder they are in existence at all after five years of struggle. *Your Committee might want to re-examine the legislation giving the Federal Trade Commission very broad powers in matters like this.*

I am not a man of science, and I do not wish to enter into a technical discussion or be accused of overruling the findings of any laboratory. But as a practical man, I think that *the National Bureau of Standards has not been sufficiently objective*, because they discount entirely the play of the market place and have placed themselves in a vulnerable position by discussing the nature and scope of their prospective reports with the very people who might not want to see the additive [AD-X2] remain on the market, and when their reports and results of tests were questioned, discussed the matter with other scientists, engaged by your Committee to make separate, objective findings.

I cannot help but wonder how many similar cases have never been heard about — how many entrepreneurs who were convinced they have [sic] a good thing for the people, who, whether they knew it or not, were licked before they started — and by their very own Government to whom they paid high taxes! . . .

In this particular case I think the subject company has not been given fair

did or did not have commercial value." A.P. dispatch from Washington of April 17, 1953. The Bureau of Standards commented critically on the MIT tests in a report prepared for the House Interstate and Foreign Commerce Committee. See 31 CHEM. AND ENG. NEWS 786 (Feb. 23, 1953); cf. testimony of Dr. Brode, *supra* note 68; Consumer's Research critique reprinted in 99 Cong. Rec. A2268 (April 23, 1953). "Two staff members of the Senate Small Business Committee, recipients of free samples from Ritchie, . . . said they found it pepped up their auto batteries." Roberts, *op. cit. infra* note 74, c.3.

⁷¹ See N. Y. Herald Tribune dispatch from Washington of March 3, 1953.

⁷² *Id.*; cf. Drew Pearson's column of March 31, 1953.

⁷³ The Committee is reported to have agreed not to press an investigation, "on assurances that the Administration will strive to clean up the situation." Editorial addendum to Drew Pearson's column in S. F. Chronicle, March 31, 1953.

⁷⁴ "President Eisenhower . . . declared he had faith that Secretary of Commerce Sinclair Weeks would be the last person to be arbitrary or unjust An aide to Thye said he wanted to make it clear the Senator had nothing to do with the Astin firing." Roberts, "*Hill*" Hearing *Likely on Astin's Ouster*, Washington Post, April 3, 1953, p. 10, col. 1.

⁷⁵ Hearings, *op. cit. supra* note 65, at pp. 3, 7 (emphasis added).

treatment and I hope to organize the Department . . . so that little businesses like this can get a fair break

The transcript also includes these comments:⁷⁶

SEN. SALTONSTALL. In other words, you felt strongly enough to ask a member of the Bureau of Standards to resign, to retire. In other words, was there any wrong doing in this or just poor judgment?

SEC. WEEKS. We have felt rather strongly about this particular situation. It is one of many phases of that particular picture that caused us to decide that it would be well to have a change in the administration of the department

SEN. HUNT. Don't you think it is going a little far to discharge a man like Dr. Condon over an incident of this type?

MR. SHEAFFER. It is Dr. Astin.

SEN. HUNT. I thought it was Dr. Condon.

SEC. WEEKS. Dr. Condon retired several years ago.

SEN. HUNT. Regardless of who the personality may be, I think that it is getting a little tough to ask the man because of one mistake. He may have done a million things that were right.

MR. SHEAFFER. This is not the only reason that Dr. Astin is resigning. This is one factor in a number of reasons.

SEN. HUNT. I think you should give the Committee the rest of the reasons.

MR. SHEAFFER. We are not prepared to do so right now, sir.⁷⁷

By this time the case was notorious, and many Congressmen rushed to Astin's defense. Demands for more investigation of AD-X2 as well as Astin's dismissal were voiced in both Senate and House.⁷⁸ Secretary Weeks responded by ordering his own investigations; and a full-dress probe by the Committee was temporarily averted when, under pressure, he agreed to postpone Astin's removal until his own probes were completed.⁷⁹ The Committee hearings were finally held in June, but in the end the merits of AD-X2 were left to consumer preference and to tests by the National Academy of Science and by the Navy.⁸⁰

⁷⁶ Hearings, *op. cit. supra* note 65, at pp. 5-6.

⁷⁷ "Astin later asked Sheaffer to give those 'other reasons'. A Commerce spokesman . . . announced that the department had 'no comment' when asked whether it had yet supplied Astin with the reasons." Roberts, *Thye Now Seeks Early Action to Sift Facts in Astin Ouster*, Washington Post, April 14, 1953. Cf. Drew Pearson's column of April 10, 1953 ("When Sheaffer first came to Washington, he told friends that one of the first things he planned to do was shake up the Bureau of Standards. He further said that the bureau had been highhanded with him in testing a Sheaffer pen.").

⁷⁸ Among those who commented were Senators Beall, Bridges, Ellender, Humphrey, Hunt, Morse, Smith, Sparkman, Thye, and Tobey; Representatives Hyde, Price, Staggers, Widnall, and Zablocki.

⁷⁹ See A.P. dispatch from Washington of April 17, 1953; cf. *id.* April 18, 1953 ("Astin Affair Quiets, but Chief of Science Group Urges Inquiry"). Dr. Astin was permanently reinstated in August, and Assistant Secretary Sheaffer resigned in September. See N.Y. Times, Aug. 22, 1953, p. 1, col. 1; Washington Post, Oct. 8, 1953, p. 15, col. 4.

⁸⁰ In a letter to the Secretary of Defense of June 29, 1953, Thye suggested that ". . . full cooperation be given to the New London Naval Base in accomplishing further tests of AD-X2

This is an intriguing case study about Congress and the faithful execution of laws. Its members are hardly equipped to handle scientific inquiries; and in the mainstream of government the battery additive problem is surely a wisp of straw, normally not worth the countless manhours that Congressmen and top bureaucrats invested in this case. However, use of the "random sample" is a fair enough technique of governmental inquiry, and as this case progressed many of those who did invest their hours began to feel that AD-X2 was a straw that broke the camel's back.

In defense of the Congressmen who spoke up for AD-X2: Has not legislative interest been justified when a Cabinet member finally concedes that one of his bureaus "has not been sufficiently objective" and, further, that its officials "have placed themselves in a vulnerable position by discussing . . . their prospective reports with the very people who might not want to see the additive remain on the market"?⁸¹ Especially when he suggests that Congress might, therefore, want to re-examine the statutes governing such matters? Moreover, if after inquiry a committee chairman and other legislators are convinced that a citizen has been given a raw deal, we have discussed above their privilege so to notify agencies like the Bureau of Standards, the Post Office, and the FTC.⁸²

On the other hand: We cannot chide the Congressmen who attacked Weeks for his treatment of Astin. It is true that personnel policy is normally for the administrator. But personnel policy, like *all* policy, is Congress' concern when its results jeopardize the public interest.⁸³ Here, many

in submarine batteries." (There is a glowing report of preliminary Navy tests in a letter of July 16, 1953 addressed to Mr. Ritchie by Guaranteed Batteries, Inc., of Boston.)

Thye also recommended that the Postmaster General "expunge" the fraud order, pending the National Academy tests (U.P. dispatch from Washington of July 2, 1953), and it was formally rescinded on Aug. 20, 1953. In a memo of the same date to all distributors, referring to Sen. Thye's letter on the Navy tests, *Pioneers* concluded: "With this and other information in your hands, plus the fact that the Bureau of Standards, the National Better Business Bureau, and the Post Office matters are now resolved, there is no reason why substantial sales of Battery AD-X2 cannot be effected." But on Nov. 13, 1953 the National Academy of Sciences committee announced that the Bureau of Standards tests had been "excellent". See A.P. dispatch from Washington of that date; *cf.* Washington Post, Nov. 19, 1953, p. 1 ("The Post Office Department and the Federal Trade Commission are momentarily playing Alphonse-and-Gaston on moving against AD-X2, but . . . one or the other will soon act to stop the advertising of the discredited battery rejuvenator.")

⁸¹ Note, too, the remark by Dr. Keith J. Laidler, consultant to the Senate Committee, that "Vinal and Howard, . . . the authors of Circular 504 [note 66 *supra*] have now left the Bureau and are employed by battery companies." Committee Release of Dec. 18, 1952, *supra* note 70. Concerning Dr. Laidler's possible conflict of interest, see U.P. dispatch from Washington of June 23, 1953 ("Endorser for AD-X2 Was on the [Pioneer] Payroll").

⁸² See text preceding note 60 *supra*.

⁸³ Note, *Congressional Studies of Personnel*, 13 PUB. ADMIN. REV. 209 (1952); notes 27 and 28 *supra*. For favorable comment on Sen. McCarthy's personnel work, see N. Y. Herald Tribune editorial of Aug. 24, 1953; speech by Rev. Cohalan, N. Y. Times, Oct. 19, 1953; *cf.* 22 U.S.C. § 1661 (copies of loyalty reports go to Congressional committees); N. Y. Times, Sept.

Congressmen thought they detected political encroachments on science.⁸⁴ Assuming that premise, there was nothing illicit in their complaints, or even in their "threats" to remove the Bureau of Standards from the Department of Commerce if necessary.⁸⁵

H. ARE THERE ABUSES IN METHOD?

The discussion of *scope*, above, indicates that it is not easy to fix limits on Congress' broad interests. If the heckling of agencies does not engulf their officials, time-wise, and if Congressmen reserve enough time and energy to enact the laws we need, not much in governmental affairs can be called out-of-bounds for Congress. We want our legislators to concentrate on major problems; but they can learn a great deal about major problems from a "case method" approach, and the instructive cases may range in significance from the gigantic to the minuscule.

As to *method*, we emphatically do not want a system where agency officials must prove they are not liars,⁸⁶ or have to shout in order to make themselves heard.⁸⁷ They should also be protected, as individuals, by organizational and procedural reforms that most observers now believe are requisite to fair committee hearings.⁸⁸

Are other reforms needed? It would be desirable if overlappings in com-

27, 1953, p.E1, col.8 ("Communists at U.N."). For non-loyalty cases, see A.P. dispatch of Oct. 22, 1953 ("Strenuous pressure from Congress . . . got Rickover retained on active duty and assured him an Admiral's gold braid."); 99 Cong. Rec. A5525 (Aug. 26, 1953) (NLRB difficulties in promoting 15 examiners); cf. Walter Lippman's column of March 11, 1953 (suggests subordinates should be investigated only by superiors).

⁸⁴ See Umana, *Colleagues of Astin Protest*, Washington Post, April 13, 1953; Roberts, *Ike Urged to Resolve Astin Case*, *id.* April 16, 1953; cf. Marks, *Congress and the Atom*, 1 STAN. L. REV. 23 (1948); James Newman, *The Atomic Energy Industry: An Experiment in Hybridization*, 60 YALE L.J. 1263 (1951).

⁸⁵ See remarks of Rep. Hyde, 99 Cong. Rec. A2039 (April 15, 1953). Concerning changes that were made in the Bureau's functions, see U.P. dispatch from Washington of July 23, 1953; Charles Egan's dispatches to the New York Times of Aug. 21 and Oct. 15, 1953; Willard Shelton's column in the CIO News of Aug. 31, 1953.

⁸⁶ See 99 Cong. Rec. 2382-4 (March 25, 1953) (Knowland charges McCarthy with doubting the word of top officials, as well as Knowland's own veracity).

⁸⁷ Cf. U.P. dispatch from Washington of July 13, 1953, concerning Summerfield's row with the House Post Office Committee ("The Cabinet officer was game but vocally outclassed.").

⁸⁸ See Galloway, *Congressional Investigations: Proposed Reforms*, 18 U. OF CHI. L. REV. 478 (1951); 99 Cong. Rec. 9202 (July 16, 1953) (Sen. Douglas); Note, *Debate Over Chairmen's Powers Flares Again*, 11 CONG. Q. 1076 (1953). One special problem relates to "closed door" participation by lobbyists. *E.g.*, see remarks of Rep. Van Zandt in 99 Cong. Rec. A3913 (June 23, 1953) ("In a 3-hour conference . . . these three veterans' organizations were given a preview of the proposed recommendations . . ."); CIO News, May 4, 1953, p.10 ("[T]wo of the oil cartel firms—now being sued by the government to recover \$77 million as the result of FTC action—sat in a closed committee meeting on the bill providing funds for that agency."); Plumb, *Taber Calls in Big Business to Ax Budget*, *id.* Feb. 16, 1953, p. 2.

mittee jurisdiction could be minimized,⁸⁹ and lines between legislative and appropriative policy drawn more sharply.⁹⁰ Improvements in the staffing and administering of committees would help;⁹¹ and conflicts of interest and divided loyalties should be avoided—though complaints that the hiring of ex-administrators by Congress⁹² and ex-Congressional employees by the Executive⁹³ violates separation of powers hardly seem justified.⁹⁴ Congressional junketing has been scoffed at;⁹⁵ but query whether we can censure,

⁸⁹ Cf. A.P. dispatch from N.Y. of May 13, 1953 (parallel investigations of Voice of America lead to different conclusions); SEN. REP. NO. 51, 82d Cong., 1st Sess. (1951) ("Some Problems of Committee Jurisdiction"); Prof. Covey Oliver's letter to N.Y. Times of May 17, 1953 ("... annual foreign aid legislation requires at least twelve full-dress, high-level Congressional appearances ..."). But cf. Robert Allen's column of July 14, 1953, quoting Sen. Long ("They ... know this [air] base program won't stand up under a real investigation. That's why they are ducking our committee and are trying to deal only with yours.").

⁹⁰ "It is a rule of the House that forbids appropriations not authorized by law. It is not a legal requirement nor a constitutional requirement." Rep. Sheppard, 99 Cong. Rec. 8069 (July 1, 1953); cf. *United States v. FPC*, 345 U.S. 153, 164 n. 5 (1953); *NLRB v. Thompson Products*, 141 F.2d 794 (9th Cir. 1944); Borda, *Federal Legislation, Legislative Aspects of Appropriation Bills—The Point of Order, Its Use and Effects*, 32 GEO. L.J. 395 (1944); Note, 46 ILL. L. REV. 291 (1951); and see this comment by Sen. Gillette in 99 Cong. Rec. 7909 (June 30, 1953):

There has not been a month in which I have served that I have not heard in connection with the consideration of an authorization bill the statement, 'This is merely an authorization bill . . . Do not worry about it. The Appropriations Committee will go over it with a fine-tooth comb.' Then the Appropriations Committee says, 'A legislative committee held extensive hearings on the matter; they have gone over it very carefully. All we have to do is to make the money available. We do not go into the basic questions.'

Cf. remarks of Rep. Baker concerning the TVA, *id.* at 6927 (June 17, 1953); complaint of Rep. Rogers concerning encroachments by appropriations committees, *id.* at 3744 (April 23, 1953); plea of Sen. McCarran, *id.* at 8889 (July 13, 1953); BOWMAN, PUBLIC CONTROL OF LABOR RELATIONS 344, 355 (1942) (NLRB travails).

⁹¹ See GALLOWAY, THE LEGISLATIVE PROCESS IN CONGRESS c. 17 (1953); Lawton, *Legislative-Executive Relationships in Budgeting as Viewed by the Executive*, 13 PUB. AD. REV. 169 (1953); Cohen, *Hearing on a Bill: Legislative Folklore?*, 37 MINN. L. REV. 34, 43 (1952); remarks of Rep. Whitten, 99 Cong. Rec. 8485 (July 8, 1953); of Rep. Colmer, *id.* at A3408 (June 5, 1953); of Rep. Multer, *id.* at A3210 (May 28, 1953). But cf. MacMahon, *Congressional Oversight of Administration: The Power of the Purse*, 58 POL. SCI. Q. 161, 187 (1943).

⁹² See Washington Post editorial of April 4, 1953 ("The proposal to employ Gen. James A. Van Fleet as military adviser to the Senate Appropriations Committee reflects the aim of Chairman Bridges and his friends to usurp the jurisdiction of the executive branch . . ."); accord: Marquis Childs' column of April 10, 1953.

⁹³ See Drew Pearson's columns on Scott McLeod (June 7, 1953) and Karl Schlotterbeck (May 5, 1953); Robert Allen's on Scott McLeod and George Wilson (July 2, 1953); CIO News, July 6, 1953, p. 11 ("... Taber's chief big business aide now moves to a [Budget Bureau] spot with virtual veto power over requests for appropriations . . .").

⁹⁴ See SEN. REP., 83d Cong., 1st Sess. 58 (1951) ("Ethical Standards in Government").

⁹⁵ E.g., see A.P. dispatch from Washington of Sept. 15, 1953 ("Hot Air is called fuel for Congress' junkets"); Harris, *infra* note 97 at 28 ("Taber . . . never saw eye to eye with the Marshall Plan; after a junket abroad he qualified himself as an ambassador of ill will by reporting that foreigners appeared to be almost as lazy and inefficient as civil-service workers.").

say, the dispatch of men like Senators Dirksen and Magnuson to the Far East, "for a country-by-country survey of military aid needs."⁹⁶

The New York Bar conclusion that Congress should not "coerce" agencies to change their interpretations was quoted above. Perhaps we should frown on all forms of coercion (except, presumably, that resulting from duly enacted laws—including duly enacted appropriation bills).⁹⁷ The difficulty lies in deciding at what point conduct becomes coercive. When a Congressman calls an agency on the telephone, is the presence or absence of "threat" to be determined by reference to what he says, or to his status, his tone of voice, his past practices, or the political richness of the proceeding? A memo prepared for the Senate's GOP Policy Committee credits Republican Appropriations committeemen with prodding the State Department to publish a 40-volume history of U. S. diplomacy under Roosevelt and Truman.⁹⁸ This could be a product of coercion; but it could just as well be a valued addition to the nation's archives, to which legislators contributed either the original idea or the needed encouragement. A recent committee proposal that the Bonneville Administration buy supplementary power from private firms might have been thought coercive; but on the Senate floor one of the committeemen explained what seemed to him obvious, that the proposal's "validity is for the . . . [Administrator] to determine, both as to the wisdom and the legality."⁹⁹

Congressmen sometimes threaten, and they sometimes make good their threats. The Douglas Committee on Ethical Standards in Government argued that "Pressure through personal attacks¹⁰⁰ or by hostile action in budgets or legislation is a kind of blackmail which is damaging to the public interest and which destroys satisfactory working relations between the legislative and executive branches."¹⁰¹ Nonetheless, the Committee concluded that the only practicable control was "the self-restraint of Senators and Representatives."¹⁰²

⁹⁶ A.P. dispatch from Washington of May 16, 1953; cf. Carnahan, *Congressional Travel Abroad and Reports*, 289 ANNALS 120 (1953); N. Y. Herald Tribune dispatch from Washington of Aug. 9, 1953 ("Near-Record Schedule of Study Trips for Legislators").

⁹⁷ Cf. *supra* note 13; H. H. Harris, *Crustiest Crusader: John Taber, Knight of the Shining Meat Ax*, The Reporter, May 26, 1953, p. 27 ("The tortures Tabor applies in his Third Chamber are exquisite."); Robert Allen's column of July 14, 1953 ("Dulles was bluntly told not to give Franco any money until he had signed on the dotted line."); Sen. Cooper's discussion in 99 Cong. Rec. 8751 (July 10, 1953) of this unusual device: "The committee directs the Authority by the end of fiscal year 1954 to turn over to . . . [other] agencies the responsibility for continuing their respective parts of the resource development program, so that no further appropriations may be required to the Authority for that purpose."

⁹⁸ See U.P. dispatch from Washington of June 29, 1953.

⁹⁹ 99 Cong. Rec. 7580 (June 26, 1953).

¹⁰⁰ Cf. Sen. Symington's remarks concerning Rep. Taher's attack on Gen. Vandenberg, 99 Cong. Rec. 8251 (July 6, 1953).

¹⁰¹ Sen. Rep., *op. cit. supra* note 94, at 57; cf. *id.* at 29.

¹⁰² *Id.* The Committee also concluded, however, that measures could be taken to improve legislative-administrative relations in general. See particularly pp. 1-5, 29-30, and 57-8.

III. WHAT ABOUT THE REQUIREMENT OF "ADVICE AND CONSENT"?

One device used by legislators to keep tab on administrators relates to the rule that the President make treaties and appoint men to high public office only "by and with the advice and consent of the Senate."¹⁰³ Recent Congresses seem to have liked variations of this device, and several statutes now declare that agency action on matters other than treaties and appointments requires legislative consent. Moreover, the consent called for is to be manifested not in a follow-up statute, but in a resolution of either or both Houses, or by vote of a committee or the endorsement of its chairman.¹⁰⁴

Mr. Robert W. Ginnane, in a penetrating article titled "The Control of Federal Administration by Congressional Resolutions and Committees", contends (1) that prescribing consent-by-resolution is an unconstitutional by-passing of the President's veto power, and (2) that requiring committee consent is an unconstitutional delegation of Congress' law-making power.¹⁰⁵ His views were shared, at least in part, by both Roosevelt and Truman.¹⁰⁶

These consent requirements, exploiting the force of law, differ from the samples of Congressional oversight we have already examined. Consent is demanded by law but is to be expressed not in the form of law but in another form, *i.e.*, by simple or concurrent resolution or committee approval. Our premise has been that Congress has full power to pass laws, appropriate, inquire, and comment. Consent is a hybrid device. It parallels the treaty and appointment procedures, but is neither these nor law-making.

This article is not the place for a review of Mr. Ginnane's findings, or a complementary study of Congress' experiments with the consent device. Regarding constitutionality, however: Has the veto power in fact been circumvented when the President could have vetoed the statutes that set up the requirement of consent?¹⁰⁷ Further, now that we accept tremendously

¹⁰³ U. S. CONST. ART. II, § 2; see Mike Mansfield, *The Meaning of the Term "Advice and Consent,"* 289 ANNALS 127 (1953).

¹⁰⁴ See Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); *cf.* debate on 1953 extension of Reorganization Act of 1949 (providing that President's plans become effective unless either House disapproves within 60 days), where Congressmen discuss whether disapproval should be expressed by simple or constitutional majority vote, 99 Cong. Rec. 791 (Feb. 2, 1953) (House); *id.* at 935 (Feb. 6, 1953) (Senate); *id.* at A445 (Feb. 3, 1953) (Rep. Holifield); also see *id.* at 7539 (June 25, 1953) (debate on bill subjecting contracts for disposal of government-owned rubber plants to disapproval by concurrent resolution).

¹⁰⁵ See Ginnane, *supra* note 104, at 593, 605.

¹⁰⁶ See Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953); Ginnane, *supra* note 104, at 603; message disapproving H.R. 6839, which required Postmaster General to obtain committee approval before entering into lease-purchase agreements, 98 Cong. Rec. A4945 (July 29, 1952).

¹⁰⁷ A statute setting up a consent requirement could, of course, have been enacted over the President's veto, or been approved by a predecessor President. But the veto power is a power of the office, not the man; and there would seem to be no circumvention if there has been an opportunity to exercise the power.

broad delegations of power to public officials and private groups,¹⁰⁸ can we sensibly hold that experimental delegations to the House and Senate, or to committees they trust, are void per se?¹⁰⁹ A system whereby all agency action was to be approved by Congressmen would be hopelessly chaotic; but so would a system whereby all law was to be enacted by regulation, instead of statute. We have avoided the latter not because of constitutional restraints, but because our legislators have been wise enough to delegate their powers sparingly. Similar wisdom should protect us from capricious use of "consent". Under the Constitution, legislative-administrative liaisons have not been set rigidly. Efforts to develop new forms of liaison should not be squelched by a literalness of constitutional interpretation that we reject for most other problems.

When consent is not made essential, statutes requiring that administrators before taking action advise Congress or consult with its committees are surely not objectionable.¹¹⁰ The "advice" requirement is merely an offspring of the power to inquire and comment. If Congress feels that the national parks would be better administered were the Secretary of Interior to report on all concessions and leases, it should so require.¹¹¹ Even when legislators argue that better administration requires their informal approval of items like concessions and leases¹¹² there is no objection—so long as everyone understands that the approval really is informal, and that (unlike the "consent" situation discussed above) agencies are not bound by disapproval.¹¹³

¹⁰⁸ See DAVIS, ADMINISTRATIVE LAW § 27 (1951).

¹⁰⁹ "[H]ow, in view of the scope that legislative delegations take nowadays, is the line between *delegation* and *abdication* to be maintained? Only, I urge, by rendering the delegated powers recoverable without the consent of the delegate; and for this purpose the concurrent resolution seems to be an available mechanism . . ." CORWIN, THE PRESIDENT 160 (3d ed. 1948). Is there any doubt that Congress could delegate powers to a committee clerk? Cf. *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935); Harvey Mansfield, *Fiscal Accountability* in MORSTEIN MARX, ELEMENTS OF PUBLIC ADMINISTRATION 577, 614 (1946). So why not to a committee chairman? But cf. Ginnane, *supra* note 104, at 593 n.108.

¹¹⁰ Cf. Jones, *Further Notes on the Presidential Power Issue*, 37 A.B.A.J. 468 (1951); Jones, "Watchdog Committees" in the 80th Congress, 34 *id.* at 726 (1948).

¹¹¹ Cf. 99 Cong. Rec. 7575, 7578 (June 26, 1953).

¹¹² See Ginnane, *supra* note 104, at 602 n.140 (naval petroleum contracts and Naval Affairs Committees); cf. JAFFE, ADMINISTRATIVE LAW (Prelim. ed. 1953) 330 ("Freeing [the Shipping Board] from Presidential control in its operating functions did not make it completely independent. From time to time Congressional resolutions asked the Board to delay some projected action until Congress had opportunity to review the matter . . ."). Congressmen often expect to be consulted. See, e.g., remarks of Sen. Morse and Sen. Humphrey, 99 Cong. Rec. 8269 (July 6, 1953) (Banking and Currency Committee not consulted regarding interest rate on government bonds).

¹¹³ Cf. remarks of Sen. Sparkman, 99 Cong. Rec. 8826 (July 11, 1953) and Sen. Hennings, *id.* at 8887 (July 13, 1953) (CAB ignores request of Small Business Committee to delay proceedings against North American Airlines until committee can complete hearings); Robert Allen's column of May 20, 1953 (committee chairman decides he alone and not committee should be consulted).

New Department?

[SWEIGERT—San Francisco Chronicle]

IV. WHAT ABOUT SENATOR MCCARTHY?

Question: Didn't your subcommittee take over the function of the State Department by forcing the Greek shipowners to stop cargo shipments to Red China?

*Answer:*¹¹⁴ We did not. The subcommittee kept well within the functions of a legislative body and we did not "force" any action. We merely persuaded the shipowners to agree voluntarily among themselves to discontinue trade with the enemy. Secretary of State Dulles praised our work in the shipping case and said our efforts "were in the national interest." Frank C. Nash, Assistant Secretary of Defense, testified March 31 before the subcommittee and said that even halting one ship "would be of great help," and that our persuading owners of 242 ships to stop such traffic "would be 242 times as much help." (Two hundred and forty-two ships had been removed from trade with Red China and between Soviet bloc countries at that time. The figure is now 295.) He added that our efforts "would meet with applause from the Department of Defense . . ."¹¹⁵

¹¹⁴ From a news release, *Senator McCarthy Answers Questions*, 99 Cong. Rec. A3579 (June 11, 1953).

¹¹⁵ McCarthy announced later that he felt he almost owed an apology to the Greek shipowners for "having encouraged them to get out of that profitable trade and then have it taken over by the British." U.P. dispatch from Washington of Aug. 4, 1953. Cf. Solow, *Those Resourceful Greek Shipping Men*, 48 FORTUNE 142 (Oct. 1953).

Q: Do you agree with the statement that recent developments of your Investigations Committee, for example, the transportation of Communist troops along the China coast during the Korean war by ships owned by British firms is [sic] increasing the existing tensions between the United States and Great Britain?

A: First, we must examine the existing tensions before we can answer the question. I think one of the greatest contributing factors to existing tensions is the apparent lack of real unity among the western powers. Unquestionably it is extremely important to have complete unity of purpose among the western powers if world peace is to be attained. However, nothing would be gained by covering up and disguising a phony unity. Certainly there is nothing unreasonable in a request to our allies to stop supplying the sinews of war to a mutual enemy. Certainly all of the peoples of the so-called free world are entitled to have the facts brought to light when any of our allies flagrantly abuse a trust

Q: Recently your committee has been checking all books by Communist authors which were purchased by the Acheson State Department and placed on the shelves of our libraries throughout the world What is the new administration doing about these books?

A: Following the disclosure of the facts by our committee, the State Department, under its new leadership, ordered books by Communist authors removed from the shelves of our information centers in other countries. As fast as we disclose more information on Communist writers, the State Department has promised action in clearing out this Communist propaganda which cost the taxpayers hundreds of thousands of dollars

Q: Have you ever sued anyone because of false statements about your Communist fight?

A: Yes. I sued the Post-Standard, of Syracuse, N.Y., for libel. The result of this libel suit was a payment by them of \$16,500 plus the printing of the following retraction: . . . ¹¹⁶

The editorial . . . also criticized Senator McCARTHY for a financial transaction with the Lustron Co. The facts in this case are these:

Senator McCARTHY had prepared a book advising veterans how they could finance home purchases and obtain full advantage of all helps and provisions of Federal housing laws. He entered into an agreement with the Lustron Co., whereby they undertook to publish and distribute 100,000 copies of this book, to pay him 10 cents a copy for these and 5 cents a copy thereafter. This agreement was entered into after Senator McCARTHY's party, the Republican Party, had been defeated in the 1950 elections and had lost control of Congress and Senator McCARTHY was very unpopular with the Truman Administration. It is not possible, therefore, that Senator

¹¹⁶ The retraction dealt with several matters of which the one mentioned here is especially pertinent.

MCCARTHY could have been useful to the Lustron Co. with the Truman administration.¹¹⁷

Lustron at that time was about to embark upon a large scale production of homes. There was no public indication that the RFC was about to foreclose. There has never been evidence presented before any committee or elsewhere that Senator MCCARTHY in any way attempted to intercede on behalf of Lustron. The Post-Standard is therefore convinced that Senator MCCARTHY's part in this transaction was on the same plane as the common practice among legislators of accepting fees for speeches and earning other fees from legitimate services

Q: President Eisenhower recently set up a new loyalty-security program Was this program discussed with you before it was adopted?

A: Yes, Senator Jenner, chairman of the Internal Security Committee, Congressman Velde, chairman of the House Un-American Activities Committee, and I, as chairman of the Senate Permanent Subcommittee on Investigations, were called to the White House where the matter was discussed in complete detail with us¹¹⁸

These questions and answers reveal how Senator McCarthy himself regards outcries that he is usurping the duties of the Executive Branch. The writers of this article are inclined to accept his denial of usurpation.¹¹⁹ For if people are convinced that what the Greek and British shipowners did was right, or that pressure on them should always be channeled through their governments, or that the deals the Senator made were less beneficial than what Mr. Stassen or Mr. Dulles could have negotiated, then those points—*i.e.*, the merits—ought to be argued. Similarly, people who object to book burning or the loyalty-security program ought to stress the merits there—not whether the Senator's role was seemly. And those who believe that McCarthy has poor judgment, or is scheming, or ruthless, or fanati-

¹¹⁷ Query.

¹¹⁸ "[I]f the executive branch has a sorry record on a loyalty program whose procedures give less opportunity to the accused than to a common felon, the explanation lies in a pusillanimous attitude to Congress . . ." Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808, 817 (1952); cf. Lavine, *Can Eisenhower Form a Government?*, 16 COMMENTARY 10, 11, col. 2 (1953); W. H. Lawrence's column of April 13, 1953; note 83 *supra*; James Reston's column of Nov. 24, 1953 ("Dulles and Aides Disagree Over Whether Employee May Always Confront Accuser").

¹¹⁹ But readers should not infer that we generally endorse the Senator's views. Cf. Frank Kent's column of June 8, 1953 ("[T]o say a word about Senator McCarthy not denunciatory or even mildly favorable is to subject one's self to a more violent denunciation from the anti-McCarthy elements than comes from the pro-McCarthy elements when their man is denounced or slurred."). On matters closely related to our topic, compare Galloway, *op. cit. supra* note 88, with Kaghan, *The McCarthyization of Theodore Kaghan*, The Reporter, July 21, 1953, p. 17; notes 95-6 *supra*, with Rovere, *The Adventures of Cohn and Schine*, *id.* at 9. Cf. HART, MCCARTHY VERSUS THE STATE DEPARTMENT (Rev. March 1, 1952); N. Y. Herald Tribune dispatch from Washington of July 20, 1953 ("McCarthy Threatens Fund Cut.").

cal,¹²⁰ ought to debate at that political level—and not sweeten their rebukes with talk of *ultra vires*.

V. DO WE NEED LAW REFORM?

The climate of politics is tempestuous. But we should not wreck the framework of our government to get planks for storm shelters. McCarthy and his cohorts are by no means the only legislators who dabble, for example, with military and foreign affairs. Who would deny any Congressman his concern with the Korean War, disloyalty, European aid, and the aims of our allies, including the British? The law-making, appropriating, and investigating powers must stand — so far as they affect the Executive. If Congress wants to resolve that it favors a unified Germany we should acclaim its power to do so, though we might question the wisdom of the resolution.¹²¹ How can there be "impropriety" in Senator Knowland's friendship for Free China, or in Congressman Multer's interceding with the Spanish Ambassador on behalf of children orphaned by Hitler's death mills?¹²²

The fracas in March 1953, preceding the confirmation of Charles E. Bohlen as Ambassador to Russia, caused much fussing about who can do what to whom. One highly respected newspaper editorialized as follows:¹²³

It is a generally understood principle of our three-faceted system of government that the President's appointees to the diplomatic service are untouchable except where glaring improprieties or misdemeanors are involved

¹²⁰ "A friend . . . tells me that 'Joe' always speaks moderately, is tolerant, patient, and gentlemanly." Rev. James Gillis' article reprinted in 99 Cong. Rec. A3565 (June 11, 1953); cf. Holmes Alexander's column of July 24, 1953 ("this terrible fellow . . . merely wants to be liked"); *id.* July 27, 1953 ("People who moan about Joe's assaults on freedom of thought seem to forget that such freedom thrives on persecution."). But cf. Pedrick, *Senator McCarthy and the Law of Libel: A Study of Two Campaign Speeches*, 48 N.W.U.L. REV. 135 (1953).

¹²¹ Sen. Con. Res. 36, 83d Cong., 1st Sess., 99 Cong. Rec. 8161 (July 2, 1953); cf. *Congress and Foreign Relations*, 289 ANNALS 1-177 (1953); Stein, *Foreign Policy and the Dispersion of Power*, 13 PUB. ADMIN. REV. 196 (1953); Prof. Covey Oliver's letter to N.Y. Times of May 17, 1953; remarks of Sen. Langer, 99 Cong. Rec. 8900 (July 13, 1953) ("Several Members of both Houses of Congress were privileged to participate in some way in the revision of this [International Wheat] agreement, some in the capacity of advisers, others as members of the United States delegation.").

¹²² 99 Cong. Rec. 8035 (July 1, 1953); cf. Baudy, *The Affair of the Finaly Children*, 15 COMMENTARY 547 (1953). Concerning Rep. O'Konski's letter to Syngman Rhee, involving a possible violation of the Logan Act [18 U.S.C. § 953 (1948)], see James Reston's column of Oct. 19, 1953. Also see Robert Allen's column of July 14, 1953 ("South Korean Ambassador Yang spends more time in the office of Senator William Knowland . . . than at the State Department.").

¹²³ Washington Post editorial of March 28, 1953; cf. San Francisco Chronicle editorial of March 31, 1953 ("Lochinvar in Hobnail Boots"); and see this comment by Rep. Busbey: "... I was indeed surprised when President Eisenhower, in commenting on the Senate debate pertaining to the confirmation of Charles E. Bohlen . . . said: 'In a democracy, one has to expect that.' While for years the Democrats . . . have referred to our form of government as a democracy, there is no reason why a Republican should do so, even though he be the President of the United States." 99 Cong. Rec. A2148 (April 20, 1953).

or, as Hamilton put it, where an obviously undesirable character has been chosen. The Senate's constitutional function in these matters, it has been said, is "confined to simple affirmation or rejection" of the President's nomination. It was not intended that appointments should be made the occasion of prolonged and debilitating debates.

The writers of this article disagree. The Senate's consent to the appointment of an ambassador should be an authentic consent. The majority normally will want to respect the President's judgment, but if there are doubts they ought to be aired, and no special cloture rules or like inhibitions should throttle the doubting Senators.¹²⁴

* * *

A variety of law reforms dealing with legislative supervision could be articulated—in Congressional rules, in statutes, in amendments to the Constitution. With few exceptions (*e.g.*, those relating to the efficiency of Congress and the fairness of its hearings¹²⁵) the writers of this article believe such reforms are not needed.¹²⁶

That is not to say Congress is blameless. We could easily cite instances where Congressional interference has reflected the crassest kind of politics, and where personal interest has overwhelmed the public interest.¹²⁷ Further, there is serious danger that Congressmen *are* becoming mired in trivia;

¹²⁴ See Rev. James Gillis' article, *loc. cit. supra* note 120.

¹²⁵ See text preceding notes 32-3 and 86-94, *supra*.

¹²⁶ See HYNEMAN, *BUREAUCRACY IN A DEMOCRACY* c. 9 (1950); *cf. id.* at 576-9; *supra* note 102; Key, *Legislative Control* in MORSTEIN MARX, *op. cit. supra* note 109, at 339, 358 (1946); Burt and Kennedy, *supra* note 38, at 368; White, *Congressional Control of the Public Service*, 39 AM. POL. SCI. REV. 1 (1945); Note, "*Laying on the Table*," 65 HARV. L. REV. 637 (1952).

¹²⁷ *E.g.*, see the comments on Sen. McKellar and the TVA in Key, *Government Corporations* in MORSTEIN MARX, *op. cit. supra* note 109, at 258 (1946); *cf. United States v. Quinn*, 11 F. Supp. 870 (E.D.N.Y. 1953), discussing 18 U.S.C. § 281 (1949); *United States v. Driggs*, 125 Fed. 520 (N.Y. Cir. 1903), discussing 18 U.S.C. § 216 (1948); Don Olesen's story in the Washington Post of March 21, 1953 (Rep. McMillan's trial on charges that he illegally leased U.S. lands). *But cf.* Robert Allen's column of Aug. 13, 1953 ("When Senator Butler's office was queried [about his trip at an oil company's expense to attend opening ceremonies of a new pipeline] . . . an assistant replied, 'The senator was invited to this affair because he helped the company get the steel that was needed for the pipeline.'"); Aubrey Graves' story in the Washington Post of April 23, 1953 ("Among the 'wealthy duck hunters' angered by the policies of Albert M. Day, who is being ousted as Director of the U. S. Fish and Wildlife Service, was Sen. John W. Bricker . . . [In connection with proceedings involving Bricker's private hunting reserve, Day stated] 'after the election returns were in last November, I got a long distance call from the Senator. He really bent my ear.'").

The FCC has suffered some unusually foul blows. For illustrations see 89 Cong. Rec. 235 (1943), BURNS, *CONGRESS ON TRIAL* 107 (1949), and MERLO PUSEY, *BIG GOVERNMENT: CAN WE CONTROL IT?* 122 (1945) (Representative Cox); HYNEMAN, *op. cit. supra* note 126, at 162 n. 1 (1950) (Senators McKellar and Stewart); The Reporter, May 26, 1953, p. 2 (Sen. McCarthy); *cf. Freidrich and Sternberg, Congress and the Control of Radio-Broadcasting*, 37 AM. POL. SCI. REV. 797, 1014 (1943); ATT'Y GEN. COMM. AD. PROC., FCC, SEN. DOC. NO. 186, Part 3, 76th Cong., 3d Sess. 59 (1940); *Hearings before House Select Committee to Investigate the FCC*, 80th Cong., 2d Sess. (1948).

and we can hardly be proud of their recurring failures to meet fiscal deadlines, or their frantic activities during adjournment week.¹²⁸

One wonders, though, where the most blame lies. If administrators play a scared-rabbit, hangdog role, salaaming whenever a legislator snaps his fingers, legislative-administrative relations will of course deteriorate.¹²⁹ And even when their officials are stout-hearted, some agencies still knuckle under and then rationalize, "Only thus do we most benefit the public in the long run." One wonders what would happen if the attitude were rather: "All right, you are a bigshot on an important subcommittee. Yet, *we* make the decisions — regardless of your inquiries, comments, criticisms, and requests, your exposés, proddings, harangues, and cajoleries. We listen respectfully but on the basis of all information do what to *us* seems best."¹³⁰

¹²⁸ See Time, June 9, 1951, p. 16 ("At the end of the fiscal year . . . Congress had not passed a single regular appropriation."); Milton Plim's column in CIO News, June 29, 1953 ("one of the worst government money bill log-jams in history"); BAILEY AND SAMUEL, CONGRESS AT WORK 442 (1952) ("Congress Adjourns"); Time, August 10, 1953, p. 17 (" . . . The Last Week"); A.P. dispatch from Washington of Aug. 5, 1953 (Knowland suggests fault must be shared by Administration).

¹²⁹ "[T]he congressman may bluster and threaten, but inescapably he remains the petitioner and the agency the grantor." Herring, *Executive-Legislative Responsibilities* in Morstein Marx (ed.), *The American Road from War to Peace: A Symposium*, 38 AM. POL. SCI. REV. 1153 (1944); and see Cater, *Congress and The President*, The Reporter, May 12, 1953, p. 15 ("There is some reason to believe that the meek and mild approach of the Administration witnesses encouraged committee members to greater fury than a frontal attack . . . would have."); Lavine, *supra* note 118, at 14 ("Congress and the Executive . . . are constantly contending for power, and if one fights while the other keeps appeasing it, the latter will soon become a prisoner of the former."); cf. N. Y. Times editorial reprinted in 99 Cong. Rec. A1596 (March 25, 1953) ("The wild men . . . are not representative of American political life; they can only grow in power as, if, and when we are foolish enough to knuckle under to them."); James Reston's column reprinted in 97 Cong. Rec. A6987 (Oct. 20, 1951) ("How to Win the United States Senate in 14—Ah, Simple—Lessons"). But cf. DIMOCK AND DIMOCK, PUBLIC ADMINISTRATION 505 (1953) ("If more administrators could see the advantage of trying to get the legislature on their side instead of regarding it as an antagonist, they would probably get further in their legitimate requests for a more rounded authority.").

For illustrations, see Sec. Humphrey's equivocation on the role of Congressmen in tax cases, *Hearings before Committee on Ways and Means on Excess Profits Tax Extension*, 83d Cong., 1st Sess. 164-6 (1953); Washington Post editorial of April 16, 1953 ("Yesterday Senator Mundt disclosed that he had received four telephone calls from high officials of the [State] department asking, in effect, 'What do you want us to do?'"). On whether TVA's main office should be at Muscle Shoals or in Knoxville, compare the straight-from-the-shoulder letter of Director Clapp to Rep. Baker, 99 Cong. Rec. 6927 (June 17, 1953), with the kowtowing telegram to Clapp from the Budget Bureau, *id.* at 6928 ("[D]elay any action . . . until the subject has been resolved to the satisfaction of the Congress."); and cf. Sen. Kefauver's comments, 99 Cong. Rec. 2700 (April 1, 1953).

¹³⁰ For illustrations, see remarks of Rep. Bray, 99 Cong. Rec. A4487 (July 10, 1953) (criticizing SEC's failure to investigate activities of North American Co., as recommended by subcommittee); ARRY GEN. COMM. AD. PROC., *United States Employees' Compensation Commission*, SEN. DOC. NO. 10, Part 8, 77th Cong., 1st Sess. 52 (1941) ("[W]hether this congressional intervention is very significant may be doubted."). But cf. *id.* FCC, SEN. DOC. NO. 186, Part 3, 76th Cong., 3d Sess. 59 (1940). Compare Spingarn, *Memorandum on The Record*,

Congressmen could respond, of course, by eviscerating the agency with amendments of its laws, or hamstringing it with inadequate appropriations, or decapitating it with refusals to consent to the appointment of its best leaders. But are drastic retaliations like these a real threat? At each step the administrator has a chance to defend and to rally his friends, in and out of Congress. If the issue is crucial he can enlist even the President's aid.¹³¹ And it is not easy for a Congressman to persuade his colleagues, say, that appropriations should be cut \$1,000,000 because the agency has denied the claim of one of his constituents (unless we assume log-rolling at its very worst).

A stiff backbone means that the merits of retaliatory action—laws, appropriations, appointments—are exposed. If such a course were routine, is it not conceivable that Congress would have to widen its perspective? Only a pampered overseer can afford to be dilettante; a responsible overseer has to be discriminate. If their bluffs were called, if they were forced to take public responsibility for their demands, more Congressmen might become decently discriminating in their choices. At least, is not the chance worth taking?

Dec. 24, 1952 (alleging that FTC in two years has not yielded to a single instance of unethical pressure), *with* N. Y. Times dispatch from Washington of Dec. 5, 1952 (Spingarn criticizes retailers for seeking Congressional intervention in Eastman Kodak proceeding).

¹³¹ "The pressure from the White House is stronger than I've seen in my 21 years in Congress, and by far the most effective . . ." Rep. Francis Walter, quoted in a San Francisco Chronicle editorial of July 26, 1953 ("[T]he Eisenhower 'breakout' on the legislative front surprised some of the experts."); *cf.* Robert Allen's column of July 21, 1953 ("The generous breakfast President Eisenhower served the House Appropriations Subcommittee . . . saved \$400,000,000 from being chopped off the fund.").